ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he was injured in the course and scope of his employment with Employer on August 27, 2020.

IF THE CLAIM IS FOUND COMPENSABLE, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits that are authorized, reasonably necessary and related to the alleged injury of August 27, 2020.

III. Whether Claimant has proven what his average weekly wage is at the time of the incident in question.

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from August 28, 2020 and continuing until terminated by law.

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

STIPULATIONS OF THE PARTIES

The parties stipulated that, if the claim was deemed compensable, Clinica Family Health was the authorized treating provider with regard to the claim and that Claimant's average weekly wage was $103.85. The stipulations of the parties are approved and incorporated into this order.

FINDINGS OF FACT

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

1. Claimant was 74 years old at the time of the hearing. He worked for Employer as a dishwasher, one day a week, working the 2 p.m. to 9:30 p.m. shift. He would wash pots, pans, receptacles, platters, plastic containers that would be reused and other utensils. He had started working for Employer in approximately June 2020.

2. On August 27, 2020 Claimant injured himself at work while lifting a 10 lb. pot three quarters full of water and food debris, which weighed close to 50 lbs. total with contents. He lifted it up from the floor to the counter sink, and hurt his back in the process, though he was able to lift it all the way into the sink. Claimant continued working until the end of his shift, when he advised his supervisor and shift manager, M.M., who did not respond. Claimant left the restaurant and went home.

3. The following Monday he went to Clinica Campesina or Clinica Family Health to seek treatment. Claimant was advised that they were too busy with patients due to the COVID-19 pandemic. They instructed him to leave and return at a later time.

4. Claimant was due to return to work on Thursday, September 4, 2020. However, on September 1, 2020 Claimant received a call from Employer's representative, F.M. who terminated his employment.

5. Claimant returned to Employer's premises on September 4, 2020 in order to ask Ms. F.M. to send him to a doctor because of his back pain. He parked at the restaurant right next to Ms. F.M.'s car. He got out of his car and at that moment Ms. F.M. was coming out of the restaurant and got in her car. He tried to get her attention and she rolled up her car windows and did not respond to him, driving out of the parking lot.

6. Claimant returned to Clinica Family Health again on September 4, 2020. They could not see him again. However, on this occasions they provided him an appointment for September 16, 2020. He was attended at that time and provided prescriptions for medications. They gave him steroids, muscle relaxants, anti-inflammatories, Tylenol as well as injections into the back, which helped. But the pain would come back. He was also, eventually given work restrictions of 10 lbs. lifting. He explained that the doctors were in the process scheduling more injections.

7. At one point his back pain was very intense and he went to Clinica for medical care but they sent him on to the emergency room at Avista Adventist Hospital, where they charged him $9,800, which continued to remain unpaid. He noted that approximately two months before the hearing he had received his last injection into his back and was provided with continued 10 lbs. restrictions.

8. Claimant filed a Workers' Claim for Compensation on September 10, 2020 stating that he was lifting a few pan/pots on August 27, 2020 at approximately 5 p.m. and felt a pop and sharp pain in his back. He noted that he had numbness in his legs. He reported the incident to M.M.

9. On September 16, 2020 Claimant was evaluated at Clinica Family Health related to a reported August 27, 2020 incident where Claimant was lifting a heavy pot and strained his back, causing mid back, low back pain, hip pain, and bilateral leg pain. Nurse Practitioner Jennifer Manchester noted Claimant continued with symptoms that radiated to both legs causing difficulty ambulating and had an onset of urinary hesitancy.

10. On September 18, 2020 Nurse Manchester restricted Claimant from work as of his date of injury and continuing, though stated he could return to work as of October 2, 2020 with a 20 lbs. restrictions. She recommended an MRI and referral to an orthopedic spine specialist, which Claimant declined as he did not have insurance or means to pay for them.

11. Dr. Upasana Mohapatra at Clinica also evaluated Claimant on September 23, 2020 and continued Claimant off work. He noted that Claimant's pain persisted in the middle and low back as well as the bilateral legs, specifically radiating to the left and right thighs. He diagnosed acute midline thoracic back pain. He noted that Claimant previously had reported tenderness to palpation over the lumbar spine but it was most pronounced over the thoracic spine with a positive straight leg test. He prescribed oxycodone and

cyclobenzaprine, an antidepressant. He ordered a thoracic x-ray and continued to recommend further diagnostic testing, which Claimant declined due to the cost.

12. On October 23, 2020 Dr. Mohapatra stated that Claimant continued to be unable to work. He noted that Claimant had pain in the middle back, low back and gluteal area with pain radiating down the left thigh and calf. Dr. Mohapatra continued to keep Claimant off work on November 23, 2020 noting that Claimant continued to have low back pain with radiculopathy affecting the lower extremity. His work status continued on December 13, 2021. In January 2021 his Clinica providers noted Claimant now had depressed mood related to his inability to provide for his family due to his ongoing chronic low back pain. In February 2021 Claimant was noted to have continued chronic low back pain with continued urinary hesitancy. This patterned continued with assessments of lumbar back pain with radiculopathy affecting the lower extremity, continued medications for both pain and depression related to the trauma.

13. On April 13, 2021 Claimant was evaluated by physiatrist Greg Reichhardt, M.D. for an Independent Medical Evaluation (IME) at the request of Claimant's counsel. On exam Dr. Reichhardt noted tenderness to palpation from T8 to the S1 area with most tenderness at the L1 to L3 level. Claimant had moderate lumbar paraspinal muscle spasm from L1 to L5. Straight leg raising was positive for back and leg pain. Patrick's maneuver was positive. Iliac compression test was positive. Dr. Reichhardt diagnosed thoracolumbar pain with bilateral lower extremity pain from lifting a pot at work on August 27, 2020 while-working as a dishwasher. He assessed that Claimant's exam was concerning for possible radiculopathy or myelopathy. He also noted Claimant had depression, which was multi-factorial, and only partly related to his work-related injury, and partially to the stresses of COVID, with possible adjustment disorder. Dr. Reichhardt opined that based on the history provided by Claimant, as well as the medical records available, to a reasonable degree of medical probability, Claimant current thoracolumbar pain and lower extremity symptoms were related to his August 27, 2020 work-related injury.

14. Dr. Reichhardt recommended Claimant undergo thoracic and lumbar MRIs to evaluate for potential nerve root or spinal cord compression leading to myelopathy or radiculopathy. After the MRIs, it would be appropriate for him to undergo physical therapy, progressing to an independent active exercise program. Depending on the results of the MRIs there might be consideration for selective spine injections or surgical intervention. He further stated that appropriate restrictions for Claimant were 10 pound lifting, pushing, pulling and carrying, with limited standing and walking to 30 minutes at a time with a five minute rest break, no climbing at unprotected heights, and no bending or twisting at the waist.

15. Claimant received trigger point injections on January 19, 2022 at Clinica Family Health. On January 27, 2022, Claimant returned for a follow up with Dr. Mohapatra when Claimant reported improvement with trigger point injections and muscle relaxants.

16. Claimant was seen on April 14, 2022 by Dr. Alejandro Stella at Avista Adventist Hospital for low back and right lower extremity pain. He was diagnosed with back pain and lower extremity pain. The triage nurse noted that Claimant presented with a history of low back injury of approximately one and one half years now experiencing

right buttock pain that radiated down the right leg and left foot numbness that extended up to the left knee. Dr. Stella ordered an MRI, which was conducted on April 14, 2022. The radiologist, Kevin Woolley, M.D. reported Claimant had lumbar spine degenerative changes with grade 1 anterolisthesis at L4-5 level to the basis of facet arthropathy, spinal stenosis noted at L4-L5 with bilateral foraminal impingement on the basis of degenerative change and listhesis, and bilateral foraminal impingement at L5- S1 with no disc herniation. They also performed a lower extremity ultrasound to rule out DVT.[1] Claimant was released to follow up with his primary care provider.

17. On April 25, 2022, Claimant returned to Clinica Family Health. Claimant reported previous trigger point injection helped for about two months. He received a second trigger point injection at this time. On a follow up with Clinica on May 10, 2022, Claimant reported improvement with trigger point injections, steroid burst, cyclobenzaprine, and gabapentin. On August 10, 2022, Claimant returned to Clinica for more trigger point injections. Dr. Mohapatra noted Claimant reported a reduction in pain previously. Four trigger points were injected. Claimant reported mild improvement after the procedure.

18. Claimant was seen for an IME by Dr. Lloyd Thurston on August 19, 2022, at Respondents' request. Dr. Thurston questioned Claimant on the weight of the pot at the time of the alleged injury. He informed him that 10-15 gallons weighs 80-120 pounds without a pot. Claimant stated that he believed he could not lift more than 60 pounds. Claimant stated he lifted the pot from the ground tipped it over and poured the water out, and then cleaned it with a spatula. He then put the pot away overhead. It was Dr. Thurston's opinion claimant exaggerated the mechanism of injury. He noted that if Claimant incurred an injury, it was a minor myofascial strain and resolved within 4-6 weeks of the date of injury. He opined there were no radicular symptoms. He explained that the continued subjective complaints were not consistent with a physical injury. He opined that Claimant significantly embellished and exaggerated the mechanism of injury to Dr. Reichhardt.

19. On October 10, 2022, Claimant received his last round of trigger point injections. On the last recorded visit to Clinica Family Health before the hearing, on October 20, 2022, it is noted Claimant received numerous treatments and most helpful were ibuprofen 600mg tablets taken twice a day, acetaminophen 500mg twice a day, lidocaine patches, and Cyclobenzaprine, trigger point injections and steroid bursts.

20. Since his back injury of August 27, 2020 Claimant has not returned to work due to ongoing back pain related to the work injury.

21. Ms. F.M. stated that Claimant was initially hired without a position but was doing dishwashing one day a week. The restaurant was slower around 2 p.m. when Claimant started, and then would pick up around 5 p.m. She stated that several of the pots, one for chili and one for beans were used for cooking which would be filled to about four inches below the top of the pans. The deep square pans were used to serve food and were placed on steamers by the wait staff. Claimant would wash them when they

[1] Deep vein thrombosis.

were empty. The pots full of chili or beans are taken out to the platers to put the food and then brought back with some residue and food at the bottom of the pots.

22. Mr. T.M. is also a Respondent representative. He stated the chili and bean pans weighed approximately 5 lbs. empty, that the pots are given to the dishwasher after all the food is scraped out and put into smaller containers, and that there was only residue in the pots. He stated that the diner rush lasted about one hour from 5:30 to 6:30 p.m. and that most of the cooking had been done by the time Claimant was there at 2 p.m. It was not until after the rush the steam pans from were given to the dishwasher. What was not explained by any Employer witnesses was what was Claimant doing from 2 p.m. to 6:30 p.m. when the dinner crowd was done and Claimant had to start washing the trays.

23. The photographs showed a cooking pot (chili pot) that seems to be a 40 quart stock pot which is normally 12 to 14 inches wide at the mouth and approximately 15 inches tall. This ALJ deduces that it likely could hold up to 10 gallons of water. The second pot, behind the first, is a smaller, potentially a 32 quart stock pot (beans pot). Further in photograph 3 it shows Ms. F.M. rinsing the smaller pot (beans pot) by lifting it with one hand and using a hose. The pan already appeared to have been scrubbed and washed. Lastly, Ms. F.M. stated that they would wash the chili pot by submerging it in water then rinsing it as shown in the photo. Photograph 2 showed pans on the ground that appear to be the stated dimensions that Ms. F.M. testified of 12 by 14 inches. In the sink can also be seen a plastic container, which Ms. F.M. denied they reused.

24. Ms. F.M. stated that she had a conversation with Claimant by phone on September 1, 2020 to see if she could make arrangements with Claimant to change his schedule because the staff had complained he was taking too long to finish his job. She disclosed that Claimant became very upset. She denied that she terminated Claimant. However, in the responses to discovery she indicated she would testify that “when she informed him [Claimant] of his termination, he became quite agitated and threatened to call their corporate office and speak to individuals there who did not have connection with his termination.” This is also confirmed by discovery responses by Mr. T.M. Discovery responses also stated that Claimant was terminated for cause as he had been previously counseled that he worked very slow, and needed to improve the quality and speed of his work.

25. Dr. Thurston testified at the end of hearing and his testimony was concluded via deposition. He explained that the x-ray and MRI did not show an acute injury, and that this is corroborated by Dr. Mohapatra and Dr. Stella. He disagreed with the diagnosis of radiculopathy. He explained that Dr. Reichhardt’s conclusions were based on incorrect information. He opined that while a possible myofascial injury may have occurred, that it was not probable that it was a work injury.

26. While the clocked-in time shows seven or less hours worked per day, this does not count the time that Claimant was at the job site, including his breaks, which may be what Claimant was referencing and that is consistent with his testimony that he was at work seven to eight hours a day. The argument that co-workers were complaining and that he was not finishing on time is inconsistent with the time clock which has Claimant clocking out between 9:00 p.m. and 9:30 p.m. at the latest each night. Unless the clock

was not accurate or changed, Ms. F.M.'s testimony is found to be not credible or persuasive.

27. As found, Claimant has shown he was injured in the course and scope of his employment for Employer on August 27, 2020 injuring his back and causing radicular symptoms down his legs as well as urinary hesitancy and aggravation of his depression due to the chronic back pain. The opinions of providers at Clinica Family Health and Dr. Reichhardt are more credible and persuasive than the contrary opinions of Dr. Thurston.

28. Claimant has shown he was unable to work after his August 27, 2020 work injury and has shown he is entitled to temporary disability benefits. The records fail to show that Claimant has been placed at maximum medical improvement through the date of the hearing of April 12, 2023.

29. Respondents have failed to show that Claimant was terminated for cause. Claimant reported the injury to his supervisor. Further, Ms. F.M.'s testimony was unpersuasive as her discovery responses indicated she terminated Claimant.

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

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

B. Compensability

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

Claimant has proven that it was more likely than not he was injured in the course and scope of his employment with Employer on August 27, 2020 when lifted a pot with water and food debris off the floor and strained his thoracolumbar spine. He subsequently developed lower extremity radicular symptoms and depression related to the chronic low back and radicular pain and numbness. Claimant's claim is determined to be compensable.

Respondents argue that Claimant's version of events was illogical and there was no reason for anyone to take the empty pot, fill it with water and then place it on the ground to be cleaned as it did not make sense. However, this ALJ concludes that it makes a lot of sense. It is clear that dirty pans do get placed on the floor waiting to be washed as seen in the photos taken by Respondents. It is evident from the photos that there is limited area to place dirty items as the space was needed to take items from the sink onto the small counter in order to wash them. Claimant's testimony that the pot he lifted was full of water and food debris was credible. A pot that has been used to cook may have

had food stuck and water was placed in the pot in order to assist with cleaning the pot later. And while Claimant's assessment of weight may be imperfect, it does not change the fact that Claimant lifted items that he considered heavy, and at one of those events, injured his thoracolumbar spine. This is supported by the records from Clinica Family Health and Dr. Reichhardt as well as Claimant's testimony, which are found credible. This ALJ does not consider Claimant's being a poor historian, which was documented in various records, as being untruthful but a contribution of multiple factors, including use of interpreters instead of direct communication, his clear lack of education demonstrated by Claimant's word usage and patterns of speech at hearing, his demeanor and difficulty understanding simple questions, in addition to his age, memory, and documented depression. Claimant has shown that he was injured in the course and scope of his employment with Employer on August 27, 2020.

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. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8–43–404(5), C.R.S.2011, gives employers or insurers the right to choose treating physicians in the first instance in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330 (Colo.App.2005). Here, the parties stipulated that Clinica Family Health were authorized treating providers for the work related conditions and the provider is accepted.

Claimant has shown he is entitled to medical benefits that are reasonably necessary and related. Following Claimant's lifting incident on August 27, 2022, Claimant immediately contacted his primary care provider at Clinica Family Health. Claimant has proven by a preponderance of the evidence that Claimant's medical care through Clinica and Avista Adventist was authorized, reasonably necessary medical treatment causally related to the August 27, 2020 accident.

23. Only those expenses related to Claimant's August 27, 2020 work related injuries for his mid and low back, bilateral radicular symptoms, urinary urgency and depression are related and not any hypertension or other unrelated medical care.

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 to an average weekly wage of $103.85 which provides a temporary total disability rate of $69.23. This stipulation is accepted.

E. Temporary Total Disability Benefits and Interest

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Claimant's testimony and the medical records from Clinica Family Health show that Claimant was either unable to work or under restrictions from the day of his injury of August 27, 2020. Claimant continues to be under medical care and has not been placed at maximum medical improvement pursuant to the records submitted by the parties. Claimant has shown that he is entitled to temporary disability benefits from August 28, 2020 until terminated by law.

Claimant is also due interest on all benefits which were not paid when due pursuant to statute in the amount of 8% per annum. Temporary total disability benefits and interest through the date of the hearing were calculated as follows:

[Redacted as interest rate calculator with claimant's name, hereinafter RA]

F. 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 was terminated by Employer's representative before his next scheduled day of work, on September 1, 2020 as shown by the discovery responses and Claimant's credible testimony. Claimant persuasively testified that he was unable to work after his injury. Further, this is supported by the credible medical records from Clinica Family Health providers who stated Claimant could not work or was under restrictions. Any testimony or evidence to the contrary is specifically found not credible or persuasive. Respondents have failed to show that Claimant was terminated for cause.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's August 27, 2020 work related injury is compensable, including his mid and low back injuries, his radicular symptoms, urinary urgency and the sequelae of depression related to the ongoing chronic pain.

2. Respondents shall pay the authorized, reasonably necessary and related medical benefits including his providers from Clinica Family Health and Avista Adventist Hospital for his hospitalization of April 14, 2022. Any non-related conditions are not Respondents' responsibility. All medical bills shall be paid in accordance with the Colorado Fee Schedule.

3. The stipulation of the parties regarding average weekly wage of $103.85 is accepted and incorporated as part of this order.

4. Respondents shall pay temporary disability benefits from August 28, 2020 through the present until terminated by law. TTD benefits at the rate of $69.23 per week through the date of the hearing of April 12, 2023 is $9,475.30.

5. Respondents shall pay interest at 8% per annum on all benefits not paid when due, for a total of $10,525.63 through the date of the hearing including temporary total disability benefits. Interests shall continue to be paid until indemnity benefits are paid pursuant to this order.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. 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 1st day of August, 2023.

Digital Signature

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary partial disability ("TPD") benefits from February 14, 2022 to March 10, 2022.

II. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability ("TTD") benefits from March 11, 2022, ongoing.

III. Whether Respondents proved by a preponderance of the evidence Claimant was responsible for his termination from employment and thus not entitled to temporary indemnity benefits

FINDINGS OF FACT

1. Claimant is a 48-year-old who worked for Employer for approximately 2 years as a laborer and 16 years as a foreman.

2. Claimant's average weekly wage ("AWW") was $873.78.

3. Claimant sustained a work injury on March 8, 2021 when he fell a distance of six feet, landing on concrete and striking his head.

4. Claimant initially received medical care for the work injury at UC Health on March 13, 2021. He was diagnosed with a subarachnoid hemorrhage and underwent a pterional craniotomy operative procedure. Claimant was hospitalized for 20 days before being discharged on April 2, 2021.

5. Claimant subsequently began care with authorized provider Concentra on May 25, 2021. Claimant reported daily headaches, right eye pain, decreased vision, bilateral knee pain, swelling and clicking, right ankle pain, neck pain and low back pain. Nancy Strain D.O. gave an assessment of acute head injury, traumatic brain hemorrhage, bursitis of the right and left knees, cervical strain and lumbar strain. Dr. Strain restricted Claimant from all work and referred him for an orthopedic evaluation and physical therapy.

6. Respondents filed a General Admission of Liability ("GAL") admitting for medical benefits and TTD beginning March 9, 2021, ongoing.

7. On June 8, 2021, authorized treating physician ("ATP") Patrick Antonio, D.O. released Claimant to modified duty with the following work restrictions: no lifting greater

than 20 pounds, no kneeling, no climbing, no walking on uneven terrain, no bending, and no working in safety sensitive positions.

8. Claimant did not work from the date of injury to February 13, 2022. Employer paid Claimant TTD benefits during such time period.

9. Claimant underwent extensive evaluations and treatment and continued to complain of headaches, vertigo, dizziness, and right head pain.

10. On January 20, 2022, Respondents submitted a letter to Dr. Antonio requesting approval of proposed temporary modified duty work. Respondents' letter to Dr. Antonio outlined that in the modified duty position Claimant would "[w]ork with crew to assist with tool roll out, material handling and location, job review and supervision, job site cleanup, ride along in company vehicle to and from job site. Requires walking short distances, standing, handling, grasping, reaching, occasional bending and verbal communication. Lift/carry to 20 lbs." (R. Ex. E p. 17).

11. Dr. Antonio approved the proposed modified duty on February 1, 2022, noting "Recommend no bending, no uneven terrain. Allow to sit or stand as tolerated." (Id).

12. On February 3, 2022, Employer sent Claimant a written offer of modified employment to begin on February 14, 2022. The offer of modified employment was consistent with Dr. Antonio's approval. Claimant was to work eight hours per day, five days per week, at $26.00 per hour.

13. Claimant began the modified job on February 14, 2022. Claimant testified that his modified job duties included cleaning work trucks and retrieving and dispensing work materials including pipes, joints, and wire. Claimant testified that his modified work duties did not involve lifting over 20 pounds, but did involve walking over uneven terrain at the worksite. Claimant testified the modified work was not difficult, but that upon returning home after work he felt very tired.

14. On February 16, 2022, Respondents filed a GAL terminating Claimant's TTD as of February 14, 2022 based upon the offer of modified duty.

15. On February 23, 2022, Claimant reported to Dr. Antonio some overall improvement in his dizziness but worsened dizziness when walking on uneven surfaces. Dr. Antonio noted Claimant "Has returned to work Feb 14, handing tools but a lot of sitting. Even so, he returns home from work with increased dizziness." (Cl. Ex. 11 p. 985). Dr. Antonio continued Claimant on the same work restrictions.

16. On March 3, 2022, Claimant saw authorized provider John Aschberger, M.D., who noted Claimant's recurrent headaches seemed to be subsiding in form. He noted Claimant's main concern was recurrent dizziness. Dr. Aschberger documented, "He has been working. He tends to have increased symptoms at the end of the day." (Cl. Ex. 12 p. 23).

17. On March 7, 2022 Claimant sought treatment at the UC Health emergency department for headaches and dizziness that had worsened in the last two days. A CT scan of the head was without acute intracranial blood products or intracranial mass. Claimant was provided with symptomatic control and discharged to follow up with his primary care physician.

18. Between February 14, 2022 and March 11, 2022, Claimant worked only one to three days out of each scheduled five-day work week. Claimant testified he missed several days of work during this time period due to experiencing ongoing symptoms from the work injury. Claimant testified he did not notify Employer of each of his absences and that he did not remember what days he did notify Employer of any absences. Claimant testified he did not remember if he notified anyone when he would not be going into work. Claimant produced no records of text messages or phone call to Employer during this time period.

19. Claimant testified that, prior to his work injury, he would typically send a text message to [Redacted, hereinafter MR], Owner of Employer, notifying MR[Redacted] if he was going to be absent or tardy. Claimant also testified that, prior to the work injury, on occasion he would no-call, no-show, but never several days for multiple weeks.

20. Claimant testified it was his understanding texting was an acceptable method of notifying Employer of his absences or tardies. Claimant testified he was not aware of any formal Employer policy regarding how to report absences or tardies and that he was never informed that a certain number of absences would result in termination. Claimant had not received any warnings or reprimands from Employer.

21. Claimant further testified that when he went to the emergency department on March 7, 2022 he texted MR[Redacted] to notify MR[Redacted] he was sick and unable to return to work. Claimant testified he was not surprised when he received a letter of termination from Employer because he suspected he was going to be terminated due to his many absences. Claimant testified he understood that missing work without notifying Employer would result in termination. Claimant testified he just stopped going to work sometime in March 2022 because of the work injury. Claimant testified he did not reach out to Employer and attempt to explain that he was missing work due to symptoms of his injury. He testified that Employer worked with him to find duties within his restrictions and that MR[Redacted] did what he could to give Claimant a job.

22. Employer terminated Claimant effective March 11, 2022 for no-call, no-shows. Employer sent Claimant a letter dated March 10, 2022 informing him of his termination due to “no show or no call excusing your absence.” (R. Ex. H, p. 63).

23. MR[Redacted] credibly testified at hearing. He testified that three days after starting his modified duty position Claimant missed work on February 17, 2023, without calling or texting Employer to inform Employer of his absence. MR[Redacted] testified that Claimant returned to work on February 18, 2022. MR[Redacted] testified that Claimant worked only one day during the week of February 21 through February 25, 2022. MR[Redacted] testified Claimant did not communicate with Employer regarding

his absences that week until Friday, February 25, 2022, when Claimant sent MR[Redacted] a text message late in the day stating he was going to the doctor. No medical record was submitted in evidence which shows Claimant attended a medical appointment on February 25, 2022.

24. MR[Redacted] testified that from February 28 through March 4, 2022, Claimant again attended only one day of work and that Claimant did not call or send a text message to MR[Redacted] regarding his absences, except one text message on March 3, 2022, which stated that Claimant was not feeling well.

25. MR[Redacted] testified that the week of March 7-11, 2022, Claimant did not attend any work at all, and that Employer received no communication from Claimant regarding missing work. MR[Redacted] testified Claimant did not communicate with him regarding going to the emergency department on March 7, 2022. MR[Redacted] testified that, on March 10, 2022, he made the decision to terminate Claimant's employment due to Claimant's repeated no-call/no-shows. MR[Redacted] testified he did not terminate Claimant due to the work injury or work restrictions. He testified that there was modified duty available to Claimant within Claimant's restrictions at the time of his termination.

26. MR[Redacted] further testified Employer has no formal policy regarding attendance or disciplinary action. He testified that he did not issue any warnings to Claimant regarding Claimant's no-call, no-shows as there was not much communication with Claimant during that time period. MR[Redacted] testified that when other employees would previously stop attending work, he would terminate their employment and replace them with new employees. He also did not give those employees verbal or written warnings. MR[Redacted] estimated he terminated approximately 8-10 employees over the course of 20 years while operating Employer.

27. On March 30, 2022, Claimant was evaluated by Dr. Antonio and stated that no light duty work was available to him. Dr. Antonio did not increase Claimant's work restrictions at that time.

28. Claimant has continued to undergo treatment for his work injury and continued to report headaches, dizziness. As of the date of hearing, Claimant remained on the same work restrictions for the work injury.

29. Claimant has not worked or received any wages since March 11, 2022.

30. The ALJ credits Claimant's testimony regarding the reason for his absences subsequent to the work injury and finds Claimant proved it is more probably true than not the March 8, 2021 work 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 total wage loss as well as partial wage loss.

31. The ALJ finds Claimant was aware of Employer's expectation to notify Employer of his absences and that his failure to do so could result in termination. Respondents

proved it is more probably true than not Claimant is responsible for termination of his employment and thus Claimant is not entitled to TTD as of March 11, 2022.

CONCLUSIONS OF LAW

Generally

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

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

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

TPD

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

claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

Between February 14, 2022 and March 11, 2022 Claimant did not work several days out of each scheduled five-day work week due to experiencing ongoing symptoms as a result of the work injury. While the offer of modified employment totaled $1,040 per week, exceeding Claimant's AWW, Claimant did not work multiple shifts and suffered partial wage loss as a result of the work injury. Accordingly, he is entitled to TPD benefits from February 14, 2022 through March 10, 2022.

TTD and Responsibility for Termination

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

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of*

Davis, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As found, Claimant proved 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. Nonetheless, Claimant is not entitled to TTD as of March 11, 2022 as the preponderant evidence demonstrates Claimant was responsible for termination from his modified employment.

As credibly testified to by MR[Redacted] and documented in the termination letter, Employer terminated Claimant due to his failure to notify Employer of his repeated absences. That several of the absences were due to ongoing symptoms from his work injury did not, under these particular circumstances, absolve Claimant of the responsibility to notify Employer of his absences. Despite there being no formal policy regarding no-call, no-shows and disciplinary action, Claimant was aware of Employer's expectation that he notify Employer of absences and tardies and that failing to do so could result in his termination. Claimant testified that, prior to the work injury, he typically texted MR[Redacted] to notify him of absences and tardies. Even if, on occasion, Claimant had not provided prior notice to Employer of an absence, it was not a situation in which Claimant missed several days of scheduled work for multiple weeks, as he did February 14, 2022 through March 10, 2022. Claimant further testified that he was not surprised he was terminated as a result of his absences. Claimant did not testify, nor is there any evidence indicating, he had some sort of reasonable

understanding that he was not required to report to work nor notify Employer of his absences while on modified duty.

Claimant made no reasonable attempts to notify Employer of his repeated absences nor explain to Employer that his absences were due to his work injury. Moreover, although on March 3, 2022 Claimant reported to Dr. Antonio experiencing increased dizziness after a work day, the evidence does not demonstrate Claimant actively sought a change in his work restrictions at the time. Claimant simply stopped appearing for work and made no reasonable efforts to notify Employer of each absence. A reasonably prudent individual in the same or similar circumstances would provide prior notice to employer of such absences. While absences due to ongoing symptoms of the work injury may not have been within Claimant's control, his repeated failure to take any reasonable action to notify Employer of his absences, knowing that such action could result in termination, was volitional.

Based on the totality of the circumstances, the preponderant evidence demonstrates Claimant was at fault for his separation from employment and thus not entitled to TTD benefits as of March 11, 2022.

ORDER

It is therefore ordered that:

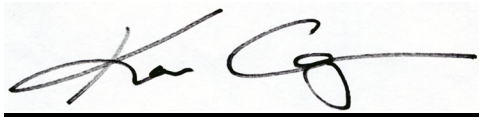
1. Respondents shall pay Claimant TPD February 14, 2022 through March 10, 2022.

2. Claimant was responsible for his termination from employment and thus not entitled to TTD benefits as of March 11, 2022.

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: August 1, 2023



Kara R. Cayce
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 he sustained a compensable injury or occupational disease arising out of and in the course and scope of his employment with Employer?

- If Claimant has proven he sustained a compensable injury or occupational disease, whether Claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable, necessary and related to his work injury and provided by a physician who was authorized to treat Claimant for his injuries?

- If Claimant has proven he sustained a compensable injury or occupational disease, whether Respondents have proven by a preponderance of the evidence that Claimant's claim is barred by the statute of limitations?

- If Claimant has proven he sustained a compensable injury or occupational disease, whether Respondents have proven by a preponderance of the evidence that Claimant is subject to a penalty for late reporting of his injury pursuant to Section 8-43-102(1)(a)?

- At the commencement of the hearing, the parties agreed that if Claimant has proven a compensable injury or occupational disease arising out of and in the course and scope of his employment with Employer that the issue of average weekly wage **("AWW")** would be held in abeyance.

FINDINGS OF FACT

1. Claimant was employed by Employer as an underground miner. Claimant began his employment with Employer on May 29, 2012. Claimant testified he has worked as a general laborer, shuttle car operator, an underground utility mine and a mine helper, in addition to a short stints as a roof bolter. Claimant is currently employed as a belt repairman. Claimant testified his job duties as a belt repairman is to look after the belts and shovel accumulations of coal that fall off the belts and land underneath the belts.

2. Claimant testified that on April 19, 2021 he was shoveling an accumulation from under the belt and while reaching under the belt, Claimant felt a "pop" in his right shoulder. Claimant testified he reported the incident to his foreman, [Redacted, hereinafter JP] and to [Redacted, hereinafter DR]. Claimant testified he did not initially seek medical attention nor was he referred for medical treatment by Employer. An incident report form was completed by JP[Redacted] and DR[Redacted] which documented Claimant reporting a pop in his right shoulder and reported the injury occurred while shoveling under the belt.

3. Claimant continued to work for Employer and in February 2022 he went to his supervisor, [Redacted, hereinafter SP], and advised SP[Redacted] that he needed to get medical treatment for his right shoulder. After reporting to SP[Redacted] that he needed medical treatment, Claimant completed an Employee Accident Report for Employer. The form lists Claimant's accident date as April 19, 2021 and indicates both shoulders had been injured. An Employer's First Report of Injury was completed by [Redacted, hereinafter DC], the Human Resource Manager for Employer, on February 22, 2022.

4. Respondents presented the testimony of SP[Redacted] at hearing. SP[Redacted] confirmed that it was protocol at the mine that if an employee sustains an injury they are to report the injury to a supervisor. SP[Redacted] testified that Claimant reported an injury to him on February 22, 2022 and he went back to the original complaint of shoulder pain on April 19, 2021 when completing the report, then took Claimant to the doctor.

5. Claimant had testified that he had previously reported a work injury for his left shoulder in 2018 and was told he had reported it too late and could not make a workers' compensation claim. Claimant specifically testified that he was informed by Employer that he was "out of luck" with regard to the left shoulder injury. SP[Redacted] testified he was not aware of any situation where Claimant was prohibited from making a workers' compensation claim.

6. Claimant testified at hearing that between April 19, 2021 and February 22, 2022, he continued performing his regular work for Employer. Claimant testified his shoulder symptoms increased after the April 19, 2021 incident and he eventually reported to SP[Redacted] that he wanted to seek medical treatment for his shoulder injury.

7. Claimant sought medical treatment at the Rangely District Hospital Emergency Room ("ER") on February 22, 2022. Claimant complained of an injury involving shoulder pain as a result of working in a mine and performing heavy shoveling and lifting. Claimant reported he had chronic shoulder pain for over a year with his left shoulder having more pain than his right shoulder. The ER records indicate Claimant denied any specific injury that led to the shoulder pain. Claimant underwent x-rays of the right shoulder which showed no significant abnormalities. Claimant also underwent an x-ray of the left shoulder that showed mild degenerative changes of the acromioclavicular joint. Claimant testified that the ER wanted to refer Claimant to a surgeon in Meeker, but Claimant requested a referral to a physician in Vernal, Utah. Claimant subsequently came under the care of Dr. Madsen.

8. Claimant testified he had previously received medical care from Dr. Madsen for a shoulder injury that he alleged was work related and occurred in 2018. As noted above, Claimant testified that when he tried to report the work injury, he was advised by Employer that he had waited too long to report the injury and it would not be accepted. Claimant testified he then sought medical treatment for his left shoulder outside the workers' compensation system.

9. According to the medical records, Claimant's treatment with Dr. Madsen began March 21, 2019 when he was treated for neck pain and stiffness. Claimant also

reported occasional tingling and numbness in his arms and reported mild tenderness of his upper left sided trapezius. Claimant denied any specific injury. Claimant testified this neck condition was treated as a workers' compensation claim. The medical records also contain a cervical magnetic resonance image ("MRI") on April 12, 2017 that showed some degenerative changes to the cervical spine along with bulging discs at the C5-6 and C6-7 levels.

10. Claimant was evaluated on August 26, 2020 with reports of left shoulder arm and elbow pain for the past 6-8 months. Claimant again denied any specific injury. Claimant returned on October 12, 2020 with complaints of bilateral shoulder pain and was diagnosed by Dr. David Perry with degenerative joint disease of the acromioclavicular joint of the left shoulder. Claimant returned for additional medical treatment on November 9, 2020. Claimant underwent an MRI of the left shoulder on November 9, 2020 which demonstrated degenerative joint disease along with a partial thickness tear of the distal supraspinatus and infraspinatus tendon. According to the medical records, this series of medical treatment represents the medical treatment for Claimant's left shoulder condition that Claimant testified he received after being informed by Employer that he was too late in reporting a workers' compensation injury.

11. Claimant was examined by Dr. Madsen on January 5, 2021 with complaints of left shoulder pain. Dr. Madsen noted that Claimant was scheduled for left shoulder surgery with Dr. Moore, but cancelled it to obtain a second opinion. Dr. Madsen recommended conservative treatment with physical therapy and anti- inflammatories. Claimant was provided with a left shoulder lidocaine injection.

12. Claimant returned to Dr. Madsen on March 2, 2021. Dr. Madsen noted Claimant had not been diligent with his physical therapy. Dr. Madsen recommended Claimant focus on strengthening the shoulder and away from formal therapy.

13. Claimant returned to Dr. Madsen for his left shoulder issue on April 27, 2021 and reported the work injury of April 19, 2021 to his right shoulder during this evaluation. Dr. Madsen noted that Claimant was going to file a claim for the right shoulder injury. Dr. Madsen noted that Claimant had been busy at work and had good improvement with regard to his shoulder and was not thinking he needed surgery. Dr. Madsen noted that Claimant would return and Dr. Madsen would see him for his right shoulder condition "whenever he is available and ready".

14. After this visit, Claimant did not receive treatment from Dr. Madsen for either shoulder issue until almost a year later on March 11, 2022. At this point, Claimant was reporting increased pain in both shoulders. Dr. Madsen recommended Claimant undergo an MRI of the right shoulder at this point. Claimant underwent an MRI of the right shoulder on March 25, 2022. The MRI revealed small partial thickness tears of the supraspinatus and infraspinatus tendon without retraction.

15. Claimant testified at hearing that following his injury to the right shoulder on April 19, 2021, he began compensating by using his left shoulder more which caused more pain in his left shoulder.

16. Claimant returned to Dr. Madsen on March 31, 2022. Dr. Madsen noted the results of the MRI and recommended conservative treatment. Claimant was provided with a lidocaine injection for the right shoulder and a prescription for physical therapy. Claimant was instructed to return in six (6) weeks.

17. Claimant was re-examined by Dr. Madsen on May 24, 2022 and reported that the subacromial injection provided him with 40% relief and he was able to sleep better at night. Claimant reported positive progress with physical therapy and Dr. Madsen recommended continuing conservative treatment.

18. Claimant was examined by Dr. Madsen on June 28, 2022 and August 18, 2022, who continued to recommend conservative treatment including anti- inflammatories, injections and physical therapy. Claimant was diagnosed with a non- traumatic incomplete tear of the left rotator cuff and an incomplete tear of the right rotator cuff. Dr. Madsen provided Claimant with a lidocaine injection into the left shoulder on August 18, 2022.

19. Respondents obtained an independent medical examination ("IME") of Claimant with Dr. Failinger on October 15, 2022. Dr. Failinger reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with Claimant's IME. Dr. Failinger reported Claimant was a relatively poor historian with regard to his shoulder injury and treatment. Dr. Failinger noted that Claimant reported an incident on April 19, 2021 but there were no clinical notes or any other records documenting a right shoulder injury and a filing of a claim at that point. Dr. Failinger opined in his report that Claimant was suffering from rotator cuff disease that was, in most all cases, one of degeneration. Dr. Failinger opined that Claimant's activities in the mine would not be sufficient activities to meet the criteria of performing repetitive shoulder movements pursuant to the Colorado Medical Treatment Guidelines. Dr. Failinger noted in his report that although Claimant reported he was raking and noticed a pop in his right shoulder two to three years agao, there were no records that provide such information to Dr. Failinger. Dr. Failinger ultimately opined in his report that Claimant's right shoulder condition was not related to his work with Employer.

20. Dr. Failinger testified by deposition in this matter consistent with his IME report. Dr. Failinger noted that at the time of his IME report he did not have a copy of the incident report dated April 19, 2021 completed by Employer. Dr. Failinger opined in his testimony that if Claimant had injured the rotator cuff while shoveling on April 19, 2021, he would not have been shoveling for very long and would have needed to stop and obtain treatment. Dr. Failinger opined that it was not medically probable that Claimant would have an injury when he experienced the pop in the shoulder and not obtain treatment for 10 months. Dr. Failinger opined that at most, Claimant experienced a sprain/strain during the incident which would resolve in four to six weeks.

21. The ALJ credits the testimony of Claimant at hearing along with the supporting medical records from Rangely District Hospital and Dr. Madsen and determines that Claimant has established that he has proven that it is more likely than not that he sustained a compensable injury arising out of and in the course and scope of

his employment with Employer on April 19, 2021 when he experienced a pop in his right shoulder.

22. The ALJ recognizes that Claimant did not seek medical treatment for this injury until February 22, 2022, but Claimant did report the injury and then continued to work for Employer before eventually deciding that he could no longer forgo on the need for medical treatment. The ALJ notes that Claimant reported the incident to Dr. Madsen on April 27, 2021 and finds the medical record consistent with Claimant's testimony at hearing. The ALJ therefore finds that Claimant has proven that it is more likely than not that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer.

23. The ALJ credits the medical records and Claimant's testimony at hearing and finds that the medical treatment provided by Rangely District Hospital ER and Dr. Madsen was reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury to Claimant's right shoulder.

24. The ALJ notes that Claimant was taken for medical treatment to the Rangely District Hospital by Employer. However, there is insufficient evidence to establish that Employer referred Claimant to a physician willing to treat Claimant for his injuries. Therefore, Claimant is free to select Dr. Madsen as his authorized treating physician and the treatment provided by Dr. Madsen is deemed authorized.

25. With regard to the issue of the statute of limitations, Respondents argue that Claimant began seeking medical treatment for his right shoulder injury based on the fact that he sought medical treatment for the right shoulder as early as August 12, 2020 and reported to the physician that the symptoms began six to eight months prior. This argument ignores the fact that Claimant had a specific incident on April 19, 2021 that he immediately reported to his employer that involved a "pop" in his shoulder while shoveling under the belt.

26. The ALJ finds that based on Claimant's injury to his right shoulder on April 19, 2021, Claimant's claim for workers' compensation benefits is not barred by the statute of limitations as the claim for compensation was brought within 2 years of the date of injury.

27. The ALJ further credits Claimant's testimony that his left shoulder condition worsened after April 19, 2021 when he began over compensating for the right shoulder which caused increase pain in his left shoulder. The ALJ notes that when Claimant was examined by Dr. Madsen on April 27, 2021 he noted that his left shoulder was getting stronger doing better and less bothersome. Claimant did not then seek medical treatment for either of his shoulders until February 22, 2022 when he reported his injury to Employer.

28. The ALJ credits Claimant's testimony as credible and finds that Claimant' has established that it is more likely than not that his overuse of his left shoulder at work after April 19, 2021 right shoulder injury aggravated, accelerated or combined with

Claimant's preexisting condition of his left shoulder to cause the need for medical treatment provided by Dr. Madsen after February 22, 2022.

29. Respondents further contend that Claimant is subject to a penalty for late reporting of his workers compensation injury pursuant to Section 8-43-102(1)(a). The ALJ is not persuaded.

30. Claimant in this case reported the April 19, 2021 incident involving the "pop" in his right shoulder on the date of the incident. Claimant did not seek medical treatment immediately after reporting the injury, but Claimant did report the injury to Employer on the date the injury occurred. Section 8-43-102(1)(a) requires that an injured worker to report the injury to Employer in writing within four(4) days of the date of the occurrence. The statute provides that any other person who has notice of the injury may submit written notice to the person in charge, and in that event the injured worker is relieved of the obligation to give such notice.

31. In this case, Claimant testified at hearing that he reported the injury on April 19, 2021 to SP[Redacted] and DR[Redacted]. The ALJ finds Claimant's testimony credible as it is supported by the incident report form signed by SP[Redacted] and DR[Redacted] dated April 19, 2021. The incident report form which memorializes Claimant's report of injury and identifies Claimant and is signed by SP[Redacted] and DR[Redacted] satisfies the requirements of Section 8-43-102(1)(a) that Employer be provided with written notice of Claimant's injury.

32. Insofar as Respondents are arguing that Claimant failed to timely report an injury in 2018 that led to Claimant's medical treatment in 2019 and 2020, the ALJ credits Claimant's testimony that he attempted to report the injury to Employer and was told that he was out of luck as he had not timely reported the injury. However, based on the ALJ's finding that Claimant's actions of over compensating for his right shoulder after April 19, 2021 which resulted in his left shoulder to be aggravated, accelerated, or combining with a preexisting condition to cause the need for medical treatment in 2022, Claimant's written notice of the April 19, 2021 injury is sufficient for both is right and left shoulder claims.

CONCLUSIONS OF LAW

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

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

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

conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

5. As found, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer when he was shoveling coal from under the conveyor belt on April 19, 2021. As found, Claimant's testimony that he felt a pop and had onset of pain in his right shoulder while performing work activities is found to be credible. As found, Claimant's testimony is consistent with Claimant's report to Dr. Madsen on April 27, 2021 and consistent with the Incident Report Form completed by Employer on April 19, 2021.

6. As found, Claimant's testimony that his overcompensating for the right upper extremity resulted in increased pain in his left shoulder is found to be credible. As found, Claimant's testimony is consistent with the medical records from Dr. Madsen which show Claimant's left shoulder symptoms improving on April 27, 2021 before worsening leading up to Claimant receiving medical treatment on February 22, 2022.

7. As found, Claimant has proven by a preponderance of the evidence that his overcompensating for the right shoulder injury of April 19, 2021 aggravated, accelerated of combined with Claimant's preexisting left shoulder condition causing the need for medical treatment. The ALJ recognizes that Claimant had a history of left shoulder medical treatment prior to the April 19, 2021 right shoulder injury, but credits the April 27, 2021 medical report of Dr. Madsen

8. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not

change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office,* 931 P.2d 570 (Colo. App. 1996).

9. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.,* W.C. No. 4-304- 437 (January 3, 2008). Section 8-43-404(5)(a} specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion...." *Greager v. Industrial Commission,* 701 P.2d 168 (Colo. App. 1985), *citing,* 2 A. Larson, *Workers' Compensation Law* § 61.12(9)(1983).

10. As found, Claimant's medical treatment with Rangely District Hospital and Dr. Madsen are found to be reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the industrial injury. As found, Claimant's treatment with Dr. Madsen is found to be authorized by virtue of the fact that Employer did not provide Claimant with a list of medical providers authorized to treat Claimant following Claimant's request for medical treatment on February 22, 2022 when Employer took Claimant to the emergency room.

11. Section 8-43-103(2), C.R.S. requires that claimant must file a claim for compensation within two years after the injury. The statute of limitations does not commence to run until claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of her injury. *City of Boulder v. Payne,* 162 Colo. 345 (Colo. 1967); *City of Colorado Springs v. Industrial Claim Appeals Office,* 89 P.3d 504 (Colo. App. 2004).

12. As found, in the present case, Claimant sustained a compensable injury arising out of and in the course of his employment with Employer on April 19, 2021 and immediately reported the injury to Employer. As found, Claimant's over compensation of his right shoulder related to the April 19, 2021 injury over the next ten months resulted in the need for treatment to the left shoulder, in addition to the right shoulder. As found, Claimant's claim for compensation was brought within 2 years of the April 19, 2021 injury.

13. Section 8-43-102(1)(a) states in pertinent part:

> Every employee who sustains an injury resulting from an accident shall notify said employee's employer in writing of the injury within four days of the occurrence of the injury. If the employee is physically or mentally unable to provide said notice, the employee's foreman, superintendent, manager, or any other person in charge who has notice of said injury shall submit such written notice to the employer. Any other person who has

notice of said injury may submit a written notice to the said person in charge or to the employer, and in that event the injured employee shall be relieved of the obligation to give such notice. Otherwise, if said employee fails to report said injury in writing, said employee may lose up to one day's compensation for each day's failure to so report. If, at the time of said injury, the employer has failed to display the notice specified in paragraph (b) of this subsection (1), the time period allotted to the employee shall be tolled for the duration of such failure.

14. As found, Claimant reported the injury on April 19, 2021 and the Employer completed an incident report form that was signed by JP[Redacted] and DR[Redacted]. As found, Claimant timely reported his work injury to Employer.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer on April 19, 2021.

2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of his industrial injury, including the medical treatment provided by Rangely District Hospital and Dr. Madsen.

3. Respondents have failed to prove that Claimant's claim for compensation is barred by the statute of limitations.

4. Respondents have failed to prove that Claimant is subject to penalties for late reporting of his April 19, 2021 injury pursuant to Section 8-43-102(1)(a)

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

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

DATED: August 2, 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
WORKER'S COMPENSATION NO. WC 5-222-363-001

STIPULATED FACTS

1. [Redacted, hereinafter CC] was an employee of the Employer on November 15, 2022.

2. On November 15, 2022 CC[Redacted] was killed performing duties in the course and scope of his employment with the Employer.

3. At the time of his death, CC[Redacted] had two Dependents, [Redacted, hereinafter AP], spouse, and [Redacted, hereinafter KC], child.

4. Respondents filed a Fatal Case-General Admission on November 30, 2022 and began paying death benefits equally to the Dependents at the rate of $447.14 per week.

5. The parties agree that CC's[Redacted] Average Weekly Wage (AWW) for wages earned at the time of his death was $1,341.42. The total death benefit payable to the Dependents is $894.28 per week, divided equally among both Dependents.

6. At the time of his death, CC[Redacted] had a policy for health and dental insurance in place through his Employer.

7. The health and dental policy in place included coverage for both Dependents.

8. Meritain Health maintained the coverage of the Employer's health plan and verified coverage for both Dependents through November 30, 2022. Both Dependents were covered by the insurance at the time of CC's[Redacted] death and on the date the health insurance was terminated due to CC's[Redacted] death.

9. On December 6, 2022 the Employer issued a letter to the Dependents for a COBRA Election Form. Continuation of coverage for family medical coverage was priced at $2,205.04 per month for medical coverage and $125.59 per month for dental coverage. The combined cost for continuing health and dental insurance is $2,330.63 per month or $537.84 per week. Both Dependents were eligible for continuation of coverage in the COBRA Election Form.

10. The COBRA Election Form also specified that the Dependents would be entitled to continuing coverage under COBRA for 36 months.

11. Dependents' position is that the additional cost of continuing coverage of $537.84 per week should be added to the currently admitted AWW pursuant to §8-40-201(19), C.R.S.

12. Respondents position is that the cost of continuing coverage is not applicable to fatal claims because the Employee is deceased and will not have a continuing cost in the Employer's health insurance or cost of conversion. Death benefits for the Dependents are not increased for COBRA because they are not the "employee," as defined in §8-40-201(19)(b), C.R.S.

ISSUE

Whether Decedent's COBRA benefits should be included in the AWW used to calculate Dependents' death benefits.

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. Section 8-40-201(19)(b), C.R.S. provides, in relevant part, that "wages" include "the amount of the employee's cost of continuing the employer's group health insurance plan, and upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan." It is well-established that, if a claimant is receiving lost wage benefits and insurance coverage is terminated by the employer, the cost of that insurance is added to the claimant's AWW. The question in this case is whether the same reasoning applies to dependents who were receiving group health insurance under a plan maintained by the decedent and the employer terminated the benefits after the decedent's death.

5. Section 8-42-114, C.R.S. provides in pertinent part, "in case of death the dependents of the deceased entitled thereto shall receive as compensation of death benefits 66 ⅔% of the deceased average weekly wages not to exceed a maximum 91% of the state's average weekly wage for accidents occurring on or after July 1, 1989…"

6. Section 8-42-115(1), C.R.S. specifies that, where death proximately results from an industrial injury, the decedent's dependents are entitled to receive the decedent's workers' compensation benefits. Under §8-42-115(1), C.R.S. the calculation of death benefits is based on the decedent's AWW. The amount and duration of death benefits requires a determination of whether the decedent was survived by whole or partial dependents. *Erickson v. Foxworth Galbraith Lumber Co,*, W.C. No. 4-497-321 (ICAO, Sept. 17, 2003).

7. There are prior decisions by the Industrial Claimant Appeals Office (Panel) that support the conclusion that the Dependents should be entitled to the cost of continuing the Employer's group health insurance plan included with the current admitted AWW. The decisions address the same issues regarding temporary total disability benefits and permanent benefits.

8. In *Gutierrez v. Plan De Salud Del Valle Inc.,* W.C. No. 4-257-435 (ICAO, Jan. 12, 2001) the Panel reiterated prior decisions that the plain meaning of §8-40-201(19)(b), C.R.S. incorporates the cost of health insurance coverage provided to the claimant's dependents in cases where the employer's health insurance plan allows such coverage. The Panel noted that, if the General Assembly wished to limit the statute to the cost of health insurance provided solely to the claimant, it could have used such limiting language. They were not persuaded by the respondent's attempt to distinguish between adjustments in the AWW for purposes of temporary disability benefits and adjustments for purposes of permanent disability benefits. The Panel noted that, although there are differences in the statutory methods used for calculating those benefits, temporary disability and permanent disability benefits are both designed to compensate for the claimant's loss of earning capacity. *Colorado AFL-CIO vs. Donlon, 914 P.2d 396* (Colo. App.1995).

9. There are additional cases that support amending the AWW to include the cost of continuing insurance in the present matter. Numerous cases have held that §8-40-201(19)(b), C.R.S. reflects a legislative compromise that attempts to value health insurance once the employer stops paying premiums. The amendment adds the cost of healthcare coverage when the employer stops paying. Whether the cost of insurance is included in the AWW is dependent on enrollment at the time the employer terminates coverage. *Gonzales v. City of Fort Collins and Occupational Healthcare Management Services,* W.C. No. 4-365-220 (ICAO, Nov. 20, 2003).

10. The Panel issued Identical holdings in *Maguire vs. Family Dollar Stores Inc.,* W.C. No. 4-738-209 (ICAO, Mar. 28, 2012) and *Villa vs. Leprino Foods,* W.C. No. 4-735-985 (ICAO, Nov. 3, 2009). In *Gonzales*, *Villa*, and *Maguire,* the Panel determined that the cost of continuing insurance for the dependents should not be included in the AWW for calculation of either temporary disability benefits or permanent benefits. The Panel

explained that, because only the claimant was covered under the employer's health insurance plan when the employer terminated coverage, the AWW would be increased by the cost of converting to a similar or lesser plan for only the claimant. The Panel reasoned that the dependents were not covered under the employer's health insurance plan at the time insurance terminated, and were thus not eligible for continuing coverage under COBRA. They acknowledged in all three cases that, when the General Assembly enacted §8-40-201(19)(b), C.R.S. it was aware that the value of COBRA insurance, and hence the inclusion of the cost of such insurance in the AWW, would be dependent on enrollment at the time the employer terminates coverage.

11. Under §8-40-201(19)(b), C.R.S. "wages" shall not include the employee's cost of continuing the employer's group health insurance plan if the employer continues to pay the cost of health insurance coverage. Relying on *In re Claim of Flake*, W.C., No. 4-997-403-03 (ICAO, Sept. 19, 2017), the Respondents contend that, because the employer continued to pay the cost of health insurance coverage until at least October 13, 2015 after a September 22, 2015 work accident, the cost of health insurance coverage should not be included in the Decedent's AWW before that date. Respondents assert that in the present matter Decedents health insurance coverage had not been discontinued or terminated prior to the time of his death. Therefore, it should not be included in the AWW used to compute the Dependents' benefits. However, importantly in *Flake*, the Panel reasoned that, because the employer continued to pay the cost of continuing health insurance coverage at least until October 13, 2022, it could not be included in the claimant's AWW "before that date." The temporary benefits the claimant received were for dates prior to October 13, 2022 and thus calculated on an AWW that did not include the cost of continuing health insurance.

12. *Flake* is distinguishable from the present case. Here, the Dependents are not seeking an increase in the AWW for a period before the Employer ceased paying for health care coverage, but only after termination of the payments. The Employer terminated health insurance payments on November 30, 2022. The Dependents do not seek an increase in the AWW for a period preceding the termination of the health insurance plan on November 30, 2022, but only urge an increase in the AWW by the cost of continuing health insurance coverage beginning on December 1, 2022.

13. In the present matter, the Dependents were enrolled in health insurance coverage at the time of termination of the plan. In Exhibit 2 from Meritain Health, there is confirmation of coverage for both Dependents effective May 1, 2021 until the date the letter was issued on January 3, 2023. Furthermore, in Exhibit 3, a letter from the Employer to Dependent, AP[Redacted], provides the notice of continuation of insurance coverage through the COBRA Election Form, and reflects ongoing premium payments would be due beginning January 1, 2023 in the amount of $2,205.04 per month for family medical coverage. Family medical coverage is the only plan under the COBRA Election Form that would be applicable to the Dependents. Therefore, the reasoning in the previously cited case law supports the conclusion that the Dependents were covered by the continuing health insurance coverage at the time health insurance was terminated.

14. The additional letter from Meritain Health at Exhibit 2 states that the Dependents' coverage for medical, dental and vision insurance existed from May 1, 2021 through November 30, 2022, and was terminated at that time. The preceding facts suggest that the AWW should be amended to reflect the cost of continuing healthcare insurance for medical and dental coverage that is outlined in Exhibit 3. The amount of continuing coverage is $2,205.04 per month for medical insurance and $125.59 per month for dental insurance for a total monthly cost of $2,330.63. The AWW would thus increase by $537.84.

15. The plain language of §8-40-201(19)(b), C.R.S. reflects that the AWW should be amended in this claim to include the cost of continuing health insurance to the Dependents. Specific reference to the claimant in the statute includes the dependents in a death case because they essentially occupy the position of the claimant. Here, the Dependents essentially became the Claimants after CC[Redacted] was killed within the course and scope of his employment on November 15, 2022. Furthermore, the amendment of the AWW to reflect the continuing cost of insurance should not be limited to 36 months as outlined in the COBRA Election Form at Exhibit 3. Despite any termination of the right to COBRA entitlement at 36 months, the Dependents would continue to require continuing health insurance coverage beyond that point. The loss of that insurance coverage is part of the wage loss benefit provided by CC's[Redacted] wages. The ongoing death benefits are meant to reflect the loss to the Dependents and should include the cost of insurance as part of their AWW.

16. The Dependents have met their burden to prove that the AWW should be amended to reflect the cost of continuing health insurance as set forth in §8-40-201(19)(b), C.R.S. At the time of CC's[Redacted] death and through November 30, 2022, the Dependents were included in a group health insurance plan provided by the Employer for medical and dental coverage. The cost of that insurance is $2,205.04 per month for medical and $125.59 per month for dental. The combined cost for continuing coverage for health and dental insurance is $2,330.63 per month or $537.84 per week. For purposes of evaluation under §8-40-201(19)(b), C.R.S. the Dependents are entitled to the cost of continued insurance as a benefit for the economic loss due to the death of CC[Redacted].

ORDER

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

1. At the time of CC's[Redacted] death within the course of the scope of his employment with the Employer, CC[Redacted] and his Dependents, AP[Redacted] and KC[Redacted] were enrolled in a health and dental insurance plan provided by the Employer. Both Dependents were also covered under that plan when the Employer terminated that plan on November 30, 2022.

2. Pursuant to §8-40-201(19), C.R.S. the Dependents are entitled to the cost of continuing coverage for the health and dental policies that were in existence on the

date of termination. The cost of the medical coverage for continuation was $2,205.04 per month and for dental coverage $125.59 per month. The combined cost for continuing coverage for health and dental insurance is $2,330.63 per month or $537.84 per week.

3. Respondents shall amend the AWW in their admission of liability to add an additional $537.84 per week to the current admitted AWW of $1,341.42. Respondents shall pay death benefits in accordance with statute and rule beginning December 1, 2022 until terminated by statute.

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

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

DATED: August 2, 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. 5-144-649-004

ISSUES

1. Whether Claimant has proved by clear and convincing evidence that the DIME physician erred in determining that she had reached maximum medical improvement (MMI).

2. Whether Claimant is entitled to temporary disability benefits.

3. Whether Claimant has proved by a preponderance of the evidence that she is entitled to a general award of maintenance medical benefits.

FINDINGS OF FACT

1. Claimant is a cashier who, on August 2, 2020, while working for Respondent-Employer, sustained an admitted injury when a shoplifter grabbed her and threw her to the ground. Among Claimant's injuries was an injury to the right shoulder.

2. Claimant had a significant medical history related to her right shoulder and adjacent body parts before her work injury.

3. Specifically, on June 2, 2017, Claimant underwent a right scapula x-ray due to persistent distal medial scapular pain radiating into her right shoulder. The pain, described as stabbing and burning, had worsened over the previous month without any known new injury.

4. On June 5, 2018, Claimant reported issues with her right shoulder after falling on it. Another x-ray revealed mild superior migration of the humeral head, subacromial space narrowing at 6 mm, and mild acromioclavicular and glenohumeral degenerative changes. The fall caused pain, swelling, tenderness, and limited range of motion. Claimant was also diagnosed with osteoporosis.

5. On February 21, 2019, Claimant sought evaluation for ongoing right shoulder pain and mentioned performing home exercises.

6. Subsequently, on December 5, 2019, Claimant reported an additional injury to her right shoulder that occurred two weeks earlier. A right shoulder x-ray revealed an impaction fracture of the humeral head and degenerative changes in the acromioclavicular and glenohumeral joints. The medical notes also mentioned a history of "right rotator cuff tendinitis." Claimant experienced pain when lifting and reaching overhead.

7. During a follow-up appointment on December 11, 2019, for the right proximal humerus fracture, it was noted that Claimant had been wearing a sling most of the time since her injury and had a chronic history of rotator cuff tearing.

8. On January 6, 2020, Claimant returned for evaluation, reporting a new mechanism of injury involving a "trunk" falling onto her right shoulder. She continued to experience pain, and her co-workers assisted her with lifting and activities requiring her to raise her arm above 90 degrees. A third right shoulder x-ray revealed osteoarthritis in the glenohumeral joint and subacromial space narrowing consistent with rotator cuff pathology and a probable tear.

9. On January 29, 2020, during a physical therapy appointment, Claimant mentioned not following the recommendation to wear a shoulder sling while working. She continued to report ongoing shoulder pain and weakness during subsequent physical therapy appointments on February 20, 2020. There were no further records of additional physical therapy or indications that Claimant's fracture had stabilized, with no likelihood of further treatment improving her condition.

10. There was also a January 29, 2020 physical therapy note documenting Claimant trying to use her left arm as much as possible and a January 6, 2020 note documenting that her coworkers would help her with anything that required her to raise her arm overhead

11. During her initial evaluation for her August 2, 2020 injury on August 3, 2020, Claimant reported that she had experienced a shoulder fracture in November 2019 and had to discontinue physical therapy earlier than anticipated due to COVID-19.

12. Claimant underwent a right shoulder x-ray which revealed findings consistent with mild glenohumeral osteoarthritis and a reduction in the acromiohumeral distance, indicative of a rotator cuff tear. The records document that scapular winging was observed on physical examination, though there was no mention of shoulder bruising. However, at a follow-up examination on August 14, 2020, Claimant reported bruising on her thighs, but no skin trauma was observed during the examination of her right shoulder.

13. Claimant underwent an evaluation by orthopedic specialist Dr. Cary Motz on August 18, 2020. Claimant denied any prior shoulder injury. Dr. Motz recommended a shoulder MRI, which Claimant underwent on August 21, 2020.

14. The MRI showed a massive chronic rotator cuff tear with a high-riding humeral head and signs of rotator cuff arthropathy. The radiologist noted that the findings were age-indeterminate. However, the radiologist did observe severe muscle atrophy in relation to the subscapularis tendon.

15. At Claimant's August 25, 2020 visit with Dr. Motz, Dr. Motz reviewed the MRI and noted that it was consistent with a long-standing rotator cuff tear due to significant

remodeling. Therefore, in his opinion, the injury did not appear recent. At that appointment, Claimant told Dr. Motz that she had fallen in 2019 while at work but did not report the injury. Dr. Motz mused, "I suspect that that was a portion of the tear as this does not appear to be a recent injury."

16. Claimant had another visit with Dr. Motz on September 29, 2020. At that time, Claimant reported that she had no significant improvement following a steroid injection and limited progress in physical therapy. Dr. Motz opined that a reverse total shoulder arthroplasty might be necessary. However, based on the MRI findings, he felt the need for surgery would be of a chronic nature, unrelated to the August 2, 2020 injury.

17. Claimant was referred to Dr. Nathan Faulkner for a surgical evaluation. Claimant saw Dr. Faulkner on October 2, 2020. At that appointment, Claimant denied any preexisting shoulder pain or dysfunction. Dr. Faulkner similarly made no mention in his report of Claimant's prior shoulder problems, including Claimant's November 2019 shoulder injury.

18. Ultimately, Dr. Faulkner recommended arthroscopic rotator cuff repair. He felt the surgery was reasonably necessary "[g]iven her younger age, acute nature of the injury, as well as her level of pain/dysfunction and failure with more conservative treatment." Regarding the relatedness of Claimant's rotator cuff tears, Dr. Faulkner opined that the atrophy appeared to be only grade 1 or grade 2, and that the tears therefore appeared "relatively acute."

19. Respondents ultimately denied the surgery recommended by Dr. Faulkner, relying on a respondent-sponsored independent medical examination (IME) report by Dr. Timothy O'Brien.

20. Claimant underwent an IME with Dr. O'Brien on December 8, 2020, pursuant to § 8-43-404, C.R.S., and Rule 8-8, W.C.R.P. Dr. O'Brien reviewed Claimant's medical records, examined Claimant, and took Claimant's history. Dr. O'Brien observed that Claimant had shoulder pain dating back to 2017 and radiographs in 2018 revealing a high riding humeral head that had been present for many years. Dr. O'Brien noted that this condition was a chronic condition that would gradually worsen until a reverse total shoulder arthroplasty would be needed. Dr. O'Brien also reviewed the MRI results, which he observed to show a high riding humeral head, re-modeling of the undersurface of the acromion, glenohumeral joint arthritic changes, and moderate to severe subscapularis atrophy associated with fatty atrophy, all of which Dr. O'Brien noted to be consistent with a longstanding rotator cuff tear.

21. Based on the imaging and prior history, Dr. O'Brien felt that Claimant's need for surgery was not related to the August 2, 2020 injury. He pointed out that the pre-injury imaging showed evidence of a massive rotator cuff tear. Regarding Dr. Faulkner's recommendation, Dr. O'Brien noted that Dr. Faulkner did not account

for Claimant's pre-injury medical history and committed several other errors in his analysis. Specifically, regarding Dr. Faulkner's finding that the atrophy was minor, Dr. O'Brien noted, "when we look at Dr. Motz's review of the MRI scan, as well as the radiology review of the MRI scan, we see that not only is fatty atrophy present (and it is considered to be moderate to severe in the subscapularis, which contradicts Dr. Faulkner's reading) but it is associated with fatty atrophy." He also noted that Dr. Faulkner failed to recognize that the high-riding humeral head and resulting severe glenohumeral joint arthritis were evidence that Claimant's rotator cuff tear was in fact old.

22. Dr. O'Brien also felt that an arthroscopic shoulder surgery was not reasonable, as it would likely be unsuccessful and cause scarring that would complicate a subsequent reverse total shoulder arthroplasty. Although Dr. O'Brien felt that a reverse total shoulder arthroplasty was indicated, he clarified that it would not be related to Claimant's minor work injury from August 2, 2020.

23. Claimant had Dr. Sander Orent attend the IME as well and prepare a report. In his report, Dr. Orent raised several concerns about Dr. O'Brien's evaluation and report.

24. First, he criticized Dr. O'Brien's description of the mechanism of injury as being brief, noting that important elements were omitted, such as the instruction to "go after" the assailant by the store manager and the severity of the assault.

25. Dr. Orent also disputed Dr. O'Brien's assessment of the patient's range of motion and found omissions in the report related to the patient's symptoms and physical examination. He disagreed with Dr. O'Brien's opinions, especially regarding the absence of cervical and lumbosacral spine injuries due to delayed onset of pain and the characterization of the shoulder injury as minor.

26. Dr. Orent emphasized that Claimant had a complete tear of the supraspinatus tendon and other significant injuries that required a reverse shoulder arthroplasty, contradicting Dr. O'Brien's assessment. He challenged Dr. O'Brien's extensive experience and questioned his understanding of the patient's age-related healing process and the severity of the injuries.

27. The Court finds Dr. Orent's analysis unpersuasive. Dr. Orent's critique of Dr. O'Brien's conclusion that Claimant sustained a minor injury was based on the argument that a rotator cuff tear would not be a minor injury. However, this misstates Dr. O'Brien's conclusions, which were that the rotator cuff tears pre-dated the injury itself and that the injury itself was minor. In other words, Dr. Orent's analysis is unreliable and misleading. The Court, therefore, does not rely on Dr. Orent's report.

28. The parties underwent a hearing on March 2, 2021, on the issue of whether an arthroscopic rotator cuff repair was reasonably necessary to cure and relieve Claimant of the effects of her August 2, 2020 injury. On May 24, 2022, the ALJ in

that dispute issued an Order finding that the arthroscopic rotator cuff repair recommended by Dr. Faulkner to be not reasonable or necessary. The ALJ did feel that a reverse total shoulder arthroplasty was reasonably necessary and found that Claimant‘s need for an arthroplasty was the result of several factors, including her prior trauma, the preexisting degenerative changes in the right shoulder, and the work injury of August 2, 2020. However, because there had been no request nor denial of a reverse total shoulder arthroplasty at that time, the issue of whether a reverse total shoulder arthroplasty would be reasonably necessary and related to Claimant's August 2, 2023 injury was not at issue. The ALJ's findings in this regard were simply part of his analysis as to whether arthroscopic shoulder surgery was reasonably necessary and related to the injury and was not an award of medical benefits.

29. Claimant continued to treat with physical medicine and rehabilitation specialist Dr. John Sacha during the pendency of the May 24, 2022 Order. Dr. Sacha placed Claimant at MMI effective January 31, 2022, prior to the May 24, 2022 Order, and assigned a 10% whole-person impairment rating for Claimant's cervical spine. Dr. Sacha recommended maintenance medical care be left open for possible medial branch block and radiofrequency on the right from C4-C7, as well as physical therapy, medications, and follow-up. Respondents filed a final admission of liability (FAL) admitting for permanent partial disability benefits and maintenance care based on Dr. Sacha's findings, and Claimant requested a DIME to challenge Dr. Sacha's MMI and impairment determinations.

30. Claimant underwent a DIME with Dr. Anjmun Sharma on October 11, 2022. Dr. Sharma issued a report on October 13, 2022, finding Claimant to have reached MMI as of the date of the DIME appointment with a 12% whole-person impairment for her cervical spine and an 18% right upper extremity impairment for Claimant's shoulder. Dr. Sharma felt that Claimant may need some medical treatment for her shoulder, but he felt that surgery would not be related, reasoning that Claimant's need for surgery appeared to pre-date her injury.

31. Although Dr. Sharma made reference in his report under the section "RATIONALE FOR YOUR DECISION" to Claimant's plans to pursue a reverse total shoulder arthroplasty under her private insurance, the Court finds that that comment did not demonstrate that Dr. Sharma in fact considered Claimant's access to private health insurance when determining whether a reverse total shoulder arthroplasty would be related to Claimant's work injury and therefore an impediment to MMI. Rather, the Court finds that comment to merely reflect Claimant's response to Dr. Sharma informing her that he did not feel the reverse total shoulder arthroplasty would be related.

32. Regarding the issue of post-MMI maintenance treatment, Dr. Sharma opined, "None at this time." Dr. Sharma did not provide any explanation in his report nor in his deposition testimony as to why he did not recommend maintenance medical treatment as to Claimant's neck or body parts other than the right shoulder.

33. Respondents filed a FAL based on Dr. Sharma's DIME report. Claimant filed an Application for Hearing to challenge the DIME's finding of MMI and to challenge Respondents' denial of maintenance medical care.

34. In anticipation of hearing, the parties obtained the deposition testimony of Dr. Sharma. Dr. Sharma affirmed that he felt that any need for surgical treatment for the shoulder would be due to Claimant's pre-existing condition and not due to her work injury. Dr. Sharma was also presented with a copy of the May 24, 2022 Order finding the need for a reverse total shoulder replacement surgery to be reasonably necessary to cure and relieve Claimant of the effects of her injury. Dr. Sharma's opinions remained unchanged.

35. The Court finds Dr. Sharma's opinions as to the issue of MMI, as expressed in his reports and findings, to be persuasive and credible. However, the Court does not find Dr. Sharma's opinions as to the need for maintenance medical treatment to be persuasive or credible, as he provides no analysis or explanation as to why he believes Claimant does not require maintenance medical treatment for conditions other than Claimant's right shoulder injury, including Claimant's neck.

36. Claimant testified at hearing and explained her mechanism of injury in a way consistent with that which is documented in the medical records. Claimant testified that the new pain that she developed in her shoulder was distinct from what she experienced prior to the date of injury. Regarding the level of pain, Claimant clarified that her pain in the morning was a nine or ten out of ten, but would subside to a six or eight during the day.

37. Regarding her prior symptoms and treatment, Claimant testified that she injured her right shoulder at work previously in November 2019 when she stepped on a dolly at work and fell but did not report the injury. Claimant also testified that she did not want to miss work during the holiday season, so she lied to her doctors at that time by telling them that she slipped on ice while getting mail. Claimant testified that she continued to treat for her November 2019 injury until March 2020 due to medical facilities closing as a result of the pandemic. She testified that she had been doing great around February or March 2020 and that she had never discussed the possibility of shoulder surgery with any physician prior to her date of injury.

38. During her testimony, Claimant denied that she told her doctors that she would only use her left arm for work and that her coworkers would help her with her job during that period of time prior to her August 2020 injury. This was despite a January 29, 2020 physical therapy note documenting Claimant trying to use her left arm as much as possible and a January 6, 2020 note documenting that her coworkers would help her with anything that required her to raise her arm overhead. When asked why she did not mention her November 2019 injury when

she saw Dr. Faulkner for the surgical consultation on October 2, 2020, Claimant explained that “He didn’t ask me.”

39. Based on the above inconsistencies documenting Claimant’s willingness to withhold relevant information or even provide false information to medical providers, including Claimant’s having denied to Dr. Motz on August 18, 2020, that she had any prior shoulder injury, as well as the inconsistencies between Claimant’s testimony and the medical records, the Court finds Claimant’s testimony not credible.

40. During the hearing, Dr. O'Brien acted as an expert witness for the Respondents, providing testimony as a Level II accredited orthopedic surgeon. Dr. O'Brien concurred with Dr. Sharma's opinion that any need for a right total shoulder arthroplasty was not work-related and that Claimant had reached MMI without requiring further maintenance care.

41. Dr. O'Brien explained that Claimant's current pain complaints were solely due to pre-existing rotator cuff tear arthropathy, not a result of the work-related injury. He noted that there was an absence of any shoulder bruising or other objective evidence of an acute injury, and the objective medical evidence did not support the presence of a new tear in the rotator cuff.

42. On cross-examination, Dr. O'Brien emphasized that based on Claimant's pre-injury radiographs, she was already a candidate for a right total arthroplasty due to her condition. He further stated that he had never seen an individual with her specific high-riding humeral head condition who did not experience pain and dysfunction, making it unlikely that she was functioning normally before the injury.

43. The Court finds Dr. O’Brien’ opinions, as expressed in his reports and testimony, to be credible and persuasive with regard to MMI. The Court finds that Dr. O’Brien’s explanation of the anatomy of Claimant’s shoulder condition most plausible, given the absence of bruising of the shoulder shortly after the injury and the evidence of the condition pre-dating the date of injury, including the high-riding humeral head, arthritis, and fatty atrophy in the rotator cuff. Although Dr. Faulkner noted the atrophy to be mild and likely traumatic, Dr. O’Brien’s reading of the MRI was more consistent with the radiologist’s. Furthermore, to the extent that Dr. O’Brien’s opinions differ from those of Dr. Faulkner, the Court finds significant that Dr. O’Brien had the opportunity to review Claimant’s complete medical history whereas Dr. Faulkner did not. The same is true for Dr. Sharma’s review of medical records, and the Court finds it telling that both Dr. O’Brien and Dr. Sharma reached similar conclusions as to whether Claimant’s right shoulder pathology arose from her August 2, 2020 injury.

44. Claimant’s need for a right total shoulder replacement surgery was not caused by Claimant’s August 2, 2020 injury.

45. Claimant has failed to prove by clear and convincing evidence that DIME Dr. Sharma erred in determining Claimant to have reached MMI.

46. As for the issue of maintenance medical treatment, Dr. Sacha recommended maintenance medical care be left open for possible medial branch block and radiofrequency on the right from C4-C7, as well as physical therapy, medications, and follow-up. Drs. O'Brien and Sharma recommended against maintenance medical care, but they did not address why maintenance medical treatment for body parts other than the right shoulder would not be reasonably necessary to maintain Claimant at MMI. The Court finds Dr. Sacha more persuasive than Drs. O'Brien and Sharma as to the issue of maintenance medical treatment.

47. Claimant has proved by a preponderance of the evidence that she is entitled to maintenance medical care.

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).

Maximum Medical Improvement

Claimant seeks to overcome the DIME's opinion as to MMI.

The Workers' Compensation Act defines MMI to be:

> "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. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement."[1]

Section 8-40-201(11.5), C.R.S.

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo.App.2005); *Monfort Transportation v. Industrial 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." Section 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*, W.C. No. 4-974-718-03 (Mar. 15, 2017). A finding that the claimant needs additional medical treatment including surgery to improve her injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial 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 Construction Management*, W.C. No. 4-356-512 (May 20, 2004).

[1] Section 8-40-201(11.5), C.R.S.

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. 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,* W.C. No. 4-914-378-02 (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.*, W.C. No. 4-476-254 (Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 and 4-523-097 (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*, W.C. No. 4-863-323-04 (July 26, 2016).

As found above, Claimant's need for a right total shoulder replacement surgery was not caused by Claimant's August 2, 2020 injury. Prior radiographs showed evidence of a pre-existing changes to Claimant's shoulder anatomy consistent with a pre-existing rotator cuff tear. Imaging from after Claimant's August 2, 2020 injury show degenerative changes consistent with an old rotator cuff tear. Although Claimant testified that she was "doing great" with regard to her shoulder prior to the August 2, 2020 injury, the Court does not find Claimant's testimony credible for the reasons set forth above.

Because Claimant's argument in support consists primarily of an alleged error by Dr. Sharma in determining that a reverse total shoulder arthroplasty would not be related to Claimant's August 2, 2020 injury, the Court concludes that Claimant has failed to prove by clear and convincing evidence that Dr. Sharma erred in determining Claimant to be at MMI.

Claimant's argument includes that Dr. Sharma's rationale in reaching the finding that the need for a reverse total shoulder replacement was not related to Claimant's August 2, 2020 injury is contradictory and flawed. He acknowledged that the work injury exacerbated the Claimant's underlying conditions (rotator cuff tear and arthropathy) but stated that the need for shoulder replacement was not work-related. This, Claimant argues, is inconsistent, as the underlying conditions are precisely the reasons for the need for a reverse total shoulder replacement. Moreover, Claimant argued, Dr. Sharma's statement about the injury being "old" contradicts his own decision to assign an 18% impairment rating for the exacerbated conditions.

Claimant further emphasizes that Dr. Sharma's rationale for the surgery not being related to the work injury was based on a legal misunderstanding rather than medical evidence. Claimant then correctly recounts the state of established case law which dictates that a pre-existing condition does not disqualify a claim for medical benefits if the industrial injury aggravates, accelerates, or combines with the pre-existing condition to

necessitate treatment. *See Peter Kiewit Sons' Co. v. Indus. Comm'n of Colo.*, 236 P.2d 296, 298 (1951); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990).

The Court finds these arguments unpersuasive. It may be both true that Claimant's need for a reverse total shoulder replacement predated Claimant's August 2, 2020 injury and that the August 2, 2020 injury caused an aggravation of Claimant's shoulder requiring medical treatment. Indeed, even where respondents admit for a compensable injury, the parties may dispute whether a particular condition is related. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo.App.1997). Because this Court finds that Claimant's need for a reverse total shoulder arthroplasty predates Claimant's work injury and does not arise from Claimant's work injury, the need for a reverse total shoulder arthroplasty is not an impediment to Claimant having reached MMI with regard to her August 2, 2020 injury.

Claimant also argues that Dr. Sharma's understanding of the May 24, 2022 Order was incorrect, leading to biased and erroneous conclusions. The May 24, 2022 Order indicated that Claimant's need for surgery was a result of a combination of factors, including the pre-existing conditions and the work injury, but Dr. Sharma disregarded this finding.

The Court finds this argument unpersuasive as well. Dr. Sharma, as a DIME physician, was free to make his own findings as to the causal relationship between Claimant's work injury and her need for a reverse total shoulder arthroplasty without regard to the May 24, 2022 Order. The findings in the May 24, 2022 Order, insofar as they conflict with those findings Dr. Sharma made in determining MMI, are superseded by Dr. Sharma's findings. *See Robbins v. Qwest Corp.*, W.C. No. 588-918-010 (Dec. 19, 2022)(no issue preclusion where prior order conflicted with DIME physician's findings). Therefore, Dr. Sharma's decision to diverge from the findings of the May 24, 2022 Order was within his discretion.

Next, Claimant's argument points out that Dr. Sharma seemed to consider Claimant's ability to receive treatment under private insurance, which should not have influenced his MMI determination.

As found above, Dr. Sharma's findings regarding MMI were not based upon consideration of whether Claimant could receive treatment under private health insurance. Because this was not something Dr. Sharma considered in reaching his MMI determination, the Court finds Dr. Sharma's comment uninformative as to whether Dr. Sharma erred in placing Claimant at MMI.

Therefore, the Court concludes that Claimant failed to meet her burden in proving by clear and convincing evidence that Dr. Sharma erred in placing Claimant at MMI.

Maintenance Medical Benefits

Claimant seeks to overcome Respondents' denial of maintenance medical benefits in Respondents' December 2, 2022 FAL.

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo.App.1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo.App.2003). An award for maintenance medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Indus. Claim Appeals Office*, 992 P.2d 701 (Colo.App.1999); *Hastings v. Excel Electric*, W.C. No. 4-471-818 (May 16, 2002).

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.*, 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Indus.l Claim Appeals Office*, 916 P.2d 609, 611 (Colo.App.1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo.App.2003); *see Karathanasis v. Chilis Grill & Bar*, W.C. No. 4-461-989 (Aug. 8, 2003).

In this case, Dr. Sharma opined in his DIME report that maintenance medical care would not be needed at that time. In the December 2, 2022 FAL, Respondents denied maintenance medical treatment based on Dr. Sharma's DIME report.

While Respondents may rely on Dr. Sharma's opinion as to maintenance medical treatment in their denial of the same in their FAL, a DIME physician's opinion as to maintenance medical benefits carries no special weight. *Johnston v. Hunter Douglas, Inc.*, W.C. No. 4-879-066-04 at *3 (June 28, 2016).

As found above, Dr. Sharma did not provide any explanation as to why maintenance medical treatment for body parts other than the right shoulder would not be reasonably necessary to maintain Claimant at MMI. Dr. O'Brien, who similarly opined that maintenance medical treatment was not reasonably necessary, also did not provide any such analysis. To the contrary, Dr. Sacha credibly and persuasively opined in his MMI report that it was reasonably necessary that maintenance medical care be left open

for possible medial branch block and radiofrequency on the right from C4-C7, as well as physical therapy, medications, and follow-up.

Based upon Dr. Sacha's report, the Court concludes that Claimant has met her burden in proving by a preponderance of the evidence that maintenance medical treatment is reasonably necessary to maintain her at MMI.

ORDER

It is therefore ordered that:

1. Claimant's request for the Court to overturn the DIME's determination as to MMI is denied.

2. Claimant is entitled to a general award of maintenance medical benefits.

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: August 2, 2023

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

ISSUES

1. Whether Respondents established by a preponderance of the evidence grounds for withdrawal of their General Admission of Liability.

2. Whether Respondents proved by a preponderance of the evidence that sanctions should be imposed upon Claimant for willfully failing to comply with orders to provide discovery.

3. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant was employed by Employer as a temporary laborer beginning in December 2021. Claimant asserts that he sustained a compensable injury to his left foot as the result of a flatbed truck running over Claimant's foot.

2. Claimant has a history of issues with his left foot and ankle dating to approximately December 2021. On December 21, 2021, while working for a different employer, Claimant reported that he sustained an injury to his left foot when a large box fell on his left foot. Claimant was evaluated at UC Health for a left foot contusion, and underwent x-rays of the left foot. The x-rays demonstrated the presence of a foreign body in his left heel, suspected to be a portion of a needle. Based on the x-rays and evaluation, it was determined that the foreign body in his heel was pre-existing and unrelated to his work injury. (Ex. N).

3. During the course of the evaluation for the December 21, 2021 injury, Claimant was examined and treated at Concentra on February 16, 2022. Claimant reported swelling and tenderness on the bottom of his left foot, and was referred for a podiatry evaluation. Claimant's February 23, 2022 record from Concentra references a visit with a podiatrist named "Dr. Zyzda," however no records from that visit were offered or admitted into evidence. (Ex. O).

4. On February 25, 2022, Claimant returned to UC Health, reporting pain in the bottom of his left foot, and occasional numbness in his heel. (Ex. N).

5. On April 15, 2022, Claimant saw Dr. Chau at Concentra, reporting that he would have the foreign body removed from his foot through private insurance. Claimant reported diffuse pain in the anterior ankle and lateral Achilles, and swelling under the bottom of his foot. Dr. Chau placed Claimant at maximum medical improvement (MMI) for his December 21, 2021 injury. (Ex. O). Claimant resolved his workers compensation claim related to the December 21, 2021 incident through settlement.

6. On June 16, 2022, Claimant saw Lindsy Allen, DPM, at Podiatry Associates, to address the foreign body in his left heel. Claimant reported pain with palpation of his left heel. Examination of Claimant's foot and ankle demonstrated normal range of motion. On June 24, 2022, Claimant underwent surgery to remove the foreign body in his left heel. Post-operative x-rays demonstrated that small portion of the foreign body was not removed and would need to be removed in a subsequent surgery. Claimant was placed in a post-operative shoe and permitted to bear weight. (Ex. 4).

7. Claimant returned to Dr. Allen on July 21, 2022. Dr. Allen noted that Claimant had medial deviation of the 1st metatarsal and lateral deviation of the large toe on the left. Claimant reported constant pain in the large toe, with a date of onset of June 26, 2022. Claimant reported pain with movement and limited range of motion. Dr. Allen diagnosed Claimant with a mild, chronic bunion deformity on the left, recommended orthotics, and discussed performing an injection and/or bunion surgery. Dr. Allen's notes reference both the 1st toe and the 5th toe, however when read in context, the ALJ infers that Respondents was experiencing issues with the large toe. (Ex. 4).

Incident at Issue

8. On August 9, 2022, Claimant was working for Employer as a "flagger" directing traffic. Claimant testified that he was holding a stop sign at a four-way stop, and a flatbed truck ran over the toes on his left foot. At hearing, Claimant testified that others were present at the scene, but were 4-5 car lengths away. Claimant testified that after the alleged incident occurred, he called his supervisor, and was instructed not to call the police. Claimant also called his mother, who arrived at the scene and took him for medical care. No credible evidence was admitted indicating that anyone other than Claimant witnessed the alleged incident.

9. On August 9, 2022, Claimant was seen at AFC Urgent Care by Derek Miller, PA. Claimant reported that a flatbed truck ran over all of the toes on his left foot, and complained of diffuse pain in the large toe. Examination of Claimant's left foot demonstrated no objective evidence of injury. Claimant's foot was not swollen or discolored, and he was neurovascularly intact. The only evidence of injury was a subjective complaint of mild, diffuse pain, and tenderness to palpation over the 1st toe (*i.e.*, large toe), with mild range of motion restriction. X-rays were apparently performed of Claimant's left foot, although no radiologist report or other specific interpretation of the x-rays was included in the AFC Urgent Care records. PA Miller commented that Claimant should follow up with an surgeon regarding the foreign body in his left heel. Claimant was provided a prescription for a short walking boot, and celecoxib for pain. (Ex. L).

10. The following day, August 10, 2022, Claimant returned to AFC Urgent Care, indicating his pain was not well controlled. Bradley Qualizza, PA-C examined Claimant and noted the same findings as the previous day, and provided a prescription for 10 pills of ketorolac. (Ex. L).

11. On August 11, 2022, Claimant returned to Dr. Allen at Podiatry Associates. Significantly, Claimant did not report to Dr. Allen that his foot had been run over, or

otherwise indicate he was injured in the course of his employment. Dr. Allen examined Claimant and noted tenderness to his operative site, continued pain of the 1st metatarsal and left large toe, with limited range of motion. Dr. Allen diagnosed Claimant with a foreign body in the left foot, and a chronic, left bunion. She then performed a steroid injection into the left first metatarsophalangeal joint (MPJ), she had previously discussed on July 21, 2022. Dr. Allen also discussed a second surgery to remove the remainder of the foreign body in Claimant's left heel. (Ex. M).

12. On August 16, 2022, Claimant saw Stewart Harsant, PA-C, at AFC Urgent Care. Claimant reported pain between the 1st and 2nd toes on his left foot, and requested pain medication other than ibuprofen. Claimant did not report receiving a steroid injection into the large toe from Dr. Allen five days earlier. On examination, PA Harsant noted reports of tenderness between the toes, but otherwise found full range of motion, strength, and sensation, and noted Claimant walked with a normal gait, although in a walking boot. (Ex. L).

13. On August 22, 2022, Dr. Allen performed a second surgery on Claimant's left foot to remove the remaining foreign object in his left heel. (Ex. 4).

14. On August 23, 2022, Respondents filed a General Admission of Liability, admitting to medical benefits, and temporary total disability benefits at the rate of $7.89 per week, based on an average weekly wage of $11.83. (Ex. B).

15. Claimant returned to Dr. Allen for a post-operative visit on August 25, 2022. Claimant reported similar symptoms and pain as he reported on July 21, 2022. Claimant did not report that his left foot had been run over by a vehicle or that he sustained any work injury to his left foot on August 9, 2022. (Ex. M). No credible evidence was admitted indicating Claimant returned to Dr. Allen after August 25, 2022.

16. Between August 30, 2022 and February 28, 2023, Claimant returned to AFC Urgent Care multiple times, and was evaluated by several different providers. During this time, none of the providers documented objective evidence of injury, with the exception of October 30, 2022, where "slight swelling at 1st IP joint" was documented, and the only diagnosis provided was "pain in left foot." Although providers at AFC Urgent Care completed WC 164 forms which indicated, the records provide no objective evidence that Claimant sustained an injury to his left foot on August 9, 2022, or that the evaluations and treatment Claimant received were the result of a work-related injury. (Ex. L & 3).

17. Claimant's medical records from AFC Urgent Care reference referrals to an orthopedist, and physical therapy. However, no records or other credible evidence of such treatment were offered or admitted into evidence. Claimant alternatively testified that he did not see an orthopedic surgeon because he did not have information, and that he saw an orthopedic surgeon.

18. On April 17, 2023, Ryan Mazin, M.D., one of the providers Claimant saw at AFC Urgent Care, responded in writing to questions regarding Claimant alleged injury and care. In response to the question: "[Are Claimant's] current left symptoms causally related

to the alleged August 9, 2022 industrial injury?," Dr. Mazin responded "Yes" and "Patient claims such is the case." In response to the question "Has [Claimant] reached maximum medical improvement ("MMI") for the August 9, 2022 industrial injury?," Dr. Mazin indicated "No" and also wrote "Patient claims he is not at MMI." (Ex. 3). Dr. Mazin's April 17, 2023 letter offers no substantive explanation for his opinions, and appears to rely entirely upon Claimant's assertions that his alleged injury was work-related and that he was not at MMI. Dr. Mazin's opinions are neither credible nor persuasive.

19. On April 24, 2023, John Raschbacher, M.D., performed a record review at Respondents' request. Dr. Raschbacher opined that Claimant's medical records did not document any objective findings of injury related to the alleged August 9, 2022 incident. He noted that there was no documentation of swelling, bruising, redness or traumatic wound, bony abnormality, or other acute findings. He further noted that the only reported evidence of injury was Claimant's reports of tenderness, which is not an objective finding. (Ex. K).

20. Claimant's payroll records indicate he worked 9 hours the week of December 16, 2021, 5.5 hours the week of January 20, 2022, and 10.5 hours the week of August 9, 2022. In total, for the 35 weeks between December 16, 2021 and August 9, 2022, Claimant worked a total of 25 hours for Employer and received gross wages of $400.45. Claimant's average weekly wage over this 35-week period was $11.45. Respondents admitted to an average weekly wage of $11.83, and no basis exists to alter that calculation. Claimant's contention that he intended to work 40 hours per week, and that his average weekly wage should be $600 per week is not credible or otherwise supported by the evidence.

DISCOVERY ISSUES

21. On September 21, 2022, Respondents, through counsel, sent Claimant a letter enclosing authorizations for release of medical, employment, insurance, social security, and unemployment records.

22. Although Claimant testified that he did not receive the requests for authorizations, the emails in evidence demonstrate that Claimant likely did receive the requests for authorization, and elected not to provide the requested information. Claimant's testimony that he did not receive the releases from Respondents is not credible. Claimant offered no valid excuse for his failure to provide the requested documentation.

23. On October 11, 2022, PALJ Phillips issued an order requiring Claimant to provide the signed releases within ten days, and also permitted Respondents to engage in pro se discovery. (Ex. C). Claimant did not provide the signed releases within ten days.

24. On November 23, 2022, PALJ Mueller issued an order again requiring Claimant to provide signed releases within ten days, and also requiring Claimant to provide discovery responses. Claimant did not timely comply with the Order.

25. On March 9, 2023, PALJ Sisk issued a third order granting Respondents' motion to compel the releases, and required Claimant to provide those releases on or before

March 15, 2023. (Ex. F). Ultimately, Claimant did provide signed releases to Respondents at some point after March 9, 2023.

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).

Withdrawal Of General Admission Of Liability

By filing an admission of liability and admitting for benefits, Respondents' "admitted that the claimant has sustained the burden of proving entitlement to benefits." *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014). If Respondents seek to withdraw the admission of liability, they must prove by a preponderance of the evidence that Claimant

did not sustain an injury that arose out of and occurred in the course and scope of employment. *See* Section 8-41-201(1), C.R.S. ("a party seeking to modify an issue determined by a general or final admission . . . shall bear the burden of proof for any such modification."). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 592 P.2d 792 (1979).

The Workers' Compensation Act distinguishes between the terms "accident" and "injury." The term "accident refers to an unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), C.R.S. However, an "injury" refers to the physical trauma caused by the accident and is the result of an accident. *City of Boulder v. Payne,* 426 P.2d 194 (1967). The mere fact that an accident occurs does not rise to the level of compensability unless the accident results in an injury. *Leary v. Vail Resorts, Inc.* W.C. No. 5-075-399-002 (ICAO, April 24, 2020). A compensable industrial accident is one that results in an injury requiring treatment or causing disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The fact that medical treatment occurred does not require a finding that medical treatment was required because of a work incident. *Washburn v. City Market,* W.C. 5-109-470 (ICAO June 3, 2020).

Respondents have established by a preponderance of the evidence that Claimant did not sustain a compensable injury arising out of the course of his employment with Employer on August 9, 2022. Consequently, Respondents have established grounds for withdrawal of the August 23, 2022 General Admission of Liability. Although Claimant alleges his left foot was run over by a flatbed truck, no objective evidence was presented to support that allegation. While Claimant did report the incident to AFC Urgent Care on August 9, 2022, his examination and complaints were not consistent with a foot that had been subjected to the forces of a vehicle's weight. For example, Claimant had no swelling, edema, or erythema of his left foot, and his only complaint was of mild pain in the large toe, where Claimant had reported similar symptoms to Dr. Allen approximately three weeks earlier. In addition, Claimant did not report any incident involving his foot being run over to Dr. Allen, and had he done so, it is highly probable that Dr. Allen would have noted such a report in her records. Claimant's testimony that he reported the incident to Dr. Allen is not credible. At Claimant's later visits at AFC Urgent Care, no objective evidence of injury was documented, and the few objective signs that were documented corresponded to Claimant's pre-existing left foot issues.

The ALJ finds it more likely than not that Claimant did not sustain a compensable injury arising out of the course of his employment with Employer on August 9, 2022. Respondents' request to withdraw the August 23, 2022 General Admission of Liability is granted. Claimant's claim is dismissed.

Average Weekly Wage

As found, Claimant's average weekly wage on August 9, 2022 was $11.83. Claimant's testimony that he intended to work 40 hours per week at $15.00 per hour at

the time of his alleged injury was not credible, given the fact that Claimant had worked a total of 25 hours during the preceding 35 weeks.

Sanctions for Failure to Timely Respond to Discovery

Respondents' request that Claimant's claim be dismissed for discovery violations is denied. Claimant clearly received discovery requests and requests for releases, and failed to respond in a timely manner. The delay in providing timely responses resulted in some prejudice to Respondents. However, given the ALJ's decision with respect to withdrawal of the GAL, the ALJ finds additional discovery sanctions would be redundant and unnecessary. Respondents' request for discovery sanctions is denied.

ORDER

It is therefore ordered that:

1. Respondents General Admission of Liability is withdrawn, and Claimant's claim is dismissed.

2. Respondents' request for discovery sanctions is denied.

3. All remaining matters are moot.

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

DATED: August 2, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-216-026-002

ISSUES

- Did Claimant prove he performed services for Employer for pay?
- If so, did Employer prove Claimant was an independent contractor?
- If Claimant is Employer's employee, did he prove he suffered a compensable injury to his right knee on or about June 20, 2022?
- If Claimant proved a compensable claim, the following issues will be addressed:
- What is Claimant's average weekly wage?
- Did Claimant prove entitlement to TTD benefits from June 21, 2022 through March 3, 2023?
- Was the treatment Claimant received reasonably needed to cure and relieve the effects of the compensable injury?
- Did Claimant make a proper showing for a prospective change of physician to Dr. Miguel Castrejon?
- Did Claimant prove Employer should be penalized for failing to timely admit or deny liability?

FINDINGS OF FACT

1. Employer is a landscaping company, solely owned and operated by [Redacted, hereinafter LS]. According to LS[Redacted], Employer has no employees and performs all work using "subcontractors." LS[Redacted] testified he primarily used two subcontractors to provide labor: [Redacted, hereinafter OM] and [Redacted, hereinafter JJ]. He testified Claimant was a member of OM's[Redacted] crew. LS[Redacted] typically advised OM[Redacted] by text message where and when the crew should appear for various jobs. OM[Redacted] brought Claimant and the other crew members to the job site in OM's[Redacted] vehicle. LS[Redacted] conceded Claimant worked at least three days on one of Employer's projects in June 2020, including a large driveway project on [Redacted, hereinafter ED]. LS[Redacted] testified he had only brief conversations with Claimant because of Claimant's limited English proficiency.

2. Claimant primarily did concrete work on Employer's jobs, but also performed other landscaping tasks if needed, including planting trees. LS[Redacted] initially testified OM's[Redacted] crew did not plant trees because "[OM[Redacted]] is a concrete contractor." But he later testified Claimant and OM's[Redacted] crew brought tools such as rakes, shovels, and picks when doing "landscape jobs" or "tree digging."

3. LS[Redacted] scheduled and paid for concrete deliveries and advised OM[Redacted] when the concrete trucks were scheduled to arrive, to ensure the crew was there for the concrete pour.

4. Claimant testified Employer provided tools for use during some jobs. LS[Redacted] testified Claimant and other members of OM's[Redacted] crew brought their own tools to the jobs.

5. Employer provided Claimant no training because Claimant was already skilled at the work required of him.

6. In addition to working performing concrete and landscaping work on Employer's contracts, Claimant worked other jobs with OM[Redacted] and JJ[Redacted]. He also occasionally worked for his brother doing framing.

7. Claimant injured his right knee on or about June 20, 2022 while planting a tree on one of Employer's landscaping projects. The tree was being lowered into the ground by a skid loader when it struck and injured his right knee. Claimant testified LS[Redacted] was operating the forklift and was aware of Claimant's injury. LS[Redacted] offered no treatment and Claimant got a ride home from a coworker.

8. LS[Redacted] denied working with Claimant on June 20, 2022. He testified he was at a different property installing a stone veneer. However, Employer produced no work orders, calendars, schedules, receipts, or other documentation to substantiate LS[Redacted] testimony in this regard.

9. Claimant testified LS[Redacted] had agreed to pay him $18 per hour. LS[Redacted] denied having any specific conversations or negotiations with Claimant regarding pay. LS[Redacted] testified OM[Redacted] requested that checks be written directly to his crew members. He paid Claimant $175 per day because "that's what [OM[Redacted]] told me to pay him."

10. Employer paid Claimant $531 on June 21, 2022, by check drawn on Employer's business account. The check was payable to Claimant personally. The check contains no notations to identify the dates covered by the payment. LS[Redacted] testified the check was for a concrete job on June 13, 14, and 15, 2022.

11. LS[Redacted] initially denied he paid Claimant anything besides the June 21 check. However, he was confronted at hearing with copies of four other checks from July and August 2022, likewise drawn on Employer's business account and payable to Claimant personally. LS[Redacted] acknowledged the checks but claimed he did not know why he had made the payments. He suggested they showed Claimant was continuing to work after his injury. When asked why he failed to produce copies of the July and August checks in response to Claimant's discovery request, LS[Redacted] testified he "didn't look" for them and "didn't have time to get that deep into it." This testimony is not credible.

12. LS[Redacted] also testified he had no conversations with Claimant after June 20, 2022.

13. Claimant credibly denied working in the months after the accident because of difficulty standing and walking. He credibly testified LS[Redacted] gave him money in July and August to cover medical bills related to the injury. However, LS[Redacted] stopped covering any expenses once he learned Claimant needed knee surgery.

14. LS's[Redacted] failure to exchange the checks in discovery and his unconvincing testimony on the subject detracts from his overall credibility. Because Employer's case rests almost entirely on testimony, this shortcoming substantially undercuts Employer's defense.

15. Claimant saw Dr. David Lauritzen, a chiropractor, on June 29, 2022 for his right knee pain. Claimant told Dr. Lauritzen the injury happened at work on June 20, 2022, when "a tree fell off of a forklift and hit the patient's knee." The pain was constant and aggravated by walking and bending the knee. Claimant's right knee was noticeably swollen, and he was "in obvious pain especially when walking." McMurray's and compression tests were positive, and Dr. Lauritzen suspected a meniscus tear. He recommended an MRI and instructed Claimant to follow up with an orthopedist.

16. Claimant was seen at Peak Vista Community Health Center on July 13, 2022. He stated, "he was [planting] a tree on June 20 and the tree fell on his right knee." Claimant's knee was still painful and aggravated by bending, waking, and standing. Physical examination showed continued swelling, reduced range of motion, loss of strength, and tenderness around the MCL. The provider suspected a ligamentous injury and ordered an MRI.

17. Claimant underwent a right knee MRI on August 7, 2022. It showed a complex tear of the medial meniscus and moderate joint effusion.

18. Claimant filed a Workers' Claim for Compensation on September 7, 2022. He identified the employer as "[Redacted, hereinafter DC]." Claimant described the accident as, "We were planting pine trees, I was making a hole to plant the pine tree, at that time of putting the pine tree in the hole, my boss did not tie the pine tree well and it fell . . . the pine tree hit me on my knee." He listed "OM[Redacted]" as a witness to the accident. He further stated he reported the injury "to my boss, he was there." The ALJ infers Claimant was referring to LS[Redacted] as "my boss."

19. Claimant saw PA-C Leann Murphy at Kinetic Orthopedics on September 12, 2022. He reported his right knee pain started in June 2022 while "planting a tree." Claimant described pain along the medial joint line and mechanical clicking. He was having difficulty with standing, walking, and stairs. Ms. Murphy noted the pain "prevents him from being able to do his job." Ms. Murphy recommended arthroscopic surgery. However, she advised Claimant to apply for Medicaid and indicated they would wait to schedule the surgery until he had submitted the application.

20. A second Workers' Claim for Compensation form was filed by Claimant's counsel on September 15, 2022. The form stated Claimant was planting a tree and the tree struck his right knee as it was being lowered into the hole. The claim form identifies witnesses as "Supervisor, OM[Redacted] and Boss." It also states the injury was reported to "Supervisor, OM[Redacted] and Boss."

21. Employer never directed Claimant to a physician or clinic for treatment.

22. There is no persuasive evidence Employer filed a Notice of Contest or Admission of Liability after Claimant filed the claim.

23. Claimant saw Odessa Wright, LPC on January 27, 2023. He was distressed about being out of work since June 2022 because of his knee and unable to support his family. Claimant stated, "boss discussing he would support but did not follow through." This comment is consistent with Claimant's testimony that LS[Redacted] covered some medical expenses until learning Claimant needed surgery.

24. Claimant returned to Kinetic Orthopedics on March 27,2023 and saw Dr. Brian Kam. He reported continued mechanical pain in the right knee "since June 2022." Dr. Kam recommended arthroscopic surgery.

25. Claimant proved he was injured while performing services for Employer for pay. Claimant's testimony is generally credible, and more persuasive than the contrary testimony offered by LS[Redacted]. Claimant's testimony is buttressed by his consistent report to multiple medical providers that he injured his knee on June 20, 2022 while planting a tree. There is no persuasive evidence Claimant performed any other landscaping work around that time.

26. Employer failed to prove Claimant is an independent contractor. There is no persuasive evidence that Claimant is customarily engaged in an independent trade or business related to landscaping. There is no persuasive evidence Claimant has a business related to landscaping. Employer determined the place and time for performance each day. Employer produced no written contract or other documentation reflecting an agreement that Claimant would provide services as an independent contractor. LS[Redacted] testified he never discussed compensation directly with Claimant, which is inconsistent with the interactions one would expect with a true independent contractor relationship. Claimant considered OM[Redacted] his supervisor and LS[Redacted] to be his "boss." Claimant further believed LS[Redacted] could fire him at any time. Although Claimant's subjective impression is not dispositive, it speaks to the absence of any "meeting of the minds" regarding Claimant's alleged status as an independent contractor.

27. Claimant's average weekly wage is $531, with a corresponding TTD rate of $354. There is no persuasive evidence to show the average hours or days Claimant had worked, or reasonably expected to work, in a typical week. The June 21, 2022 check provides the most persuasive evidence of Claimant's earnings at the time of the injury.

28. Claimant proved he was disabled and suffered a wage loss commencing June 21, 2022. Multiple providers documented ongoing knee pain and difficulty with standing and walking, including using crutches for a time. Claimant's pre-injury work was physically demanding and required activities beyond his functional capacity after the injury.

29. Claimant returned to work on March 4, 2023. Claimant conceded his eligibility for TTD terminated upon his return to work.

30. The treatment Claimant received after the injury was reasonably needed to cure and relieve the effects of his compensable injury. Respondent conceded at the start of the hearing it has no defense to the medical benefits Claimant is seeking, other than the threshold issue of compensability. The evaluations and treatment Claimant has received to date were reasonably necessary.

31. Claimant made a proper showing for a prospective change of physician to Dr. Miguel Castrejon. Neither Dr. Kam nor any providers who evaluated Claimant at Peak Vista are listed as Level II providers on the Division's Accredited Provider Directory. It is in the interest of both parties to have a primary ATP who is Level II accredited.

32. Employer knew Claimant stopped working because of the injury on June 20, 2022. Accordingly, Employer was required to formally admit or deny liability no later than Monday, July 11, 2022. Employer never filed an admission of liability or notice of contest with the Division of Workers' Compensation. Employer should be penalized $15 per day, from July 20, 2022 through July 19, 2023 (365 days), for failing to admit or deny liability. This results in an aggregate penalty of $5,475.

33. Employer conceded at hearing it is uninsured for workers' compensation liability. Accordingly, Employer is liable to pay the Colorado Uninsured Employer fund 25% of compensation awarded to Claimant.

CONCLUSIONS OF LAW

A. Claimant is an Employee, not an Independent Contractor

Section 8-40-202(2)(a) provides that "any individual who performs services for pay for another shall be deemed to be an employee . . . unless such individual is free from control and direction in the performance of the service . . . [and] is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

Once a claimant shows they performed services for pay, the burden shifts to the putative employer to show the claimant was an independent contractor. The Act creates a balancing test to overcome the statutory presumption of employment and establish independence. *Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1998). Section 8-40-202(2)(b)(II) sets forth several factors the General Assembly considers particularly "important" in distinguishing employees from independent contractors. *Industrial Claim Appeals Office v. Softrock Geological Services Inc.*, 325 P.3d

560, 565 (Colo. 2014). No single factor is dispositive, and the determination must be based on the totality of evidence in any given case. *Id*.

As found, Claimant proved he was injured while performing services for Employer for pay, and Employer failed to prove Claimant was an independent contractor. Claimant's testimony is generally credible and more persuasive than the contrary testimony offered by LS[Redacted]. Claimant told multiple medical providers he was injured in June 2022 while planting a tree at work, and there is no persuasive evidence he performed landscaping work for any other employers or on his own in June 2022. There is no persuasive evidence that Claimant is customarily engaged in an independent trade or business related to landscaping. Claimant was paid personally and not in the name of any trade or business. There is no persuasive evidence Claimant has a business related to landscaping, or concrete for that matter. Employer determined the place and time for performance each day. Employer produced no written contract or other documentation reflecting an agreement that Claimant would provide services as an independent contractor. LS[Redacted] testified he never discussed compensation directly with Claimant, which is inconsistent with the interaction one would expect with a true independent contractor relationship. Claimant considered OM[Redacted] his supervisor and LS[Redacted] to be his "boss." Claimant further believed LS[Redacted] could fire him at any time. Although Claimant's subjective impression is not dispositive, it speaks to the absence of any "meeting of the minds" regarding Claimant's alleged status as an independent contractor.

B. Average weekly wage

Section 8-42-102(2) provides compensation shall be based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

As found, Claimant's AWW is $531, with a corresponding TTD rate of $354. There is no persuasive evidence to show the average hours or days Claimant had worked, or reasonably expected to work, in a typical week. The June 21, 2022 check provides the most persuasive evidence of Claimant's earnings at the time of the injury.

C. Claimant is entitled to TTD from June 21, 2022 through March 3, 2023

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the wage loss to obtain TTD benefits. *Id*. 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). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Once commenced, TTD benefits continue until the occurrence of one of the factors enumerated in § 8-42-105(3), C.R.S.

The persuasive evidence shows Claimant was disabled by his knee injury and suffered an injury-related wage loss commencing of June 21, 2023. He was off work until March 4, 2023. Accordingly, Claimant is entitled to $12,946.29 in TTD benefits from June 21, 2022 through March 3, 2023.

D. Total TTD and statutory interest owed

Employers or their insurers must pay statutory interest of 8% per annum on all benefits not paid when due. Section 8-43-410(2), C.R.S. Based on the TTD rate of $354 per week, Employer owes $804.84 in interest from June 21, 2022 through August 4, 2023. Interest will continue to accrue at the rate of $3.01 per day until the past-due TTD is paid. The accrued interest and ongoing daily interest were calculated using the Division of Workers' Compensation Benefits Calculator, which is available on the Division's website: https://dowc.cdle.state.co.us/Benefits/tab/interest.aspx

[Redacted, hereinafter IRC]

E. Medical benefits

An employer is liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. Under § 8-43-404(5), the employer has the right to choose the treating physician in the first instance. But the employer must tender medical treatment "forthwith" upon receiving notice of the injury, or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

As found, Employer never referred Claimant to a specific physician or clinic, so the right of selection passed to Claimant. There is no reason to belabor the question of medical benefits because Respondent stated at the start of the hearing it had no defense to the injury-related medical treatment Claimant has received to date, beyond the threshold issue of compensability. In any event, the evaluations and treatment Claimant has received to date were reasonably needed. Respondent shall pay for the treatment by Dr. Lauritzen, the MRI, and Kinetic Orthopedics.

F. Change of physician to Dr. Castrejon

A claimant may obtain permission to treat with a physician of their choosing "upon the proper showing to the division." Section 8-43-404(5)(a)(VI)(A); *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). Section 8-43-404(5)(a)(VI)(A) does not define a "proper showing," and the ALJ has broad discretion to decide if the circumstances justify a change or addition of an ATP. *Jones v. T.T.C. Illinois,*

Inc., W.C. No. 4-503-150 (May 5, 2006). The ALJ should exercise this discretion with an eye toward ensuring the claimant receives reasonably necessary treatment while protecting the respondents' legitimate interest to be apprised of treatment for which they may ultimately be held liable. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Landeros v. CF & I Steel*, W.C. No. 4-395-315 (October 26, 2000). The ALJ may consider a wide range of factors including whether the claimant has received adequate treatment, whether the claimant trusts the ATP, the level of communication between the claimant and the ATP, the ATP's expertise and skill at managing a condition, and the ATP's willingness to provide additional treatment. *E.g*., *Carson v. Wal-Mart*, W.C. No. 3-964-07 (April 12, 1993); *Merrill v. Mulberry Inn, Inc*., W.C. No. 3-949-781 (November 1995); *Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (December 5, 1995); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (August 23, 1995).

A change of physician can only be awarded prospectively; it cannot be granted retroactively to allow coverage for treatment that was unauthorized when it was provided. *Lutz v. Western Pacific Airlines, Inc*., W.C. No. 3-333-031 (December 27, 1999); *Consolidated Landscape v. Industrial Claim Appeals Office,* 883 P.2d 571 (Colo. App. 1994).

As found, Claimant made a proper showing for a prospective change of physician to Dr. Miguel Castrejon. Neither Dr. Kam nor any providers who evaluated Claimant at Peak Vista are listed as Level II providers on the Division's Accredited Provider Directory. It is in the interest of both parties for Claimant to have a primary ATP who is Level II accredited.

G. Penalties for failure to admit or deny

Claimant seeks a penalty under § 8-43-203 for "failure to file [a] General Admission of Liability." The employer must admit or deny liability within 30 days after it learns of an injury that results in "lost time from work for the injured employee in excess of three shifts or calendar days." Section 8-43-101; 8-43-203(1)(a). Under § 8-43-203(2)(a), an employer "may become liable" to the claimant "for up to one day's compensation for each day's failure" to file an admission or notice of contest with the Division. The maximum penalty for failure to admit or deny liability cannot exceed "the aggregate amount of three hundred sixty-five days' compensation." Fifty percent of any penalty shall be paid to the claimant and fifty percent to the Subsequent Injury Fund. Section 8-43-203(2)(a), C.R.S.

The phrase "may become liable" means imposition of a penalty under § 8-43-203(2)(a) is discretionary. *E.g., Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of the requirement to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so the Division can exercise its administrative oversight over the claim process. *Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the

non-violating party. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005). The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Industrial Claim Appeals Office*, 442 P.3d 94 (Colo. 2019). The claimant must prove circumstances justifying the imposition of a penalty. *Pioneer Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005).

Employer knew Claimant suffered a lost time injury on June 20, 2022, so the deadline to admit or deny liability was July 20, 2022. Employer has never filed an admission or denial of liability regarding Claimant's injury and offered no explanation for its failure to do so. However, Employer reimbursed Claimant for some medical bills, which is a mitigating factor that can be considered regarding imposition of a penalty. *E.g.*, *Lightle v. Sonic Drive In*, W.C. No. 4-416-066 (June 30, 2000). Claimant had retained counsel by mid-September 2022, which obviates the concern that he did not understand the legal ramifications of his situation. More important, Claimant produced no persuasive evidence of any specific harm or prejudice occasioned by Employer's failure to formally admit or deny liability. Nevertheless, besides providing a remedy to the claimant, § 8-43-203 serves a public purpose of apprising the Division of the claim and encouraging employers to follow the procedures set forth in the Workers' Compensation Act. As such, some penalty is warranted to promote and reinforce the integrity of the system, irrespective of any harm to Claimant.

As found, Employer should be penalized $5,475 from July 20, 2022 through July 19, 2023 for failure to admit or deny liability. This is based on 365 days at the rate of $15 dollars per day. The maximum allowable penalty of $129,210 ($354 x 365 days) would be grossly disproportionate to the gravity of the infraction and the harm to Claimant. An aggregate penalty of $5,475 is sufficient to provide a meaningful consequence for Employer's violation of the law and encourage future compliance, without being excessively punitive. Fifty percent (50%) of this penalty shall be paid to Claimant and fifty percent (50%) to the Subsequent Injury Fund.

H. Payment to the Colorado Uninsured Employer fund for failure to insure

Section 8-43-408(5), C.R.S. (2021) provides,

> In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an employee suffers a compensable injury or occupational disease shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund created in section 8-67-105.

The penalty for failure to insure only applies to indemnity benefits; it does not apply to medical benefits. *Industrial Commission v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc*., W.C. No. 4-155-231 (February 13, 1998). Although the ALJ is not aware of a case directly on point, statutory interest is not properly considered "compensation or benefits" within the meaning of 8-43-408(5). Interest is a statutory right intended to secure claimants the present value of benefits to which they are entitled by creating an equitable remedy for the lost time value of money during the accrual period. *Subsequent Injury Fund v. Trevethan*, 809 P.2d 1098 (Colo. App. 1991). Similarly, the ALJ concludes that the penalties awarded herein are not "compensation or benefits."

Employer has been ordered to pay Claimant $12,946.29 in TTD benefits. Twenty-five percent (25%) of the compensation awarded is $3,236.57, which shall be sent to the Division of Workers' Compensation Revenue Assessment Unit, 633 17th Street, Suite 400, Denver, CO 80202.

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

Employer was not insured for workers' compensation liability at the time of Claimant's injury. Under § 8-43-408(2), Employer must pay to the trustee of the Division of Workers' Compensation ("Division") an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. This Order awards no ongoing indemnity benefits, so the present value equals the total benefits awarded. No medical bills were submitted at hearing, so no specific payments for medical benefits are being awarded herein. The total of TTD, interest, and penalties Ordered herein is $19,226.13. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by some surety company authorized to do business in Colorado. Employer may contact the Division Trustee for assistance with its obligations in this regard. The Division Trustee may be contacted through the Division's customer service line at 303-318-8700 or by email to Mariya Cassin mariya.cassin@state.co.us The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

It is therefore ordered that:

1. Claimant's claim for a right knee injury on June 20, 2022 is compensable.

2. Employer's independent contractor defense is denied and dismissed.

3. Employer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including but not limited to charges from Dr. Lauritzen, the August 7, 2022 MRI at UCHealth, and charges from Kinetic Orthopedics.

4. Dr. Miguel Castrejon is Claimant's primary ATP as of the date of this Order.

5. Claimant's average weekly wage is $531, with a corresponding TTD rate of $354 per week.

6. Employer shall pay Claimant $12,946.29 for TTD benefits from June 21, 2022 through March 3, 2023.

7. Employer shall pay Claimant statutory interest of $804.84 on the past-due TTD benefits. Interest shall continue to accrue at the daily rate of $3.01 until the past-due TTD is paid.

8. Employer shall pay a penalty of $5,475 for failure to admit or deny liability. Fifty percent (50%) of this penalty shall be paid to Claimant and fifty percent (50%) to the Subsequent Injury Fund. The check for the Subsequent Injury Fund shall be sent to the Division of Workers' Compensation, 633 17th Street, Suite 400, Denver, Colorado 80202, Attention: Mariya Cassin, Division Trustee.

9. In lieu of direct payment of the above compensation and benefits, Employer shall:

a. Deposit $19,226.13 with the Division of Workers' Compensation, as trustee, to secure payment of all unpaid compensation and benefits awarded. The check shall be sent to the Division of Workers' Compensation, 633 17th Street, Suite 400, Denver, Colorado 80202, Attention: Mariya Cassin, Division Trustee; or

b. File a surety bond in the amount of $19,226.13 with the Division of Workers' Compensation within ten (10) days of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado.

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

10. Employer shall pay $3,236.57 to the Colorado Uninsured Employer Fund pursuant to § 8-43-408(5). The check shall be sent to the Division of Workers'

Compensation, Revenue Assessment Unit, 633 17th Street, Suite 400, Denver, CO 80202.

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

12. Filing any appeal, including a petition to review, shall not relieve Employer of the obligation to pay the designated sum to the Claimant, to the trustee or to file the bond as required by paragraph 11(b) above. Section 8-43-408(2), C.R.S.

13. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or Order authorizing distribution provides otherwise.

14. Pursuant to § 8-42-101(4), C.R.S., any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Employer is solely liable and responsible for the payment of all medical costs related to Claimant's work injury.

15. 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: August 4, 2023

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

ISSUES

I. Whether Respondents produced clear and convincing evidence to overcome the maximum medical improvement (MMI) determination of Dr. Dwight Caughfield regarding the left knee in W.C. No. 5-159-881.

II. If it is determined that Claimant is not at MMI, whether he established, by a preponderance of the evidence, that he is entitled to additional reasonable, necessary, and related care for his left knee condition, including, but not limited to a second surgical opinion regarding his candidacy for a total knee replacement.

III. If Claimant is found to be at MMI, whether he established, by a preponderance of the evidence, that he is entitled to maintenance care for the work-related injury associated with his left knee under Workers' Compensation Claim No. 5-159-881.

IV. Whether Claimant established, by a preponderance of the evidence, that he is entitled to maintenance care for the work-related injuries associated with his left hand/arm following his January 16, 2021 motor vehicle accident, which has been assigned Workers' Compensation Claim No. 5-160-957.

V. Whether Claimant is financially liable to Respondents for a late cancellation fee imposed by their retained medical expert for his failure to appear for a properly scheduled independent medical examination (IME) appointment on December 8, 2022.

FINDINGS OF FACT

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

1. Claimant is a former delivery driver for Employer. He suffered two separate injuries while working for Employer in January 2021. Specifically on January 9, 2021, Claimant slipped and fell injuring his left knee while walking in the snow from a parking lot into Employer's building to report to work. (Resp. Hearing Exhibit (RHE) I). This claim has been assigned workers' compensation claim number 5-159-881. Approximately one week later, on January 16, 2021, Claimant was involved in a motor vehicle crash while driving one of Employer's semi-trucks from New Mexico northbound towards Fountain, Colorado on I-25. Claimant lost control of the truck flipping it onto its left side in the ditch just north of Trinidad, Colorado. (RHE H). Claimant sustained multiple fractures and injuries to his left hand, arm, and shoulder. This claim has been assigned workers' compensation claim number 5-160-957.

2. Following his January 16, 2021 MVA, Claimant was transported, via ambulance, to the Emergency Room (ER) at Mt. San Rafael Hospital in Trinidad where he was diagnosed with multiple injuries, including abrasions, a fracture of his left little finger, and a displaced fracture of the middle left index finger. (RHE H, pp. 50-62). Claimant also reported pain in the left scapular area; dorsal aspect of his left forearm, wrist, and hand; palmar aspect of left forearm and left knee pain.

3. Claimant was first seen by a workers' compensation physician under both claims 2 days later on January 18, 2021. (RHE I). Dr. Douglas Bradley at Concentra Medical Center (Concentra) evaluated Claimant and assessed a contusion of the left knee and lower leg, neck pain, left hand abrasion, left forearm abrasion, multiple closed fractures of the finger with malunion, thoracic myofascial strain, left elbow contusion, and left shoulder contusion. Dr. Bradley provided Claimant with a knee brace wrap and imposed significant work restrictions to include no lifting, pushing/pulling or carrying more than 2 pounds, no crawling, no climbing, no driving of company vehicles, and no use of power/impact/vibratory tools the left upper extremity. (RHE I, pp. 66-67).

4. Dr. Bradley referred Claimant for an MRI of the left knee on February 8, 2021. (RHE I, pp. 99-103). The MRI was completed on February 22, 2021. (RHE K, pp. 127-129). MR imaging demonstrated: (1) mild osteoarthritis with patellar chondromalacia and small joint effusion; (2) a grade I MCL strain without tear; (3) a horizontal lateral meniscus tear extending into the anterior horn; (4) a small peripheral tear in the posterior horn of the medial meniscus; and (5) prepatellar and pretibial edema, and bone contusion versus reactive osteoedema in the lateral tibial plateau. *Id.*

5. Dr. Allison Fall performed an independent medical examination (IME) of Claimant at the request of Respondents on April 21, 2021. (RHE M). The focus of her examination was directed to the condition of Claimant's left knee. *Id.* After obtaining a history, reviewing security video, conducting a records review and completing a physical examination, Dr. Fall opined that while Claimant fell in the parking lot on January 9, 2021, his injuries were limited to a knee "contusion", which was self-limiting and did not require medical care. *Id*. at p. 139. Dr. Fall concluded that the findings on Claimant's February 22, 2021 MRI were "consistent with degenerative changes and [Claimant's] obesity"[1] and thus, unrelated to his slip and fall. *Id*.

6. Respondents requested a second IME with Dr. Nicholas Kurz at Work Comp Solutions, LLC to address Claimant's left upper extremity injuries. (RHE N). The IME was completed on July 12, 2021. *Id.* Dr. Kurz completed a records review and a physical examination directed to Claimant's left upper extremity. *Id*. at pp. 149-150. Following his examination, Dr. Kurz opined that Claimant had sustained a "left fifth metacarpal fracture, hand and elbow contusions & abrasions, contusions of muscles about [the] left shoulder upper back, neck, and [an] exacerbation of his previous left

[1] At the time of Dr. Fall's IME appointment Claimant was noted to weigh 400 pounds, which the ALJ notes is less than the 449 pounds (204.12 kg) Claimant weighed when he was transported to the ER following his January 16, 2021 MVA.

knee strain. *Id.* at p. 152. Dr. Kurz opined that Claimant "likely met the criteria for being at MMI approximately 8-10 weeks after his DOI (January 16, 2021) on or about March 30, 2021. *Id*. at p. 153. He also concluded that Claimant sustained no impairment as a consequence of his left upper extremity injuries. *Id*.

7. Claimant came under the care of Dr. Daniel Peterson at Concentra. Dr. Peterson evaluated Claimant on March 7, 2022, at which time he noted that Claimant had undergone an IME for his left knee with Dr. Fall and an IME for his left hand with Dr. Kurz. (RHE O, p. 161). Because Claimant had elevated blood pressure and no primary care provider (PCP) to get it under control, he had not completed a previously recommended functional capacity evaluation (FCE). *Id.* Moreover, Dr. Peterson noted that a request for a second opinion with Dr. Larsen regarding the condition of Claimant's left hand had been denied, but that he had been seen by Dr. Fitzpatrick, who had reviewed the MRI of his left knee and advised him regarding the potential for surgery. *Id*. at p. 162. Dr. Peterson scheduled a follow-up appointment for April 4, 2022, as he needed to "re-evaluate the medical records in greater detail to sort out what [was] appropriate to do next". *Id.* at pp. 161, 165.

8. Claimant returned to Concentra on April 19, 2022 where he was once again evaluated by Dr. Peterson. (RHE O, pp. 168-180). Dr. Peterson noted that he had reviewed the IME reports of Dr. Fall and Dr. Kurz. *Id*. at p. 168. Dr. Peterson completed a physical examination and obtained range of motion measurements of Claimant's left knee and hand. He subsequently placed Claimant at MMI, noting that he was a "functional goal" and "ready for discharge". *Id*. at p. 175. MMI was back dated to December 13, 2021, when Claimant was seen by Dr. Lisa Baron. *Id*. at p. 176. Included among the diagnoses provided by Dr. Peterson in his April 19, 2022 report is "Primary localized arthritis of the left knee." *Id.* at 176.

9. Dr. Peterson opined that the February 22, 2021, MRI showed degenerative changes and some meniscal abnormalities. (RHE O, p. 176). Nonetheless, Dr. Peterson noted that his examination findings did not support a suggestion of ongoing meniscal issues. *Id.*

10. Dr. Peterson noted that Claimant qualified for an impairment rating for both his left hand and left knee. (RHE O, p. 176). He assigned 16% left lower extremity rating for Claimant's knee, which included impairment for range of motion loss as well as a Table 40 diagnosis, specifically for "arthritis due to any cause, including trauma; chondromalacia". *Id.* (See Also, *AMA Guides, Third Edition, Revised*, p. 68). He also assigned a total of 9% left upper extremity impairment for the injuries Claimant suffered to his left fingers. (RHE O, p. 178).

11. Claimant challenged Dr. Peterson's MMI determination through a Division Independent Medical Examination ("DIME"). (Claimant's Hearing Exhibits (CHE) 7). Dr. Dwight Caughfield was selected to perform the examination and did so on September 14, 2022. *Id.* Dr. Caughfield documented that Claimant had fallen onto his left knee at work, causing immediate pain. *Id.* at p. 58. He also acknowledged Claimant's January

16, 2021 work-related MVA that is the subject of his second claim. *Id.* It was noted that Claimant was not able to get his CDL back due to the pain in his knee and shoulder weakness.[2] *Id.* Claimant reported ongoing 6/10 knee pain with his pain increasing to a 10/10 with standing and walking. *Id.* at p. 59.

12. Claimant reported to Dr. Caughfield that he had seen Dr. Fitzpatrick and that she had "recommended a surgery", although none of Dr. Fitzpatrick's records were provided to Dr. Caughfield for review. (CHE 7, p. 59). Claimant found his knee pain to be limiting his tolerance for walking and driving. *Id.* Dr. Caughfield reviewed the February 22, 2021, MRI of Claimant's left knee noting that it demonstrated "[m]ild osteoarthritis . . . with chondromalacia type III and small joint effusion" along with a strain of the medial collateral ligament without tear" and "[d]egenerative signal with a horizontal tear in the body of the lateral meniscus extending into the superior horn of the lateral meniscus. *Id.* at p. 60. Dr. Caughfield diagnosed Claimant as having "left knee pain with aggravation of osteoarthritis". *Id.* at p. 61.

13. Dr. Caughfield disagreed with Dr. Peterson's determination that Claimant had reached MMI, noting that the functional loss associated with Claimant's left knee injury had not resolved with treatment and was consistent with an occupational aggravation of his pre-existing degenerative arthritis. (CHE 7, p. 61). Citing the lower extremity medical treatment guidelines as support for his opinion that Claimant is not at MMI, Dr. Caughfield opined:

> Per the lower extremity treatment guidelines, [Claimant's] aggravated arthritis treatment opinions include surgical intervention, which has not been explored per the records provided. [Claimant] mentions, as do the records, that he was seen by Dr. Fitzpatrick and received both an injection that provided short term improvement, as well as a recommendation for surgery. The recommendation for surgery is appropriate per the guidelines but in acknowledgement of increased surgical complications due to his elevated BMI a 2nd expert opinion is needed before undertaking surgery. The Lower extremity treatment guidelines, page 194, 7th paragraph [provides]: "A number of studies suggest that obesity correlates with an increased risk of complications following TKA (total knee arthroplasty). Furthermore, several studies suggest that morbid obesity (BMI > or = to 40) is associated with lower implant survivorship, lower functional outcome, and a higher rate of complications in TKA patients. **Patients with BMI greater than 40 require a second expert surgical opinion"**.[3] (Emphasis in original).

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[2] Claimant left the employ of [Redacted, hereinafter FF] and subsequently found work through [Redacted, hereinafter ED] at [Redacted, hereinafter OL]. He was hired permanently by OL[Redacted] on May 16, 2022.

[3] During his initial appointment with Dr. Bradley on January 18, 2021, Claimant's calculated BMI, based upon his reported weight of 440 pounds was documented to equal 59.68 kg/m2.

> If the 2nd surgical opinion agrees with the need of a left total knee, then that would be consistent with the treatment guidelines as care for aggravated arthritis. If the 2nd opinion does not agree with a total knee replacement then [Claimant] would be at MMI after that evaluation.

Id.

14. Based upon the evidence presented, the ALJ finds that Dr. Caughfield assumed that the surgery Dr. Fitzpatrick suggested to Claimant, if a recommendation was actually made, consisted of a total knee arthroplasty. As noted, Dr. Caughfield was not provided with records from Dr. Fitzpatrick nor were any such records submitted to the ALJ for review. Accordingly, it is unknown what surgery, if any, Dr. Fitzpatrick recommended.

15. Respondent's scheduled a follow-up IME for Claimant with Dr. Fall after he completed his evaluation (DIME) with Dr. Caughfield. Notice that the IME had been scheduled for December 8, 2022 @ 1:45 p.m., with a 1:15 p.m. check in at Integrated Medical Evaluations, Inc. at 7447 E. Berry Ave., Suite 150, Greenwood Village, CO 80111 was sent to Claimant in care of his attorney on October 25, 2022. (RHE F, p. 43(A)). Claimant acknowledged receipt of the notice and testified that he was aware of the scheduled appointment. Nonetheless, Claimant failed to appear for the IME. Accordingly, Integrated Medical Evaluations, Inc. (Dr. Fall) directed an invoice to Respondents' counsel requesting payment in the amount of $1,435.00 for late cancellation of the December 8, 2022 IME. (RHE F, p. 43). The invoice was sent January 5, 2023 and the IME was rescheduled to January 12, 2023.

16. Dr. Fall re-evaluated Claimant on January 12, 2023. (RHE M). During this encounter, Claimant reported persistent left knee pain of the same intensity whether he was "sitting, standing or driving". (RHE M, p.141). Claimant described worsening pain about the entire knee, with recent pain development on both sides of the knee joint. *Id.* Physical examination revealed pain with end range extension of the knee but no medial or lateral joint line tenderness. Id. at p. 144. Rather, Claimant reported that his pain was proximal to the medial joint line. Claimant was noted to weigh 373 pounds, which represented a significant loss of weight when compared to previous reported weight readings exceeding 440 pounds at times. *Id.* at p. 141, 144.

17. Dr. Fall agreed with the conclusion reached by Dr. Peterson in his April 19, 2022 report when he noted that despite the presence of degenerative joint disease and some meniscal changes in the left knee, nothing on her examination from that day suggested that Claimant had ongoing meniscal problems in the left knee. (RHE M, p. 143-144). Indeed, Dr. Fall noted: I would agree with [Dr. Peterson's] opinion based upon my exam. In other words, there was no correlating finding on exam to the MRI findings that would indicate that he would benefit from a surgery". *Id*. at p. 144. Dr. Fall opined that the MRI demonstrated degenerative findings and a possible MCL strain and

reiterated her impression that Claimant's examination findings were not consistent with a symptomatic meniscus. *Id*. at p. 145. Regarding the question surrounding surgery directed to the left knee, Dr. Fall stated:

> . . . surgery for meniscal tears with underlying arthritis are not recommended based upon lack of efficacy in the scientific literature, Apparently, it was reported to the providers at Concentra and also to the DIME that [Claimant] had seen Dr. Fitzpatrick, who recommended surgery, however, the specific surgery was not noted. Dr. Caughfield inferred that this was a total knee arthroplasty. There was no other mention in the records of anyone recommending a total knee arthroplasty. [Dr. Caughfield then indicated that [Claimant] should have a second opinion, given his morbid obesity and that this was per the medical treatment guidelines. It is my opinion that Dr. Caughfield has made an error in stating that [Claimant] was not at MMI for the knee because he needed a second opinion with another orthopedic surgeon regarding a total knee arthroplasty. I have not reviewed documentation indicating that this has been recommended. Generally, [Claimant's] obesity would preclude that. Also, [Claimant's] examination is benign. The potential risks of a total knee arthroplasty would outweigh any benefit, at this point in time. Also it would be premature to recommend this, given that [Dr. Caughfield] has not seen Dr. Fitzpatrick's note. If Dr. Fitzpatrick recommended a different surgery or no surgery, then [Dr. Caughfield's] comments would not be applicable for pursuing a second opinion regarding a total knee arthroplasty.
>
> Therefore, in my opinion, [Dr. Caughfield] has clearly erred. The report from Dr. Fitzpatrick would be important to review to know what surgery he recommended. If he did recommend a total knee arthroplasty, then I would agree that a second opinion would be warranted."

Id.

18. Dr. Fall testified by deposition on June 5, 2023. She testified as a Level II accredited, board certified expert in Physical Medicine and Rehabilitation (PM&R). Dr. Fall testified that Dr. Caughfield did not recommend any specific treatment for Claimant to attain MMI. (Depo. Dr. Fall, p. 8, ll. 24-25, p. 9, l. 1). Rather, Dr. Fall testified that Dr. Caughfield simply stated that according to the Colorado Workers' Compensation Medical Treatment Guidelines when "there had been a recommendation for a surgery in the presence of . . . [an] elevated BMI, then a second expert opinion would be needed. *Id*. at p. 9, ll. 1-4.

19. Dr. Fall reiterated her opinion that "[i]n the situation where there is osteoarthritis, arthroscopic surgery has not been shown to lead to major benefit, and if "[Dr. Fitzpatrick] is recommending total knee arthroplasty, again that's not consistent with the MRI of [Claimant's] knee" noting further that it would typically take a more significant level of arthritis to lead to a total knee, and Claimant's morbid obesity would be a contraindication for that. (Depo. Dr. Fall, p. 9, ll. 9-17). Dr. Fall testified that because Dr. Caughfield was unware of what specific surgery, if any, Dr. Fitzpatrick recommended, it was "premature" to for him to recommend a second surgical opinion. *Id*. at p. 9, ll. 23-25. Dr. Fall testified that it would be erroneous to make additional recommendations based upon the presumed surgical opinion of Dr. Fitzpatrick because "we don't know what the surgery is". *Id*. at p. 13, ll. 15-21. Accordingly, Dr. Fall testified that Dr. Caughfield erred when he concluded that Claimant was not at MMI determination based upon his need for a second surgical opinion. *Id*. at p. 9, ll. 18-20.

20. In support of her opinion that Claimant had reached MMI with "good level function" of the left knee, Dr. Fall cited his ability to maintain full-time work. (Depo. Dr. Fall, p. 12, ll. 18-24). She also referenced Claimant's lack of active care as additional support that his left knee condition was "stable" and at MMI. *Id*. at p. 13, ll. 3-9. Moreover, Dr. Fall agreed with Dr. Caughfield's determination that Claimant reached MMI for the injuries he suffered to his left hand/arm. *Id*. at p. 16, ll. 6-9. She also opined that additional maintenance care for these injuries was not necessary.

21. Careful review of the record persuades the ALJ that none of Claimant's authorized providers have recommended maintenance care for the injury Claimant suffered to his left knee. Furthermore, thorough review of Dr. Caughfield's DIME report persuades the ALJ that Dr. Fall was correct when she noted that Dr. Caughfield did not recommend the completion of any actual treatment or diagnostic testing in order for Claimant to reach MMI. To the contrary, he simply concluded that Claimant needed a second surgical opinion based on an assumption that Dr. Fitzgerald recommended a TKA. Based upon the evidence presented, Dr. Caughfield recommended a "surgical follow-up" as post-MMI treatment for the left long finger, should Claimant's pain worsen, to "evaluate for the development of arthritis since the fracture extended into the MP joint". (CHE 7, p. 63). There is no indication that Claimant is currently experiencing worsening pain in the long finger.

22. The ALJ credits the reports and opinions of Dr. Peterson and the testimony of Dr. Fall to find that Claimant reached MMI for the sequela related to his left knee injury on December 13, 2021. Here, Claimant's medical records do not reflect a recommendation from Dr. Fitzgerald for any particular surgical procedure. Indeed, Dr. Caughfield did not have the records of Dr. Fitzgerald. Nevertheless, he made assumptions regarding the content of the same. Based on the evidence presented, the ALJ finds that Dr. Caughfield's request for a second opinion is based upon an incomplete understanding of Claimant's potential surgical needs. Because Dr. Caughfield's assumption that Claimant needs a TKA is not supported by medical record he reviewed as part of his DIME, the ALJ agrees with Dr. Fall to find that his "not at MMI" determination to obtain a second surgical opinion is premature. Had Dr.

Caughfield obtained Dr. Fitzgerald's records they may clearly have recommended a TKA. If so, even Dr. Fall agrees that Claimant should proceed to a second surgical opinion given the contraindications for a TKA in a person of Claimant's size. Yet, because Dr. Fitzgerald's have not been provided to either Dr. Caughfield or this ALJ, the record supports a finding that Dr. Caughfield erred when he determined that Dr. Fitzgerald recommended a TKA and Claimant needed a second consultation regarding the same.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) 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.

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

Overcoming Dr. Caughfield's DIME Regarding MMI

C. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo.App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, the party challenging the DIME must demonstrate that the physicians determinations in this regard is highly probably

incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo.App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (October 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

D. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo.App. 1998). Careful review and comparison of the written DIME report of Dr. Caughfield and the reports/opinions of Drs. Peterson and Fall persuades the ALJ that Claimant reached MMI for the effects of his industrially based knee injury and subsequent aggravation thereof on December 13, 2021.

E. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. In this case, Dr. Caughfield's not at MMI determination is inconsistent with the balance of the medical record as a whole. Here, Claimant's ability to maintain employment combined with the lack of any medical treatment for several months strongly supports Dr. Fall's opinion that Claimant is at MMI, especially when the basis for the "not at MMI" determination rests completely on an assumed treatment need not supported by the available record. Contrary to Claimant's assertion, the record supports an inference/conclusion that Dr. Caughfield recommended further evaluation solely because Dr. Fitzgerald recommended a TKA, not because surgical intervention had not been explored or that he required additional treatment to improve his condition. Moreover, Dr. Caughfield clearly concluded that Claimant was not at MMI because he needed a second surgical consultation based upon this perceived treatment need. As found, Dr. Caughfield's assumption that Claimant needs a TKA is not supported by available medical record and appears inconsistent with Claimant's demonstrated functional abilities. Because the "not at MMI" determination expressed by Dr. Caughfield is not supported by any surgical opinion from Dr. Fitzgerald and conflicts with Claimant's proven capability, the ALJ concludes that it is premature and highly probably incorrect. Accordingly, Dr. Caughfield's opinion regarding MMI has been overcome. Claimant is at MMI. The correct date of MMI is December 13, 2021 as determined by Dr. Peterson.

Claimant's Entitlement to Maintenance Medical Treatment

F. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in

the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for medical treatment is reasonable, necessary and related to the compensable injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

G. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, the record evidence persuades the ALJ that Claimant has failed to prove he is entitled to medical maintenance care. None of his authorized treating physicians have recommended that he undergo maintenance care. Indeed, the only opinion recommending maintenance treatment in these claims come from Dr. Caughfield, who in both cases simply recommended a second surgical opinion regarding the left knee and a surgical following regarding the left hand. Here, the evidence presented supports a conclusion that Claimant has not suffered a deterioration of his present condition and no authorized provider has presented any recommendations that he requires further medical treatment to relieve the effects of his injuries. Accordingly, Claimant's request for medical maintenance treatment must be denied and dismissed.

Respondent's Request for Reimbursement of Late Expert Cancellation Fees

H. This ALJ has had the occasion to address the issue of Respondent's entitlement to reimbursement for a late cancellation/no show fee for a claimant's failure to attend an IME previously. Indeed, that case involved the same law firms and in the case of Respondents' counsel, the same attorney as in the instant claim. See generally, *Jason Fahler v. Redbox*, W.C. No. 5-111-049 (August 17, 2020). In *Fahler*, Respondents sought reimbursement for Claimant's failure to appear for an IME with Dr. Robert Rokicki. Respondents' asserted that C.R.S. § 8-43-404(1)(b)(II) entitled them to recover the missed IME fee imposed against them by the physician from any future indemnity benefits awarded to Claimant. This ALJ was not convinced, noting that § 8-43-404(1)(b)(II), C.R.S. provided that if an employer pays estimated expenses, including mileage, transportation, food and/or lodging expenses, to a claimant in conjunction with a Respondent requested IME and Claimant subsequently fails to appear for the examination, the employer may recover the "costs paid for the [Claimant's] expenses from future indemnity benefits". Concluding that § 8-43-404(1)(b)(II), was silent on recovering the physician fee charged for a missed IME appointment, this ALJ found that

Respondents' reliance on § 8-43-404(1)(b)(II), as authority to order Claimant to reimburse the costs of the missed IME with Dr. Rokicki was misplaced. Respondents appealed the issue to the Industrial Claims Appeals Panel (Panel) for determination. On appeal the Panel agreed with the ALJ that §8-43-404(1)(b)(II), C.R.S. did not require the claimant to reimburse the respondents for the $917.50 cancellation fee associated with a missed IME appointment. *Fahler v. Redbox, supra*. Holding that the "clear intent of §8-43-404(1)(b)(II), C.R.S. is to allow the employer or insurer to recover the advanced expenses made specifically to the claimant for his or her lodging, travel, and hotel costs associated with attending an IME, when the claimant misses such IME", the Panel affirmed this ALJ's determination that claimant was not responsible to reimburse Respondents for the cost of the missed IME. *Id*.

I. Additionally, the Panel, like this ALJ, was "unaware of any Workers' Compensation Rule of Procedure that required the claimant to reimburse the respondents for the costs of the missed IME". See W.C. Rule of Procedure 8-8, 7 CCR 1101-3 (addressing IMEs); see also W.C. Rule of Procedure 18-7(B), 7 CCR 1101-3 (addressing cancellation fees for payer-made appointments); see also Safeway, Inc. v. Industrial Claim Appeals Office, 186 P.3d 103, 105 (Colo.App. 2008)(when construing administrative rule or regulation, same rules of construction are applied when interpreting a statute). As was the situation set forth in *Fahler*, this ALJ is convinced that Claimant failed to appear for his December 8, 2022, IME with Dr. Fall without justification. Nonetheless, Respondents have failed to cite any authority under any statute or subsection of the Act or under any rule of procedure that specifically extends the authority to the ALJ to order Claimant to reimburse Respondents for the cost of his missed IME appointment. Since the Panel concluded that §8-43-404(1)(b)(II), C.R.S. does not provide the relief the respondents seek for the cost of the missed IME and Respondents have not set forth any alternative legal authority in support of their request for relief, the ALJ concludes that the request for reimbursement for the missed IME must be denied and dismissed as unsupported by statue or rule of procedure.

ORDER

It is therefore ordered that:

1. Respondents request to set aside Dr. Caughfield's MMI determination regarding Claimant's left knee in W.C. No. 5-159-881 is GRANTED.

2. Claimant's request for maintenance treatment for his left knee under W.C. No. 5-159-881 is denied and dismissed.

3. Claimant's request for maintenance treatment for the injuries associated with his left upper extremity in W.C. No. 5-160-957 is denied and dismissed.

4. Respondents request for recovery of the no show fee associated with Claimant's missed December 8, 2022 IME is denied and dismissed

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

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.

DATED: August 7, 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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-223-731-004

ISSUES:

- Did Claimant prove by a preponderance of evidence that medical benefits related to his heart arrhythmia are reasonable, necessary, and related to the work injury?
- Whether Respondent should be awarded reasonable attorney fees and costs for Claimant's pursuit of an unripe issue after failing to request a DIME?

RESPONDENT'S CONCESSION

Respondent concedes responsibility for some medical bills incurred by Claimant in its position statement. It is in the process of paying the original Emergency Room and Ambulance bills for Claimant's post injury admittance to Rio Grande Hospital November 11, 2022 (Ex. 9 & 13.) This includes the bills on Ex. 4 pg. 13 as "Rio Grande HSP", "VLY Citizens FNDTN F", and "Northern Saguache." However, Respondent contests every bill related to Claimant's heart condition for treatment from November 12, 2022 onward, which is every bill identified in the excerpt below from Ex. 4 pg. 13 and other exhibits:

Victor N	4432236300832	I49.5	CAREPOINT EMERG ME	11/12/2022 - 11/12/2022	$1,091.00	$388.28
Victor N	4432232705335	R51.9	CO IMAG ASC PC	11/12/2022 - 11/12/2022	$718.00	$293.26
Victor N	4432232705336	S29.9XXA	CO IMAG ASC PC	11/12/2022 - 11/12/2022	$254.00	$104.70
Victor N	4432232905182	R55	HEALTHONE HEART CA	11/12/2022 - 11/12/2022	$261.00	$100.58
Victor N	4432232705334	S39.91XA	CO IMAG ASC PC	11/12/2022 - 11/12/2022	$360.00	$153.18
Victor N	4432232996444	R55	HEALTHONE HEART CA	11/12/2022 - 11/12/2022	$202.00	$82.90
Victor N	4432232705338	S09.90XA	CO IMAG ASC PC	11/12/2022 - 11/12/2022	$174.00	$71.50
Victor N	4432233602458	S19.9XXA	CO IMAG ASC PC	11/12/2022 - 11/12/2022	$238.00	$83.97
Victor N	4432233499747	R55	MED CTR OF AURORA	11/12/2022 - 11/12/2022	$52,321.46	$6,647.99
Victor N	4432234396577	I49.8	HEALTHONE IRL PATH	11/12/2022 - 11/13/2022	$189.00	$20.00
Victor N	4432301097562	R55	HEALTHONE HEART CA	11/12/2022 - 11/12/2022	$27.00	$9.54
Victor N	4432232996997	R55	CRITICAL CARE PULMO	11/13/2022 - 11/13/2022	$161.00	$73.28
Victor N	4432232996740	R55	CRITICAL CARE PULMO	11/14/2022 - 11/14/2022	$238.00	$105.38

In addition to the above insurance letter listing bills, Claimant provided specific bills for the following already listed providers: $52,321.46 for the Medical Center of Aurora (ex. 10), $1,043.00 for Aurora Denver Cardiology Associates (ex. 11), and $447

for Critical Care & Pulmonary Consultants (ex. 12). Respondent asserts that all three of these bills are unrelated to the work injury.

FINDINGS OF FACT

1. On November 11, 2022 Claimant was not feeling well. As he was driving his patrol car on the highway near Alamosa feeling “funny” and “weird.” Claimant started pulling over and lost consciousness. Ex. 14 pg. 40. His car went off the south side of the road, through a fence, and into a ditch. Claimant woke up a few minutes later with a headache and a gentleman at the door of his vehicle. *Id.* During the crash, Claimant hit his head on a seat pillar. Ex. A pg. 13.

2. Claimant was taken to Rio Grande Hospital via ambulance and reported that he had headache and nausea with vomiting most of the day, and that he had been feeling sick since having Covid two weeks ago. Ex. 13 pg. 13. He complained of a severe pain in his head due to a blow to the head. *Id.* He did not complain of any chest or cardiac pain. *Id.* As part of his workup, an EKG was performed that returned an abnormal result. Ex. 13 pg. 39. He was diagnosed with syncope, syncope secondary to illness, and pneumonia. *Id.* The doctors at the emergency room referred Claimant to Aurora Medical Center for evaluation of his heart based on the EKG result. *Id.* & Ex. B pg. 19.

3. On November 12, 2022 after an overnight stay, Claimant left Rio Grande Hospital and his fiancé drove him to Aurora Medical Center, where he was admitted to the ER solely to obtain further treatment for his heart. Ex. 14 pg. 40. After two days of testing, he was discharged with normal results. *Id.* & Ex. B. The discharge paperwork for the Medical Center of Aurora listed only one consultation purpose for the admission:

"Cardiology." Ex. B pg. 16. Regarding his passing out, the doctors at Aurora determined that Claimant "likely had a vasovagal episode related to recent viral illnesses." *Id.* The diagnoses on discharge were syncope, abnormal EKG, recent covid infection, and history of anxiety and depression. *Id.*

4. Allison Fall, M.D. performed a records review in this matter. Ex. D. Dr. Fall examined the relevant medical records in this claim. *Id.* Dr. Fall opined that Claimant had a crash "due to an underlying medical condition unrelated to work." *Id.* pg. 30. Claimant "was transferred to the Medical Center of Aurora for a workup and evaluation of the cardiac arrhythmia, which was not caused by the motor vehicle collision." *Id*.

5. On November 16, 2022 Claimant went to his ATP, Michael Shell, D.O. and reported no ongoing symptoms other than a mild, improving cough. Ex. A pg. 13. On that day Dr. Shell put him at MMI with no impairment. *Id.* pg. 14. Throughout the records from this visit, the ATP repeatedly stated that Claimant's only work-related injury was his concussion. Ex. A. In his doctor's note, the ATP stated, "he was ultimately diagnosed with pneumonia and a heart arrhythmia associated with a fever." *Id.* pg. 13. In his assessment, the only diagnosis was "Concussion w LOC 30 minutes or less." *Id.* pg. 14. Similarly, the work-related medical diagnosis on the WC-164 form was "S06.06X1A concussion with LOC of 30 minutes or less." Ex. A pg. 12.

6. There is no causation opinion from the treating providers relating the heart arrythmia to the motor vehicle accident.

7. Respondent filed FALs on March 13, 2023 and April 6, 2023. In each case, Claimant did not seek a DIME and instead filed Applications for Hearing.

8. On May 17, 2023 a prehearing was held where Respondent attempted to strike the issue of medical benefits as unripe. Ex. E. It was denied. *Id.*

9. The only specific bills provided by Claimant at issue are: $52,321.46 for the Medical Center of Aurora (ex. 10), $1,043.00 for Aurora Denver Cardiology Associates (ex. 11), and $447 for Critical Care & Pulmonary Consultants (ex. 12). These medical bills are for Claimant's unrelated heart condition.

10. Claimant also provided a listing of medical bills by his insurance company for dates of service November 11-November 14. Ex. 4 pg. 13. Claimant presented no credible evidence that the listing of these medical bills from November 12 onward are for any care other than for Claimant's heart. In his testimony, Claimant stated he left Rio Grande Hospital and went straight to Aurora Medical Center for heart treatment. There was no claim that he sought treatment for his concussion at any of these providers from November 12, 2022 onward.

CONCLUSIONS OF LAW

A. Medical Benefits Must Be Related Even If They Were Needed on an Emergency Basis

Claimant relies on Sims v. Indus. Claim Appeals Off. of State of Colo., 797 P.2d 777, 781 (Colo. App. 1990) for the proposition that treatment sought on an emergent basis is compensable. However, a closer reading of Sims v. Indus. Claim Appeals Off. of State of Colo., 797 P.2d 777, 781 (Colo. App. 1990); reveals that it only excuses the need to seek authorization for the treatment during an emergency. It does not negate the requirement that the treatment be causally connected to the work injury. Initially, I find that the treatment at Aurora Medical was still part of the emergency. Although the Claimant was not

transported by Ambulance to that facility, since he requested that his fiancée drive him to the emergency room at Aurora Medical, Dr. Rose at Rio Grande Hospital recommended monitored transfer because of possible medical risks. (Claimant Exhibit 13, p. 39). Based on this, I find that the treatment was emergent in nature. However, although the treatment at Aurora Medical was emergent, Claimant must also prove that the treatment was related to the work related accident.

B. Claimant's Heart Condition is Not Work Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, 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 of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000).

Where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001). However, where an industrial injury merely causes the *discovery* of the underlying disease to happen sooner but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO

May 15, 2007). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990). Claimant has not satisfied his burden in this claim.

As in Robinson, the automobile crash provided the opportunity for Claimant's hospital provider to find the pre-existing condition namely, his heart arrhythmia. This does not provide a basis for this being a compensable or related condition. *See Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Claimant's ATP found that Claimant's only work-related diagnosis was a concussion because of the motor vehicle accident. Ex. A. Claimant's own cardiologists and his treating physicians at both Rio Grande Hospital and Aurora Medical Center opined that Claimant's pre-existing viral illness was the cause of his heart arrhythmia. Ex. 13 & B. Claimant's ATP adopted that opinion in his note. Ex. A pg. 13. Dr. Fall's opinion that the heart condition was not work related is credible and persuasive. Ex. C. There is no credible medical opinion that Claimant's heart condition was caused or aggravated by the work injury. Based on the forgoing, the vast weight of the evidence supports the conclusion that Claimant's heart arrhythmia is not work related. Therefore, Respondent is not liable for all heart related medical bills.

C. Attorney Fees

C.R.S. §8-43-211(3) provides that an attorney who requests a hearing or files a

notice to set a hearing on an issue not ripe for adjudication may be assessed reasonable attorney fees for the expenses of the opposite party. An issue is ripe when it is real, immediate and fit for adjudication. *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App 2006). The term "fit for adjudication" refers to a disputed issue for which there is no legal impediment to immediate adjudication. Under that doctrine, adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which never occur. *Olivas-Soto v. ICAO*, supra. (Citations omitted). *See also McMeekin v. Memorial Gardens*, W.C. 4-384-910 (ICAO 9/30/2014). Here, there was no requirement for the Claimant to seek a DIME in order to pursue medical benefits arguably related to automobile crash. The fact that Claimant sought the medical benefits incurred before MMI after a FAL was filed does not make that issue unripe. As such, the request for fees and costs is denied.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Claimant's claim for medical benefits is denied and dismissed except for the benefits conceded by Respondent.

2. Respondent's request for attorney fees and costs is denied.

3. Any issues not resolved herein is reserved for future determination.

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

DATED: August 8, 2023

Michael A. Perales

Michael Perales
Administrative Law Judge
Office of Administrative Courts
Colorado Springs, Colorado

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-221-402-001

ISSUES

- Did Claimant prove she suffered a compensable right knee injury on September 17, 2022?
- Whether the medical treatment provided was authorized, reasonable, necessary and related to the claimed work injury?
- Whether the Claimant is entitled to temporary disability benefits?[1]
- If the Claim is compensable, the amount of Claimant's disfigurement due to the work injury.

FINDINGS OF FACT

1. Claimant worked for a destination management company where they assist large conferences staying at hotels and plan and operate their activities. She is a program coordinator for the employer.

2. Claimant is paid $30 per hour and works approximately 20 hours per week. She worked approximately 55 hours in the two week period prior to the date of injury. The work is seasonal and extends from April through November.

3. On September 17, 2022 at approximately 5:30 p.m., Claimant was working and was carrying a case of water bottles down the stairs of a bus when she missed the last two steps and fell down landing on the concrete twisting her right knee. She immediately felt pain and was limping. Prior to the incident, Claimant had no pain in her right knee. In the six month period prior to her fall, Claimant's knee was fine. She was able to hike five times per week from 3 to 5 miles per day. She also went on a hiking trip to Switzerland in the mountains in August of 2022 for 2 ½ weeks. She was able to hike 70 to 80 miles over the trip. She had no knee problems during the trip or when she returned.

4. Claimant reported the injury immediately to [Redacted, hereinafter LD], her manager for that day. LD[Redacted] told her to go see a doctor but did not specify a doctor. The Claimant went to the [Redacted, hereinafter OM] Center Urgent Care on September 19, 2022 and saw Dr. Cindy Lockett. The chart note for that date states: "Here with a work comp right knee injury. Pt tourguide for [Redacted, hereinafter RC] and was carrying case of water off bus at the time of injury. Acute discomfort after missing the last step of a bus and twisting her right knee when she fell. No other trauma from fall. Did not break skin. Able to wiggle toes and no numbness or tingling. . . Patient does have a history

[1] The issue of average weekly wage was reserved pending exchange of information regarding concurrent employment.

of chronic knee troubles has underlying ANA positivity and connective tissue disorder for which she is been under rheumatological care. Chronic knee discomfort and osteopenia. Most recent x-rays from just over a year ago were normal. Gets cortisone shots in right knee through Ortho MD – last shot 8 months ago and doing OK." (Respondents Exhibit G p. 81). Dr. Lockett diagnosed Claimant with a right knee strain. Dr. Lockett provided restrictions of walking and standing less than an hour, no kneeling or squatting and no climbing ladders. Claimant was allowed to use a cane or crutches. She was not allowed to drive while wearing the splint that had been prescribed. Dr. Lockett referred Claimant to Dr. McNulty, a workers compensation doctor, also with OM[Redacted] at a different location.

5. Dr. McNulty reviewed the x-rays taken by Dr. Lockett. Dr. McNulty told Claimant to rest and return in three weeks. When Claimant did not improve after the three weeks, Dr. McNulty referred Claimant for an MRI. He also prescribed physical therapy which she received from Synergy Physical Therapy. He also referred her to an orthopedic doctor. She selected Dr. Feign, whom she had seen in the past for a pulled muscle in her right knee. Dr. Feign had previously provided two cortisone injections for her right knee. One of the injections was in March 2022 and the prior one was a year before that. The injections did not help her pain. At some point in time, prior to the work incident, Dr. Feign told the Claimant that she would eventually need a right knee replacement. However there were no immediate plans for that procedure. After the work incident, Dr. Feign recommended a total knee replacement of Claimant's right knee. The workers compensation carrier denied the surgery.

6. Claimant underwent a total knee replacement on November 29, 2022, paid for by Medicare. After surgery, Claimant had physical therapy with Action Potential. Dr. Feign prescribed physical therapy but left the selection of the physical therapist up to Claimant.

7. Claimant was seen by Respondents' Independent Medical Examiner, Dr. Schwappach, post-surgery on April 7, 2023. Dr. Schwappach is an orthopedic surgeon who specializes in hips, knees and extremities. Dr. Schwappach noted that Claimant had significant prior symptoms and treatment to her right knee. She had a diagnosis of bilateral osteoarthritis in her knees. It was his opinion that Claimant sustained a right knee strain when she stepped off the bus. He also opined that there is no evidence that the incident accelerated her arthritis.

8. In his testimony, he reviewed the findings on the MRI performed on October 26, 2022. He explained that the finding of a full-thickness cartilaginous defect along the lateral femoral condyle is describing where the cartilage is gone and has been worn away. It is not an acute finding and is a long standing injury and the edema underneath it is consistent with edema that you would find from arthritis in the knee. It is the response of the bone when you do not have the cartilage protecting it. Also, the meniscus is morselized similar to the grinding when using a mortar and pestle. That is also an indication that this is not due to an acute injury but instead due to degeneration over a longer period of time.

9. At the time of the incident, Claimant had concurrent employment with [Redacted, hereinafter AS], [Redacted, hereinafter CI] and [Redacted, hereinafter IT]. Claimant did similar work as a program coordinator for these other employers as she did for RC[Redacted]. AS[Redacted] paid the Claimant $30 per hour with an average of 10 hours per week. She returned to work for AS[Redacted] in early May, 2023. CI[Redacted] paid Claimant $30 per hour and Claimant also worked about 10 hours per week on average. She returned to work for CI[Redacted] in early May. Claimant was paid $35 per hour with IT[Redacted]. She would work approximately 5 hours per week for them. She had not returned to work for IT[Redacted] as of the date of the hearing.

10. Claimant did not return to work for RC[Redacted] until May, 2023.

11. Due to the surgery, Claimant has a visible disfigurement to the body consisting of a scar on her right knee which is a thin line mostly whitish in color 1/8 inch in width and 8 inches long.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he or she is 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); *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 he seeks 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), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." Section 8-40-201(1). Workers' compensation benefits are only payable if an accident results in a compensable "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). The mere fact that an incident occurred at work and caused symptoms 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). The fact that the employer provides treatment after an employee reports symptoms does not automatically establish a compensable injury. The claimant must prove the symptoms and need for treatment were proximately caused by their work. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017).

Even a “minor strain” or a “temporary exacerbation” of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant’s work activities and caused him to seek medical treatment. *E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

Claimant proved she suffered a compensable injury to her right knee on September 17, 2022. Claimant’s testimony regarding the incident and onset of symptoms after the incident was credible. These facts are sufficient to establish a compensable claim. The real issue is whether the fall on September 17, 2022 resulted in the need for a total knee replacement of whether it simply caused a strain, as initially diagnosed, and the total knee surgery was due to Claimant’s preexisting condition. Claimant had treated with Dr. Feign previously and Dr. Feign did tell Claimant that she would eventually need a knee replacement for her right knee. Dr. Schwappach credibly testified that the need for the total knee replacement was due to the natural progression of the degenerative process of the knee and was not due to the fall from the steps of the bus.

B. Medical benefits

The respondents are liable for authorized medical treatment reasonably necessary 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). Having found that the Claimant’s knee strain is compensable, the Claimant is entitled to medical benefits for the treatment provided by OM[Redacted] and Dr. Lockett and Dr. McNulty as well as the physical therapy provided based on their referral. However, Respondents are not liable for the total knee surgery or the treatment following that surgery since the need for surgery was not caused by the fall on September 17, 2022.

C. Temporary Disability benefits

The Claimant was given restrictions following the injury that prevented her from returning to work and is entitled to temporary disability benefits beginning September 18, 2022 until terminated by law.

D. Disfigurement

Since the scarring the Claimant has on her knee was due to the non-compensable total knee replacement surgery, no disfigurement is awardable.

ORDER

It is therefore ordered that:

1. Claimant's claim for her right knee strain on September 17, 2022 is compensable.

2. Respondents are not liable for the total knee surgery or the post-operative physical therapy.

3. Claimant is entitled to temporary disability benefits beginning on September 17, 2022.

4. Respondents are liable for the medical treatment Claimant received prior to the total knee surgery.

5. The request for disfigurement award is denied and dismissed.

6. 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: August 8, 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 5-202-999-002

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable left shoulder injury during the course and scope of her employment with Employer on December 14, 2021.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment for her left shoulder injury including the left shoulder surgery recommended by Nirav R. Shah, M.D.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $535.55.

2. Claimant withdrew with prejudice the issue of Temporary Total Disability (TTD) benefits from the date of injury through the hearing date with prejudice.

FINDINGS OF FACT

1. Employer operates grocery stores throughout Colorado. Claimant was employed as a cashier for Employer. Claimant's job duties sometimes required her to work a register in a grocery aisle. At other times she worked on the self-checkout, where she assisted customers as they scanned their groceries for payment at several terminals.

2. On December 14, 2021 Claimant was working at the self-checkout lanes assisting customers as they scanned their groceries. However, she became involved in an altercation with a male customer. A woman had entered the store in a wheelchair and Claimant offered to push her. Claimant testified that the woman and/or her son felt Claimant was pushing her too fast. When the son demanded to push his mother, a dispute ensued. As the male customer was leaving the store and Claimant was walking past, he "shoulder-checked" her. He specifically struck his right shoulder against Claimant's left shoulder. Claimant described the customer who struck her was a large male between six feet five inches and six feet nine inches tall. The incident was not captured on store security cameras because remodeling had disabled the cameras in that area.

3. Claimant testified that she immediately felt left shoulder pain at the level of a 10 out of 10. She did not doubt that she had sustained an extremely painful shoulder injury Claimant specified that "he hit me where I transferred my shoulder, so I stepped back, after he hit me, it jarred me back. I didn't hit the ground." She remarked that [Redacted, hereinafter JH] and other managers came over to break up the altercation. Claimant commented that no one asked her if she wanted to file a police report. She noted that Employer also never asked her if

she was injured or required medical care.

4. [Redacted, hereinafter MC] testified that on December 14, 2021 he was the Pickup Supervisor for Employer. He witnessed the interaction between Claimant and the male customer because he was standing a few feet away from the incident. MC[Redacted] remarked that Claimant did not stumble backwards, and that she acted "more as a surprise that that happened." He testified the customer lowered his shoulder and checked Claimant while they were next to him. "It was a shoulder check." MC[Redacted] commented, that after the contact, the customer and Claimant got "face to face, even close, almost to the point where they kind of wanted to push or fight." He described the customer as a bigger male, who was about six feet tall and over 200 pounds. MC[Redacted] noted Claimant did not state she was injured after the incident.

5. [Redacted, hereinafter JB] explained that he was the Front-end Supervisor for Employer on December 14, 2021. He was one of Claimant's supervisors and witnessed the altercation. JB[Redacted] commented that the impact was not hard and neither party stumbled. In fact, they both immediately "move[d] closer right in front of the face." JB[Redacted] stated that he and Store Manager [Redacted, hereinafter FD] spoke to Claimant and asked her if she needed any medical assistance. Claimant responded that she did not. He also noted that he talked to Claimant several times in the days following the incident "making sure that she was okay and that she felt safe at work." However, Claimant never mentioned she was injured or wanted medical care.

6. FD[Redacted] recalled that he spoke to Claimant shortly after the incident on December 14, 2021. He inquired whether Claimant was injured or if she needed medical assistance. Claimant replied she was not injured and did not need medical assistance. FD[Redacted] also remarked that he asked Claimant on subsequent occasions whether she was injured, but Claimant never mentioned any injuries. He also asked Claimant whether she wanted to file a Workers' Compensation incident report, but Claimant declined.

7. Claimant recounted that she was "positive" she did not finish her shift on December 14, 2021 because FD[Redacted] sent her home after the altercation. However, Claimant's testimony is inconsistent with the testimony of JB[Redacted] and Employer's time cards. JB[Redacted] testified that Claimant finished her shift on December 14, 2021. Notably, Employer's calendar reflects that Claimant was scheduled to work from 2:30 p.m. to 11:00 p.m. on December 14, 2021. Her time card shows that she punched out at 11:01 p.m. on December 14, 2021.

8. Claimant testified that she remained in "10 out of 10" pain from December 14, 2021 for the following several weeks. She remarked she has been unable to use her left arm after the injury. However, Claimant's testimony again is inconsistent with the testimony of Employer witnesses. JB[Redacted] and FD[Redacted] specifically stated they saw Claimant on a daily basis and she did not exhibit any difficulties in using her arm or performing normal job duties. Notably, Claimant never appeared injured and repeatedly stated she did not need medical care.

9. On December 21, 2021 Incident report [Redacted, hereinafter IT] was prepared

by the [Redacted, hereinafter FP]. The report documented that on December 20, 2021 Investigator [Redacted, hereinafter FP] was contacted by Claimant regarding an assault that occurred at Employer's store on December 14, 2021. Claimant described that she was assaulted by a customer and injured her shoulder. The Incident report reflects a classification of harassment. A [Redacted, hereinafter FC] transcript reflects that the customer was later convicted of the original charge of harassment.

10. FD[Redacted] testified that on January 5, 2022 Claimant was involved in another altercation with a customer. Claimant "ma[d]e a move" toward the individual, but did not actually swing at the customer. FD[Redacted] remarked that Claimant did not appear to be injured at all during the January 5, 2022 altercation. Because of the incident, Claimant was suspended from employment pending an investigation.

11. On January 7, 2022 FD[Redacted] met with Claimant to discuss her suspension. Notably, Claimant did not make any request for medical treatment for her left shoulder injury at the meeting.

12. On January 10, 2022 Claimant sought medical treatment from her personal primary care clinic at Salud Family Health Centers. Michael Beer, PA-C noted Claimant was a 62-year-old female with left shoulder pain suffered at work about three weeks ago. He recounted that Claimant was hit in the shoulder by an angry customer. PA-C Beer assessed Claimant with acute pain of the left shoulder.

13. FD[Redacted] testified that the first time Claimant requested any medical treatment was on January 12, 2022. He made a specific written note of the phone call because he was "concerned that there was no previous mention of her having any injury in regards" to the December 14, 2021 incident.

14. On January 14, 2022 Employer completed a Work Related Injury Report Form, Claimant completed the Employee's portion of the Form and signed the Workers' Compensation Designated Medical Provider List. FD[Redacted] stated that it is Employer's protocol to complete the paperwork when an associate reports an injury. He would have completed the documentation on December 14, 2021 if Claimant had reported an injury or wanted medical treatment.

15. On January 18, 2022 Claimant visited Katherine Drapeau, DO. at Authorized Treating Provider (ATP) Workwell for an examination. The patient history documented Claimant was assaulted by a large man who struck her in the shoulder with his shoulder. Claimant did not feel pain right away but experienced symptoms by the evening. She complained of continued pain in the anterior left shoulder that radiated down her upper arm and sometimes into the left base of her neck. Dr. Drapeau diagnosed Claimant with an unspecified strain of the left shoulder joint. She assigned work restrictions of no lifting over five pounds. Claimant was not permitted to cashier but could work at the self-checkout. Dr. Drapeau ordered an MRI of Claimant's left shoulder and referred her to physical therapy. The objective findings were consistent with a work-related mechanism of injury.

16. On January 24, 2022 Claimant visited Bruce B. Cazden, M.D., at Workwell.

Claimant reported persistent left shoulder pain and limited range of motion. Dr. Cazden diagnosed Claimant with an unspecified strain of the left shoulder joint and continued her work restrictions. He summarized that, with the information available at the time, there was more than 50% probability that Claimant suffered a work-related injury.

17. On January 28, 2022 Claimant underwent a left shoulder MRI. The imaging showed a complete disruption of the supraspinatus tendon with medial tendon retraction accompanied by mild corresponding muscle atrophy. The radiologist's impression was a full-thickness supraspinatus tendon tear with secondary findings consistent with internal impingement.

18. On January 31, 2022 Claimant visited Teresa Ayandale, PA-C, at Workwell. PA-C Ayandale noted the MRI revealed a full thickness supraspinatus tear. Claimant reported no prior injury and had no pain symptoms prior to the assault. PA-C Ayandale diagnosed Claimant with an unspecified strain of the left shoulder joint and continued her work restrictions. She summarized there was a greater than 50% probability Claimant suffered a work-related injury and referred Claimant for an orthopedic evaluation.

19. On February 2, 2022 Claimant visited orthopedic surgeon Nirav R. Shah, M.D. for an evaluation. The patient history documented that Claimant's shoulder was bumped by an angry customer on December 14, 2021. Dr. Shah recounted that Claimant suffered sudden, severe shoulder pain that had lasted for seven weeks. Based on a physical examination and review of the left shoulder MRI, Dr. Shah diagnosed Claimant with left shoulder impingement and a complete tear of the left rotator cuff. On February 3, 2022 Dr. Shah requested prior authorization for a left shoulder rotator cuff repair.

20. On March 14, 2022 Claimant followed up with Myles Cope, M.D. from Workwell. He continued Claimant's work restrictions of no lifting over five pounds and limited her to working the self-checkout line. Dr. Cope characterized Claimant's symptoms as an aching pain at a level of 3/10 in her left shoulder. He diagnosed Claimant with an unspecified sprain of the left shoulder joint and noted that the objective findings were consistent with a work-related mechanism of injury. However, Dr. Cope did not recommend surgery for Claimant's condition.

21. On March 28, 2022 F. Mark Paz, M.D., conducted an Independent Medical Examination of Claimant. He reviewed Claimant's medical history and conducted a physical examination. Dr. Paz documented that he reviewed the position of Claimant's upper extremities during the altercation on December 14, 2021. She confirmed that her upper extremities were at her side while she was walking at the time of contact. Dr. Paz explained that the surpraspinatus tendon begins to function at 60 degrees to approximately 120 degrees. The location of Claimant's arms was important when determining whether her supraspinatus tear was caused by the incident on December 14, 2021. Dr. Paz reasoned that Claimant's arms were at her sides when the contact occurred and thus located at zero degrees. Because Claimant's arm was located at zero degrees, Dr. Paz remarked that there would be no significant load tension across the supraspinatus tendon. He therefore concluded it was not medically probable that the incident on December 14, 2021 caused an acute rotator cuff tear.

22. Although Claimant stated that she experienced left shoulder pain shortly after the

December 14, 2021 event, all Employer witnesses at hearing commented that she never mentioned an injury or requested medical care after the incident. Dr. Paz explained that Claimant's lack of left shoulder pain immediately after the altercation rendered it medically improbable that Claimant sustained an acute supraspinatus tendon tear on the date. Importantly, Dr. Paz testified that the findings on the January 28, 2022 MRI revealed retraction of the supraspinatus tendon and muscle atrophy only 45 days after the incident on December 14, 2021. However, he explained that muscle atrophy does not develop in 45 days, but takes more than three months to occur. Therefore, it is medically probable that Claimant's supraspinatus tear was not caused by the incident on December 14, 2021.

23. Dr. Paz explained that the incident on December 14, 2021 also did not aggravate Claimant's pre-existing full-thickness rotator cuff tear. He remarked that "if there's already a torn, retracted, atrophied supraspinatus muscle, you can't aggravate that. It's … the end result, you can't aggravate it anymore." Considering all of the medical evidence, including the position of Claimant's arm at the time of impact, the lack of immediate pain complaints, and the existence of muscle atrophy on MRI only 45 days after the December 14, 2021 event, Dr. Paz concluded that it is more likely than not that Claimant's supraspinatus tendon tear was a degenerative condition caused by the internal impingement seen on the MRI.

24. Claimant has established it is more probably true than not that she suffered a compensable left shoulder injury during the course and scope of her employment with Employer on December 14, 2021. Initially, Claimant explained that, during an altercation at her store with a male customer, he struck his right shoulder against her left shoulder. Employees MC[Redacted] and JB[Redacted] witnessed the incident. Furthermore, on December 21, 2021 Claimant filed a report of the incident with the FP[Redacted]. She described that she was assaulted by a customer and injured her shoulder.

25. On January 10, 2022 Claimant sought medical treatment from her personal primary care clinic at Salud Family Health Centers. PA-C Beer recounted that about three weeks earlier, Claimant was hit in the shoulder by an angry customer. He assessed Claimant with acute pain of the left shoulder. On January 14, 2022 Employer completed a Work Related Injury Report Form, Claimant completed the Employee's portion of the Form, and signed the Workers' Compensation Designated Medical Provider List. On January 18, 2022 Dr. Drapeau at ATP Workwell documented Claimant was assaulted by a large man who hit her in the shoulder with his shoulder. Dr. Drapeau diagnosed Claimant with an unspecified strain of the left shoulder joint and assigned work restrictions. She noted the objective findings were consistent with work-related mechanism of injury. On January 24, 2022 Dr. Cazden, M.D., at Workwell also diagnosed Claimant with an unspecified strain of the left shoulder joint and continued her work restrictions. He summarized that, with the information available at the time, there was a greater than 50% probability Claimant suffered a work-related injury. PA-C Ayandale subsequently diagnosed Claimant with an unspecified strain of the left shoulder joint and continued her work restrictions. She also summarized there was more than a 50% probability Claimant suffered a work-related injury. Dr. Cope at Workwell later diagnosed Claimant with an unspecified sprain of the left shoulder joint. He also noted that the objective findings were consistent with a work-related mechanism of injury.

26. The record reveals that multiple medical providers at Workwell diagnosed

Claimant with an unspecified strain of the left shoulder joint and determined there was a greater than 50% probability that Claimant suffered a work-related injury. Moreover, Employer witnesses observed the incident and Claimant filed a police report describing the altercation. Although Claimant did not seek medical treatment immediately after the December 14, 2021 incident, the record reveals that a customer "shoulder-checked" her left shoulder during an altercation at Employer's store. Claimant thus suffered an unspecified strain of the left shoulder joint while working for Employer on December 14, 2021. Accordingly, Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment.

27. Claimant has demonstrated it is more probably true than not that she is entitled to receive reasonable, necessary and causally related medical treatment for her left shoulder injury. The record reveals that Claimant received reasonable medical treatment in the form of examinations, imaging and physical therapy for an unspecified strain of her left shoulder. Notably, the treatment recommendations from Claimant's ATPs at Workwell were accompanied by written opinions that Claimant's injuries were work-related. Moreover, the referral to Dr. Shah was reasonable based on Claimant's left shoulder MRI that revealed a full-thickness supraspinatus tendon tear with secondary findings consistent with internal impingement. After reviewing Claimant's left shoulder MRI, Dr. Shah diagnosed Claimant with left shoulder impingement and a complete tear of the left rotator cuff. He then requested prior authorization for a left shoulder rotator cuff repair. However, based on a review of the medical records and the persuasive opinion of Dr. Paz, the left shoulder surgery requested by Dr. Shah is not causally related to the December 14, 2021 work incident.

28. Initially, multiple medical providers at Workwell diagnosed Claimant with an unspecified strain of the left shoulder joint. They determined there was more than a 50% probability Claimant suffered a work-related injury. However, the providers did not assess whether Claimant's torn left rotator cuff was causally related to the December 14, 2021 altercation. They did not consider whether the mechanism of injury described by Claimant was sufficient to cause a rotator cuff tear. In fact, at a March 14, 2022 visit after the MRI, Dr. Cope diagnosed Claimant with an unspecified sprain of the left shoulder joint and noted the objective findings were consistent with a work-related mechanism of injury. However, he did not recommend surgery for Claimant's condition. Finally, Dr. Shah failed to conduct a causality assessment in considering whether the proposed surgery for Claimant's left rotator cuff tear was related to the December 14, 2021 work incident.

29. Dr. Paz reviewed Claimant's medical history and conducted a physical examination as part of an independent medical examination. He reviewed the position of the Claimant's upper extremities during the altercation on December 14, 2021. Claimant confirmed that the upper extremities were at her side while she was walking at the time of contact. Dr. Paz explained that the surpraspinatus tendon begins to function at 60 degrees to approximately 120 degrees. Because Claimant's arms were at her sides when the contact occurred, they were located at zero degrees. Dr. Paz reasoned that there was thus no significant load tension across the supraspinatus tendon. Therefore, Dr. Paz concluded it was not medically probable that the incident on December 14, 2021 caused an acute rotator cuff tear.

30. Importantly, Dr. Paz testified that the findings on the January 28, 2022 MRI

revealed retraction of the supraspinatus tendon and muscle atrophy only 45 days after the incident on December 14, 2021. However, he explained that muscle atrophy does not develop in 45 days, but takes more than three months to occur. Therefore, it is medically probable that Claimant's supraspinatus tear was not caused by the incident on December 14, 2021. Finally, Dr. Paz explained that the incident on December 14, 2021 also did not aggravate Claimant's pre-existing full-thickness rotator cuff tear because it existed before the work incident. The supraspinatus muscle was already torn, retracted, and atrophied at the time of the work altercation. Considering all of the medical evidence, including the position of Claimant's arm at the time of impact and the existence of muscle atrophy on MRI only 45 days after the December 14, 2021 incident, Dr. Paz persuasively concluded that it is more likely than not that Claimant's supraspinatus tendon tear was a degenerative condition caused by internal impingement.

31. Based on the medical records and persuasive opinion of Dr. Paz, the surgery requested by Dr. Shah on February 3, 2022 is not causally related to Claimant's December 14, 2021 work incident. The record reveals that Claimant was injured at work when a male customer struck his right shoulder against her left shoulder. Claimant has received reasonable, necessary and causally related medical treatment for an unspecified strain of her left shoulder. She may continue to receive reasonable, necessary and causally related medical treatment for the injury. However, the medical records do not reflect that Claimant suffered a left rotator cuff tear during the incident. As noted by Dr. Paz, Claimant likely suffered from a pre-existing, degenerative left shoulder condition unrelated to her work activities. Claimant's employment thus did not aggravate, accelerate or combine with her pre-existing condition to produce the need for surgical intervention. Accordingly, Claimant's request for the left shoulder rotator cuff repair surgery recommended by Dr. Shah is denied and dismissed.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See*

Prudential Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

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 she suffered a compensable left shoulder injury during the course and scope of her employment with Employer on December 14, 2021. Initially, Claimant explained that, during an altercation at her store with a male customer, he struck his right shoulder against her left shoulder. Employees MC[Redacted] and JB[Redacted] witnessed the incident. Furthermore, on December 21, 2021 Claimant filed a report of the incident with the FP[Redacted]. She described that she was assaulted by a customer and injured her shoulder.

8. As found, on January 10, 2022 Claimant sought medical treatment from her personal primary care clinic at Salud Family Health Centers. PA-C Beer recounted that about three weeks earlier, Claimant was hit in the shoulder by an angry customer. He assessed Claimant with acute pain of the left shoulder. On January 14, 2022 Employer completed a Work Related Injury Report Form, Claimant completed the Employee's portion of the Form, and signed the Workers' Compensation Designated Medical Provider List. On January 18, 2022 Dr. Drapeau at ATP Workwell documented Claimant was assaulted by a large man who hit her in

the shoulder with his shoulder. Dr. Drapeau diagnosed Claimant with an unspecified strain of the left shoulder joint and assigned work restrictions. She noted the objective findings were consistent with work-related mechanism of injury. On January 24, 2022 Dr. Cazden, M.D., at Workwell also diagnosed Claimant with an unspecified strain of the left shoulder joint and continued her work restrictions. He summarized that, with the information available at the time, there was a greater than 50% probability Claimant suffered a work-related injury. PA-C Ayandale subsequently diagnosed Claimant with an unspecified strain of the left shoulder joint and continued her work restrictions. She also summarized there was more than a 50% probability Claimant suffered a work-related injury. Dr. Cope at Workwell later diagnosed Claimant with an unspecified sprain of the left shoulder joint. He also noted that the objective findings were consistent with a work-related mechanism of injury.

9. As found, the record reveals that multiple medical providers at Workwell diagnosed Claimant with an unspecified strain of the left shoulder joint and determined there was a greater than 50% probability that Claimant suffered a work-related injury. Moreover, Employer witnesses observed the incident and Claimant filed a police report describing the altercation. Although Claimant did not seek medical treatment immediately after the December 14, 2021 incident, the record reveals that a customer "shoulder-checked" her left shoulder during an altercation at Employer's store. Claimant thus suffered an unspecified strain of the left shoulder joint while working for Employer on December 14, 2021. Accordingly, Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment.

Medical Benefits

10. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular 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).

11. 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).

12. As found, Claimant has demonstrated by a preponderance of the evidence that

she is entitled to receive reasonable, necessary and causally related medical treatment for her left shoulder injury. The record reveals that Claimant received reasonable medical treatment in the form of examinations, imaging and physical therapy for an unspecified strain of her left shoulder. Notably, the treatment recommendations from Claimant's ATPs at Workwell were accompanied by written opinions that Claimant's injuries were work-related. Moreover, the referral to Dr. Shah was reasonable based on Claimant's left shoulder MRI that revealed a full-thickness supraspinatus tendon tear with secondary findings consistent with internal impingement. After reviewing Claimant's left shoulder MRI, Dr. Shah diagnosed Claimant with left shoulder impingement and a complete tear of the left rotator cuff. He then requested prior authorization for a left shoulder rotator cuff repair. However, based on a review of the medical records and the persuasive opinion of Dr. Paz, the left shoulder surgery requested by Dr. Shah is not causally related to the December 14, 2021 work incident.

13. As found, initially, multiple medical providers at Workwell diagnosed Claimant with an unspecified strain of the left shoulder joint. They determined there was more than a 50% probability Claimant suffered a work-related injury. However, the providers did not assess whether Claimant's torn left rotator cuff was causally related to the December 14, 2021 altercation. They did not consider whether the mechanism of injury described by Claimant was sufficient to cause a rotator cuff tear. In fact, at a March 14, 2022 visit after the MRI, Dr. Cope diagnosed Claimant with an unspecified sprain of the left shoulder joint and noted the objective findings were consistent with a work-related mechanism of injury. However, he did not recommend surgery for Claimant's condition. Finally, Dr. Shah failed to conduct a causality assessment in considering whether the proposed surgery for Claimant's left rotator cuff tear was related to the December 14, 2021 work incident.

14. As found, Dr. Paz reviewed Claimant's medical history and conducted a physical examination as part of an independent medical examination. He reviewed the position of the Claimant's upper extremities during the altercation on December 14, 2021. Claimant confirmed that the upper extremities were at her side while she was walking at the time of contact. Dr. Paz explained that the surpraspinatus tendon begins to function at 60 degrees to approximately 120 degrees. Because Claimant's arms were at her sides when the contact occurred, they were located at zero degrees. Dr. Paz reasoned that there was thus no significant load tension across the supraspinatus tendon. Therefore, Dr. Paz concluded it was not medically probable that the incident on December 14, 2021 caused an acute rotator cuff tear.

15. As found, importantly, Dr. Paz testified that the findings on the January 28, 2022 MRI revealed retraction of the supraspinatus tendon and muscle atrophy only 45 days after the incident on December 14, 2021. However, he explained that muscle atrophy does not develop in 45 days, but takes more than three months to occur. Therefore, it is medically probable that Claimant's supraspinatus tear was not caused by the incident on December 14, 2021. Finally, Dr. Paz explained that the incident on December 14, 2021 also did not aggravate Claimant's pre-existing full-thickness rotator cuff tear because it existed before the work incident. The supraspinatus muscle was already torn, retracted, and atrophied at the time of the work altercation. Considering all of the medical evidence, including the position of Claimant's arm at the time of impact and the existence of muscle atrophy on MRI only 45 days after the December 14, 2021 incident, Dr. Paz persuasively concluded that it is more likely than not that Claimant's supraspinatus tendon tear was a degenerative condition caused by internal impingement.

16. As found, based on the medical records and persuasive opinion of Dr. Paz, the surgery requested by Dr. Shah on February 3, 2022 is not causally related to Claimant's December 14, 2021 work incident. The record reveals that Claimant was injured at work when a male customer struck his right shoulder against her left shoulder. Claimant has received reasonable, necessary and causally related medical treatment for an unspecified strain of her left shoulder. She may continue to receive reasonable, necessary and causally related medical treatment for the injury. However, the medical records do not reflect that Claimant suffered a left rotator cuff tear during the incident. As noted by Dr. Paz, Claimant likely suffered from a pre-existing, degenerative left shoulder condition unrelated to her work activities. Claimant's employment thus did not aggravate, accelerate or combine with her pre-existing condition to produce the need for surgical intervention. Accordingly, Claimant's request for the left shoulder rotator cuff repair surgery recommended by Dr. Shah is denied and dismissed.

ORDER

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

1. On December 14, 2021 Claimant suffered an unspecified strain of the left shoulder joint while working for Employer.

2. Claimant has received reasonable, necessary and causally related medical treatment for an unspecified strain of her left shoulder. She may continue to receive reasonable, necessary and causally related medical treatment for the injury.

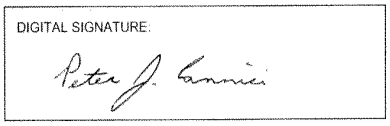
3. Claimant's request for the left shoulder rotator cuff repair surgery recommended by Dr. Shah is denied and dismissed.

4. Claimant earned an AWW of $535.55.

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

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

DATED: August 8, 2023.



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 5-219-204-002

ISSUES

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

FINDINGS OF FACT

1. Claimant has been employed by Employer for approximately thirteen years. Employer is a roofing company that employs approximately 430 employees, the majority of which are roofers and/or foremen. As relevant to the present claim, Claimant served in the role of service foreman, and received safety training from Employer. Claimant was designated as a "competent person," meaning he completed a 30-hour OSHA safety course and was trained to identify safety issues. In his role as a foreman and "competent person," Claimant was authorized to enforce safety rules, and take corrective action to remedy safety issues on the job site.

2. During the relevant time frame, Employer had in place a safety rule that required employees to maintain three points of contact when ascending or descending ladders. Claimant testified at hearing that he was aware of the rule and agreed that it was Employer's policy, and that the rule was enforced. Although the precise terms of the rule are not explicitly set forth in Employer's documentation, the parties agree the rule requires that employees ascending or descending ladders maintain three points of contact with the ladder at all times (*i.e.*, two feet and one hand; or two hands and one foot). The parties dispute what constitutes a "point of contact."

3. On October 7, 2022, Claimant was working on a jobsite in Colorado Springs. During the course of the day, Claimant made the decision to purchase coffee for the crew he was overseeing. The crew was working on a roof, which was accessed through a fixed, vertical ladder permanently attached to the side of the building. The ladder extended approximately twenty feet to the roof area where the crew was working. Claimant purchased cups of coffee from a nearby convenience store, and made the decision to deliver the drinks to the crew on the roof.

4. Claimant ascended the fixed ladder with a tray containing three cups of coffee in his right hand. Claimant's right hand and fingers were not grasping the rungs of the ladder, but his right wrist was "hooked" around the vertical rail on the side of the ladder while holding the tray of coffee in his right hand. Claimant testified that while ascending the ladder, he slid his right wrist/hand up the ladder and his left hand along outside of the other vertical rail, when his left hand slipped off the ladder, causing him to fall to the ground from approximately 15 feet. As a result of the fall, Claimant sustained injuries to both ankles and his left wrist. Claimant testified that he believed he complied with the three-points rule because his right wrist maintained contact with the vertical side of the

ladder while ascending, and that the tray of coffee did not cause him to be unbalanced. Given the vertical orientation of the ladder, the ALJ finds credible that Claimant was able to use his right hand/wrist to assist him in ascending the ladder.

5. Employer's safety manager, [Redacted, hereinafter GD] testified at hearing. GD[Redacted] testified that the three-points rule requires that employees maintain contact with the ladder with either two feet and one hand, or two hands and one foot. He testified that the rule requires that one hand be grasping a rung of the ladder. He testified that it would not be possible to comply with the rule while carrying an object in one hand while climbing a ladder. GD[Redacted] testified that he did not believe that the way the Claimant ascended the fixed ladder on October 7, 2022 (*i.e.*, carrying a tray of coffee in one hand) complied with the three-points rule, because Claimant was not grasping a rung with his right hand or maintaining contact. GD[Redacted] testified that Claimant was disciplined for failure to maintain three points of contact while ascending the ladder on October 7, 2022. GD[Redacted] testified that it is very seldom that he sees an employee not complying with the three-points rule without counseling them. He later testified that he always counsels employees he observes not complying with the rule, and that there had never been an exception.

6. As part of its operations, Employer issues "Infraction Notices" for violations of safety policies. (Ex. B). The "Infraction Notices' document the "Discipline Stage" for each infraction notice, which includes "Written Warning" and "Verbal." Four of the infraction notices document verbal discipline. From this the ALJ infers that, if Employer provided employees verbal warnings or verbal counseling, those actions would be documented in Infraction Notices.

7. Although GD[Redacted] testified the three-points rule was enforced, Respondents' exhibits demonstrate that Employer has issued only one infraction notice citing an employee for violation of this rule -- the infraction notice for Claimant's October 7, 2022 injury. Respondents' Exhibit B contains six additional "Infraction Notices" in which employees were disciplined for violating ladder safety rules between April 2019 and December 2022. None of these cite employees for violation of the three-points rule. Two infraction notices (*i.e.*, those issued on October 8, 2022, and December 12, 2022) include photographs of employees standing on ladders without maintaining three points of contact. Given the lack of Infraction Notices documenting disciplinary actions related to the three-points rule, the ALJ does not find credible GD's[Redacted] testimony that he always, without exception, counsels employees for violation of the three-points rule.

8. Employer's safety manual (Ex. 3), includes a section entitled "Job Site Safety - Ladder Safety." This section of the manual (Ex. 3, p. 38) advises employees to "Use all portable ladders safely. Properly select, inspect, erect, secure and safely use all ladders." This section does not reference or instruct employees on the three-points rule. The safety manual also defines the responsibilities of foreman (such as Claimant) with respect to safety at Section 12. (Ex. 3, p. 15). This section of the manual does not instruct foremen on the three-points rule. The only written reference to the three-points rule is contained in a slide presentation that GD[Redacted] testified was in OSHA training materials. (Ex. 5). A slide entitled "Climbing the Ladder," states the following "Face the ladder when

going up or down. Use at least one hand to grab the ladder when going up or down. Do not carry any object or load that could cause you to lose balance." (Ex. 5, p. 000194). The evidence was unclear if or when the OSHA presentation was provided to Claimant or other employees.

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).

Safety Rule Violation

Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation "Where injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." "Under § 8-42-

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

Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alvarado*, W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995).

Respondents have failed to establish that Claimant's indemnity benefits should be subjected to a 50% penalty for willful failure to obey a reasonable safety rule. Although the parties agree that Employer had in place a "three-points-of-contact" safety rule, the specific requirements of the rule are in dispute. Respondents contend the rule requires that employees "grasp" the rungs of a ladder with the fingers of at least one hand at all times when ascending or descending. However, Employer's training materials do not reflect the interpretation urged by Respondents. Employer's safety manual does not reference or explain the three-points rule, and thus provides no guidance to employees on compliance. While Ex. 5, the OSHA slide presentation, indicates that employees should "grab" the ladder with at least one hand, it does not require that employees grab the rungs or prohibit employees from carrying objects in one hand while ascending. Claimant credibly testified that he understood the three-points rule to require that the employee maintain contact with the ladder using either two feet and one hand, or two hands and one foot at a time.

Claimant contends it is sufficient that an employee maintain contact with the ladder by "hooking" a wrist around the vertical rail of the ladder. Employer's training and safety materials do not address this issue, and Respondents have failed to establish by credible evidence what, precisely, the "three-points" rule requires.

Employer did not have in place a rule that prohibited employees from carrying objects up a ladder, and trained employees not to carry any object that could cause them to lose their balance. Thus, Employer's policies implicitly permitted employees to carry objects or loads that would not cause them to lose their balance, and if they could maintain three points of contact.

Respondents have also failed to demonstrate that Employer consistently enforced the three-points rule. As found, GD's[Redacted] testimony that he always, without exception, counsels employees who do not follow the three-points rule is not credible. Employer's "Infraction Notices," do not document any employee receiving written or verbal disciplinary action for non-compliance with the three-points rule, other than Claimant. Although Claimant testified that the three-points rule is enforced, given the lack of clarity regarding the terms of the rule, it is unclear what version of the rule was enforced. The lack of enforcement of the three-points rule calls into question whether the Respondents' interpretation of the rule was conveyed to employees, such that an employee would know and understand the conduct that would violate or comply with the rule. Because Employer did not articulate and enforce the three-points rule, Respondents have failed to establish that Claimant knew the rule as Respondents' interpret it and deliberately performed an act forbidden by the rule.

The ALJ also finds credible Claimant's testimony that he maintained three points of contact with the ladder on October 7, 2022, as he understood the rule to require. The ladder from which Claimant fell was vertical and attached to a building, requiring Claimant to climb straight up. Although Claimant has many years' experience climbing ladders, it would be extremely difficult (if not impossible) to ascend a vertical ladder with one hand, while carrying a tray of coffee in the other. Claimant could not likely have ascended the ladder to the height from which he fell without maintaining three points of contact in some meaningful manner, whether it be through hooking his wrist around the vertical rail of the ladder, or grasping a rung with his fingers.

Respondents have failed to establish grounds for reducing Claimant's compensation pursuant to § 8-42-112 (1)(b), C.R.S.

ORDER

It is therefore ordered that:

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

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

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

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 8, 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. 4-991-178-006

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on November 1, 2022 on issues that included medical benefits that are authorized and reasonably necessary, and penalties as follows:

> Medical benefits ordered by Administrative Law Judge Nemechek March 3, 2022, and July 6, 2022. Failure to pay Claimant and medical providers pursuant to 7/6/2022 ICAO Order, attached, and failure to make any meaningful attempt to arrange payment. $1000 per day since 8/26/2022. Section 8-43-401 (2)(a), CRS Respondents owe 8% of the amount of wrongfully withheld benefits. Respondents have unilaterally changed PTD benefits payment scheduled without Division or Claimant approval. Respondents owe 8% interest on all late direct deposit payments. Section 8-43-401 (2)(a).

Respondent filed a Response to November 1, 2022 Application for Hearing on December 1, 2022 listing as issues reasonably necessary, authorized and related medical benefits. Respondent also listed an affirmative defense to Claimant's alleged penalties as follows:

> C.R.S § 8-43-304(4) in Claimant has not stated with specificity the grounds on which the penalty is being asserted, therefore, pursuant to C.R.S. § 8-43-304(4), Respondents reserve the right to cure any alleged violation, if any, within 20 days of Claimant specifying the violation; statute of limitations. … Respondents properly denied medical treatment consistent with Rule 16…

Claimant's exhibits 1 through 8 were admitted into evidence. Also admitted over Respondent's objection were Claimant's Exhibit 9, Exhibit 10 bates 0001-0003 and 0006 (for purposes of a timeline and date documents were exchanged not for the truth of the matter asserted in the body of the email), Claimant's Exhibits 12 through 15, 17 and 18. This ALJ will take judicial notice of Exhibit 16 as part of the Act. Respondent's exhibits A through C were admitted into evidence.

On March 30, 2023[1] this ALJ issued an Order noting that the issues for hearing were to be bifurcated and that this ALJ would issue a separate Order regarding the issue of authorization of medical provider in this matter. The parties were granted through April 6, 2023 to provide briefs, post-hearing position statements or proposed orders with regard to the bifurcated authorization of medical provider issue.

On April 13, 2023 this ALJ issued a Summary Order on the bifurcated issue of authorization of medical provider determining that selection of authorized provider had passed to Claimant and Claimant selected Dr. Ryan Bozzell. The order was served to the parties on the same day. The Order specified that the parties were required to submit a request for a full order within ten working days of the date of service. Neither party requested a full order pursuant to Section 8-43-215 (1), C.R.S., so the Order issued on April 13, 2023 was final. Claimant's authorized treating provider (ATP) in this matter is now Dr. Bozzell, and any providers within the chain of referral he refers Claimant to are

[1] The order was mistakenly dated December 30, 2023 instead of March 30, 2023.

authorized with regard to Claimant's orthopedic, pulmonary and urological problems related to this July 23, 2015 claim.

The parties were provided through April 21, 2023 to submit post hearing positions statements, briefs or proposed orders on the remaining issues. Following two motions to extend this deadline, the motions were granted and the deadline was extended to May 3, 2023. The proposed Findings of Fact, Conclusions of Law and Order were timely filed.

This ALJ issued Findings of Fact, Conclusions of Law and Order on May 9, 2023, which was served on May 10, 2023 finding Respondent had failed to comply with Nemechek's order of March 2, 2022, ordering Respondent to pay the past due reasonably necessary and related medical benefits, denying interest, and ordering a penalty for failure to comply with the prior order and ordering reasonably necessary medical benefits.

Respondent filed a Petition to Review on May 30, 2023. The Briefing Scheduled was issued on June 8, 2023. Following the granting of an extension of time, Respondents filed Respondents' Brief in Support of Petition to Review on July 5, 2023. OAC also granted Claimant an extension of time. Claimant filed Claimant's Brief in Opposition to Petition to Review on July 25, 2023. This Supplemental and Corrected Findings of Fact, Conclusions of Law and Order follows.

STIPULATIONS OF THE PARTIES

At the time of the hearing on March 29, 2023 Claimant withdrew the penalty with regard to late indemnity benefits. This is considered a stipulation of the parties. Therefore both parties agreed to withdraw exhibits related to this issue, Claimant's Exhibit 11 and Respondent's Exhibit D.

Further, Claimant stipulated to the admission of Respondent's Exhibit E with the following conditions:

A. The exhibit be utilized only as a per unit or per line example of fair costs of the items Claimant itemized in Exhibit No. 17, not to represent the total owed to Claimant and only be utilized to calculate the expenses Claimant has had in the past, not for future costs.

B. Claimant be allowed to testify about her usage of the items enumerated in Claimant's Exhibit 17, including how much she is currently using the items listed and how much she used them in the past as well as how she will be using them in the future.

C. Claimant will, from the March 29, 2023 hearing forward, obtain receipts of all supplies purchased and submit them to Respondent for payment.

D. The bills paid by [Redacted, hereinafter BC] be paid in full by virtue of Sec. 8-42-101(6)(a) & (b), C.R.S.

E. Respondent provide the items listed that Claimant requires and are reasonably necessary or accept the receipt of the costs from Claimant in the future, reimbursing Claimant the full value of what Claimant has paid out of pocket pursuant to Sec. 8-42-101(6)(b).

This ALJ accepted that Exhibit E is not a document that would normally be admitted into evidence, without the laying of foundation, as it is hearsay, and notes that Claimant's conditions are reasonable. Respondent neither acquiesced nor provided sufficient arguments supporting an objection to the stipulation. Respondents noted in the proposed order that Exhibit E was admitted and this ALJ infers from these actions that Respondent conceded to the offered stipulations. The stipulation of the parties is accepted and is part of this order.

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that Respondent failed to comply with ALJ Nemechek's March 2, 2023 Findings of Fact, Conclusions of Law and Order following closure of the appeal process by July 27, 2022.

II. If Respondent failed to comply with the Order, what are the reasonably necessary and related maintenance medical benefits that Respondent owed to Claimant?

III. If Respondent failed to comply with the Order, whether Claimant proved by a preponderance of the evidence that she is owed eight percent (8%) interest on all benefits past due and owing pursuant to Sec. 8-43-401(2)(a), C.R.S.

IV. If Respondent failed to comply with ALJ Nemechek's March 2, 2022 Order to pay Claimant and medical providers within a reasonable time, whether Claimant proved by a preponderance of the evidence if a penalty is owed pursuant to Sec. 8-43-304 and 8-43-305, C.R.S. and the appropriate penalty, considering the *Demi* test.

FINDINGS OF FACT

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

1. Claimant was 58 years old at the time of the hearing. Claimant was adjudicated permanently and totally disabled after she was injured in the course and scope of her employment with Employer on July 23, 2015.[2] Claimant was working as an assistant produce manager for Respondent-Employer when she was injured while pulling a pallet of heavy bags of potatoes. The pallet began moving very fast and Claimant was thrown into a set of double doors. Claimant then fell on her back and left hip. Claimant initially received conservative medical treatment care, including physical therapy, injections, and medications. However, she continued to experience pain and urinary incontinence, which worsened over time.

2. Claimant continued to have trouble with mobility, function, and urinary incontinence, in addition to low back pain, left lower extremity radicular problems, breathing problems and chronic pain.

[2] Claimant testified that she had been injured on July 24, 2015 but all three of the prior orders issued by other ALJs as well as pleadings submitted all cite to July 23, 2015 as the date of the injury.

3. ALJ Kimberly Turnbow issued Findings of Fact, Conclusions of Law and Order on June 26, 2017 ordering further neurosurgical evaluation with Scott P. Falci, M.D. ALJ Turnbow specifically found that:

> The ALJ is concerned about the possibility of continuing progressive worsening of the urinary incontinence and left leg weakness conditions, and possible right leg weakness and even bowel incontinence as described by Dr. Falci. This ALJ finds and concludes that all reasonable conservative treatment and diagnostics have been exhausted, and is [sic.] that Claimant's conditions are significant and require urgent care. The ALJ notes that Claimant's description of her urinary incontinence was credible and compelling.

4. ALJ Turnbow ordered that:

> Respondents shall pay for a repeat neurosurgical consultation with Dr. Falci and, if he offers a spinal untethering surgery, Respondents shall pay for all reasonable and related pre-operative, operative, and postoperative expenses, according to the Colorado Fee Schedule, that are related to such surgery.

5. Following ALJ Turnbow's decision, Claimant did, in fact, follow up with Dr. Falci and he performed the untethering surgery in 2017. During the surgery her lungs collapsed. Subsequent to the surgery, Claimant developed problems breathing as a consequence of the lung collapse. Claimant also had urinary incontinence as a consequence of her low back injury. Claimant credibly stated that the low back surgery, while it did not solve all her problems with her lumbar spine or her urinary incontinence, and added additional pulmonary issues, the surgery helped her to stand up straight, when she had been bent over due to the pain for a long time. She explained that the surgery was necessary to stop the progression of nerve damage in the spine, going into her lower extremities and bladder problems.

6. On June 11, 2020 ALJ Glen B. Goldman issued Findings of Fact, Conclusions of Law and Order awarding permanent total disability benefits, and stated that "Respondents shall provide Claimant maintenance medical benefits for her back injury and urinary incontinence." ALJ Goldman found that Claimant testified she required the following supplies:

. Incontinence pads, extra heavy, two bags per week, since August 2015.
· Periodic visits with Dr. Paulsen who has assumed direct care.
· Wipes, which she has bought herself.
· Urinary pads for the bed, which she has bought on her own.
· Self-Catheterization supplies.
· Oxygen and oxygen supplies.
· Cane which she bought.
· Grabber which she has bought.
· Large ball, small ball, one and 3-pound weights, balancing pad, recumbent bike recommended by her physical therapist.

7. ALJ Goldman noted that "[D]uring her testimony, Claimant asked for a bathroom break, cried several times, and changed chairs because of discomfort." This ALJ noted similar behavior during her March 29, 2023 hearing, as Claimant was uncomfortable, would frequently shift, tear up during testimony and discussion of her claim, and required breaks.

8. In addition to making a finding that Claimant was permanently and totally disabled, ALJ Goldman found that:

> 53. Claimant's surgery was complicated by a collapsed lung which required her to stay in the hospital about two weeks. (*Exhibit 12, p. 2*).
>
> 54. Due to her work injury, Claimant has become less active, depressed, and unable to control her weight. As a result of her work injury, Claimant has gained approximately 76 pounds.
>
> …
>
> 58. Claimant's urinary incontinence and need for medical treatment for such condition was caused by her work injury when she suffered a contusion to her sacral nerve.
>
> 59. Claimant requires maintenance medical treatment to relieve her from the effects of her work injury and to maintain MMI.
>
> 60. Claimant requires maintenance medical treatment for her back injury and urinary incontinence.

9. On August 25, 2020, Respondent filed a Final Admission of Liability ("FAL") in which it admitted for reasonable necessary and related medical benefits for Claimant's back injury and urinary incontinence pursuant to ALJ Goldman's Order.

10. ALJ Timothy L. Nemechek issued a Summary Order on November 26, 2021 ordering as follows:

> 1. Claimant established by a preponderance of the evidence that she is entitled to maintenance medical benefits under the Colorado Workers' Compensation Act.
>
> 2. Respondents shall provide medical benefits to Claimant required to treat the effects of her work injury and to maintain MMI, pursuant to the Colorado Workers' Compensation Medical Fee schedule. Specifically, **Respondent shall pay** for the following:
>
> - All medical supplies related to Claimant's urinary incontinence (including catheters, small and large wipes).
> - Oxygen concentrator (reimbursement for expenses previously incurred).
> - CPAP machine and supplies (including cannula, tubing mask/headgear).
> - The walking cane, 4-wheel walker, wheelchair.
> - Exercise equipment (large and small exercise balls, 1 and 3 pound weights, treadmill, exercise bands, balancing pad, and recumbent bike), [reimbursement for expenses previously incurred].
>
> 3. Claimant's request for a one-year gym membership is denied and dismissed.[3]

[3] This was denied because Claimant was no longer in the Granby, Colorado area and had moved to New Mexico.

11. These findings were supported by a letter issued by Dr. Paulsen dated August 26, 2020 which noted that Claimant would require the following items and that Respondent had denied liability for the medical supplies by letter dated October 6, 2020:

I. Urinary Incontinence Supplies:

1. Urinary pads – 2 bags/week
2. Wipes – 10 bags/year
3. Cloth urinary pads for bed – 8 pads/year

II. Mobility Items:

4. Cane
5. 4 wheel walker
6. Wheelchair
7. Grabber

III. Exercise equipment including:

8. Large exercise ball
9. Small exercise ball
10. One and three pound weights
11. Treadmill
12. Exercise bands
13. Balancing pad
14. Recumbent bike
15. Suction handrails for bathroom
16. Pool therapy access
17. Annual pass to Durango Rec. Center

12. The hearings before ALJ Nemechek, took place on November 10, 2020. At that time Claimant testified that she had moved to New Mexico. The move was specifically noted in both the Summary Order and the Findings of Fact, Conclusions of Law and Order that was issued by ALJ Nemechek on March 2, 2022. This Order was consistent with his prior Summary Order in listing Respondent's same responsibilities to pay.

13. ALJ Nemechek found and ordered that "Counsel for Respondent stipulated to pay for the co-pays of (sic.) incurred by Claimant for urinary incontinence pads totaling $360.00. *This Stipulation was accepted by the Court and is made part of this Order.*" (Emphasis added.) However, Claimant stated that none of the items she listed on the request for reimbursement were part of any reimbursement. Claimant stated that she did not receive the $360.00 for urinary incontinence pads. Further, in examining the medical benefits payment log, no check was issued to Claimant following the date the stipulation was made on November 10, 2020 to the last payment of medical benefits on February 28, 2022. Neither did Respondent provide any evidence of actual payment of the stipulated amount.

14. ALJ Nemechek specified that Dr. Paulsen's testimony that Claimant required supplies for urinary incontinence, assistive devices for mobility and oxygen supplies was persuasive. Further, ALJ Nemechek found Claimant's testimony, that she requires the supplies, persuasive.

15. The process for the hearing before ALJ Nemechek likely started no later than August 2020, as a hearing is set between 80 to 100 days. Claimant stated that she had been waiting before this to receive payments without response. She stated that she had been excited to receive ALJ Nemechek's order with the hope that she would get the care and equipment she needed but after the order was issued nothing happened. She felt disappointed and disheartened when nothing happened. She felt emotionally drained by the process and was depressed, though she had good days and bad days. The same was true of her physical abilities, that she had good and bad days. She has had to take money out of her limited grocery budget for food and other items to get needed supplies that were indispensable, like pads and wipes. She stated she could not do anything in life and had to just wait to be reimbursed to get on with her life. She stated that, while Dr. Paulson had her on antidepressants previously, she no longer had access to them. Claimant was noted to breakdown on multiple occasions, and one of those occasions was while explaining what happened with her hopes of getting some resolution for medical care and reimbursement for items that she required.

16. Respondent appealed the decision of ALJ Nemechek and a Final Order was issued by the Industrial Claim Appeals Office (ICAO) on July 6, 2022 affirming ALJ Nemechek's decision of March 2, 2022. ICAO noted that Respondent had 21 days to file a Notice of Appeal to the Colorado Court of Appeals. Pursuant to Sec. 8-43-301(10), C.R.S., after July 27, 2022, the right to appeal was closed and the order became final.

17. The Application for Hearing dated November 1, 2022 before this ALJ listed Claimant's address in Farmington, New Mexico and was sent to Respondent's. In Respondent's Response to Application for hearing dated December 1, 2022, Respondent listed Claimant's address in Farmington, New Mexico.

18. At the current hearing Claimant stated that she moved from Granby, Colorado to Farmington, New Mexico, a little over two and one half years ago. She lived in Granby for approximately eight to nine years, where she had worked for Employer. She testified that she was planning to live in Farmington for the foreseeable future. She moved because most of her family lived in New Mexico and she wanted to live at a lower elevation. She explained that the lower elevation helped her breath easier.

19. While in Colorado, Claimant suffered from pulmonary issues following her 2017 surgery requiring her to use both a CPAP machine and an oxygen machine from that time until she moved to New Mexico. She currently continues using her CPAP machine nightly but not her oxygen machine as the lower altitude has help significantly. She does, however, continue to keep track of what her oxygen levels are, in case she has to start using the oxygen machine again.

20. After she last saw Dr. Paulson in approximately May 2021, Dr. Paulson advised her it was too far for Claimant to be travelling for maintenance care from Farmington, New Mexico to Denver, Colorado. She was no longer able to continue with her Colorado treating provider. Neither would Dr. Paulson do virtual/telemedicine appointments, especially to prescribe medications long distance. Claimant stated that she required a physician that could make the appropriate referrals, including to an orthopedic specialist, an urologist as well as a pulmonologist, to continue appropriate

maintenance care. Dr. Paulson not provide a referral to a medical provider in Farmington, New Mexico.

21. Claimant had been seeing her personal treating provider, Dr. Ryan Bozzell, a family doctor, in Farmington, New Mexico for her conditions, including for her low back and bladder incontinence problems but because he was not designated by Respondent as an authorized medical provider for the workers' compensation claim, Claimant had only seen him in a limited capacity for this claim. Claimant had other conditions which Dr. Bozzell had also addressed, including rheumatoid arthritis and ankylosing spondylitis. She had been on Medicare and Medicaid since approximately July 2020, when her health benefits were terminated by Employer and she moved to New Mexico. Dr. Bozzell was approximately ten minutes from where she lived for over two years. She had been seeing him for approximately one year. He was paid by Medicaid and Medicare.

22. This ALJ issued a Summary Order on April 13, 2023 that determined the selection of authorized provider had passed to Claimant and Claimant selected Dr. Ryan Bozzell. Dr. Bozzell became Claimant's authorized treating physician as the period to appeal that order expired, making the order final.

23. Since Claimant's July 23, 2015 work related injury to the present, Claimant has had bladder problems and incontinence. This was determined related by ALJ Turbow in her June 26, 2017 order. She specifically stated that the "ALJ finds credible and persuasive Dr. Falci's theory that a stretched spinal cord suffered in her fall at work in conjunction with Claimant's low-lying conus explains why Claimant suffers from urinary incontinence and left leg weakness." Claimant has been using pads, cloth wipes, bed pads, cleansing wipes and antibacterial hand wash since that time or shortly thereafter. Further, following the surgery of 2017, Claimant had to use catheters and urine bags for approximately 10 months. As found these were all reasonably necessary as previously found by ALJ Nemechek. Respondent is liable for these medical benefits and costs that are reasonably necessary and related to the claim. Claimant's estimate of usage and length of time of use is credible and are laid out below.

24. This ALJ found the price on the receipt Claimant submitted from Walmart as the actual cost Claimant incurred for maximum absorbency pads, which is what Claimant actually uses. (See ALJ Goldman Order of June 2020 listing "[I]ncontinence pads, extra heavy, two bags per week," and Dr. Paulson's letter of August 26, 2020 cited in ALJ Nemechek's Order.) This ALJ also determines that the antibacterial soap was critical to avoid infections and to remain sanitary in light of Claimant having to deal with dirty pads, wipes and accidents caused by the incontinence, including changing wet bedding and clothing. While Claimant may have used this product before her surgery in 2017, she credibly testified that she started using it regularly after her 2015 accident.

25. Claimant purchased a cane for walking, which cost her approximately $20.00, but has since purchased two others. She also bought a four wheel walker from a garage sale for approximately $25.00. Both of these items are shown in the pictures within Claimant's Exhibits. Claimant did not obtain receipts for these items and the costs were approximated. Claimant stated she required the use of these items to allow her to be as functional as possible. Claimant stated that she uses the cane in her home, and the walker when she leaves the house. Her left leg frequently gives out and is not stable

so she needs the wheel chair to prevent any further falls. The cane, the four wheel walker and the wheel chair were determined to be reasonably necessary medical benefits related to Claimants injury by ALJ Nemechek. As found, the canes and the walker are reasonably necessary should be reimbursed to Claimant.

26. It has become more and more difficult for Claimant to get around and she requires a wheel chair that has the outer large wheels so she can operate the chair herself and not have to rely on others to push her around in the chair. When on family outings that required too much walking, she could not participate because of her inability to be on her feet for long. She showed a picture of the kind of wheel chair she required (Empower lightweight wheelchair)[4] that was priced at $319.98. As found, this chair is reasonably necessary and related to the July 23, 2015 work injury.[5] ALJ Nemechek also found a wheel chair reasonably necessary and related to the injury when he issued his original Summary Order. As further found, the [Redacted, hereinafter WS] wheel chair (not the aluminum two wheel one listed by [Redacted, hereinafter OM]) is reasonably necessary and Claimant shall be reimbursed for this expense as well.

27. Claimant continued to be out of pocket for the cost, which were not covered by her personal insurance, of the oxygen concentrator, a large machine that holds 2 liters of concentrated oxygen, and CPAP machine. She paid a portion of the oxygen machine, purse and CPAP machine but some of the cost were paid by her prior insurance, BC[Redacted]. She paid $2,185.00, for the oxygen machine, oxygen purse (portable oxygen machine), and CPAP, which have not yet been reimbursed. She did not contact BC[Redacted] to find out how much the insurer had paid for their percentage because they discontinued her insurance since July 2020 and she was no longer a member. In addition, she required the cannulas (used to funnel the oxygen into her nose), the headset and mask since approximately 2017. This was noted by ALJ Goldman in June 2020 and ordered by ALJ Nemechek. She used the oxygen concentrator from the time she had her surgery in 2017 continuously while in Granby, CO. She has been able to taper off of the oxygen since moving to New Mexico due to the lower altitude. As found, the oxygen machine, purse and CPAP machine as well as all the necessary supplies are all reasonably necessary and related to the 2015 work injury and shall be reimbursed.

28. Claimant continued to use the CPAP machine, which is a machine that provides forced air (but not concentrated oxygen). It helps her breath while sleeping at night. The CPAP machine requires supplies as well, including cannula, mask, headgear, tubing, filters, replacement water chambers and a CPAP cleaner. She has purchased the equipment on her own, except for the CPAP cleaner, which she does not have as she could not afford to purchase the $264.99 cleaner at WS[Redacted]. The cleaner sanitizes the supplies including the headgear, cannula, and tubing. This is required to keep bacteria and germs from forming on and in the equipment and supplies. She explained that she runs the risk of infection without the sanitizer and has been operating the machine without cleaning it properly since 2017, sucking whatever forms on the supplies into her lungs. While ALJ Nemechek specifically stated Respondent shall pay for “CPAP machine

[4] There was also a picture of a “Transport chair,” which is one that a patient cannot move herself. Claimant credibly testified that this chair was not suitable for her as she would be dependent on others to push her.

[5] While there was mention of an electric chair, Claimant stated that she did not require one at this time.

and supplies (including cannula, tubing/headgear)" he did not specifically address the equipment necessary to keep the CPAP supplies clean. Claimant testified that the cleaner was recommended for use every day. As found, Claimant requires this machine to keep her CPAP equipment clean and sterile for use and avoid any further risks of infections or bacterial overgrowth. As found, this durable medical equipment is a reasonably necessary medical benefit and related to the July 23, 2015 work injury.

29. Claimant testified that her inability to care for herself as recommended by her prior provider has affected her emotionally and financially. Following the long process of trial and appeal, she continued to be somewhat skeptical that she would have resolution of the issues and finally obtain the funds to purchase those items she has been unable to obtain due to failure of the insurance to provide her with any options. As found, Respondent's failure to take any steps to provide Claimant the required medical maintenance care including, a medical provider, the equipment itself or the payment for the cost of the equipment is inexcusable.

30. Claimant continued to have to make the trip to Denver to see Dr. Paulson, until approximately May 2021. It is clear that Respondent provided consistent payments for medical care, including for prescription medication through [Redacted, hereinafter TS], until May 7, 2021. Following this date there were only three more payments to TS[Redacted], two for a date of service of November 12, 2021 and one for February 11, 2022. No other payments were shown on the payment log and there was no indication that the payment log was incomplete.

31. Claimant stated that she had worked long hours with the assistance of her sister to write all the expenses she had incurred since her injury that had not been paid or promised. She initially submitted the spreadsheet to Respondent by early December, 2022.[6] Further, on January 13, 2023 Claimant submitted some receipts and again, prior to trial, Claimant found several other receipts, found in her storage, and sent them to Respondent.

32. Respondent was responsible for the costs of reasonably necessary and related maintenance medical care as previously established by orders issued by ALJs Goldman and Nemechek. Claimant noted that she required additional assistance even when she was treating with the medical providers, which included the alternating use of over the counter Tylenol and ibuprofen. Further, to assist her with pain relief, Claimant obtained Theraworx, a topical pain relief foam. As found Claimant's use of these three products was and is reasonably necessary and related to her July 23, 2015 work related injury.

33. Claimant has been unable to purchase the recumbent bike ordered by ALJ Nemechek because she could not afford the purchase price of $469.99. Given ALJ Nemechek's denial of a gym membership, it was critical for her to receive the exercise equipment needed to maintain her functional abilities, to allow her to lose some weight, and help control pain and depression. She also has to keep up her strength as she needs to be able to keep as mobile as possible for as long as possible. Further, the balancing pad would help her as well. These were also items ordered by ALJ Nemechek to be paid

[6] As Claimant was unable to pinpoint the exact date, this ALJ will infer it was no later than December 31, 2022.

by Respondent. As found, these items continue to be reasonably necessary and related to the claim and shall be reimbursed to Claimant.

34. Claimant further paid for the exercise balls, weights, a treadmill, exercise bands, also photographed in the exhibits and listed on her spreadsheet. Claimant paid for this equipment out of her own pocket and requested that Respondent reimburse her, pursuant to ALJ Nemechek's order, without response. As found, for these items alone Claimant is still owed approximately $342.88 and shall be paid.

35. On March 3, 2023 Respondent obtained some of the pricing through OM[Redacted] for numerous of the items which Claimant purchased and that was ordered by ALJ Nemechek. The OM[Redacted] pricing was submitted as a spreadsheet of the individual items with prices.

36. As found, Respondent knew or should have known that Claimant would require continuing medical care. This ALJ issued a Summary Order dated April 13, 2023, finding that Respondent knew or should have known that Claimant moved to Farmington, New Mexico as of at least November 10, 2020, though more likely before July 2020. Respondent knew that Claimant required ongoing medical care for her low back, respiratory conditions and her urinary incontinence. Yet, when Claimant moved, Respondents failed to designate a provider nor did they pay for any further medical care other than the occasional prescription.

37. As found, Respondent knew or should have known that they were responsible to pay for the ordered medical benefits listed by ALJ Nemechek. The order put the onus on Respondent to comply with the order. It stated that "Respondents shall pay" for the items listed, which this ALJ determines was a proactive obligation. As further found, the order did not specify that Claimant had to make a claim or submit any receipts, as she had already made a claim and it was discussed by ALJ Nemechek and ordered.

38. As found, Respondents stipulated they would pay for past due benefits of $360.00, which ALJ Nemechek incorporated into his summary order of November 26, 2021, specifically stating that "*This Stipulation was accepted by the Court and is made part of this Order.*" This was also in his March 2, 2022 Findings of Fact, Conclusions of Law and Order. This was an order of the court and became final on July 27, 2022 when the appeal process terminated and the order became final. As found, Respondent failed to comply with this order of the court, which they had agreed to pay.

39. As found, Respondent were aware and had notice of the itemized list of medical benefits Claimant required by July 27, 2022 when the appeal process terminated and ALJ Nemechek's order became final. Respondent had knowledge of the items Claimant was requesting as they featured prominently in both ALJ Goldman's and ALJ Nemechek's Final Orders which ALJ Nemechek found as reasonably necessary medical benefits related to the claim. Respondent failed to comply with ALJ Nemechek's Order to pay the reasonable, necessary and authorized medical care.

40. As found, by combining the information that was persuasive and credible from both the Claimant's and OM's[Redacted] spreadsheets as well as considering Claimant's testimony and other receipts in the record, this ALJ makes the reasonable

choice to determine the actual cost of past due benefits that Respondent was ordered to pay.

41. After considering the pricing that OM[Redacted] recalculated, and Claimant's re-drafted second spreadsheet (Exh. 17) which more accurately reflected her expenses,[7] and Claimant's credible and persuasive testimony, it is determined that Respondent shall pay Claimant as follows:

Bladder & Incontinence Supplies			
Item description	**Price per unit**	**Amount**	Total price
EQUATE OPTION PADS, DISCREET BLADDER PROTECTION LONG LENGTH, MAXIMUM ABSORBENCY; BAG OF 72	$14.34	368	$ 5,277.12
CARDINAL HEALTH DISP DRY WASHCLOTH, 9" X 13.5", WHITE CS/500 (MFR# AT907)	$13.10	85	$ 1,113.50
FIBERLINKS TEXTILES INC AMERICARE ULTRA WATERPROOF SHEET PROTECTOR WITH HANDLES 34" X 36" TWIN SIZE (MFR# A12605/H)	$13.50	14	$ 189.00
BARD ALL PURPOSE RED RUBBER URETHRAL CATHETER 16FR, CASE/100 (MFR# 9416)	$82.30	10	$ 823.00
URINARY DRAIN BAG MCKESSON ANTI-REFLUX VALVE STERILE 2000ML, VINYL, CS/20 (MFR# 37-2802)	$40.95	10	$ 409.50
MEDLINE ALOETOUCH QUILTED PERSONAL CLEANSING WIPES 8 X 12, PK/48 (MFR# MSC263625)	$3.58	20	$ 71.60
DIAL ANTIBACTERIAL W/ MOISTURIZERS, SCENTED, 7.5OZ (MFR# 2461275)	$2.95	144	$ 424.80
*MINUS $360.00 PER THE STIPULATION		***Total***	**$7,948.52**
Mobility Aids			
		Amount	Total price
CARDINAL HEALTH ADJUSTABLE OFFSET PUSH BUTTON CANE, BLACK (MFR# CNE0014)	$22.50	3	$ 67.50
FOUR WHEEL WALKER	$25.00	1	$ 25.00
MEDLINE EMPOWER LIGHTWEIGHT WHEELCHAIR UP TO 300 LBS. WEIGHT CAPACITY	$319.99	1	$ 319.99
CANE HEAVY DUTY REPLACEMENT TIPS	$16.35	14	$ 228.90
		Total	**$ 641.39**
Oxygen Supplies			
	Item description	**Price**	**Amount**	**Total Price**
CPAP TUBING		$47.13	20	$ 942.60
CPAP MASK		$115.21	10	$ 1,152.10

[7] With the exception of the "Handicap Features for her Household," which have not been requested and were not at issue at this hearing, and reserved for future determination.

CPAP HEADGEAR	$30.26	10	$ 302.60
CPAP FILTERS (EACH FILTER)	$2.64	30	$ 79.20
CPAP CLEANER	$316.14	1	$ 316.14
REPLACEMENT WATER CHAMBER	$30.99	10	$ 309.90
PORTION PAID BY CLAIMANT OF PURCHASED CPAP MACHINE AND OXYGEN CONCENTRATORS	$2,185.00	1	$ 2,185.00
PULSE OXIMETER FINGER TIP	$29.97	1	$ 29.97
			$5,317.51
Other Miscellaneous Supplies			
Item description	**Price**		
LARGE BALL	$24.99	1	$ 24.99
SMALL BALL SET	$27.99	1	$ 27.99
WEIGHTS - BELL	$49.95	1	$ 49.95
USED TREADMILL	$200.00	1	$ 200.00
EXERCISE BANDS	$39.95	1	$ 39.95
RECUMBENT BIKE	$469.99	1	$ 469.99
BALANCING PAD	$159.99	1	$ 159.99
IBUPROFEN (OTC)	$13.70	42	$ 575.40
TYLENOL (OTC)	$8.99	28	$ 251.72
THERAWORX TOPICAL PAIN RELIEF SPRAY (MFG# AZVTWR08SPH)	$24.50	28	$ 686.00
ALJ NEMECHEK STIPULATED AND ORDERED FUNDS*	$360.00	1	$ 360.00
			$2,845.98
*(DEDUCTED FROM URINARY INCONTINENT TOTAL)			
		Cum. Total	**$ 16,753.40**

42. Respondent shall pay Claimant the total amount of $16,753.40 for those benefits as established by the chart above.

43. Respondent shall pay past due medical benefits to BC[Redacted] for any out of pocket reasonably necessary medical care they may have paid for problems with incontinence and oxygen or lung issues suffered by Claimant related to her July 23, 2015 work injury.

44. Further, as found, Respondent failed to comply with ALJ Nemechek's order, which merits an additional penalty due to the violation of the order to pay. This penalty is

deemed to be from July 27, 2022 and continuing until the funds are paid by Respondent to Claimant.

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

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (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*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

B. Failure to Comply with ALJ Order

Claimant alleges that Respondent failed to comply with ALJ Nemechek's Summary Order on November 26, 2021 and subsequent Findings of Fact, Conclusions of Law and Order of March 2, 2022 wherein he ordered Respondent to pay for, in compliance with the Colorado Workers' Compensation Fee Schedule, certain items he found were reasonably necessary and related to the injury. These items included, but were not limited to a stipulated amount of $360.00, medical supplies related to Claimant's urinary incontinence, oxygen concentrator, CPAP machine and supplies, walking cane, 4-wheel walker, wheelchair, and specific exercise equipment. Some of the items Claimant had already purchased, some had been partially paid by her personal insurance, some of the items required an ongoing recurring purchase and some of the items had not been purchased due to the costly nature of the items.

What is clear is that Respondent neither paid for nor made arrangements to pay for what they had stipulated to pay nor what Claimant paid for, what she could not pay for and/or failed to make arrangements for Claimant's receipt of the items prescribed. Nothing in ALJ Nemechek's order could be confused. He specifically stated that the stipulated amount of $360.00 was "*accepted by the Court and is made part of this Order."* Claimant had established she was entitled to maintenance medical benefits and that "Respondent shall pay for the following items." The use of "shall" here is interpreted as mandatory. Nothing in ALJ Nemechek's order indicated that they only needed to pay for the items if Claimant produced a receipt that Respondent accepted as accurate or reasonable. Nothing in the order noted that Claimant had to purchase the items and then produce the receipts. Neither did the order indicated that Respondent was able to reject the price or value of what Claimant had purchased. In fact, pursuant to Sec. 8-42-101(6)(b) Claimant must be reimbursed the full amount of what she paid.

No persuasive evidence was provided by either party as to the cost of the items listed pursuant to the Colorado Workers' Compensation Fee Schedule or what items were not listed on the Fee Schedule. It is not up to this ALJ to provide those costs and rule on what medical services or items are on the Fee Schedule. However, Claimant either provided a receipt, an estimate of the cost of the item or agreed to the number identified by Respondent on the OM[Redacted] listing, which Respondent tendered as an exhibit of potential costs of the item (Exhibit E, which was admitted by stipulation). Respondent did not state or assert that those per item cost listed on the OM[Redacted] document were in compliance with the Fee Schedule either. However, what is clear from the evidence is that ALJ Nemechek ordered Respondent to pay for items which were reasonably needed

to maintain Claimant at MMI and ordered Respondent to pay. Nothing in the evidence persuasively indicated that any of the items listed by Claimant in her spreadsheet had actually been paid for previously. In fact, the only statement that indicated that Respondent had paid pursuant to a stipulation of the parties which specifically stated "Counsel for Respondent stipulated to pay for the co-pays of (sic.) incurred by Claimant for urinary incontinence pads totaling $360.00. This Stipulation was accepted by the Court and is made part of this Order." However, Claimant credibly testified that she had not been paid pursuant to the stipulation and Employer's log does not show a payment.

What is patently clear to this ALJ is that Respondent failed to comply with ALJ Nemechek's order once it became final. They did not pay for the amount they had promised by stipulation. They did not make the arrangements necessary for Claimant to receive the items. They did not send any inquiries of what Claimant would prefer to happen or make arrangements with Claimant to pay for the items. They did not provide persuasive evidence that they were in the process of acquiring the items to send to Claimant through a vendor, which is commonly done within the workers' compensation system in cases like these, where Claimant has an ongoing disability that requires frequent refills, like medications, incontinence pads, or equipment. What is clear, is that, pursuant to ALJ Nemechek's order, Respondent had, at the very least, a list of Claimant's ongoing medical need requirements as authored by ATP Paulsen since August 26, 2020. It is inconceivable that Respondent had the list of these items by no later than the hearing of November 10, 2020 and, still, Respondent provided little evidence that they had taken any affirmative steps to procure the items or pay for the items or the funds promised. Therefore, they cannot credibly assert that they had no knowledge of them or not enough time to provide them. This pattern of behavior is a blatant disregard for the Workers' Compensation System and to the Act as it showed that Respondent, had indeed, not given any importance to the ALJ's findings and his order. Claimant has shown by a preponderance of the evidence that Respondent failed to comply with ALJ Nemechek's order when it became final.

C. Reasonably necessary and related medical benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). 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 of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 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*, 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).

Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover* v. *Indus. Commission*, 759 P.2d 705 (Colo. 1988). 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). Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Commission, supra*. When the respondents contest liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.*

ALJ Nemechek found that multiple items were reasonably necessary and related to the July 23, 2015 work injury. This ALJ also finds those items are reasonably necessary and related to the July 23, 2015 work injury. That includes:

- All medical supplies related to Claimant's urinary incontinence (including catheters, small and large wipes).
- Oxygen concentrator (reimbursement for expenses previously incurred).
- CPAP machine and supplies (including cannula, tubing mask/headgear).
- The walking cane, 4-wheel walker, wheelchair.
- Exercise equipment (large and small exercise balls, 1 and 3 pound weights, treadmill, exercise bands, balancing pad, and recumbent bike), [reimbursement for expenses previously incurred].

This ALJ also determines that the antibacterial soap was critical to avoid infections and to remain sanitary in light of Claimant having to deal with incontinence and is reasonably necessary and related to the July 23, 2015 work injury.

While ALJ Nemechek specifically stated Respondent shall pay for "CPAP machine and supplies (including cannula, tubing/headgear)" he did not specifically address the equipment necessary to keep the CPAP supplies clean. Claimant testified that the cleaner is recommended for use every day. As found, Claimant requires this machine to keep her CPAP equipment clean and sterile for use and avoid any further risks of infections or bacterial overgrowth. This durable equipment is a reasonably necessary medical benefit and related to the July 23, 2015 work injury.

Claimant continued to be out of pocket for the cost, which were not covered by her personal insurance, for the oxygen concentrator, OxyGo (small portable oxygen purse) and CPAP machine in the amount of $2,185.00. She paid this portion but some additional costs were also paid by her prior insurance, BC[Redacted]. In addition, Claimant required the cannulas, the headset and mask since approximately 2017. This was mentioned by ALJ Goldman in June 2020. The oxygen machine, purse and CPAP machine as well as all the necessary supplies are reasonably necessary and related to the 2015 work injury. Claimant has shown by a preponderance of the evidence that both Claimant and BC[Redacted] should be paid for the costs listed above.

Claimant credibly and persuasively testified that she required additional assistance to control pain levels, even when she was treating with the medical providers, which included the alternating use of over the counter Tylenol and ibuprofen. Further, to assist her with pain relief, Claimant obtained Theraworx, a topical pain relief foam. As found Claimant has shown it is more likely than not that these three products were and are reasonably necessary and related to her July 23, 2015 work related injury.

Claimant purchased some exercise equipment that ALJ Nemechek already found reasonably necessary and related to her injury. What Claimant has not been able to afford on her own is the recumbent bike ordered by ALJ Nemechek because she could not afford the purchase price of $469.99. As found, the exercise equipment needed to maintain her functional abilities listed in the chart above including the recumbent bike are reasonably necessary and related to the injury.

Claimant has shown by a preponderance of the evidence that Respondent owes Claimant the amount of $16,753.40 for those benefits that are reasonably necessary and related to her July 23, 2015 work related injury, as established by the chart above, and which will not be replicated here. Further, Claimant has shown she has continuing needs for ongoing supplies, both due to the incontinence as well as for use of the CPAP machine. Respondent is liable for both past benefits set out in the chart above and ongoing benefits. Respondent shall reimburse Claimant pursuant to the stipulation laid out above or shall make arrangements to send Claimant the supplies through a vendor.[8]

D. Interest Penalties on Past Due Benefits

Sec. 8-43-401(2)(a), C.R.S. states as follows:

> After all appeals have been exhausted … all … employers shall pay benefits within thirty days after any benefits are due. If any … self-insured employer knowingly delays payment of medical benefits for more than thirty days …, such … employer shall pay a penalty of eight percent of the amount of wrongfully withheld benefits....

Claimant argues that Respondent owe eight percent interests on all benefits not paid when due, specifically citing to the items that ALJ Nemechek listed as reasonably necessary medical benefits in his final order of March 2, 2022. However, in looking at case law, the Court in *Pena v. ICAO*, 117 P.3d 84 (Colo. App. 2005) provides some guidance. In that case, the Court stated that the ALJ appropriately denied penalties under Sec. 8-43-401(2)(a) for failure to pay benefits timely because Claimant did not submit evidence of medical bills that were not timely paid. *Id.* at p. 90.

Like in the *Pena* case, here, there was no requirement for prior authorization and the insurer did not treat the order as a request for prior authorization by contesting it in accordance with rules that apply to prior authorizations. Further, it is not a situation in which Claimant received treatment, the provider submitted a bill for the treatment, payment was due, and Respondent delayed payment of that medical benefit for more than thirty days after the due date or stopped payment. Sec. 8-43-401(2)(a) does not apply as it does not specifically provide a penalty for Respondent's actions following

[8] The amounts may be subject to change and either party may request a change in the costs set out in the chart incorporated in this order or challenge the continuing reasonable, necessity of the supplies.

receipt of the ALJ's decision and Respondent's failure to provide medical benefits in accordance with the order. Claimant established that Respondent failed to comply with the Order issued by ALJ Nemechek and failed to provide the medical benefits Claimant was entitled to pursuant to the Order. The more appropriate penalty here is pursuant to Sec. 8-43-304, C.R.S. Therefore, Claimant's request for penalties under Sec. 8-43-401(2)(a) is denied.

E. Penalties Due for Violation of an Order

Under Sec. 8-43-304(1), C.R.S. (2022), penalties of up to one thousand dollars per day may be imposed against a party who: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or the Panel; or (4) fails, neglects, or refuses to obey any lawful order. *Pena v. Indus. Claim Appeals Office,* 117 P.3d 84, 87 (Colo. App. 2004). Further, Sec. 8-43-305, C.R.S. states that "Every day during which any employer … fails to comply with any lawful order of an administrative law judge … shall constitute a separate and distinct violation thereof."

To determine whether penalties should be imposed under Sec. 8-43-304(1), C.R.S. there is a two-step process, first requiring the ALJ to determine if the employer's conduct violated the Act, a rule, or an order. If a violation occurred, the ALJ must then determine whether the party's actions were objectively reasonable. An ALJ may impose a penalty under Sec. 8-43-304(1) if it is shown that the employer failed to take an action that a reasonable employer would have taken to comply with the order. The employer's conduct is measured by an objective standard of reasonableness. *Jiminez v. Indus. Claim Appeals Office,* 107 P.3d 965, 967 (Colo. App. 2003). Different divisions of the Colorado Court of Appeals have reached different conclusions regarding the measure of "objectively reasonable" conduct. Some divisions have concluded that the relevant inquiry is whether the conduct was based upon a rational argument in law or fact, while others have concluded that the question is merely whether the conduct was unreasonable. *See Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97, 100 (Colo. App. 2005) [discussing the two lines of cases]; *Diversified Veterans Corporate Ctr. v. Hewuse,* 942 P.2d 1312, 1313 (Colo.App.1997).

The ALJ also has wide discretion in determining the amount of any penalty. *Crowell v. Industrial Claim Appeals Office*, 298 P.3d 1014 (Colo. App. 2012). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The penalty should be sufficient to discourage future violations, but should not be constitutionally excessive or "grossly disproportionate" to the violation found. *Colorado Dept. of Labor & Employment v. Dami*, 442 P.3d 94 (Colo. 2019). When assessing proportionality, the ALJ should "consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many

offenses." *Id*. at 103. The ALJ can also consider factors such as the reprehensibility of the conduct involved and the harm to the non-violating party. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005); *Pueblo School Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). Actual prejudice or harm to the claimant is relevant but is not dispositive, particularly where the violation is not explained by the evidence. *Strombitski v. Man Made Pizza, Inc*., W.C. No. 4-403-661 (July 25, 2005).

Here, Claimant alleges Respondent failed to comply with ALJ Nemechek's Summary Order dated November 26, 2021 and subsequent Findings of Fact, Conclusions of Law and Order dated March 2, 2022, wherein the ALJ ordered Respondent to pay for medical benefits. First, ALJ Nemechek, pursuant to the parties stipulation to pay the $360.00, incorporated the stipulation as part of his order. Second, ALJ Nemechek ordered payment of medical benefits and supplies, in compliance with the Colorado Workers' Compensation Fee Schedule, for certain items he found were reasonably necessary and related to the injury. This ALJ acknowledges Respondent's right to appeal in this matter and the fact that the ALJ's order was not final until all appeals were abandoned on July 27, 2022. Here, this ALJ was persuaded there was a violation of the Order issued by ALJ Nemechek. Specifically, ALJ Nemechek issued an order that stated that Respondent "shall provide medical benefits to Claimant required to treat the effects of her work injury and to maintain MMI, pursuant to the Colorado Workers Compensation Medical Fee schedule" and that "Respondents shall pay" Claimant for specific items, which he listed in his order.

Respondent argues that they did not pay because Claimant had not provided receipts for the items she was purchasing. However, nothing in the order stated it was required Claimant to provide receipts, only that "Respondents will be required to reimburse Claimant for said equipment." And even if it implied that some form or proof was necessary, the Claimant's testimony alone was sufficient to establish what she paid and what should have been reimbursed to Claimant. Stated another way, Claimant was not required by the ALJ's order to provide a receipt for each item in order to receive reimbursement. The onus here was on Respondent, not Claimant, to make the payment in accordance with the Colorado Workers' Compensation Fee schedule. When Respondent's stipulated that they would pay $360.00, they did not put any conditions to the stipulation. The parties simply stipulated that the funds were owed to Claimant. And while Respondents argue that Claimant acknowledged she "may have been paid" the funds, this ALJ finds to the contrary as supported by Claimant's persuasive testimony and the lack of documentation in Respondent's pay log.

Respondent's "negligence in failing to take the action a reasonable carrier would take should result in the imposition of penalties..." See *Diversified, supra*, at p. 1313. As found, Respondent failed to take any credible or persuasive steps to even investigate the costs of the items until March 2, 2023 when they obtained the OM[Redacted] listing of items priced. Nothing in counsel's statements or in the evidence presented at hearing clarifying the OM[Redacted] pricing stated that the OM[Redacted] pricing was consistent with the Colorado Fee Schedule. While Claimant's statements clarifying her actual costs of what she had paid for certain items that were not provided by Respondent, was helpful in determining what Claimant was owed, this was not a critical element in determining the

reprehensibility of Respondent's failure to comply with ALJ Nemechek's order. Respondent provided no reasonable or appropriate explanation for violating the Order and Respondent's actions were not objectively reasonable.

Respondent knew what the Summary Order issued by ALJ Nemechek on November 26, 2021[9] stated. They knew what ALJ Nemechek stated in his order of March 2, 2022. Yet they waited until a year later to take any steps whatsoever to investigate the costs. And even when they obtained the OM[Redacted] pricing, still they paid nothing. Had this been a bill that was being disputed by a medical provider, they would have paid what they believed the Medical Fee schedule said and fought about the reasonable costs or discrepancy at a later time. The same would happen if Respondent had received a demand for mileage reimbursement. But most importantly, they did not explain why Claimant had not been paid the $360.00 that was stipulated and made part of the order issued by ALJ Nemechek. A reasonable Respondent would have paid what was undisputed and fought over the disputed amounts at a later time. Here, as found, Respondent failed to take any action that a reasonable Respondent would have taken to comply with the order and Respondent failed to act even when they received Claimant's spreadsheet or when they received the OM[Redacted] pricing estimate, by not paying Claimant anything even by the date of the hearing. A reasonable Employer would have paid something, even if it was less than what Claimant paid or what they had stipulated they would pay. Respondent's conduct was objectively unreasonable.

Respondent also argued that Claimant, in fact, obtained some of the equipment and supplies she needed and was not deprived of the needed medical benefits. This argument seems egregious. Claimant credibly testified that she had to set aside funds she would normally use for other household needs, like needed groceries and food, in order to get some of those supplies she needed. Further, Claimant was not able to obtain some of the essential supplies she does need, such as the CPAP cleaner that keeps the supplies sanitized and lowers her risk of infections or transferring germs into her lungs. Respondent was not the one to supply the funding, Claimant had to do so to her own detriment. This one simple thing, Respondent's failure to pay pursuant to the order, is in violation of the very principles of the Workers' Compensation Act, "to assure the quick and efficient delivery of disability and medical benefits to injured workers." Sec. 8-40-102(1), *supra.* Therefore, Respondent's conduct was objectively unreasonable.

Also as found, Respondent knew or should have known that Claimant required maintenance medical benefits to maintain her at MMI pursuant to both ALJ Goldman's and ALJ Nemechek's orders. The payment log showed that Respondent was consistently making payments for medical care through the time she was no longer able to see Dr. Paulsen. Since then, there were only three payments made to TS[Redacted].[10] However, this showed Claimant consistently required medical care which Respondent stopped providing and/or paying. Claimant cannot be faulted by the fact that she was attempting to handle her medical conditions in any manner she could. Respondent made a stipulation to make a payment of $360.00 and Respondent did not pay this agreed upon

[9] Mailed on November 29, 2021.

[10] It is not clear from the log whether the payments were made for medical services before she no longer had access to Dr. Paulson or after, but this ALJ is inferring that it was after. This ALJ also is assuming that the TS[Redacted] benefits was for prescription medications.

amount. This ALJ finds that Respondent acted reprehensibly in failing to act at all after Claimant moved to New Mexico, first to designate a provider, then not paying the stipulated amount of $360.00 and lastly to provide the maintenance care she required. The Workers' Compensation Act does not prohibit a Claimant from moving from the state of the injury. In this matter, Claimant acted in a reasonable manner given her circumstances, especially considering her continual need for oxygen in Colorado, which she was actually able to ween off of after the move, with the exception of the nightly forced air treatment provided by the CPAP machine. Despite Respondents' failure to pay other medical benefits ordered, the failure to pay the stipulated $360.00 alone is sufficient to determine that Respondents acted in an unreasonable manner in disregarding ALJ Nemechek's order. As found, Respondent's conduct was objectively unreasonable.

Next, this ALJ considers the appropriate amount of the penalty to "punish the violator and deter future misconduct." Case law instructs that when assessing proportionality, the ALJ should "consider whether the gravity of the offense is proportional to the severity of the penalty." The ALJ can also consider factors such as the reprehensibility of the conduct involved and the harm to the non-violating party. Here, the ALJ considers that the failure to act and pay Claimant in accordance with the ALJ's Order significantly limited Claimant's ability to obtain the maintenance care she required to maintain MMI, including additional equipment ordered to maintain her functionality. The original Summary Order was issued in November 2021, so Respondent knew or should have known what benefits Claimant was due, and any further delays past the final order of July of 2022 was inexcusable. This has been an extremely stressful situation for Claimant and caused Claimant depression related to Respondent's failure to pay. Respondent failed to provide evidence regarding Respondent's ability to pay, so consideration of this factor is limited. However, this ALJ takes notice that the employer and its' parent company is a large chain store under multiple names and has stores in at least 10 states in the nation when considering their ability to pay. Respondent knew or should have known that the *Dami* test would be applied and they had the opportunity to put on evidence in defense of the penalties issue including ability to pay. This ALJ finds that Respondent not only acted reprehensibly but acted in a manner that showed total lack of regard to the Act and to the ALJ's order and failed to put on a defense to the issue despite the opportunity to do so.

Therefore, it is found and concluded that Claimant proved that Respondent acted objectively unreasonable in this matter. *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999). Claimant proved by a preponderance of the evidence that a penalty is due. As found, Respondent shall pay $150.00 per day for each day's failure to comply with ALJ Nemechek's March 2, 2022 order beginning from the date the Order became final on July 27, 2022 to the present and continuing until paid. As found, from July 27, 2022 to the date of the hearing of March 29, 2023 a 245 day period, penalties owed are $36,750.00. Thereafter, Respondent shall continue to owe ongoing penalties per day until the benefits are paid. As found, this is a penalty that is reasonable (only 15% of the maximum allowed), and not grossly disproportionate to the violation in light of the reprehensible act of Respondent in failing to make any payments in accordance with the order. While this ALJ views Respondent's actions as extremely and objectively unreasonable and reprehensible in failing to act and should merit a $1,000.00 a day penalty for their non-actions, when comparing similarly placed parties in other

cases, this ALJ determined that the $150.00 per day may be viewed by any reviewing panel or court as "not disproportionate" to the harm caused to Claimant and Respondent's complete disregard of the order issued and a sufficient penalty to punish Respondent and deter future misconduct. As found, there is no evidence indicating Respondent is unable to pay a penalty that is proportionate to its offense. Based on the degree of reprehensibility of Respondent's conduct, the harm suffered by Claimant, and penalties assessed in comparable cases, the ALJ concludes that a penalty of $150.00 per day is appropriate. The amount of the penalty is more than proportionate to the harm to Claimant and Respondent's disregard for the order issued by the ALJ as well as to punish Respondent and deter this conduct in the future.

ORDER

IT IS THEREFORE ORDERED:

1. The Stipulation of the Parties is approved and ordered.

2. Respondent failed to comply with ALJ Nemechek's order of March 2, 2022.

3. Respondent shall pay the past due $16,753.40 for the reasonably necessary and related medical benefits itemized in the above chart.

4. Claimant's request for interest on the past due amounts pursuant to Sec. 8-43-401(2)(a) is *denied* and *dismissed*.

5. Respondent shall pay a penalty for failure to comply with ALJ Nemechek's order of March 2, 2022 in the aggregate amount of $36,750.00, and continuing thereafter at the rate of a $150.00 per day until Respondent issues payment to Claimant for the

$16,753.40 for ordered reasonably necessary and related medical benefits based on the chart shown above.

6. Of the penalties, seventy five percent shall be apportioned and paid to Claimant and twenty five percent shall be sent to the Colorado Uninsured Employer Fund. Payment to the CUE Fund shall be sent to DOWC Revenue Assessment Unit, 633 17th Street, Suite 400, Denver CO 80202.

7. Respondent shall either arrange for delivery of the monthly items Claimant requires, which have previously been found to be reasonably necessary and related to the July 23, 2015 injury, or reimburse Claimant pursuant to the stipulation of the parties.

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

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

DATED this 9th day of August, 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. WC 5-221-256-002

ISSUE

Whether Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on November 4, 2022 and his non-medical benefits should thus be reduced by fifty percent.

FINDINGS OF FACT

1. Employer is a company that installs and maintains security systems. Claimant worked for Employer as a Senior Lead Technician.

2. On November 4, 2022 Claimant was sent to a jobsite at [Redacted, hereinafter PT] to replace a front keypad that was not functioning properly. While at the PT[Redacted], Claimant fell off a ladder. He struck shelves and cut his hand while falling. Claimant also briefly lost consciousness.

3. Employer's General Manager for the [Redacted, hereinafter RS] testified at the hearing in this matter. He explained that Employer has developed safety rules and procedures that apply when working on a job site. Once per month, Employer sends out LMS training courses that all employees are required to finish within that month. The LMS training courses cover safety policy and procedures, including ladder usage. Notably, on October 12, 2022 Claimant completed a ladder safety course and a fall prevention course. Moreover, in Claimant's position as a Commercial Service Technician he was required to attend monthly service manager meetings.

4. [Redacted, hereinafter TS] commented that Employer provides safety gloves for all employees. The safety glove policy specifies that anti-cut safety gloves should be worn by all employees. Safety glove policies and procedures are also covered in the service manager meetings.

5. TS[Redacted] explained that Employer's ladder usage safety policy specifies that two technicians must be on-site to use ladders. Notably, A-frame ladders or electric lifts are to be used while on a worksite.

6. On November 4, 2022 Claimant was dispatched to PT[Redacted] to repair a front door keypad on an alarm system. Claimant was not using an approved A-frame ladder or an electric lift on November 4, 2022. Instead, Claimant was using an extension ladder that he propped up against a wall. TS[Redacted] remarked that there was no reason for Claimant to use an extension ladder to repair a front door keypad.

7. Claimant's supervisor Service Manager [Redacted, hereinafter DH] also testified at the hearing in this matter. DH[Redacted] commented that Claimant was sent to PT[Redacted] on November 4, 2022 to fix a keypad at the front door of the facility.

Specifically, in the front of the store there is a keypad and a door contact. Because the door contact was showing a fault, Claimant was assigned to examine the front hatch in the middle of the door and make necessary repairs. There was no need to use a ladder to complete the job assignment.

8. DH[Redacted] explained that, according to Employer's ladder safety procedures and policies, two technicians must be present when using an A-frame or extension ladder over 12 feet in height. The purpose of the safety policy is to ensure that one technician remains at the bottom of the ladder to maintain stability. At the time of the accident, no coworker was holding the ladder for Claimant. DH[Redacted] explained that, under Employer's policies and procedures, Claimant should have waited for a co-worker to stabilize the ladder before he started climbing.

9. DH[Redacted] recounted that he spoke to technician [Redacted, hereinafter CV] at the job site after Claimant had fallen from the ladder on November 4, 2022. CV[Redacted] reported that he did not agree with what Claimant was doing on the jobsite. He stated the ladder was not positioned correctly and Claimant was not wearing safety equipment. Nevertheless, Claimant ascended the ladder. CV[Redacted] showed DH[Redacted] where the ladder was positioned. The ladder had been placed where the walls meet in which one side was straight and the other side was "kind of crooked." CV[Redacted] told Claimant that the ladder was not safe and he did not feel good about the location. As CV[Redacted] turned around, Claimant was already climbing up the ladder. Claimant then fell.

10. On November 4, 2022 DH[Redacted] told Claimant over the phone to wait for CV[Redacted] to arrive before he started working. He specifically stated "[d]on't start anything until CV[Redacted] gets there because you need another person." After the incident, Claimant admitted that the ladder was "a little squirrely, but he was trying to get the job done." DH[Redacted] observed Claimant without safety gloves after the accident on November 4, 2022. When he asked Claimant why he was not wearing his required safety gloves, Claimant responded "My bad. I'm sorry."

11. Respondents have proven it is more probably true than not that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on November 4, 2022 and his non-medical benefits should thus be reduced by fifty percent. Initially, Claimant was dispatched to a jobsite at PT[Redacted] to replace a front keypad that was not functioning properly. While at the PT[Redacted], Claimant fell off a ladder and suffered injuries. The record reflects that Claimant was using an extension ladder that he propped up against a wall. No coworker was holding or stabilizing the ladder at the time of the incident. Based on the obvious danger presented by the use of the ladder, as well as the persuasive testimony of Employer's witnesses, Claimant acted with deliberate intent in violating Employer's reasonable safety rules regarding the use of ladders and other safety protocols.

12. The record reflects that Employer has adopted reasonable safety rules regarding the use of ladders and gloves while working on jobsites. Safety protocols include the wearing of anti-cut safety gloves. TS[Redacted] credibly explained that

Employer's ladder usage safety policy specifies that two technicians must be on-site to use ladders. Specifically, A-frame ladders or electric lifts are to be used while on a worksite. Moreover, DH[Redacted] credibly emphasized that, according to Employer's ladder safety procedures and policies, two technicians must be present when using an A-frame or extension ladder over 12 feet in height. The purpose of the safety policy is to ensure that one technician remains at the bottom of the ladder to maintain stability. Employer's safety rules are unambiguous, definite, and non-conflicting.

13. Claimant was aware of Employer's reasonable safety rules for technicians. Once per month, Employer sends out LMS training courses that all employees are required to finish within that month. The LMS training courses cover safety policies and procedures, including ladder usage. Notably, on October 12, 2022 Claimant completed a ladder safety course and a fall prevention course. Moreover, in Claimant's position as a Commercial Service Technician he was required to attend monthly service manager meetings.

14. The record reveals that Claimant willfully violated Employer's safety rules. On November 4, 2022 no coworker was holding the ladder as Claimant was climbing. DH[Redacted] explained that, under Employer's policies and procedures, Claimant should have waited for a co-worker to stabilize the ladder before he started climbing. Notably, on November 4, 2022 DH[Redacted] told Claimant over the phone to wait for CV[Redacted] to arrive before he started working. He specifically stated "[d]on't start anything until CV[Redacted] gets there because you need another person." After the incident, Claimant admitted that the ladder was "a little squirrely, but he was trying to get the job done." DH[Redacted] also observed Claimant without safety gloves after the accident. Moreover, DH[Redacted] spoke to CV[Redacted] at the job site after Claimant had fallen from the ladder on November 4, 2022. CV[Redacted] reported Claimant had not correctly positioned the ladder and was not wearing safety equipment. Notably, the ladder had been placed where the walls meet in which one side was straight and the other side was "kind of crooked." Nevertheless, Claimant ascended the ladder without assistance.

15. Respondents have satisfied their burden of proof to establish that Claimant acted with deliberate intent in violating Employer's reasonable rules regarding the use of ladders and other safety protocols. Under the circumstances, Claimant's use of an improperly positioned extension ladder without the assistance of a coworker and failure to wear safety gloves violated Employer's reasonable safety rules. He suffered injuries as a direct result of not following Employer's safety rules. The record reflects that Claimant was aware of Employer's reasonable safety rules regarding ladder and glove use but deliberately ascended the ladder without the assistance of a coworker. Accordingly, Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on November 4, 2022 and his non-medical benefits should thus be reduced by fifty percent.

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. Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Off.,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003).

5. The willful violation of a safety rule may be established without direct evidence of the claimant's state of mind at the time of the injury because "it is a rare case where the claimant admits that the conduct was the product of a willful violation of the employer's rule." *Gargano v. Metro Wastewater Reclamation District*, W.C. No. 4-335-104 (ICAO, Feb. 19, 1999). Instead, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548, 550 (1968); *Miller v. City and County of Denver*. W.C. No. 4-658-496 (ICAO, Aug. 31, 2006).

6. Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado,* W.C. No. 4-559-275 (ICAO, Dec. 10, 2003).

Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.* 907 P.2d at 719.

7. Generally, an employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric*, W.C. No. 4-418-465 (ICAO, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.*; *see* 2 *Larson's Workers' Compensation Law*, §35.04.

8. As found, Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on November 4, 2022 and his non-medical benefits should thus be reduced by fifty percent. Initially, Claimant was dispatched to a jobsite at PT[Redacted] to replace a front keypad that was not functioning properly. While at the PT[Redacted], Claimant fell off a ladder and suffered injuries. The record reflects that Claimant was using an extension ladder that he propped up against a wall. No coworker was holding or stabilizing the ladder at the time of the incident. Based on the obvious danger presented by the use of the ladder, as well as the persuasive testimony of Employer's witnesses, Claimant acted with deliberate intent in violating Employer's reasonable safety rules regarding the use of ladders and other safety protocols.

9. As found, the record reflects that Employer has adopted reasonable safety rules regarding the use of ladders and gloves while working on jobsites. Safety protocols include the wearing of anti-cut safety gloves. TS[Redacted] credibly explained that Employer's ladder usage safety policy specifies that two technicians must be on-site to use ladders. Specifically, A-frame ladders or electric lifts are to be used while on a worksite. Moreover, DH[Redacted] credibly emphasized that, according to Employer's ladder safety procedures and policies, two technicians must be present when using an A-frame or extension ladder over 12 feet in height. The purpose of the safety policy is to ensure that one technician remains at the bottom of the ladder to maintain stability. Employer's safety rules are unambiguous, definite, and non-conflicting.

10. As found, Claimant was aware of Employer's reasonable safety rules for technicians. Once per month, Employer sends out LMS training courses that all employees are required to finish within that month. The LMS training courses cover safety policies and procedures, including ladder usage. Notably, on October 12, 2022 Claimant completed a ladder safety course and a fall prevention course. Moreover, in Claimant's position as a Commercial Service Technician he was required to attend monthly service manager meetings.

11. As found, the record reveals that Claimant willfully violated Employer's safety rules. On November 4, 2022 no coworker was holding the ladder as Claimant was climbing. DH[Redacted] explained that, under Employer's policies and procedures, Claimant should have waited for a co-worker to stabilize the ladder before he started climbing. Notably, on November 4, 2022 DH[Redacted] told Claimant over the phone to wait for CV[Redacted] to arrive before he started working. He specifically stated "[d]on't

start anything until CV[Redacted] gets there because you need another person." After the incident, Claimant admitted that the ladder was "a little squirrely, but he was trying to get the job done." DH[Redacted] also observed Claimant without safety gloves after the accident. Moreover, DH[Redacted] spoke to CV[Redacted] at the job site after Claimant had fallen from the ladder on November 4, 2022. CV[Redacted] reported Claimant had not correctly positioned the ladder and was not wearing safety equipment. Notably, the ladder had been placed where the walls meet in which one side was straight and the other side was "kind of crooked." Nevertheless, Claimant ascended the ladder without assistance.

12. As found, Respondents have satisfied their burden of proof to establish that Claimant acted with deliberate intent in violating Employer's reasonable rules regarding the use of ladders and other safety protocols. Under the circumstances, Claimant's use of an improperly positioned extension ladder without the assistance of a coworker and failure to wear safety gloves violated Employer's reasonable safety rules. He suffered injuries as a direct result of not following Employer's safety rules. The record reflects that Claimant was aware of Employer's reasonable safety rules regarding ladder and glove use but deliberately ascended the ladder without the assistance of a coworker. Accordingly, Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on November 4, 2022 and his non-medical benefits should thus be reduced by fifty percent.

ORDER

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

1. Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on November 4, 2022 and his non-medical benefits should thus be reduced by fifty percent.

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: August 10, 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. 5-201-823-001

ISSUES

The issues set for determination included:

- Did Claimant prove by a preponderance of the evidence that he sustained compensable work injuries on March 8, 2022?
- If Claimant suffered a compensable injury are Respondents required to pay for medical benefits to cure and relieve the effects of the injury sustained on March 8, 2022?
- What was Claimant's Average Weekly Wage at the time of the injury?
- Is Claimant entitled to TTD benefits from March 9, 2022 and ongoing?
- If Claimant is awarded TTD benefits, are Respondents entitled to a reduction of those benefits pursuant to a child support garnishment?

PROCEDURAL

The undersigned ALJ issued a Summary Order on January 19, 2023. On January 26, 2023, Respondents requested a full Order. This Order follows.

FINDINGS OF FACT

1. Claimant worked for Respondent-Employer in the kitchen. His job duties included prep work in the kitchen. He worked for Employer for approximately 1 1/2 months before his injury.

2. Claimant testified that he was hired to work in the dish pit and to do prep work. The jobs Claimant performed for Employer, including the pizza station, required constant standing, lifting, grabbing, squatting and bending. Claimant was credible when he described the physical nature of his job duties.

3. Claimant's medical history was significant in that he previously injured his right knee. More particularly, Claimant was evaluated by James Teumer, D.O. at the ED of UC Health on September 25, 2021, at which time he reported right knee pain. Claimant reported he had several previous injuries, from which he recovered. There was not a specific reference to a bicycle accident in the record. Claimant said he was kneeling down when he felt a pop to the inner part of the knee.

4. On examination, Dr. Teumer noted tenderness over the medial joint line of the right knee, with possible joint effusion. Range of motion ("ROM") was 135° and 80°. An x-ray was deferred and Dr. Teumer's clinical impression was: meniscal injury, right. An immobilizer was provided and Claimant was told to follow up with an orthopedic surgeon. No restrictions for the right knee were issued by Dr. Teumer. Claimant testified he had occasional pain in his right knee after this time.

5. There was no evidence in the record that Claimant required treatment for his right knee between the evaluation on September 25, 2021 and March 3, 2022.

6. There was no evidence in the record Claimant missed time from work due to right knee symptoms between September 25, 2021 and March 8, 2022.

7. Claimant testified he rode his bicycle to work every day while working for Employer, which was a distance of four miles.

8. Claimant's payroll records from January 28, 2022 through March 8, 2022 were admitted into evidence. These records showed Claimant's earnings totaled $2,967.35.[1]

9. Included in these records were February 1, 2022 to March 6, 2022 as the injury occurred on March 8, 2022 and claimant did not work a full day. Subtracting out the three days from the total of $2,967.35 equals $2,892.21. When divided by 4.71 weeks, the AWW is $614.06. The ALJ found that the calculation of Claimant's AWW fairly approximated his AWW.

10. On March 8, 2022, Claimant was working at the pizza station, learning how to make pizzas. Claimant testified that he was bending down to take a pizza out of the oven and when he stood up, felt a pop in his right knee. Claimant said the pain was intense and he was unable to stand or walk after he felt the pop. Claimant testified he required assistance to leave the workplace.

11. Claimant testified he told his supervisor ([Redacted, hereinafter BW]) that he was injured at work and then talked to the GM ([Redacted, hereinafter JM]). He was referred to Workwell, the ATP for Employer. Claimant said he was not able to secure an appointment at Workwell until later in March.

12. Claimant presented at UC Health on March 8, 2022 and was evaluated by Dr. Teumer, who noted he had knee pain for months and then when he was at work tonight, bent over and felt a pop in his knee. Claimant reported he was able to straighten his leg, but not all the way and could not bear weight on the knee. Dr. Teumer prescribed hydrocodone-acetaminophen, and his clinical impression was: acute pain of the right knee. Dr. Teumer opined this was likely a ligamentous injury with joint effusion and pain. He was then given crutches, told to ice and elevate his knee. The

[1] Exhibit 12.

ALJ found this report provided evidence that Claimant's work activities were the cause of increased pain in his knee.

13. On March 14, 2022, Claimant was evaluated by Kolby Vaughan, PA-C at UC Health for right knee pain. PA-C Vaughan said there was no indication for an MRI, noting she understand the difficulty of obtaining outpatient imaging. Dr. Teumer also evaluated Claimant and referred him to orthopedic surgery. Hydrocodone was prescribed.

14. An Employer's First report of injury was prepared on or about March 17, 2022 by [Redacted, hereinafter EG], HR manager. It specified Claimant reported the injury to JM[Redacted] and the witnesses were [Redacted, hereinafter BK], [Redacted, hereinafter BK], and [Redacted, hereinafter JO].

15. Claimant was evaluated by Pamela Rizza M.D at Workwell on March 28, 2022 for right knee pain. Claimant reported he bent down to pick up a pan and felt a pop. Claimant's right knee ROM was 20° on extension and 80° on flexion. The ALJ found there were restrictions in his right knee ROM. Dr. Rizza's diagnosis was: right knee pain and a work restriction of limited weight bearing for right lower extremity was issued. Dr. Rizza referred Claimant for an MRI. Dr. Rizza's WCM-164, of the same date, described the evaluation of acute on chronic right knee pain. The work-relatedness of Claimant's injury was noted to be undetermined.

16. On March 31, 2022, Claimant underwent an MRI on his right knee, and the films were read by Seth Andrews, D.O. Dr. Andrews' impression was: bucket-handle tear of the medial meniscus displaced into the intercondylar notch; torn anterior cruciate ligament, which was likely chronic, given the lack of associated bony contusion; medial collateral ligament was thickened but appeared intact which may represent a prior partial injury. The ALJ concluded that the MRI was evidence of both prior and acute injuries.

17. In the follow-up appointment on April 6, 2022, restrictions in Claimant's knee ROM were noted. Claimant's right knee ROM was 13° lack of extension, 102° on flexion and passive flexion-120°. Dr. Rizza diagnoses were: other spontaneous disruption of anterior cruciate ligament; other tear of medical meniscus, current injury. Claimant was referred for physical therapy ("PT") and an orthopedic referral was also made. Claimant's work restrictions were continued.

18. Dr. Rizza's opinion on the issue of causation was expressed in the April 6, 2022 WCM-164: "…ACL likely torn during bike accident of Sept 2021. With reported deep flexion, pop and mechanical block of the knee following the work related accident on 3/8, it is medically probable that [Redacted, hereinafter JG] sustained at least an exacerbation if not new onset medial meniscal tear with joint extrusion. He has had a sudden loss of function following the work related event". The ALJ credited this opinion.

19. Respondent-Employer did not have work for Claimant within in his restrictions and has not returned Claimant to work in any capacity.

20. On April 8, 2022, a Notice of Contest was filed on behalf of Respondents, which listed as grounds for the denial: investigation for medical records, prior to date of injury and possible DIME.

21. Claimant returned to Workwell on April 22, 2022 and was evaluated by Kate Tumulty, P.A., at which time it was noted he was not working because Employer could not accommodate his restrictions. Claimant was continuing PT and seeing a specialist for consideration of surgery. On examination, Claimant had laxity in the ACL, with positive Anterior Drawer and positive Lachman's tests. PA Tumulty noted there were restrictions in his right knee ROM, including 25° lack of extension and 90° on flexion. The diagnoses were the same as the April 6, 2022 evaluation.

22. Claimant testified that he was referred to Dr. Hartman from Workwell. Dr. Hartman performed surgery on his knee. From this information, the ALJ determined Dr. Hartwell is an ATP. Claimant testified he continues to have pain in his left knee.

23. The ALJ concluded Claimant suffered a compensable injury on March 8, 2022 while working for Employer. He aggravated the condition of his right knee while working in the kitchen.

24. No ATP has determined that Claimant was at MMI.

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

CONCLUSIONS OF LAW

Generally

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

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2016). 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).

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 (2005). In the case at bench, the credibility of Claimant, as well the medical records admitted at hearing directly impacted the issue of compensability.

Compensability

Claimant was required to prove by a preponderance of the evidence that, at the time of the injury, he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. §§ 8-41-301(1)(b) & (c), C.R.S. (2020). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Claimant must establish a nexus between the work activities and the claimed disability. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As a starting point, there was no dispute Claimant was working on March 8, 2022. This was a job that required standing on his feet during his shift, as well as bending down. The question in this case was whether the facts established that the March 8, 2022 incident aggravated or accelerated the condition of Claimant‘s right knee. The ALJ concluded that it was more probable than not that the incident on March 8, 2022 aggravated the underlying condition of his right knee and therefore Claimant suffered a compensable injury.

The ALJ‘s reasoning was twofold; first, the reports of the physicians treating Claimant documented that while he had previous required treatment for the right knee, the incident on March 8, 2022 exacerbated the underlying condition. (Finding of Fact 23). As determined in Findings of Fact 3-4, Claimant treated at UC Health for right knee issues. The records from UC Health admitted at hearing established Claimant required treatment for the right knee prior to March 8, 2022. However, Claimant was not given work restrictions prior to the injury. (Finding of Fact 4). Also, there was no evidence that Claimant received treatment between September 25, 2021 and March 8, 2022. (Finding of Fact 6).

After March 8, 2022, the medical evaluations of Claimant showed restrictions in his right knee ROM as a result of the injury. These restrictions in ROM were worse than those documented in the September 25, 2021 evaluation. *Id.* As found the opinions of Dr. Rizza directly supported the conclusion that the injury aggravated the right knee. (Finding of Fact 18).

Second, the March 31, 2022 MRI documented a bucket tear of the medial meniscus, which was objective evidence of a traumatic injury interposed on the underlying condition of Claimant's right knee. (Finding of Fact 16).

In coming to this conclusion, the ALJ considered Respondents' argument that Claimant did not report a bicycle injury in September 2021 to the providers at UC Health, which reflected negatively on his credibility. Respondents also argued that Claimant's described mechanism of injury was similar to the description on September 25 2021. It is true that there was not a reference to a bicycle injury in the ED records, however, this discrepancy does not refute the fact that Claimant was working as he testified on March 8, 2022. The ALJ also found the report of injury was consistent in the medical records that followed. Claimant's testimony was also in accord with the description of his injury provided to Dr. Teumer. In addition, the E-1 reflected the fact that there were witnesses to the incident and the injury was reported. Considering all of the evidence, the ALJ found there was a discrete event, which occurred on March 8, 2022, which aggravated the condition of the right knee.

AWW

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW.

However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (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 Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007)

In *Campbell*, Claimant's initial injury occurred ten years before her deteriorating condition caused her to cease working. Her employer argued that her AWW should be based on the wages she earned at the time of her initial injury, rather than the higher wages she had earned through salary increases and promotions during the intervening years. The Colorado Court of Appeals determined that it would be "manifestly unjust to base Claimant's disability benefits in 1986 and 1989 on her substantially lower earnings in 1979", and determined that her AWW should be based upon the higher salary earned at the time her deteriorating condition caused her to stop working. *Campbell v. IBM Corp., supra,* 867 P.2d at 82. The rationale for the Court's decision was one of fairness and Justice Plank stated:

"The entire objective of wage calculation [under the Act] is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Although [AWW] generally is determined from the employee's wage at the time of injury, if for any reason this general method will not render a fair computation of wages, the

administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a fair wage". *Campbell v. IBM Corp., supra,* 867 P.2d at 82.

Likewise, in *Pizza Hut v. ICAO*, 18 P.3d 867, (Colo. App. 2001), Claimant was injured while working as a delivery driver. He then obtained a second job at a hospital. Claimant concurrently held two jobs for a short period, then quit the delivery job. The Colorado Court of Appeals affirmed the increase in Claimant's average weekly wage and reinforced the principle that the ALJ had discretion to calculate Claimant's wages to based on earnings from a subsequent employer and not upon wages earned at the time of injury, as the former represented a fairer calculation of Claimant's AWW.

Based upon the wage records admitted at hearing, the ALJ was persuaded that the fair calculation of Claimant's AWW was $614.06 per week (excluding the training days and the date of injury). (Finding of Fact 9).

TTD

As found, Claimant's ATP-s assigned physical restrictions attributable to the work injury. The evidence in the record reflected that Employer had no work within Claimant's restrictions after the injury. (Finding of Fact 9). The wage records admitted at hearing also confirmed Claimant did not return to work after his injury. In addition, no ATP placed Claimant at MMI. (Finding of Fact 24). The ALJ found Claimant is entitled to ongoing TTD benefits until terminated by law.

Child Support lien

Claimant's TTD benefits are subject to garnishment pursuant to the Notice of Administrative Lien and attachment, dated April 6, 2022 (Adams County Case No. 13JV002012) [Exhibit 13]. The ALJ concluded Respondents are entitled to offset Claimant's TTD benefits by the amount of $485.00 per month.

ORDER

It is therefore ordered:

1. Respondents shall pay for Claimant's medical treatment at UC Health and Workwell, as well as referrals from the providers, pursuant to the Colorado Worker's Compensation Medical Fee Schedule.

2. Claimant's AWW was $614.06 per week, which gives a TTD rate of $409.37 per week.

3. Respondents shall pay TTD benefits at the rate of $409.37 per week from March 9, 2022 until terminated by law.

4. Respondents shall pay interest at 8% per annum on all benefits not paid when due.

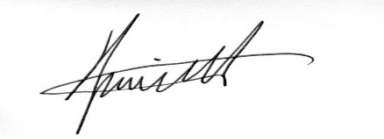
5. The amount of $485.00 per month shall be paid from Claimant's TTD benefits to the Child Support Registry.

6. All other issues are reserved for later determination.

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

DATED: August 10, 2023

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that on December 23, 2022, she suffered an injury arising out of and in the course and scope of her employment with Respondent?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment of her left knee (including surgery performed by Dr. Tomas Pevny on April 26, 2023) is reasonable, necessary, and related to the work injury?

3. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits and/or temporary partial disability (TPD) benefits?

4. If the claim is found compensable, what is Claimant's average weekly wage{AWW)?

5. Has Respondent demonstrated, by a preponderance of the evidence, that on December 23, 2022, Claimant engaged in a deviation, resulting in the December 23, 2022 incident falling outside of the course and scope of Claimant's employment?

FINDINGS OF FACT

1. Claimant has worked for Employer as a ski pro during ski season since 1988. She also works as a Mountain Bike Coach in the summer months. As a ski pro, Claimant provides professional ski instruction at Respondent's properties in Aspen/Snowmass. Claimant is certified as a Rocky Mountain Trainer by the Professional Ski Instructors of America (PSIA).

2. For a ski pro, such as Claimant, the paid work day begins at 9:00 a.m. Full day lessons are typically scheduled to begin at 9:00 a.m. and end at 3:00 p.m. However, Employer allows pros to begin their lessons earlier or later, as long as the lessons occur while ski lifts are in operation.

3. During the 2022-2023 ski season, ski pros are expected to be on the mountain and available to provide lessons during the period of December 18 through January 3. If a pro was not scheduled to give a lesson, they are to report to "line up" for job assignments. As with other normal work days, during this specific period, a ski pro's paid work day began at 9:00 a.m.

4. Claimant was assigned full day private lessons with the same two guests on December 21, 22, and 23, 2022. At the end of the lesson on December 22, 2022, the guests and Claimant agreed that the guests would contact Claimant in the morning on December 23, 2022 to finalize a meeting time and place.

5. On December 23, 2022, Claimant arrived at the staff locker room between 8:30 a.m. and 8:45 a.m. Claimant arrived during that time to dress in her work uniform and prepare her ski equipment for the day. Claimant remained in the locker room to await communication from her scheduled guests.

6. Shortly after 9:00 a.m. on December 23, 2022, the guests contacted Claimant and stated that they would meet for their lesson between 10:00 and 10:30 a.m. at the base of the gondola. As this was a pre-scheduled full-day lesson, Claimant could not report to line up for other assignments.

7. As a result, Claimant rode the gondola up the mountain to assess the conditions. Claimant then skied down a blue and recently groomed run. While on that assessment run, Claimant was engaging in short radius dynamic turns. These turns are a high level skill. While doing so, Claimant tipped on her skis and felt pain in her left knee.

8. Claimant immediately reported this incident to Respondent on December 23, 2022. Although her knee felt "fragile", Claimant still met her guests and completed the December 23, 2022 lesson.

9. Claimant testified that all of her actions on December 23, 2022 complied with guidelines set forth in the employee manual.

10. The operations manual for Employer's ski and snowboard school was admitted into evidence. This manual states:

> It is important for us to start our day in a way that allows us to warm up and assess conditions. When skiing to and from job assignments, pros are to use the easiest, most recently groomed run. Pros choosing not to ski/ride the easiest, most recently groomed run are choosing to free ski. This is outside the course and scope of employment and employees will not be entitled to workers compensation in the event of an injury.

11. The manual also notes that pros should "[t]ake time to acquaint yourself with the grooming and weather conditions prevailing on that mountain on that day."

12. In addition, the operations manual addresses a number of expectations for ski pros. This includes "[o]n-snow performance refers to the skiing/riding image and skill level a pro demonstrates. We will maintain a level of precision that matches, or exceeds our current certification level. We will demonstrate this precision while in uniform with or without guests... "

13. On December 23, 2022, Claimant completed an accident report at the direction of Employer. In that document, Claimant stated that while skiing "short radius dynamic turns" she lost her outside ski and "fell back and around". As a result, she felt soreness in her left knee.

14. On January 4, 2023, Claimant was asked to complete an Aspen Skiing Company Incident Analysis regarding the December 23, 2022 incident. Claimant did not complete this form. Rather, she provided information to a manager, [Redacted, hereinafter TF], who then typed data into the form. Claimant testified that it was TF[Redacted] who entered the term "free ski" into the January 4, 2023 documentation.

15. Claimant testified that she does not believe that she was free skiing on December 23, 2022. In support of her position, Claimant testified that she was checking conditions and setting an example as described in the operatioms manual.

16. Based upon documents entered into evidence, Respondent's position is that Claimant's injury was not work related because she was "free skiing" at the time of the incident. In an email communication between Employer and Claimant, Respondent takes the position that Claimant's injury would not be covered as a workers' compensation claim because Claimant was "coming and going" when she skied while waiting for her guests.

Left Knee Treatment Prior to December 23, 2022

17. Claimant testified that prior to the December 23, 2022 incident, she had experienced left knee pain during the summer months of 2022. On September 7, 2022, Dr. Glenn Kotz[1] referred Claimant to physical therapy to address left knee and left hamstring pain. On September 27, 2022, Claimant began physical therapy with Roaring Fork Physical Therapy.

18. Thereafter, Dr. Zotz ordered magnetic resonance imaging (MRI) of Claimant's left knee. On September 26, 2022, a left knee MRI showed a tear of the body and posterior horn of the lateral meniscus, mild proximal patellar tendinosis, Grade 2 chondromalacia of the lateral patellar facet, and Grade 3 to 4 chondromalacia of the medial femoral condyle. The MRI specifically notes that the anterior cruciate ligament {ACL) and medial collateral ligament (MCL) were both intact.

19. On September 29, 2022, Claimant was seen by Dr. Tomas Pevny. At that time, Claimant reported approximately two months of left knee pain, swelling, and limited range of motion. Dr. Pevny reviewed the MRI results and noted some subtle changes in the posterior horn of the lateral meniscus (indicating a possible small meniscus tear). Dr. Pevny recommended conservative treatment including physical therapy, ice, and over-the-counter pain medication. Dr. Pevney also noted that an injection could be considered.

[1] It appears from the medical records that Dr. Kotz is Claimant's primary care physician.

20. On October 31, 2022, Claimant returned to Dr. Pevny and reported continuing pain and swelling in her left knee. At that time, Dr. Pevny identified a diagnosis of osteoarthritis of the knee and noted a "subtle irregularity in the lateral meniscus". Dr. Pevny recommended and administered a cortisone injection to Claimant's left knee[2].

21. Claimant testified that following physical therapy and the injection from Dr. Pevny, she had no further left knee issues until the December 23, 2022 incident.

Left Knee Treatment After December 23, 2022

22. Claimant testified that on December 23, 2022, Employer provided her with a list of medical providers and she selected the urgent care clinic in Basalt, Colorado. Medical records entered into evidence demonstrate that on December 23, 2022, Claimant was seen at the Aspen Valley Hospital "after hours clinic" located in Basalt. At that time, Claimant was seen by Dr. Joshua Seymour. Claimant reported tenderness over the medial aspect of her left knee. Dr. Seymour noted that left knee x-rays taken on that date showed no acute bony abnormalities. Dr. Seymour opined that Claimant suffered a sprain of her medial collateral ligament (MCL) and recommended use of a splint, ice, rest, and elevation. In addition, Dr. Seymour referred Claimant for an orthopedic consultation.

23. On January 17, 2023, Respondent denied Claimant's claim by filing a Notice of Contest. The reason for the denial was that Claimant's injury was not work related.

24. On January 25, 2023, Claimant completed a Worker's Claim for Compensation regarding the December 23, 2022 incident. In that document, Claimant described the incident that resulted in a left knee injury as "skiing a blue groomed run to base of Aspen gondola moved back and inside when making a right turn fell and spun on my butt, left ski hit the snow".

25. On February 9, 2023, Claimant was seen for consultation with Dr. Pevny. On that date, Claimant reported immediate onset of pain in the medial aspect of her left knee while skiing at work on December 23, 2022. On examination, Dr. Pevny noted mild effusion of the left knee and instability. Dr. Pevny opined that Claimant suffered a tear of her anterior cruciate ligament (ACL). Dr. Pevny ordered a left knee MRI and recommended the continued use of a knee brace.

26. On March 14, 2023, an MRI of Claimant's left knee was administered. The MRI showed an "age-indeterminate" complete tear of the ACL; peripheral longitudinal tear of the posterior horn medial meniscus; Grade 3 chondral defect in the central weight bearing portion of the medial femoral condyle.

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[2] Specifically 5 cc of 32 mg Zilretta.

27. On March 15, 2023, Claimant returned to Dr. Pevny to discuss the MRI results. At that time, Dr. Pevny noted that there was a complete ACL tear and a medial meniscus tear. Dr. Pevny recommended surgical intervention that would include an ACL reconstruction (with cadaver graft) and medial meniscectomy. Claimant communicated to Dr. Pevny that she would prefer to wait until the end of the ski season before pursuing surgery.

28. On April 26, 2023, Dr. Pevny performed the left knee ACL reconstruction.

29. Since the surgery, Claimant has undergone physical therapy, uses a knee brace, uses a compression/ice machine daily, and follows a home exercise program. Claimant testified that she will have six to nine months of post surgical rehabilitation and recovery. Claimant testified that her current symptoms include stiffness, soreness, and swelling in her left knee.

30. Claimant testified that since her surgery, she has not returned to work for Respondent, or for any other employer. In addition, Claimant has not filed for unemployment benefits, as she is unable to work due to her surgical recovery.

31. Claimant testified that at the time of the December 23, 2022 incident she was paid as a Stage IV instructor at the rate of approximately $61.00 an hour. Claimant further testified that instructors receive a pay increase after working 255 hours, and a second increase after working 450 hours.

32. Employer's "pro pay grid" for the 2022-2023 ski season was admitted into evidence. For a Stage IV instructor the pay rate for Oto 225 hours was $53.36; for 225 to 450 hours it was $64.23; and for 450 hours and above the rate was $75.09.

33. For the two week pay period of December 18, 2023 through December 31, 2023, Claimant had gross pay of $4,832.58. This included 6 hours of pay at the rate of $57.83 per hour; and 72 hours at the rate of $62.30 per hour. The ALJ calculates that this results in an average pay of $2,416.29 per week. Two thirds of this AWW is $1,610.86.

34. The ALJ takes administrative notice that for injuries occurring in 2022, the maximum rate for temporary total disability (TTD) benefits is $1,228.99 per week.

35. Claimant proposes that her average weekly wage (AWW) is $3,449.53. Claimant calculations are based upon wages from the two week pay period of March 12, 2023 through March 25, 2023 (with a gross pay of $6,273.92). Claimant testified that this amount is representative of a normal two week period during the 2022-2023 ski season. In addition, Claimant asserts that an amount of $312.57 should be included in the calculation for her AWW to reflect the value of housing provided to Claimant by Employer.

36. Claimant is provided employee housing at a discounted rate as a benefit of working for Employer's ski school. Claimant testified that her current rent is $1,891.00 per month for a two bedroom apartment. Claimant further testified that market value rent for a similar apartment in Carbondale, Colorado would be $4,600.00 per month. Therefore, Claimant believes that her housing discount is in the amount of $2709.00 per month, ($4,600.00 less rent of $1,891.00 equals $2,709.00). Claimant shares this apartment with her partner. Therefore, she asserts that the amount of $312.57 should be added to her wages in calculating her AWW; ($2,709.00 divided by 2 equals $1,354.50; or $312.57 per week).

37. The ALJ credits Claimant's testimony, particularly testimony regarding her activities on December 23, 2022. The ALJ also credits the language of the operations manual regarding lessons, on-snow performance, and assessing conditions. The ALJ finds that claimant has demonstrated that it is more likely than not that on December 23, 2022 she suffered a left knee injury while within the course and scope of her employment with Employer. The ALJ further finds that Respondent has failed to demonstrate that it is more likely than not that Claimant was "free skiing" or engaged in any deviation from her job duties at the time of her injury. The ALJ finds that on December 23, 2022, Claimant was complying with all directives of Employer, as evidenced by the manual. Specifically, the ALJ finds that Claimant was preparing for her private lesson, assessing mountain conditions, skiing an easy blue run that was recently groomed, and skiing in a manner that was part of the "on-snow performance" expectation of Employer.

38. The ALJ is not persuaded by Respondent's assertion that Claimant engaged in a deviation when she skied prior to meeting her guests on December 22, 2023. Claimant expected to begin the lesson at 9:00 a.m., but due to the actions of her guests, the lesson was delayed. The ALJ finds that Claimant's decision to engage in appropriate job duties during this "down time" was well within the course and scope of her employment. Claimant could not report to lineup for additional duties, as she already had an assigned lesson. In addition, her decision to assess conditions rather than sit in the locker room for an hour (or more) was reasonable under the circumstances.

39. The ALJ credits the medical records and the opinions of Dr. Pevny The ALJ specifically credits the "before and after" MRI results which demonstrate that on September 26, 2022 Claimant's left ACL was intact, but after December 23, 2022, her ACL was torn. The ALJ finds that Claimant has successfully demonstrated that treatment of her left knee, including surgery performed by Dr. Pevny on April 26, 2023, constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury.

40. The ALJ credits the medical records and Claimant's testimony and finds that Claimant has demonstrated that it is more likely than that she suffered a wage loss beginning on April 26, 2023, (which was the date of her left knee surgery). Therefore,

Claimant has likewise demonstrated that it is more likely than not that she is entitled to temporary total disability (TTD) benefits beginning on April 26, 2023.

41. The ALJ credits the pay records for the period of December 18, 2022 through December 31, 2023 and calculates Claimant's AWW to be $2,416.29. The ALJ specifically excludes any value related to Employer provided housing in the AWW calculation pursuant to Section 8-40-201(19)(b), C.R.S. as discussed further in the ALJ's conclusions of law.

CONCLUSIONS OF LAW

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

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

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

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

5. As noted by the court in *City of Brighton,* the term "arising out or refers to the origin or cause of an employee's injury. *City of Brighton,* 318 P.3d at 502, *citing Horodyskyj v. Karanian,* 32 P.3d 470, 475 (Colo.2001). Specifically, the term calls for examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury. *Id.* An injury "arises out of' employment when it has its "origin in" an employee's work-related functions and is "sufficiently related to" those functions so as to be considered part of employment. *Id.* It is not essential, however, that an employee be engaged in an obligatory job function or in an activity resulting in a specific benefit to the employer at the time of the injury. *Id. citing City of Boulder v. Streeb,* 706 P.2d 786, 791 (Colo.1985).

6. When the employer asserts a personal deviation from employment "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." *Roache v. Industrial Commission,* 729 P.2d 991 (Colo. App. 1986); *In Re Laroe,* WC 4-783-889 (ICAO, Feb. 1, 2010). If an employee substantially deviates from the mandatory or incidental duties of employment so that he is acting for his sole benefit at the time of injury, his claim is not compensable. *Kater v. Industrial Commission,* 729 P.2d 746 (Colo. App. 1986). The issue is thus whether the "claimant's conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing an activity for his sole benefit." *In Re Laroe,* WC 4-783-889 (ICAO, Feb. 1, 201O); *see Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). It is thus not essential that the activities of an employee emanate from an obligatory job function or result in a specific benefit to the employer for a claim to be compensable. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). When the employee's personal errand is concluded, the deviation ends, and the employee is once again covered by Workers' Compensation. *Skywest Airlines, Inc. v. Industrial Claim Appeals Office* 2020 COA 131 (Colo. App. Aug. 27, 2020).

7. As found, Claimant has successfully demonstrated, by a preponderance of the evidence, that on December 23, 2022, she suffered an injury arising out of and in the course and scope of her employment with Respondent. As found, Claimant was engaged in activities that complied with Respondent'a manual. The ALJ concludes that at the time of Claimant's injury she had not deviated from her mandatory or incidental job duties. Furthermore, Claimant was not engaged in any activity that was for her sole benefit. On the contrary, Claimant was engaging in activities that benefited Respondent (specifically, preparing for her lesson, assessing mountain conditions, and skiing in a manner that was part of the "on-snow performance" expectation of Employer). As found, Claimant's testimony and Respondent's ski school operations manual are credible and persuasive on this issue.

8. 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).

9. As found, Claimant has successfully demonstrated, by a preponderance of the evidence, that treatment of her left knee, including surgery performed by Dr. Pevny on April 26, 2023, is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury. As found, the medical records and the opinions of Dr. Pevny are credible and persuasive on this issue.

10. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra,* requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and
(2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume his prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; a claimant's testimony alone may be sufficient to establish a temporary disability. *Lymbum v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy* & Co., 964 P.2d 595 (Colo. App. 1998).

11. As found, Claimant has successfully demonstrated, by a preponderance of the evidence, that following her work related left knee surgery, she suffered a wage loss. Therefore, Claimant has likewise demonstrated, by a preponderance of the evidence, that she is entitled to to temporary total disability (TTD) benefits beginning April 26, 2023, and ongoing until terminated by law. As found, the medical records and Claimant's testimony are credible and persuasive on this issue.

12. 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). 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).

13. Section 8-40-201(19), C.R.S. defines "wages". Section 8-40-201(19)(b), C.R.S. specifically provides that wages include "the reasonable value of board, rent, housing, and lodging received from the employer ... " Section 8-40-201(19)(b), C.R.S. further provides that "[i]f after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), ... that advantage or

benefit shall not be included in determination of the employee's wages so long as the employer continues to make payment."

14. In the present case, Claimant includes the value of the housing provided by Employer in the calculation of her AWW. The ALJ determines that Section 8-40-201(19)(b), C.R.S. provides clear direction on whether such an amount should be included as wages. Here, Claimant continues to receive the benefit of discounted housing from Employer. Therefore, the ALJ finds that this constitutes an incident in which "the employer continues to pay any advantage or fringe benefit". Therefore, this amount shall not be included in the calculation of Claimant's wages, and therefore not included in the AWW calculation at this time. If there comes a time when Claimant is no longer receiving discounted housing from Employer, the analysis on this specific issue would change.

15. As found, Claimant's AWW at the time of her injury was $2,416.29. As found, the wage records are credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. Claimant suffered a compensable injury on December 23, 2022.

2. Respondent shall pay for reasonable, necessary, and related medical treatment of Claimant's left knee, including surgery performed by Dr. Pevny on April 26, 2023.

3. Claimant is entitled to temporary total disability (TTD) benefits beginning April 26, 2023, and ongoing until terminated by law.

4. Claimant's average weekly wage (AWW) for this claim is $2,416.29.

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

Dated August 11, 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 26. 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 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.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-218-741-002

ISSUES

- Did Claimant prove she suffered a compensable injury on August 16, 2022?
- If the claim is compensable, did Claimant prove the treatment she has received for her low back was reasonably needed to cure and relieve the effects of the injury?
- The parties stipulated to an average weekly wage of $607.87.
- The parties stipulated that Dr. Brianna Fox is Claimant's primary ATP.

FINDINGS OF FACT

1. Claimant works for Employer in the housekeeping and laundry department. The job is physically demanding and requires frequent lifting, pushing, pulling, and bending. Claimant transferred to the housekeeper position in March 2022. Before that, she worked approximately two years in the kitchen as a cook.

2. Claimant underwent functional capacity testing when she transferred to the housekeeping position. The evaluator noted a history of "arthritis, herniated cervical and lumbar spine, colon cancer SX. No report of [past medical history] hindering essential job functions." During the testing, Claimant pushed and pulled 100 pounds, lifted and carried 50 pounds at waist height and 25 pounds to head level, and performed repetitive squatting and reaching.

3. Claimant alleges an injury to her low back on August 16, 2022 while vacuuming an office. She twisted to the right to pull the hose off the vacuum and felt a pop in her left side. She felt sharp pain in her low back that radiated to her legs and up to her left-side ribs.

4. Claimant immediately reported the injury to the head employee nurse, [Redacted, hereinafter DAK]. She reported it to her direct supervisor the next morning.

5. Claimant saw Natasha Garver, FNP, at the Gordon Clinic on Augst 17, 2022. Ms. Garver documented that Claimant bent down while vacuuming and "felt something pop on left by her rib cage." She continued working despite the pain. The pain persisted, so she requested treatment. Physical examination showed point tenderness around the left lower rib. X-rays of the ribs showed no fracture or other focal lesion. The report makes no mention of low back pain. Claimant testified she marked back pain on a pain diagram, but no corresponding pain diagram is in evidence. Ms. Garver gave Claimant a Toradol injection and prescribed naproxen. Claimant did not want work restrictions and assumed she would be okay after a couple days of rest. She was instructed to follow up in two weeks.

6. Also on August 17, DAK[Redacted] completed an Employer's First Report. Regarding the mechanism of injury, the report states, "while vacuuming carpet, employee turned and twisted, felt discomfort." The injury was described as a "strain," affecting "multiple body parts."

7. Claimant was evaluated by Dr. Brianna Fox on September 7, 2022. Dr. Fox noted Claimant had initially felt chest wall pain "that she thought was her ribs," but "the following day, patient's pain acutely worsened and localized to her low back." Claimant reported tingling in her feet and weakness in her right leg. She appeared uncomfortable and had difficulty maintaining a static posture. She walked with an antalgic gait. Examination showed marked tenderness from the lower thoracic spine through the lumbar spine. Dr. Fox appreciated paraspinal muscle spasm from T-10 to the sacrum. Range of motion was limited because of pain. Strength and sensation were reduced in the right leg and foot. Dr. Fox diagnosed lumbar radiculitis and muscle spasm. She was concerned about possible spinal cord irritation or compression, and ordered a lumbar MRI. Dr. Fox thought it best to wait for the MRI results before starting therapy. She prescribed a muscle relaxer and a Medrol Dosepak. Claimant was given work restrictions of no lifting more than 10 pounds and no twisting or crawling.

8. The lumbar MRI was completed on September 23, 2022. It showed multilevel pathology including (1) moderate to severe facet arthropathy at L1-2 causing foraminal stenosis and possible right L1 nerve root impingement, (2) severe facet arthropathy at L4-5 and stenosis with possible L5 root impingement, and (3) severe facet arthropathy and foraminal stenosis with possible impingement of the L5 nerves and right S1 nerve. The pathology appears to be chronic and degenerative in nature, with no convincing evidence of acute structural changes.

9. Claimant followed up with Dr. Fox on September 27, 2022. She reported ongoing low back pain and muscle spasms. After reviewing the MRI report, Dr. Fox ordered physical therapy and recommended an evaluation with a spine surgeon. Dr. Fox took Claimant off work for a week to "try to get [the] spasms to break."

10. Claimant returned to Dr. Fox on October 10, 2022. She reported an acute exacerbation of her back pain that started three days earlier when she bent over to pick up a small trash bag at work. The pain eased after taking muscle relaxers, but intensified after trying to vacuum, to the point her back "feels like one big spasm." Dr. Fox reiterated the need for a surgical evaluation and referred Claimant to pain management for consideration of injections.

11. Claimant saw Dr. Michael Schweid, a spine surgeon, on October 12, 2022. Claimant explained she developed back and leg pain after she "performed a twisting maneuver" at work. Claimant related a history of "very mild chronic back pain that she was able to work through easily." Dr. Schweid discussed therapy and epidural steroid injections but Claimant was interested in a more definitive "fix" with surgery. Dr. Schweid indicated his office would contact Claimant to schedule a surgery date, although it is unclear whether this occurred. In any event, Claimant is not requesting approval of surgery in the present litigation.

12. Claimant underwent bilateral S1 epidural steroid injections on November 30, 2022. She had a positive short-term diagnostic response, but no sustained therapeutic benefit.

13. Dr. Barry Ogin performed an IME for Respondents on December 29, 2022. Dr. Ogin opined the spinal stenosis and other multi-level degenerative changes shown on the MRI were pre-existing and not causally related to the August 16 work accident. Dr. Ogin concluded the "minimal exposure episode on 08/16/2022, where she was simply bending over and lifting the hose off her vacuum, would not have significantly caused, aggravated, or accelerated" the pre-existing condition. To the extent Claimant may require a lumbar fusion, this would be necessary regardless of occupational exposure. Nevertheless, he acknowledged that Claimant probably suffered a minor muscle strain, and opined, "a short course of physical therapy, 6-8 visits, and a pain psychology evaluation, may reasonably be pursued through this claim to address any soft-tissue component to her complaints."

14. Claimant saw Dr. Jack Rook on January 23, 2023 for an IME at the request of her counsel. Dr. Rook concluded Claimant suffered "an acute work-related injury on August 16, 2022 which caused severe worsening of low back pain and development of bilateral lower extremity radicular symptoms." Dr. Rook cited several factors supporting this conclusion, including a biologically plausible mechanism of injury (bending, twisting, and lifting), Claimant's immediate report of the injury, and the lack of treatment for a low back condition in the years before the accident. Dr. Rook emphasized that Claimant was working full-time at a physically demanding job without difficulty or limitation before the work accident.

15. Dr. Ogin issued a supplemental report dated May 4, 2023 after reviewing pre-injury medical records, including the following:

- An emergency room report from October 2, 2014 documenting a four-year history of back pain that had recently worsened without trauma, causing sensory abnormalities in her feet and urinary incontinence. An MRI that same date showed an anterior disc herniation at L1-2, and a disc bulge and foraminal stenosis at L4-5 flattening the right L5 nerve root.

- PCP records from 2015 and 2016 showing chronic back pain and requiring the use of Vicodin, NSAIDs, and Tylenol. Claimant reported falling because her legs gave out and was applying for disability based on low back and neck issues. Claimant was referred for a surgical evaluation at least twice, although she did not pursue the evaluation.

- On February 23, 2017, Claimant saw her PCP for back pain flares on and off. She could not recall any injury. She had missed a couple of days from work and needed a doctor's note to excuse the absences.

16. The new records did not change Dr. Ogin's opinions and conclusions reflected in his initial report. In Dr. Ogin's view, the pre-injury records confirmed a long

history of chronic back pain with frequent flare-ups not associated with specific events. Thus, the records buttressed his opinion about the progressive nature of Claimant's underlying degenerative spinal pathology and lack of causal relationship to the work accident. He maintained his opinion that Claimant suffered a minor soft-tissue strain on August 16, but her ongoing symptoms are solely related to the pre-existing condition.

17. Dr. Rook and Dr. Ogin testified at hearing consistent with their reports. Dr. Ogin again conceded that Claimant suffered a minor "strain" from the work accident.

18. Claimant proved she suffered a compensable injury to her back on August 16, 2022. Although Claimant had underlying degenerative pathology affecting multiple levels of her lumbar spine before the work accident, she was working at a demanding job without limitation or difficulty. She developed acute pain after bending and twisting to remove the vacuum hose on August 16, 2022. Dr. Fox's September 7, 2022 report is persuasive that Claimant initially thought it was her ribs but the pain quickly "localized" to her low back. Even though Claimant has had multiple previous flare-ups without an inciting event, *this* flare-up was triggered by her work activity on August 16, 2022. Dr. Ogin essentially agreed that Claimant suffered a minor muscle strain at work that reasonably required conservative treatment. Claimant was eventually given temporary work restrictions. Those facts are sufficient to get Claimant over the initial hurdle of compensability.

19. Claimant proved the evaluations and treatment she received from and on referral by Ms. Garver and Dr. Fox and their referrals were reasonably needed to diagnose, cure and relieve the effects of her injury, including the September 23, 2022 lumbar MRI, medications, the October 12, 2022 evaluation by Dr. Schweid, and the November 30, 2022 lumbar ESIs. Claimant has not requested approval for a lumbar fusion, and that issue is reserved for future determination, if necessary.

CONCLUSIONS OF LAW

A. 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); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *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 he seeks 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). A pre-existing condition does not disqualify a claim for compensation where the industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

Even a minor "strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused her to seek medical treatment. The ICAO's decision in *Garcia v.*

Express Personnel, W.C. No. 4-587-458 (ICAO, August 24, 2004) is instructive regarding the minimal extent of an injury that can satisfy the basic threshold requirement of compensability. In *Garcia*, the claimant felt pain in her abdomen and hip while lifting a piece of glass at work. The employer referred the claimant to Dr. Caughfield, who diagnosed a lumbar strain, but opined she had already reached MMI. The ALJ found that the claimant suffered a "minor back sprain," but also found the sprain had "resolved" within five days of the incident. The ALJ denied the claim on the theory that the claimant suffered no "injury." The ICAO reversed and held that the claimant had established a compensable injury as a matter of law:

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

Similarly, *Conry v. City of Aurora*, W.C. No. 4-195-130 (ICAO, April 17, 1996) involved a minor episode that was found to establish a compensable claim as a matter of law. In *Conry*, the claimant suffered from pre-existing asthma. One day she walked into work and encountered a "strong smell of ammonia." As a result, she "began wheezing and became short of breath." The claimant's supervisor advised that she go to the doctor. There is no indication in the decision that the claimant required any treatment other than that single physician visit. The ALJ denied the claim because the ammonia exposure merely caused a "temporary exacerbation" of the claimant's pre-existing asthma. She had no ongoing sequela nor required any additional treatment. Therefore, the ALJ determined the claimant failed to prove that she suffered a compensable "injury." The ICAO reversed the ALJ and found the claimant had proven compensability as a matter of law. The Panel stated, "the claimant's industrial exposure to ammonia caused her to experience respiratory symptoms for which she needed and received medical treatment. . . . [T]hese findings compel a conclusion that the claimant suffered a compensable aggravation of her pre-existing condition [asthma]. Therefore, we reverse the ALJ's determination that the claimant did not suffer a compensable injury."

As found, Claimant proved she suffered a compensable injury to her back on August 16, 2022. Although Claimant had underlying degenerative pathology affecting multiple levels of her lumbar spine before the work accident, she was working at a demanding job without limitation or difficulty. She developed acute pain after bending and twisting to remove the vacuum hose on August 16, 2022. Dr. Fox's September 7, 2022

report is persuasive that Claimant initially thought it was her ribs but the pain quickly "localized" to her low back. And even though Claimant has had multiple previous flare-ups without an inciting event, *this* flare-up was triggered by her work activity on August 16, 2022. Dr. Ogin essentially agreed that Claimant suffered a minor muscle strain at work that reasonably required conservative treatment. Claimant was eventually given temporary work restrictions. Those facts are sufficient to get Claimant over the initial hurdle of compensability.

B. Medical benefits

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). Compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000). An industrial injury need not be the "sole cause" of a need for medical treatment to be deemed a "proximate cause." Rather, it is sufficient if the injury is a "significant factor" in the sense that there is a "direct causal relationship" between the injuy and the need for treatment. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001).

As found, Claimant proved the evaluations and treatment from Ms. Garver and Dr. Fox and their referrals were reasonably needed to cure and relieve the effects of the injury. This includes the September 23, 2022 lumbar MRI, medications, the October 12, 2022 evaluation by Dr. Schweid, and the November 30, 2022 lumbar ESIs. At a minimum, Claimant suffered an acute soft-tissue strain that reasonably prompted her to seek treatment. She was appropriately prescribed medication to alleviate her symptoms. Because she reported severe back pain and leg symptoms, Dr. Fox reasonably ordered an MRI, injections, and an evaluation by a spine surgeon. Diagnostic evaluations and testing are a compensable medical benefit if they have a reasonable prospect of defining the claimant's condition and suggesting a course of treatment. *E.g., Villela v. Excel Corp*., W.C. No. 4-400-281 (February 1, 2001).

Claimant has not requested approval for a lumbar fusion, and that issue is reserved for future determination, if necessary.

ORDER

It is therefore ordered that:

1. Claimant's claim for a low back injury on August 16, 2022 is compensable.

2. Dr. Brianna Fox is Claimant's primary ATP.

3. Claimant's average weekly wage is $607.87.

4. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including but not limited to evaluations and treatment by Ms. Garver and Dr. Fox at the Gordon Clinic, the September 23, 2022 lumbar MRI, medications prescribed by ATPs, the October 12, 2022 evaluation by Dr. Schweid, and the November 30, 2022 lumbar epidural steroid injections.

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

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

DATED: August 18, 2023

s/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. 5-130-634-004

ISSUES

I. Whether the referral to Dr. Yi to evaluate Claimant's cubital tunnel syndrome is reasonable, necessary, and related to the November 29, 2019, industrial injury.

FINDINGS OF FACT

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

1. This claim involves an admitted injury to Claimant's right upper extremity that occurred on November 29, 2019.
2. Claimant is diabetic and was diagnosed with diabetes in 2012. Due to his diabetes, Claimant had some numbness and tingling in his upper and lower extremities after he was diagnosed as diabetic. Upon being diagnosed as diabetic, Claimant's primary care physician prescribed Metformin and gabapentin, which resolved the numbness and tingling issues related to his diabetes. Thus, prior to his work injury, he was not having numbness and tingling in his upper or lower extremities like he was previously.
3. On December 3, 2019, Claimant treated with Concentra and reported he slipped and fell on a wet floor and landed on his right hand and lower back. Claimant reported right wrist, hand, and shoulder pain with some numbness in his right arm, as well as lower back pain. Claimant reported he is diabetic but that he has had no issues with diabetic neuropathy since starting gabapentin. Claimant was prescribed a right arm sling and a right wrist brace. *Claimant's Exhibit 4, pages 8-14*.
4. On December 16, 2019, Claimant treated at Concentra with Scott Richardson, M.D. and reported persistent right wrist, arm, and should pain and symptoms. *Claimant's Exhibit 4, pages 19-25*.
5. From May 11, 2020, through July 15, 2021, Claimant underwent physical therapy for his persistent right upper extremity pain and symptoms. *See Claimant's Exhibit 11, pages 372-512*.
6. On October 1, 2020, Claimant treated with his primary care physician. At this visit, it was noted that Claimant was not checking his blood sugar levels regularly, but when he did during the last week the levels were in the 200's and his A1C had worsened. *Respondents' Exhibit G, page 149-150*.
7. On January 13, 2021, Claimant treated with his primary care physician, who noted his underlying diabetic condition was controlled without complications. He added that Claimant was doing a great job of managing his diabetes and that he was not having any complications. *Respondents' Exhibit G, page 144-145*.

8. On January 26, 2021, Claimant underwent right shoulder surgery with Mark Failinger, M.D. *Claimant's Exhibit 5, pages 262-264*.

9. On February 26, 2021, Claimant followed-up with Dr. Failinger and reported persistent right shoulder pain, arm numbness, clicking/popping in his right elbow, right hand numbness and swelling, and tinging in his fingers on his right hand. Dr. Failinger ordered right elbow x-rays and an MRI, as well as an ultrasound (which was negative) of Claimant's right upper extremity. *Claimant's Exhibit 5, pages 269-271*.

10. On March 12, 2021, Claimant continued to report right upper extremity pain and symptoms. Dr. Failinger noted the likely onset of CRPS. *Claimant's Exhibit 5, pages 273-276*.

11. On February 8, 2021, Claimant returned to see Dr. Richardson and reported persistent right shoulder pain post-surgery, right elbow pain/symptoms, and tinging in his right hand/fingers. *Claimant's Exhibit 4, pages 53-56*. On February 22, 2021, Claimant treated with Dr. Richardson and reported pain and symptoms from his right shoulder down to his fingers. *Claimant's Exhibit 4, pages 57-61*.

12. On March 15, 2021, Clamant returned again to see Dr. Richardson and reported ongoing pain and symptoms involving his right upper extremity. At this visit, he also reported pain and tightness in his right wrist with swelling and increased warmth. At this appointment, Dr. Richardson also questioned whether Claimant had CRPS. *Claimant's Exhibit 4, pages 62-70*.

13. On March 31, 2021, Claimant treated with Nicholas Olsen, DO, and reported the nature of his injury and persistent right upper extremity pain and symptoms. Claimant reported that post surgically, he started feeling range of motion restrictions in his elbow with severe pain and paresthesia. Claimant reported right elbow pain and numbness with tingling into his hand/fingers. On physical examination, Dr. Olsen noted Claimant was tender at the median nerve at the wrist and that the median nerve test at the wrist had a positive Tinel sign, but yet Claimant had a negative Tinel sign at the elbow. Based on his assessment, Dr. Olsen recommended right upper extremity testing for CRPS. *Claimant's Exhibit 6, pages 301-309*.

14. On April 28, 2021, Claimant treated with Dr. Olsen and reported persistent pain and paresthesias in his right forearm and hand, along with swelling in his wrist and hand. On physical examination, Dr. Olsen noted that the median nerve compression test was positive at the wrist, the Tinel sign was positive at the wrist, and that the Tinel sign was negative over his cubital tunnel. *Claimant's Exhibit 6, pages 310-312*.

15. On May 14, 2021, Claimant treated with Dr. Failinger and reported persistent right upper extremity pain and symptoms and delays in treatment due to not receiving physical therapy authorization. Claimant's Exhibit 5, pages 281-284. On August 13, 2021, Dr. Failinger noted Claimant should see a hand surgeon regarding his ulnar nerve issues. *Claimant's Exhibit 5, pages 290-292*.

16. On April 29, 2021, Dr. Olsen noted the CRPS testing showed a likely positive diagnosis of CRPS. Dr. Olsen recommended Claimant undergo stellate ganglion blocks. Additionally, Dr. Olsen performed a right upper extremity EMG, which despite

Claimant having a negative Tinel's sign over his cubital tunnel, revealed ulnar neuropathy at the cubital tunnel. *Claimant's Exhibit 6, pages 313-317*.

17. On May 6, 2022, Claimant was evaluated by Dr. Richardson. At this appointment, Dr. Richardson noted that Claimant had a positive Tinel's sign at his cubital tunnel and diagnosed Claimant with cubital tunnel syndrome. *Claimant's Exhibit 4, pages 85-86*.

18. On May 12, 2021, Claimant underwent a right stellate ganglion block with Dr. Olsen. *Claimant's Exhibit 6, pages 318-319*.

19. On May 18, 2021, Claimant followed-up with Dr. Olsen and reported significant improvement in his CRPS symptoms following the block. In addition to evaluating Claimant for his CRPS, Dr. Olsen also assessed Claimant for his cubital tunnel syndrome and again found Claimant had a positive Tinel's sign at his cubital tunnel. *Claimant's Exhibit 6, pages 320-322*.

20. On May 20, 2021, based on a referral from Dr. Richardson, Claimant treated with David Bierbrauer, M.D., an orthopedic hand surgeon. He concluded that the Claimant developed CRPS after his right shoulder surgery. He also concluded that Claimant has electrodiagnostic evidence of cubital tunnel syndrome graded as moderate, but yet the Claimant's complaints and symptoms were more consistent with carpal tunnel syndrome despite the negative exam of the median nerve. At that time, Dr. Bierbrauer recommended complete resolution of Claimant's CRPS before addressing Claimant's cubital tunnel syndrome. *Claimant's Exhibit 4, page 89*.

21. On July 1, 2021, Claimant returned to Dr. Bierbrauer. At this appointment, he concluded Claimant had electrodiagnostically confirmed right cubital tunnel syndrome and clinically relevant carpal tunnel syndrome. He said that he would consider performing a cubital tunnel release with sub-muscular ulnar nerve transposition and carpal tunnel release, but not until Claimant's CRPS had resolved. *Claimant's Exhibit 4, page 104*.

22. On July 6, 2021, Claimant returned to Dr. Richardson. At this appointment, Dr. Richardson noted that Claimant was seen by Dr. Bierbrauer for his EMG confirmed cubital tunnel syndrome, but that Dr. Bierbrauer wanted to hold off on surgery until Claimant's CRPS was under control. Because Dr. Bierbrauer did not want to perform surgery at that time, and based on Claimant's request, Dr. Richardson referred Claimant to Dr. In Sok Yi for a second surgical opinion. *Claimant's Exhibit 4, pages 106-114.*

23. On August 17, 2021, Claimant was evaluated by Dr. Yi, an orthopedic surgeon, for his right upper extremity symptoms. Among other things, he found that Claimant had a positive elbow flexion test and that he also had a positive Tinel's at the elbow. Based on his physical examination and assessment, he concluded Claimant has CRPS and cubital tunnel syndrome involving his right upper extremity. Dr. Yi also discussed treatment options with Claimant for which included surgery – a cubital tunnel release. Dr. Yi stated that such treatment will help the numbness and tingling in Claimant's small finger and may also help his CRPS. *Claimant's Exhibit 7, pages 344-345*.

24. Also on August 17, 2021, Claimant was evaluated by Dr. Olsen. Claimant advised Dr. Olsen that he had consulted with Dr. Yi and that Dr. Yi recommended surgery. Dr.

Olsen maintained Claimant's treatment plan and recommended moving forward with a third right stellate ganglion block. *Claimant's Exhibit 6, pages 333-336*.

25. On October 26, 2021, Claimant underwent an independent medical evaluation with John Burris, M.D., Respondents' retained expert witness. Dr. Burris opined Claimant was at MMI, does not have CRPS, and that Claimant's right elbow pain and symptoms, including [right] cubital tunnel syndrome are unrelated to his industrial injury. *Respondents' Exhibit B, pages 37-53*.

26. From late 2021 through June 2022, Claimant continued to treat with Dr. Richardson and other Concentra providers. During this time, Claimant reported persistent right upper extremity, including right elbow, pain and symptoms. *See Claimant's Exhibit 4, pages 134-193*.

27. On June 6, 2022, Claimant underwent a 24-month Division IME with John Aschberger, M.D., who concluded Claimant is not at MMI. Dr. Aschberger stated that in order to further investigate whether Claimant's right sided cubital tunnel syndrome is work related, Claimant should undergo bilateral temperature controlled electrodiagnostic testing of his upper extremities. Dr. Aschberger also stated that if the findings were localized to the right upper extremity, then further intervention could proceed, but yet work relatedness would have to be evaluated further. He also stated that if there were similar findings in the right and the left, then it would not be work-related. *Claimant's Exhibit 8, pages 346-353*.

28. On November 17, 2022, Respondents filed a General Admission of Liability. *Claimant's Exhibit 1, page 1*.

29. On December 14, 2022, Claimant presented to Justin Green, M.D., for bilateral upper extremity electrodiagnostic testing. At this appointment, Claimant still complained of pain, tingling, numbness, and weakness of the right upper extremity, which included elbow and wrist pain. He also complained of loss of extension of his fingers. Dr. Green performed the electrodiagnostic testing. The results were normal – bilaterally. Based on the normal results, Claimant was referred back to Dr. Richardson for further management of his symptoms. *Claimant's Exhibit 10, pages 370-371*.

30. On February 3, 2023, Claimant returned to Dr. Richardson. Dr. Richardson evaluated Claimant and found tenderness at the cubital tunnel of Claimant's right elbow. Dr. Richardson also noted that the December 14, 2022, EMG was normal. At this appointment, Dr. Richardson stated Claimant said he needed a referral back to the hand surgeon, Dr. Yi, to see if he can get right cubital tunnel surgery. Despite the normal EMG, Dr. Richardson felt it was appropriate to refer Claimant back to Dr. Yi. Thus, Dr. Richadson referred Claimant to back to Dr. Yi to so Dr. Yi could "evaluate and treat" Claimant. *Claimant's Exhibit 4, pages 225-230*.

31. On February 15, 2023, Dr. Burris performed a records review. Dr. Burris opined Claimant's right cubital tunnel syndrome is unrelated to Claimant's industrial injury. He also concluded that because the DIME physician's suggestion for Claimant to undergo a bilateral EMG, which he did, and which was negative, there was no need for another evaluation by Dr. Yi. Thus, he concluded that the referral to Dr. Yi is not

reasonable, necessary, or related to Claimant's industrial injury. *Respondents' Exhibit B, pages 33-36*.

32. Dr. Burris also testified by post-hearing deposition on June 16, 2023, and maintained his opinions. During his deposition, he went over the findings on physical examination of various physicians, which included a positive Tinel's sign, that developed several months after the Claimant's injury, and the prior EMG that was positive. He also discussed the mechanism of injury and how Claimant fell. Dr. Burris concluded that the lack of a temporal relationship to the initial injury, and the mechanism of injury, did not support a finding that the cubital tunnel condition was related to Claimant's work accident. Dr. Burris also stated that based on the DIME opinion, and the negative bilateral EMG findings after the DIME, in December 2022, a referral to Dr. Yi would not be appropriate and in line with the recommendations of the DIME physician. *See Burris Deposition.*

33. At Hearing, Claimant credibly testified about the onset of his right upper extremity symptoms. Claimant credibly testified that his right elbow symptoms started after his January 2021 right shoulder surgery and that he continues to have persistent right upper extremity, including right elbow, pain and symptoms. Claimant did not have any left upper extremity symptoms. Claimant also credibly testified that he did not have any issues with his right upper extremity-like he is having now-prior to his work injury.

34. Claimant does have diabetes that could be causing his right upper extremity symptoms. For example, Claimant complained of tingling in his hands and legs in 2014 and a sense of vibration in 2015. *Respondents' Exhibit D, page 63, 66*. Plus, in September 2020, his diabetes was not under control. *Claimant's Exhibit D, page 400*. But Claimant was forthcoming with his providers (from day one) about his underlying diabetic condition and his diabetes appeared to be controlled with Metformin and gabapentin as of April 2021. *Claimant's Exhibit 6, page 313*.

35. But, Claimant's right upper extremity complaints, for which he is being referred back to Dr. Yi, started after his January 2021 right shoulder surgery. As a result, the ALJ finds that the temporal relationship between Claimant's shoulder surgery and the onset of his right elbow symptoms, combined with the varying physical findings, demonstrates a causal connection of his right elbow symptoms to his work injury to support the need for additional treatment in the form of an evaluation by Dr. Yi in order to assist in ascertaining and defining the extent of Claimant's work injury and the need for future treatment, which could include surgery.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of

the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

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

I. Whether referral to Dr. Yi for a cubital tunnel syndrome surgery evaluation is reasonable, necessary, and related to the November 29, 2019, industrial injury.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The term medical treatment includes diagnostic or evaluative procedures required to ascertain the scope of the industrial injury and determine the extent of future medical treatment. *See Merriman v. Indus. Com.*, 210 P.2d 448 (1949); *Villela v. Excel Corp.*, W.C. No. 4-400-281 (February 1, 2001); *Hatch v. John H. Harland Co.*, W.C. No. 4-368-712 (August 11, 2000).

In this case, Claimant has been diagnosed with cubital tunnel syndrome. But his Tinel's and EMG test results have varied. Sometimes the testing has been positive for cubital tunnel syndrome and sometimes it has been negative. But, despite these findings, Dr. Richardson still determined that Claimant's symptoms support a finding and diagnosis of cubital tunnel syndrome and that he needs additional evaluative medical treatment.

Plus, the finding that Claimant's right upper extremity complaints, for which he is being referred back to Dr. Yi, started after his January 2021 right shoulder surgery, and did not exist before the shoulder surgery, is found to be highly persuasive. The ALJ is mindful of the logical fallacy of mistaking temporal proximity for a causal relationship and that correlation is not causation. *See Shaffstall v. Champion Technologies*, W.C. No. 4-820-016 (March 2, 2011). On the other hand, the ALJ is also mindful of the fact that such logic that may also yield inaccurate results, *i.e*., that sequence is not relevant to causation. *See Wilson v. City of Lafayette*, No. 07-cv-01844-PAB-KLM, 2010 U.S. Dist. LEXIS 24539, at *23 (D. Colo. Feb. 25, 2010).

In this case, the ALJ finds and concludes that the sequence is relevant to causation here. As a result, the ALJ finds and concludes that the temporal relationship between Claimant's shoulder surgery and the onset of his right elbow symptoms establishes a causal connection of his right elbow symptoms to support the need for additional treatment in the form of an evaluation by Dr. Yi in order to assist in ascertaining and defining the extent of Claimant's work injury and the need for future treatment, which might include surgery. As stated above, medical treatment includes diagnostic or evaluative procedures required to ascertain the scope of the industrial injury and determine the extent of future medical treatment. *See Merriman, Supra*.

The ALJ also finds persuasive the fact that Claimant's treating physician, Dr. Richardson, who was treating Claimant for his work injury, referred Claimant to Drs. Bierbrauer and Yi to evaluate Claimant for his cubital tunnel symptoms. Such referrals indicate to this ALJ that Dr. Richardson thought Claimant's cubital tunnel symptoms were related to the Claimant's work injury and needed further assessment by a surgeon such as Drs. Bierbrauer and Yi under Claimant's workers' compensation claim. Thus, this is persuasive evidence that the need for an evaluation with Dr. Yi is reasonably, necessary, and related to the work injury. The ALJ has also considered the opinions of Dr. Burris. Overall, the ALJ does not find his opinions to be persuasive, when compared to the record as a whole.

Therefore, the ALJ finds and concludes that based on the totality of the evidence, Claimant has established by a preponderance of the evidence that the referral to Dr. Yi to evaluate Claimant for his cubital tunnel symptoms is reasonable, necessary, and related to his industrial injury to help determine the extent of his work injury and the need for future medical treatment.

ORDER

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

1. The evaluation with Dr. Yi is reasonable, necessary, and causally related to the admitted industrial injury.
2. Respondents shall pay for Claimant to be evaluated by Dr. Yi for his right elbow symptoms.
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: August 14, 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 established by a preponderance of the evidence grounds for reopening his claim based on a change in his condition.

2. Whether Claimant established by a preponderance of the evidence that medical treatment recommended by Rafer Leach, M.D., is reasonably necessary to cure or relieve the effects of his industrial injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as the director of dining services for Employer's health care facility. On July 22, 2021, Claimant was assisting another employee moving a desktop into an office and sustained an admitted injury to his back and hip.

2. Claimant has a history of lower back issues, including a lower lumbar discectomy more than twenty years ago. In 2016, Claimant was treated for a lower back strain and groin pain, and underwent a lumbar MRI on September 30, 2016. (Ex. I). The MRI was interpreted as showing multilevel disc degeneration, with mild to moderate stenosis without nerve root deformity. (Ex. J). Claimant's last documented medical visit for lower back pain before July 22, 2021 was on October 19, 2016 when he was released from care without work restrictions. (Ex. K).

3. After Claimant's July 22, 2021 injury, he initially sought treatment at Concentra where he was examined by Michael Pete, PA. Claimant was diagnosed with hip pain and referred for physical therapy. (Ex. N).

4. Over the next several months, Claimant saw authorized treating physician (ATP) Kathryn Bird, D.O., at Concentra. Claimant reported consistent pain in the right hip and buttock area. On October 7, 2021, Dr. Bird referred Claimant for a physiatry evaluation with John Sacha, M.D. (Ex. N).

5. Claimant first saw Dr. Sacha on October 13, 2021, and reported pain in the right lower back, buttock, lateral thigh, and occasional numbness and tingling into his foot. Dr. Sacha diagnosed Claimant with lumbar radiculopathy and post-laminectomy syndrome. Dr. Sacha opined that although Claimant's pain was in the buttocks and hips, his issues appeared to be lumbar in nature. He opined that Claimant had a permanent exacerbation of a pre-existing problem in his lumbar spine, and that he had evidence of acute ongoing neural compromise. Dr. Sacha referred Claimant for a lumbar MRI. (Ex. O).

6. The lumbar MRI was performed on October 29, 2021, and demonstrated degenerative joint disease and facet arthropathy throughout the lumbar spine, with moderate neural foraminal stenosis on the left at L3-4, and bilaterally at L5-S1. The

radiologist also noted subarticular narrowing at the L5-S1 level which impinged on the S1 nerve root bilaterally. (Ex. 6).

7. Dr. Sacha reviewed Claimant's MRI on November 3, 2021, and noted it was difficult to determine the level causing Claimant's symptoms, but that Claimant was not a surgical candidate. He recommended a staged lumbar transforaminal injection at the L4-5 and S1 levels.

8. On November 23, 2021, Dr. Sacha performed the transforaminal injections at L4, L5 and S1 spinal levels. Claimant reported complete relief of his pain 30 minutes following the injections. (Ex. O).

9. Claimant returned to Dr. Bird on December 8, 2021. By that time, Claimant had completed 16 sessions and been released from physical therapy. Claimant reported no pain and Dr. Bird's examination was normal. She placed Claimant at maximum medical improvement (MMI) and assigned a 7% whole person impairment. She recommended maintenance care with Dr. Sacha over the following year, including, potentially, additional injections. (Ex. N).

10. On December 12, 2021, Respondents filed a Final Admission of Liability (FAL), admitting for a 7% whole person impairment and medical maintenance benefits. (Ex. B).

11. Claimant returned to Dr. Sacha on February 2, 2022, reporting he had a flare up of lower back, right buttocks, and right leg pain. Claimant was concerned that his symptoms may be hip related. Dr. Sacha did not believe the Claimant's pain was hip related, but ordered a right hip MRI to evaluate. (Ex. O).

12. A right hip MRI was performed on March 8, 2022. (Ex. R). Although the MRI demonstrated pathology in Claimant's right hip, Dr. Sacha reviewed the MRI and opined that the findings were old and degenerative, with possibly symptomatic gluteus proximal tendon attachments. However, Dr. Sacha also opined that the pathology shown on the MRI was not work-related. Claimant remained at MMI, and Dr. Sacha recommended additional injections. (Ex. O).

13. On March 28, 2022, Dr. Sacha performed injections on Claimant's right side at L5, S1, and the right hip bursa. Claimant had a complete resolution of pain 30 minutes following the injection. (Ex. 5).

14. On April 13, 2022, Claimant reported to Dr. Sacha that he did not receive lasting relief from the injections and still had ongoing pain. Dr. Sacha opined that no further interventions or surgery would be necessary, and recommended a "wait-and-see" approach, with a home exercise program and medical management of Claimant's symptoms. (Ex. O).

15. Claimant returned to Dr. Sacha on May 18, 2022, reporting no significant change in his condition. Dr. Sacha noted the care Claimant had received to date had not provided significant relief, and recommended discontinuation of Claimant's home exercise program and medications. He did recommend a e-stim unit and that Claimant return in two months.

He again indicated Claimant was not a candidate for further interventional procedures. (Ex. O).

16. On July 20, 2022, Claimant returned to Dr. Sacha reporting a flare up in right lateral hip pain. Dr. Sacha recommended that Claimant undergo a plasma-rich platelet (PRP) injection. (Ex. O).

17. On August 24, 2022, Claimant saw Samuel Chan, M.D., who performed the PRP injection recommended by Dr. Sacha. (Ex. P).

18. Claimant followed up with Dr. Sacha on September 28, 2022, reporting only mild relief from the PRP injection. Dr. Sacha ordered massage and/or acupuncture for Claimant's iliotibial bands and low back tightness, and discharged Claimant from maintenance care. (Ex. O).

IME Physicians

19. On May 6, 2022, Rafer Leach, M.D., performed an IME at Claimant's request. Dr. Leach testified at hearing, and was admitted as an expert in emergency and occupational medicine. Dr. Leach examined Claimant in May 2022, and conducted a virtual visit on June 21, 2023. Dr. Leach opined that Claimant was not at MMI in December 2021, and is currently not at MMI. Dr. Leach testified that in his opinion, Claimant's condition has worsened because Claimant has increased complaints of pain, but did not identify any change in Claimant's physical condition.

20. Dr. Leach testified that he believes Claimant sustained a lumbar disc injury and injury to the structure in and around the right hip. He further opined that claimant has underlying instability at the L5-S1 level, based on Claimant's October 29, 2021 MRI, which showed "mild retrolisthesis of L5 measuring 3 mm." He characterized this as spondylolisthesis and potentially a surgical issue. He recommended additional imaging studies to evaluate Claimant for lumbar instability. However, he offered no credible opinion that Claimant's retrolisthesis was causally related to Claimant's work injury.

21. Dr. Leach recommended that Claimant be re-evaluated, and that Dr. Sacha perform repeat epidural steroid injections at L4-5 and L5-S1. He also opined that Claimant has evidence of right lumbar facet syndrome in the lower lumbar segments, and that "should there be only a partial response with respect to lumbar axial symptoms with transforaminal epidural steroid, then it would be informative and likely therapeutic to perform lumbar medial branch blockade to determine the degree to which the lower right lumbar facets also contribute to lumbar axial and sclerotomal pain." He speculated that such treatment could improve Claimant's gluteal symptoms. None of Claimant's treating physicians have diagnosed Claimant with a lumbar disc injury, lumbar facet syndrome, or spondylolisthesis. Dr. Leach's opinions are not persuasive.

22. On October 17, 2022 Carlos Cebrian, M.D., performed an IME of Claimant at Respondents' request. Dr. Cebrian issued a report dated November 4, 2022, and testified by deposition in lieu of live testimony. Dr. Cebrian was admitted as an expert in occupational medicine. Dr. Cebrian testified that he believes Claimant sustained a lumbar

strain and a partial hamstring tear as the result of his industrial injury. Dr. Cebrian testified that he agrees with Dr. Bird's MMI opinion, and that Claimant remains at MMI. Dr. Cebrian did not recommend further maintenance care, and opined that he did not believe there was any additional treatment that would make a difference in Claimant's condition. Dr. Cebrian indicated that based on his review of medical records and examination of Claimant, he did not see any objective evidence of worsening of his condition. Dr. Cebrian also disagreed with Dr. Leach's recommendations with respect to treatment of Claimant's condition.

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).

Reopening For Change In Condition

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Indus. Comm'n*, 725 P.2d 63, 65 (Colo. App. 1986). 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 Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Office,* 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,* W.C. No. 4-358-465 (ICAO Oct. 25, 2006). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Constr. Co.,* 765 P.2d 1033 (Colo. App. 1988). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO July 19, 2004

Claimant has failed to establish by a preponderance of the evidence that he sustained a post-MMI change in condition causally connected to his original work injury. Claimant's claim was closed pursuant to the FAL filed on December 20, 2021. Approximately six weeks after the FAL was filed, Claimant returned to Dr. Sacha reporting a flare up of pain in the low back, buttocks, and leg. Dr. Sacha investigated Claimant's condition through a right hip MRI, and opined that there was no additional work-related pathology. He then performed injections in Claimant's lumbar spine and right hip, and referred him for PRP injections, none of which provided lasting relief. No treating provider has credibly opined that Claimant's physical condition has changed, or credibly identified any objective basis for the increase in pain. In testimony, Dr. Leach did not opine that Claimant's physical condition has changed, and opined only that based on Claimant's reports, he has had increased pain. The fact that Claimant has experienced flare ups of pain is not credible evidence that Claimant's physical condition changed after being placed at MMI on December 8, 2021.

Claimant has also failed to establish that his claim should be reopened to obtain additional medical care. Respondents admitted for maintenance care and Claimant remains entitled to such care if recommended by his authorized treating physicians. However, none of Claimant's ATPs have recommended additional maintenance care, with the exception of Dr. Sacha's recommendation of acupuncture or massage. Dr. Leach is not an ATP, and his treatment recommendations and diagnoses are inconsistent with Claimant's treating providers.

Medical Care

Claimant has failed to establish that the medical care recommended by Dr. Leach is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. As found, Dr. Leach's recommendations for treatment are speculative and unpersuasive.

Claimant's authorized treating providers have not recommended additional treatment beyond acupuncture and/or massage, which was recommended in September 2022. Because no authorized treating physician has recommended Claimant receive additional treatment, the ALJ lacks authority to authorize such treatment. *Potter v. Ground Services Co.*, W.C. No. 4-935-523-04 (ICAO, Aug. 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995).

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his claim for a change of condition is denied.

2. Claimant's request for the medical treatment recommended by Dr. Leach 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: August 14, 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. WC 5-221-505-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable lower back injury arising out of the course of his employment with Employer on October 8, 2022.

FINDINGS OF FACT

1. Claimant is employed as an assistant manager in Employer's restaurant. On October 8, 2022, Claimant was carrying a 30-pound box of chicken into a freezer when turned to the right and experienced symptoms in his lower back and pain shooting down his left leg. Claimant reported the incident to Employer, and a First Report of Injury was filed on October 12, 2022.

2. Claimant has a remote history of lower back surgery more than 20 years ago, and testified that he had not had issues with his lower back after that surgery for many years. Claimant testified that he has lived in Colorado for approximately 7-8 years, and has not had medical treatment for his lower back during that time, with the exception of an incident approximately six weeks before October 8, 2022 when he "tweaked" his back lifting a stack of plates while working for Employer.

3. After the October 8, 2022 incident, Claimant first sought treatment for his lower back at Centura, where he saw James Machin, NP. Claimant reported pain in his lower back, and pain shooting down his left glute into his thigh. He was diagnosed with acute low back pain with sciatica, prescribed Flexeril, and recommended physical therapy. (Ex. 5).

4. On October 14, 2022, Claimant saw Hiep Ritzer, M.D., at Intermountain Health Care. Claimant reported to Dr. Ritzer that he was working in a freezer and lifted a box of chicken causing pain in his back and shooting pain down the left gluteus into the back of his knee. Claimant also reported the prior incident where he experienced pain lifting dishes, and his prior back surgery. Claimant reported that he had no back issues until the incident with the dishes, and that it worsened after lifting the box of chicken. Dr. Ritzer noted a positive FABER test on the left side.[1] Dr. Ritzer diagnosed Claimant with a back strain of the lumbar region and SI, and opined that his symptoms were consistent with a work injury. She recommended that Claimant attend six sessions of chiropractic care with Jennifer Walker, D.C., and undergo a lumbar MRI. (Ex. 6).

5. Claimant began seeing Dr. Walker on October 31, 2022, and attended 5 sessions. Dr. Walker performed chiropractic manipulations, trigger point dry needling, massage

[1] FABER (flexion-abduction-external rotation) or Patrick's test is a test used to identify sacral pathology such as SI joint pain. See 7 CCR 1103-3, WCRP Rule 17, Ex. 6.

therapy, and instructed Claimant on home exercises. Claimant reported that the treatment with Dr. Walker lessened his lower back pain, but did not improve his leg symptoms. (Ex. 7).

6. Claimant returned to Dr. Ritzer on November 2, 2022 and November 28, 2022, reporting no significant improvement in his lower extremity symptoms. Dr. Ritzer noted that her request for an MRI had been denied. On November 28, 2022, Dr. Ritzer referred Claimant to Yasuke Wakeshima, M.D., for pain management. (Ex. 6).

7. On December 15, 2022, Respondent filed a Notice of Contest, asserting that additional investigation was necessary for causation and relatedness. (Ex. B).

8. Claimant saw Dr. Wakeshima on December 15, 2022, and reported his injury history consistent with the history he provided to Dr. Ritzer. Dr. Wakeshima noted positive straight leg test and Yeoman's tests on the left. Based on his examination and review of Dr. Ritzer's records, Dr. Wakeshima opined that Claimant's reported mechanism of injury could be consistent with a disc herniation affecting the left SI nerve root, or a L4-5, L5-S1 disc injury. He diagnosed Claimant with low back pain with sciatica, left lumbar radiculopathy, and pain of the left lower extremity due to injury. Dr. Wakeshima concurred with Dr. Ritzer's recommendation for an MRI, and requested authorization. Additionally, he prescribed an electronic stimulation (e-stim) unit, and prescribed lidocaine patches for pain. (Ex. 8).

9. Claimant returned to Dr. Wakeshima on January 13, 2023 with essentially unchanged symptoms. He indicated that neither the lidocaine patches nor the e-stim unit provided relief. Dr. Wakeshima prescribed diclofenac gel, which also did not provide relief. Dr. Wakeshima noted that his request for an MRI had been denied, and requested the MRI again. (Ex. 8).

10. Claimant continued to see Dr. Ritzer over the following three months, with no significant change in his symptoms until April 3, 3023, when he reported that his pain had increased. (Ex. 6).

11. On April 4, 2023, Claimant saw Dr. Wakeshima, reporting increased pain. Again, Dr. Wakeshima noted positive testing on the left, including straight leg raise, Patrick's test (i.e., FABER), and Yeoman's. He again recommended a lumbar MRI, which had been denied by Insurer. (Ex. 8).

12. On April 18, 2023, Claimant underwent an independent medical examination (IME) with Anant Kumar, M.D., at Respondent's request. Dr. Kumar indicated that Claimant reported pain in his left leg with straight leg testing, and that tests for SI joint injury and abnormalities were negative. (In contrast to testing performed on multiple visits by Dr. Ritzer and Dr. Wakeshima). He opined that Claimant's reported radiculopathy was in a non-dermatomal distribution below the left knee, and concluded that he could not explain Claimant's paresthesias. He further opined that it was unlikely Claimant sustained an injury which could cause involvement of the L4, L5, and S1 nerve roots, which corresponded to Claimant's reports of paresthesia symptoms. Dr. Kumar further

speculated that it was unlikely an MRI would show significant abnormality other than age-related degenerative changes. He indicated that even if the MRI showed a disc herniation at L4-5, it would not explain the distribution of Claimant's paresthesias. Although not expressly stated, Dr. Kumar infers that Claimant sustained no injury. Dr. Kumar's report and opinions are not persuasive evidence that Claimant did not sustain a work-related injury. (Ex. C).

13. On April 26, 2023, Claimant had a lumbar MRI performed. The MRI was interpreted as follows: "Large posterior/left paramedian disc bulge/protrusion at L5-S1. There is mass effect upon and displacement of the origin of the left S1 nerve root and potential irritation upon the origin of the right S1 nerve root." (Ex. E).

14. Claimant saw Dr. Wakeshima again on April 28, 2023. Although his report is not included in the record, it is quoted in Dr. Ritzer's report of May 9, 2023. Dr. Wakeshima reviewed Claimant's MRI films and indicated that there "was definitely a prominent left-sided paracentral disc protrusion at L5-S1,. This is displacing the left S1 nerve root which correlates with the patient's current symptoms." Based on the MRI, Dr. Wakeshima recommended a left L5-S1 and left S1 transforaminal epidural steroid injection to address his S1 radiculopathy symptoms. He further indicated that because the MRI did not demonstrate significant central canal stenosis, and Claimant's symptoms were pain only without weakness, that an epidural steroid would be indicated before considering surgery. (See Ex. 6)

15. Claimant returned to Dr. Ritzer on May 9, 2023. Dr. Ritzer amended her original diagnosis of Claimant to include a herniated nucleus pulposus, left L5-S1. She again opined that Claimant's condition was consistent with a work injury. (Ex. 6).

16. At hearing, [Redacted, hereinafter AG], the general manager of the restaurant in which Claimant works testified. AG[Redacted] testified he had worked with Claimant since July 2022, and that Claimant had previously complained of back problems. He indicated that prior to October 8, 2022, Claimant complained of a sore back, and had requested duties that did not aggravate his back pain.

17. Claimant testified that he did not have symptoms in his left leg prior to October 8, 2022. He further testified, credibly, that he had frequently performed the same task of lifting boxes of chicken prior to October 8, 2022 without difficulty. He testified that he had back surgery more than 20 years ago, and that the surgery resolved the issues he was having at that time.

18. The parties stipulated that if Claimant's claim is compensable, his average weekly wage is $1,075.00.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

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

had some connection with his work-related functions. *See Triad Painting Co, supra*; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014).

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

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

Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his lower back arising out of the course of his employment with Employer on October 8, 2022. Although Claimant has a remote history of lumbar surgery, no credible evidence was admitted indicating that Claimant was experiencing radicular symptoms in his left leg prior to October 8, 2022. Claimant’s treating health care providers credibly opined that Claimant’s reported mechanism of injury was consistent with an injury to his lower back. Prior to Claimant’s MRI, Dr. Wakeshima suggested that the mechanism was consistent with a disc injury affecting the S1 nerve root. Claimant’s April 26, 2023 MRI confirmed Dr. Wakeshima’s suspicion. The ALJ finds persuasive, and credits the opinions of Dr. Ritzer and Dr. Wakeshima that Claimant sustained a work-related injury as a result of moving a 30-pound box of chicken on October 8, 2022.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his lower back, including a disc herniation at L5-S1 arising out of the course of his employment on October 8, 2022.

2. Claimant’s average weekly wage is $1,075.00.

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: August 14, 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. WC 5-228-547-001

PROCEDURAL MATTER

On June 8, 2023 Claimant filed an Opposed Motion to Strike the IME Report of Dr. Erickson. The ALJ did not rule on the motion prior to hearing. At hearing Claimant asserted that, because Dr. Erickson's assistant did not email the IME report to Claimant at the same time she emailed the report to Respondents, the IME report must be stricken. It is undisputed that Respondents' counsel emailed Dr. Erickson's IME report to Claimant's counsel within 30 minutes of receipt and Dr. Erickson's office emailed a copy of the report to Claimant's counsel on June 8, 2023.

At hearing, the ALJ heard arguments on Claimant's Motion. He denied the Motion based upon the above undisputed facts. On July 11, 2023 the ALJ issued a written order again denying Claimant's motion to strike Dr. Erickson's IME report.

During Dr. Erickson's evidentiary deposition on July 10, 2023 Claimant objected to his qualifications as a medical expert under Colorado Rule of Evidence (CRE) 702 and WCRP 16-7-2(E). Dr. Erickson testified extensively with respect to his medical and surgical training. He also explained that his experience, knowledge, and skill were relevant to the disputed hip surgery in the present matter. Dr. Erickson also noted his decision to retire from performing surgeries prior to appearing before the Medical Board on two cases. He verified that he remains actively licensed to practice medicine in Colorado conditioned upon his agreement not to perform surgery.

CRE 702 provides that if scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. WCRP 16-7-2(E) involves prior authorization appeals and does not pertain to qualifying a witness as an expert. Dr. Erickson testified regarding his medical license and specifically his extensive knowledge, education, training, experience, and skill in the field of medicine. He also discussed hip anatomy, surgical indications for hip arthroscopies and hip replacements, and the Colorado Division of Workers' Compensation Medical Treatment Guidelines (MTGs). Based on the preceding testimony, Dr. Erickson is qualified to render opinions as a medical expert in the field of orthopedic surgery including hip surgeries. His testimony will assist the ALJ in understanding the evidence and determine facts relevant to the disputed issues. Therefore, Claimant's motion to disqualify Dr. Erickson from testifying as a medical expert is denied.

ISSUE

Whether Claimant has proven by a preponderance of the evidence that the left total hip replacement requested by Scott Resig, M.D. is reasonable and necessary.

STIPULATION

Respondents notified the ALJ that, if the proposed left total hip replacement is determined not to be reasonable and necessary, they will authorize a left hip arthroscopy under this claim once the correct arthroscopic procedure is determined by a specialist in hip arthroscopies. Claimant agreed and the ALJ accepted the stipulation.

FINDINGS OF FACT

1. Claimant is a 55-year-old female who began employment as a horse care worker for Employer on October 11, 2022. On December 30, 2022 Claimant injured her left hip and right shoulder while mucking out horse stalls at work.

2. Claimant presented to Authorized Treating Provider (ATP) Mary Susan Zickefoose, M.D. at Care Now Urgent Care on seven occasions between January 11, 2023 and May 11, 2023. During her initial visit on January 11, 2023 Claimant reported a work-related injury and complained of hip pain that had been present for two weeks. Non-weight-bearing, x-ray imaging revealed no osteoarthritis (OA). Dr. Zickefoose prescribed meloxicam, issued work restrictions and diagnosed Claimant with trochanteric bursitis.

3. Claimant returned to Dr. Zickefoose on January 20, 2023 and January 27, 2023. Dr. Zickefoose recommended physical therapy and proposed a left hip injection. The plan was to obtain an MRI of the hip and follow up with an orthopedist.

4. Claimant again visited Dr. Zickefoose on February 16, 2023 and March 9, 2023. During the March 9, 2023 consultation, Claimant reported receiving an injection with no relief. Claimant's pain levels remained 6-7/10. She noted anxiety, depression, and constant pain. Dr. Zickefoose recommended continued physical therapy twice weekly for four more weeks.

5. Between January 26, 2023 and May 18, 2023, Claimant presented to Orthopedic Surgeon Scott Resig, M.D. for evaluation of the left hip on six occasions. At the initial visit on January 26, 2023 left hip x-rays were again negative for OA. Dr. Resig recommended a left hip MRI.

6. Robert Stone, M.D. read Claimant's February 2, 2023 left hip MRI as showing a labral tear and " . . . up to grade III chondromalacia of the superior and anterior superior left acetabular cartilage measuring 9 mm AP by 7 mm traverse." He did not identify sclerotic changes, bone cysts, or osteophytes. Dr. Stone also did not characterize the chondromalacia as bone-on-bone or severe.

7. On February 9, 2023 Dr. Resig reviewed the left hip MRI and stated it showed an acetabular labrum tear with Grade 3 changes and femoral neck inflammation. He did not describe other findings of significance, nor did he characterize the chondromalacia as severe or bone-on-bone. Dr. Resig recommended a left hip joint injection that was administered on February 23, 2023.

8. On March 16, 2023 Claimant notified Dr. Resig that the hip joint injection provided a few hours of relief and had only minimal lasting relief. Additional left hip and pelvic x-rays

revealed only “mild” OA. In contrast, Dr. Resig reported that Claimant had “severe bone on bone arthritis on x-ray . . ..” Dr. Resig recommended a total hip replacement because there were no other options.

9. On March 28, 2023 Orthopedic Surgeon Jon Erickson, M.D. reviewed Claimant’s available medical records and issued a report addressing Dr. Resig’s surgical recommendation. Dr. Erickson explained:

> I am going to have to recommend denial of this request for surgery simply because of the inconsistencies in the medical record. The MRI failed to show the severe chondromalacia changes in either the acetabulum or the humeral head, and yet Dr. Resig relates that this is bone-on-bone arthritis. X-rays taken on that same visit showed only mild osteoarthritis.

On March 30, 2023 Insurer denied the recommended total hip replacement surgery based upon Dr. Erickson’s report and opinions.

10. In a letter dated April 11, 2023 Dr. Resig appealed the surgery denial. He explained that Claimant “has underlying osteoarthritis of the hip which was exacerbated by her workers’ compensation injury. She had no pain prior to this injury. The MRI shows a labral tear, unfortunately she also has grade 3 changes, which limits her treatment options to hip replacement.”

11. Orthopedic Surgeon Michael Hewitt, M.D. reviewed Dr. Resig’s appeal. In a report dated April 15, 2023 Dr. Hewitt reasoned that “[w]ith the arthritis apparently not grade 4, no significant trauma, and her relatively young age, I would agree with the previous reviewer [Dr. Erickson] that the surgery should be denied.” On April 21, 2023 Insurer again denied Dr. Resig’s recommendation for a left total hip arthroplasty. Dr. Hewitt subsequently reviewed additional information, and in a report dated April 28, 2023, he explained that “the proposed surgery, namely a total hip arthroplasty, in a 55-year-old female with a focal area of grade 3 chondromalacia, 9 x 7 mm, and no advanced grade 4 arthritis, appears relatively aggressive regarding the information provided.” He further remarked that it would be reasonable to obtain a second opinion with a hip arthroscopy specialist to assess whether Claimant’s labral pathology could be addressed without arthroplasty.

12. On May 31, 2023 Claimant underwent an IME with Dr. Erickson. He reviewed Claimant’s medical records and conducted a physical examination. Dr. Erickson also met with radiologist Dr. Elizabeth Carpenter to review Claimant’s x-rays and left hip MRI. Based upon the imaging review with Dr. Carpenter, Dr. Erickson concluded that the left hip x-rays from January 26, 2023 and March 16, 2023 were essentially identical. They showed normal joint space with perhaps slight narrowing. The finding was consistent with mild OA. In addressing Claimant’s left hip MRI, Dr. Erickson determined “[t]he MRI of the left hip from 2/2/2023 is consistent with these radiographs, with a reasonable mantle of articular cartilage, which measures between 3 and 4mm in width. There is a labral tear anterosuperiorly which shows some evidence of chondral labral separation and fluid in the tear.”

13. After reviewing the imaging, Dr. Erickson disagreed with Dr. Resig’s

recommendation for a left total hip arthroplasty. He explained that on March 16, 2023 Dr. Resig described "severe bone-on-bone arthritis on x-ray." However, in the note, x-rays from the same day revealed only "mild osteoarthritis." None of the imaging studies showed anything even remotely close to bone-on-bone arthritis. Notably, "the pathology barely justified an assessment of KL grade 1." Dr. Erickson further remarked that in Rule 17, Exhibit 6 the MTGs discuss indications for total hip arthroplasties. He specified that the standing radiographs in the present case do not identify the radiographic abnormalities listed in Exhibit 6 as indicators for a total hip arthroplasty. Dr. Erickson explained that Claimant's severe symptoms were likely due to her labral tear. The tear could be treated arthroscopically either from a repair or reconstruction. He recommended referral to a skilled hip arthroscopist to identify which of the preceding procedures was appropriate for Claimant.

14. Dr. Zickefoose testified at the hearing in this matter as an expert in occupational medicine with experience involving orthopedic injuries to the hip. Dr. Zickefoose has treated Claimant consistently since her December 30, 2022 date of injury. After reviewing Claimant's x-rays and MRI's, she noted there is a tear of the superior anterior labrum with chondrolabral separation associated with Grade 3 chondromalacia of the acetabulum over a very small area. Essentially Claimant's left hip was almost bone-on-bone. The MRI demonstrated the need for total hip replacement. Dr. Zickefoose summarized:

> because she is getting that Grade 3 in a smaller area, that simply just doing the arthroscopic is probably not going to relieve her pain, that it is going to require the total hip replacement because it is a large labral tear with separation. So no, there is not horrible arthritis in there, but I really don't honestly believe that an arthroscopy is just what she needs. I think she needs a total hip replacement.

15. In addressing the MTGs, Dr. Zickefoose testified that each patient must be viewed as an individual and treated for what they believe is going to be best for them. She remarked Claimant has a horrible time walking and cannot stand. Dr. Zickefoose explained that, if an arthroscopy with the labral repair does not work, Claimant will likely require a total hip replacement that would set her back another six months before she is relieved of pain. She commented that Claimant's hip limits her activities of daily living, she is not able to enjoy her life and cannot obtain a full-time job. Dr. Zickefoose noted that reasonable conservative measures have been addressed and exhausted. She summarized that, simply because Claimant does not have bone-on-bone arthritis does not necessarily disqualify her as a candidate for a total left hip arthroplasty.

16. Claimant testified at the hearing in this matter. She described her hip pain as achy and stabbing. Claimant has difficulty sitting for any length of time. She explained that she sleeps in a recliner because she cannot lie flat. Claimant experiences instability and uses a walker when performing activities of daily living.

17. On June 28, 2023 the parties conducted the deposition of Dr. Resig. He continued to recommend hip replacement surgery for Claimant. His surgical recommendation was based on Claimant's level of pain and the injury that was identified in the MRI. Nevertheless, he acknowledged that the March 16, 2023 medical record describing "bone-on-bone arthritis" was a clerical error involving electronic medical records. Notwithstanding the clerical error, his

recommendation was based more on the findings of the MRI and the fact Claimant had a labral tear combined with evidence of Grade 3 arthritis. Dr. Resig acknowledged that he is "not necessarily" recommending a total hip replacement, but it is a treatment option he could offer Claimant.

18. At the crux of Dr. Resig's opinion regarding surgery was his belief that a total hip replacement is an appropriate procedure for a patient with Grade 3 chondromalacia and a labral tear. Dr. Resig clarified that if a patient has minimal arthritis he would not perform a hip replacement, but if a patient has Grade 3 or Grade 4 arthritis he would perform a hip replacement. He agreed all of Claimant's left hip x-rays showed no to minimal OA. When asked about Dr. Stone's description of the chondromalacia being "up to" Grade 3, Dr. Resig replied that to him, "up to" Grade 3 means Grade 3. He admitted that the Grade 3 chondromalacia identified on Claimant's left hip MRI is in very small area, but was enough to guide his recommendation. He maintained that the orthoscopic repair/reconstruction suggested by Respondents would fail because Claimant suffers from underlying arthritis as reflected on MRI. Thus, using a scope and filling the joint with fluid to address Claimant's labral tear would be unsuccessful.

19. Dr. Resig recounted that he does not perform hip arthroscopies. He acknowledged that, if Claimant's left hip MRI showed the same small focal area of chondromalacia but it was characterized as Grade 2, he would refer her to a hip arthroscopy specialist and obtain another opinion. When asked whether Dr. Hewitt's recommendation for Claimant to be evaluated by a hip arthroscopist was reasonable, Dr. Resig responded that it is "certainly an option" and he was not opposed to obtaining another opinion. If a hip arthroscopist could help Claimant by performing an arthroscopic procedure, Dr. Resig would not be opposed.

20. On July 10, 2023 the parties conducted the deposition of Dr. Erickson. He testified as an expert in orthopedic surgery. Dr. Erickson explained that, to a reasonable degree of medical probability, a consultation with a hip arthroscopist is more appropriate than pursuing a total hip replacement. Dr. Erickson summarized:

> I think I would agree with the [Insurer] staffing that was performed by Dr. Hewitt that – as I said in my IME, that a reasonable course of action at this point, based on the lack of any significant arthritis in the left hip, that a hip arthroscopy, at least a consultation with a qualified hip arthroscopist would be an appropriate step at this time.

21. The primary basis of Dr. Erickson's opinion is the minimal OA identified on Claimant's left hip x-rays and MRI. Dr. Erickson agreed with the MTGs that severe OA is a required surgical indication for a total hip replacement. He commented that, from his review of Claimant's February 2, 2023 left hip MRI, there is only a small area of Grade 3 chondromalacia. However, it is not severe OA, there is no bone-on-bone OA, and there are no osteophytes or bone cysts that would suggest a disease process. Instead, Dr. Erickson classified the OA visible on the MRI as "mild." Moreover, he remarked there is a reasonable mantle of articular cartilage that reflects the hip is appropriate for arthroscopy.

22. Dr. Erickson noted that hip replacements carry greater risks than arthroscopies, particularly in terms of the risks of infection during the acute phase and difficulties with treating

an infected joint. He further explained in greater detail the more severe risks and complications associated with a total hip replacement procedure compared to a hip arthroscopy as follows:

> I think the cause of fear of most hip replacement surgeons [is] you can get failure of the device, fracture, loosening. There is a long list of things that can happen. But I think the one that makes everyone run in fear is the possibility of a periprosthetic or an intra-articular joint infection, because the treatment for that in the presence of a metallic foreign body is extremely difficult, and it is a nightmare for joint replacement specialists. Whereas with a hip arthroscopy, if you get an infection, it is usually a portal infection, and it usually goes away with benign care, plus antibiotics.

23. Dr. Erickson remarked that he reviewed Dr. Resig's deposition testimony and was aware that Dr. Resig did not oppose a referral to a hip arthroscopist for a second opinion. He reiterated that he is also recommending a referral to a hip arthroscopist for a second opinion. Dr. Erickson explained that he would defer to a hip arthroscopist to perform a proper evaluation and determine whether a left hip arthroscopy should be pursued in Claimant's case.

24. Claimant has failed to prove it is more probably true than not that the left total hip replacement requested by Dr. Resig is reasonable and necessary. Initially, on December 30, 2022 Claimant injured her left hip and right shoulder while mucking out horse stalls at work. Claimant subsequently received conservative medical treatment including hip injections and physical therapy. On March 16, 2023 Dr. Resig recommended a total left hip arthroplasty.

25. Dr. Resig explained that Claimant has underlying OA of the left hip that was exacerbated by her Workers' Compensation injury. Dr. Resig reasoned that Claimant's MRI showed a labral tear and grade three osteoarthritic changes that limited her treatment to a total hip replacement. At the crux of Dr. Resig's opinion was his belief that a total hip replacement was an appropriate procedure for a patient with Grade 3 chondromalacia and a labral tear. Dr. Zickefoose, who has treated Claimant consistently since her December 30, 2022 date of injury, agreed with Dr. Resig's analysis. After reviewing Claimant's x-rays and MRI's, she noted there was a tear of the superior anterior labrum with chondrolabral separation associated with Grade 3 chondromalacia of the acetabulum over a very small area. Essentially, Claimant's left hip is almost bone-on-bone. Dr. Zickefoose noted that reasonable conservative measures have been addressed and exhausted. She summarized that simply because Claimant does not have bone-on-bone arthritis does not necessarily disqualify her as a candidate for a total left hip arthroplasty.

26. In contrast, after conducting an IME Dr. Erickson disagreed with Dr. Resig's recommendation for a total left hip arthroplasty. He explained that none of the imaging studies revealed anything close to bone-on-bone arthritis. Notably, Dr. Erickson remarked that Rule 17, Exhibit 6 of the MTGs discusses indications for total hip arthroplasties. He specified that the standing radiographs in the present case did not identify the radiographic abnormalities listed in Exhibit 6 as necessitating a total hip arthroplasty. Dr. Erickson detailed that Claimant does not have severe OA, there is no bone-on-bone OA, and there are no osteophytes or bone cysts that would suggest a disease process. Instead, Dr. Erickson classified the OA visible on MRI as "mild." Moreover, he remarked that, because there is a reasonable mantle of articular cartilage, the hip was appropriate for an arthroscopy. Dr. Erickson commented that Claimant's labral tear could be treated arthroscopically through a repair or reconstruction. He also noted that hip

replacements carry greater risks than arthroscopies, particularly risks of infection during the acute phase and difficulties with treating an infected joint. Dr. Erickson thus recommended referral to a skilled hip arthroscopist to identify which arthroscopic procedure was appropriate for Claimant. Similarly, Dr. Hewitt explained that "the proposed surgery, namely a total hip arthroplasty, in a 55-year-old female with a focal area of grade 3 chondromalacia, 9 x 7 mm, and no advanced grade 4 arthritis, appears relatively aggressive regarding the information provided." He agreed that it would be reasonable to obtain a second opinion from a hip arthroscopy specialist to assess whether Claimant's labral pathology could be addressed without arthroplasty.

27. Based on the MTGs, a primary surgical consideration for a total hip arthroplasty is severe OA. Dr. Erickson noted that, while the MTGs are merely guidelines, they represent accepted standards of care in Colorado Workers' Compensation cases. They are written by highly competent physicians to offer a template for appropriate treatment. Dr. Erickson agreed with the MTGs that severe OA should be identified before consideration of a total hip replacement. No physicians, including multiple radiologists, who have reviewed Claimant's imaging believed she has severe left hip OA. Claimant's left hip x-rays identified at most minimal OA. Notably, Claimant's MRI only revealed an extremely small area of focal OA, the OA in that area was not severe or bone-on-bone, and there were no bone cysts or spurs.

28. Although Claimant acknowledged that application of the MTG's suggest severe or Grade 4 osteoarthritis must be identified prior to a total hip arthroplasty, Drs. Zickefoose and Resig testified that a total hip replacement is medically necessary based on Claimant's functional limitations, Grade 3 OA, and evidence of a labral tear. Claimant reasoned that, while an arthroscopic consult might be an option, the overwhelming weight of evidence reflects that all reasonable measures have been exhausted and Claimant will eventually require a total hip arthroplasty. Claimant summarized that consideration of the totality of the evidence, not solely the degree of arthritis, warrants deviation of the MTGs. However, despite Claimant's argument, the mild degree of OA identified on imaging directly undermines the reasonableness and necessity of a total hip replacement. Drs. Hewitt and Erickson have recommended Claimant visit a hip arthroscopist to determine whether her labral tear and modest degree of OA can be treated through an arthroscopy. Although Dr. Resig has asserted that a total hip replacement is appropriate, he is also not opposed to a second opinion by a hip arthroscopist.

29. Based on the medical records and persuasive opinion of Dr. Erickson, Claimant's request for a left total hip arthroplasty is not reasonable or necessary. Respondents notified the ALJ that, if the proposed left total hip replacement is determined not to be reasonable or necessary, they will authorize a left hip arthroscopy once the correct arthroscopic procedure is identified by a specialist. Claimant agreed to the stipulation, and the ALJ accepts the stipulation. The ALJ therefore orders that Claimant visit a hip arthroscopist to determine the appropriate arthroscopic procedure.

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 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).

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. The MTGs were propounded by the Director pursuant to an express grant of statutory authority. *See* §8-42-101(3.5)(a)(II), C.R.S. It is appropriate for an ALJ to consider the MTGs in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAO, Mar. 18, 2005); *see Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAO, Oct. 30, 1998) (noting that the MTGs are a reasonable source for identifying diagnostic criteria). The MTGs are regarded as accepted professional standards of care under the Workers' Compensation Act. *Rook v.*

Indus. Claim Appeals Off., 111 P.3d 549 (Colo. App. 2005). In *Hall v. Indus. Claim Appeals Off.*, 74 P.3d 459 (Colo. App. 2003) the court noted that the MTGs shall be used by health care practitioners when furnishing medical treatment under the Workers' Compensation Act. *See* §8-42-101(3)(b), C.R.S.

7. While the MTGs may carry substantial weight and provide significant guidance, the ALJ is not bound by the MTGs in deciding individual cases. Notably, §8-43-201(3), C.R.S. specifically provides:

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

8. Rule 17, Exhibit 6 of the MTGs addresses lower extremity injuries. In specifically discussing surgical considerations for a hip arthroplasty, Rule 17, Exhibit 6, §5.e. of the MTGs provides in relevant part: "Surgical Indications/Considerations: Severe osteoarthritis, all reasonable conservative measures have been exhausted, and other reasonable surgical options have been considered or implemented." Therefore, based on the MTGs, a primary surgical consideration for a total hip arthroplasty is severe OA.

9. As found, Claimant has failed to prove by a preponderance of the evidence that the left total hip replacement requested by Dr. Resig is reasonable and necessary. Initially, on December 30, 2022 Claimant injured her left hip and right shoulder while mucking out horse stalls at work. Claimant subsequently received conservative medical treatment including hip injections and physical therapy. On March 16, 2023 Dr. Resig recommended a total left hip arthroplasty.

10. As found, Dr. Resig explained that Claimant has underlying OA of the left hip that was exacerbated by her Workers' Compensation injury. Dr. Resig reasoned that Claimant's MRI showed a labral tear and grade three osteoarthritic changes that limited her treatment to a total hip replacement. At the crux of Dr. Resig's opinion was his belief that a total hip replacement was an appropriate procedure for a patient with Grade 3 chondromalacia and a labral tear. Dr. Zickfoose, who has treated Claimant consistently since her December 30, 2022 date of injury, agreed with Dr. Resig's analysis. After reviewing Claimant's x-rays and MRI's, she noted there was a tear of the superior anterior labrum with chondrolabral separation associated with Grade 3 chondromalacia of the acetabulum over a very small area. Essentially, Claimant's left hip is almost bone-on-bone. Dr. Zickefoose noted that reasonable conservative measures have been addressed and exhausted. She summarized that simply because Claimant does not have bone-on-bone arthritis does not necessarily disqualify her as a candidate for a total left hip arthroplasty.

11. As found, in contrast, after conducting an IME Dr. Erickson disagreed with Dr. Resig's recommendation for a total left hip arthroplasty. He explained that none of the imaging studies revealed anything close to bone-on-bone arthritis. Notably, Dr. Erickson remarked that Rule 17, Exhibit 6 of the MTGs discusses indications for total hip arthroplasties. He specified

that the standing radiographs in the present case did not identify the radiographic abnormalities listed in Exhibit 6 as necessitating a total hip arthroplasty. Dr. Erickson detailed that Claimant does not have severe OA, there is no bone-on-bone OA, and there are no osteophytes or bone cysts that would suggest a disease process. Instead, Dr. Erickson classified the OA visible on MRI as "mild." Moreover, he remarked that, because there is a reasonable mantle of articular cartilage, the hip was appropriate for an arthroscopy. Dr. Erickson commented that Claimant's labral tear could be treated arthroscopically through a repair or reconstruction. He also noted that hip replacements carry greater risks than arthroscopies, particularly risks of infection during the acute phase and difficulties with treating an infected joint. Dr. Erickson thus recommended referral to a skilled hip arthroscopist to identify which arthroscopic procedure was appropriate for Claimant. Similarly, Dr. Hewitt explained that "the proposed surgery, namely a total hip arthroplasty, in a 55-year-old female with a focal area of grade 3 chondromalacia, 9 x 7 mm, and no advanced grade 4 arthritis, appears relatively aggressive regarding the information provided." He agreed that it would be reasonable to obtain a second opinion from a hip arthroscopy specialist to assess whether Claimant's labral pathology could be addressed without arthroplasty.

12. As found, based on the MTGs, a primary surgical consideration for a total hip arthroplasty is severe OA. Dr. Erickson noted that, while the MTGs are merely guidelines, they represent accepted standards of care in Colorado Workers' Compensation cases. They are written by highly competent physicians to offer a template for appropriate treatment. Dr. Erickson agreed with the MTGs that severe OA should be identified before consideration of a total hip replacement. No physicians, including multiple radiologists, who have reviewed Claimant's imaging believed she has severe left hip OA. Claimant's left hip x-rays identified at most minimal OA. Notably, Claimant's MRI only revealed an extremely small area of focal OA, the OA in that area was not severe or bone-on-bone, and there were no bone cysts or spurs.

13. As found, although Claimant acknowledged that application of the MTG's suggest severe or Grade 4 osteoarthritis must be identified prior to a total hip arthroplasty, Drs. Zickefoose and Resig testified that a total hip replacement is medically necessary based on Claimant's functional limitations, Grade 3 OA, and evidence of a labral tear. Claimant reasoned that, while an arthroscopic consult might be an option, the overwhelming weight of evidence reflects that all reasonable measures have been exhausted and Claimant will eventually require a total hip arthroplasty. Claimant summarized that consideration of the totality of the evidence, not solely the degree of arthritis, warrants deviation of the MTGs. However, despite Claimant's argument, the mild degree of OA identified on imaging directly undermines the reasonableness and necessity of a total hip replacement. Drs. Hewitt and Erickson have recommended Claimant visit a hip arthroscopist to determine whether her labral tear and modest degree of OA can be treated through an arthroscopy. Although Dr. Resig has asserted that a total hip replacement is appropriate, he is also not opposed to a second opinion by a hip arthroscopist.

14. As found, based on the medical records and persuasive opinion of Dr. Erickson, Claimant's request for a left total hip arthroplasty is not reasonable or necessary. Respondents notified the ALJ that, if the proposed left total hip replacement is determined not to be reasonable or necessary, they will authorize a left hip arthroscopy once the correct arthroscopic procedure is identified by a specialist. Claimant agreed to the stipulation, and the ALJ accepts the stipulation. The ALJ therefore orders that Claimant visit a hip arthroscopist to determine the

appropriate arthroscopic procedure.

ORDER

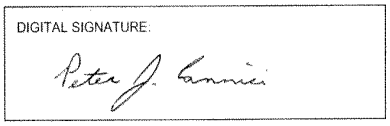
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. The left total hip arthroplasty recommended by Dr. Resig is not reasonable or necessary. Insurer shall authorize an evaluation by a specialist in hip arthroscopies, and if hip arthroscopy is recommended, Insurer shall authorize that surgery as reasonable, necessary, and related to this claim.

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

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

DATED: August 15, 2023.



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 5-176-175-003

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer on June 3, 2021.

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

3. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant was employed by Respondent as a hostler. Claimant's job duties included operating a semi-tractor truck to transport and set up trailers. On June 3, 2021, Claimant was performing her normal job duty of moving a trailer through a dirt lot or road. Claimant reported that the truck hit a pothole causing her seat to bottom out and her seatbelt to tight, which caused pressure and pain in her left anterior hip. Approximately two minutes later, Claimant exited the truck, and felt a pain shooting down her left lower leg into her hip and buttocks. Claimant reported the incident to her supervisor, and was instructed to complete moving and setting up the trailer, and to complete appropriate paperwork later.

2. At approximately 11:30 p.m. on June 3, 2021, Claimant was seen at the St. Anthony's Hospital emergency department, reporting left hip pain. Claimant reported she was driving her work vehicle approximately 3-4 miles per hour when she hit a pothole and the seatbelt locked up, causing pressure on her left anterior hip. X-rays performed at St. Anthony's were negative. Claimant was diagnosed with hip pain, provided ibuprofen and acetaminophen, and advised to see an orthopedist. (Ex. 3).

3. On June 15, 2021, Claimant saw Chelsea Rasis, PA-C, at Concentra. Claimant reported she did not experience immediate pain when she hit the pothole, but two minutes later, she stepped out of the truck and felt pain in the left groin radiating to her leg and foot. On examination, Ms. Rasis noted tenderness in the gluteus minimus, ischial tuberosity, left paraspinal muscles, and facet joints; left sided muscle spasms and limited range of motion. Claimant was diagnosed with lumbar radiculopathy, referred for physical therapy and placed on modified duty. (Ex. 4).

4. Between June 15, 2021 and July 7, 2021, Claimant attended six sessions of physical therapy at Concentra. At the conclusion of physical therapy, Claimant's hip and lumbar symptoms had not resolved. (Ex. 4 & B).

5. On June 23, and June 30, 2021, Claimant saw Theodore Villavicencio, M.D., at Concentra. She reported left lower lumbar pain and hip pain with radiation into the groin.

On June 30, 2021, Dr. Villavicencio ordered a lumbar MRI and referred Claimant for a physiatry evaluation with Samuel Chan, M.D. (Ex. B). Dr. Villavicencio was an authorized treating physician (ATP).

6. Claimant saw Dr. Chan on July 6, 2021, reporting numbness and tingling radiating down the left leg to the toes. Dr. Chan documented positive provocative maneuvers on the left, including Patrick's sign, Ganslen test, Faber's test, and Yeoman's test. He also recommended a lumbar MRI to rule out discogenic issues. (Ex. B).

7. Claimant underwent a lumbar MRI on July 29, 2021. The MRI was compared to a December 19, 2019 MRI, and demonstrated a new synovial cyst at the L4-5 level with probable compression of the left L4 nerve, possible compression of the left L5 nerve, and severe narrowing of the medial left neural foramen. Neither the December 19, 2019 MRI nor medical records from this time frame were offered or admitted into evidence, and no credible evidence was admitted explaining the purpose of the 2019 MRI. (Ex. 5).

8. Following the MRI, Claimant returned to Dr. Villavicencio on August 10, 2021, with no change in her symptoms. Dr. Villavicencio prescribed dexamethasone, and instructed Claimant to return for a follow-up appointment in two weeks. He indicated Claimant was not at maximum medical improvement, and recommended on-going temporary work restrictions. (Ex. B). Although Dr. Villavicencio did not discharge Claimant, she did not return to him for treatment, and relocated to South Dakota.

9. On August 27, 2021, Claimant saw James MacDougall, M.D., in Aberdeen, South Dakota. Dr. MacDougall reviewed Claimant's MRI and noted it showed a facet cyst (*i.e.*, synovial cyst) compressing the L4 and L5 nerve roots. He discussed treatment options including surgical and conservative management, and opined that Claimant may require decompression and excision of synovial cyst depending on her response to conservative measures. He performed an epidural steroid injection and prescribed Lyrica. Claimant reported the injection provided approximately one week of relief. At that point, Claimant was scheduled for surgery, to include a L4-5 decompression with cyst excision(Ex. 2)

10. On October 1, 2021, Dr. MacDougall performed surgery on Claimant's lumbar spine, including a left L4-5 decompression with laminotomy, medial facetectomy, foraminotomy, and excision of the synovial cyst at L4-5. (Ex.2).

11. In follow-up appointments with Dr. MacDougall's clinic, Claimant reported doing much better and relief of her leg pain. On November 17, 2021, Dr. MacDougall's physician assistant, Brian Ermer, PA-C, prescribed one visit of physical therapy to set Claimant up on a home exercise program. (Ex. 2). No records of additional medical treatment after November 17, 2021 were offered or admitted into evidence.

12. No credible evidence was admitted that Dr. MacDougall sought, or received, authorization from Insurer for the treatment provided, or that he was within the chain of referrals from Claimant's ATPs.

13. On August 22, 2022, Nicholas Olsen, D.O., performed a virtual independent medical examination (IME) at Respondents' request. Dr. Olsen did not examine Claimant,

but did speak with her over the phone. Claimant reported that she hit a pothole, and her seat belt tightened up and pulled her into the seat, but she did not experience immediate pain. She reported first experiencing pain when she tried to step out of the truck to hook up a trailer, and then felt a sharp pain running up from her foot to her lower back. Claimant reported the surgery performed by Dr. MacDougall relieved her pain, but she gets stiff if she sits too long. Based on his review of records and interview of Claimant, Dr. Olsen opined that Claimant did not suffer trauma on June 3, 2021. He opined that Claimant moving to a standing position when leaving her truck caused her synovial cyst to become active. He indicated that it was the "presence of the synovial cyst arising from the left L4-5 facet that resulted in radiculopathy when [Claimant] was simply standing at work." He indicated that the cyst could become symptomatic when standing at home or standing at work, and that hitting the pothole and the seatbelt tightening did not cause or result in trauma that contributed to her symptomatology. (Ex. A).

14. Dr. Olsen testified at hearing and was admitted as an expert in physical medicine and rehabilitation, with level II accreditation. Dr. Olsen testified that Claimant has a synovial cyst at the L5-S1 level of her spine, and that such cysts developed due to facet joint degeneration. He testified that synovial cysts are typically asymptomatic, but can become symptomatic when someone is standing up or walking because the cyst narrows the neural foramen causing nerve impingement. He testified that Claimant's cyst became symptomatic when she exited her truck and stood up, but in his opinion it was not an action specific to her occupation. He testified that the surgery performed by Dr. MacDougall was reasonable and necessary to relieve Claimant's symptoms, although he does not believe Claimant's symptoms are causally related to her employment. Dr. Olsen's opinions regarding causation of Claimant's symptoms is not persuasive.

15. On April 12, 2023, Dr. MacDougall responded to a letter from Claimant's counsel requesting opinions regarding causation of Claimant's symptoms and relatedness of the surgery he performed. Dr. MacDougall opined that the cyst itself was from a degenerative process unrelated to work activities, but he felt that Claimant driving on a rough road caused the onset of symptoms. (Ex. 2).

16. Claimant testified that although it hurt when her seatbelt tightened and her seat bottomed out, she first felt shooting pain down her left leg when she stepped out of her truck. Claimant testified she immediately called her supervisor to report her injury.

17. Claimant gave a two-week notice to her employment sometime in August 2022, and Employer terminated immediately. Claimant then moved to South Dakota.

18. Claimant testified at hearing that she spoke with Insurer's claims manager who indicated that Claimant would be covered by Workers' compensation in South Dakota. Claimant testified that the claims manager later revoked this statement indicating she could not be covered if she left Colorado. Claimant testified that she then sought treatment under her own insurance. Claimant's testimony is inconsistent with her reports to Dr. MacDougall. When Claimant first saw Dr. MacDougall, she indicated that her workers' compensation coverage was "discontinued" after the MRI demonstrated the presence of the synovial cyst. The evidence demonstrates that Claimant saw Dr. Villavicencio after

the July 29, 2021 MRI on August 10, 2021, and was instructed to return for another follow up visit after that. Nothing in the record credibly demonstrates that Claimant's workers' compensation coverage was terminated.

19. [Redacted, hereinafter JS], a safety and training manager for Employer testified at hearing. JS[Redacted] testified that the lot in which Claimant was driving on June 3, 2021 was a dirt lot that does have pot holes. JS[Redacted] testified that the lot is graded every three months to reduce pot holes, and that it was graded on May 19, 2021. JS[Redacted] testified that she examined the lot approximately seven days after June 3, 2021, and that there were no potholes in the lot.

20. The parties stipulated that Claimant's average weekly wage at the time of injury was $1,419.00.

CONCLUSIONS OF LAW

Generally

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

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

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

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove her injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Id.*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); Enriquez v. Americold D/B/A Atlas Logistics, W.C. No. 4-960-513-01, (ICAO Oct. 2, 2015)

If the precipitating cause of an injury is a preexisting health condition that is personal to the claimant, the injury does not arise out of the employment unless a "special hazard" of the employment combines with the preexisting condition to contribute to the accident or the injuries sustained. *National Health Laboratories v. Indus. Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Rice v. Dayton Hudson Corp.,* W.C. No. 4-386-678 (ICAO July 29, 1999); *Alexander v. Emergency Courier Servs,* W.C. No. 4-917-156-01 (ICAO Oct. 14, 2014). This rule is based upon the rationale that, unless a special hazard of the employment increases the risk or extent of injury, an injury due to the claimant's preexisting condition lacks sufficient causal relationship to the employment to meet the arising out of employment test. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App.

1989); *Alexander v. Emergency Courier Services,* W.C. No. 4-917-156-01 (ICAO Oct. 14, 2014). In order for a condition of employment to qualify as a "special hazard" it must not be a "ubiquitous condition" generally encountered outside the workplace. *Ramsdell v. Horn, supra*; *Briggs v. Safeway,* Inc. W.C. No. 4-950-808-01 (ICAO July 8, 2015). Conversely, if the precipitating cause of the injury involves conditions or circumstances of the employment, there is no need to prove a "special hazard" for the injury to arise out of the employment. *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *H&H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). "[T]here is no requirement that a particular activity of employment which aggravates the preexisting condition be unique to the employment, or that it constitute a 'special hazard" of the employment. To the contrary, the special hazard requirement applies only where the precipitating cause of an injury is a preexisting non-industrial condition which the claimant brings to the workplace." *Shelton v. Eckstein Elec. Co.*, W.C. No. 4-724-391 (ICAO May 3, 2008).

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

Claimant has established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment on June 3, 2021. Claimant had a pre-existing, asymptomatic synovial cyst in her lower back that became symptomatic after her truck seat bottomed out while driving through a dirt parking lot and then stepped down from her work vehicle. Claimant's testimony that she initially experienced pain in her rear when her seat bottomed-out, but that she did not experience shooting pain into her hips and leg until she stepped out of her vehicle was credible, and consistently reported to her providers. Claimant's job duties required her to operate a semitruck, which necessarily included both entering and exiting the vehicle. Stepping down from a semitruck is not a "ubiquitous condition" generally encountered outside the workplace. Instead, it was unique to Claimant's employment. .

Dr. Olsen's opinion that Claimant's symptoms were caused by her merely standing up is not credible. This characterization of the mechanism of injury is not consistent with Claimant's testimony or her contemporaneous reports to her providers as documented in medical records. The ALJ finds that Claimant's injury was caused by the combination of her seat bottoming out, and her stepping down from her work vehicle, a semi-tractor truck. Because Claimant's preexisting condition was aggravated by work-related activity, the injury is compensable.

MEDICAL BENEFITS

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Sims v. Indus. Claim Appeals Office*,

797 P.2d 777 (Colo. App. 1990). “The claimant bears the burden of proof to establish that a need for medical treatment was proximately caused by an injury arising out of and in the course of employment.” *In re Claim of Daniely*, W.C., No. 5-124-750 (ICAO, Feb. 26, 2021), citing 8-41-301(1), C.R.S,. and *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990), “Further, treatment necessitated by an industrial aggravation or acceleration of a pre-existing condition is compensable.” *Id*. Whether medical treatment is reasonable and necessary is a question of fact for determination by the ALJ. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

In addition to being “reasonable and necessary,” treatment must be “authorized.” “‘Authorization’ and the reasonableness of treatment are separate and distinct issues. *Repp v. Prowers Med. Center*, W.C. No. 4-530-649 (ICAO Sep. 12, 2005), *citing One Hour Cleaners v. Indus. Claim Appeals Office, 914 P.2d 501* (Colo. App. 1995). "Authorization" refers to the physician's legal status to treat the injury at the respondents' expense, and not the particular treatment provided. *Popke v. Indus. Claim Appeals Office*, 797 P.2d 677 (Colo. App. 1997); s*ee also*, *One Hour Cleaners*, 914 P.2d at 504 (“authorized medical benefits” refers to legal authority of provider to deliver care). All treatment provided by an “authorized treating physician” is “authorized.” *Bray v. Hayden School Dist. RE-1*, W.C. No. 4-418-310 (ICAO Apr. 11, 2000). “However, treatment is not compensable unless it is also ‘reasonable and necessary’ to cure or relieve the effects of the industrial injury.” *Id*.

Respondents are liable for medical expenses when, as part of the normal progression of authorized treatment, an authorized treating physician refers the claimant to other providers for additional services. *Greager v. Indus. Comm’n*, 701 P.2d 168 (Colo. App. 1985). If a claimant obtains treatment from a provider who is not “authorized,” a respondent is not required to pay for it. Section 8-43-404(7), C.R.S; *Yeck*, *supra; Pickett v. Colo. State Hosp.*, 513 P.2d 228 (Colo. App. 1973). The existence of a valid referral is a question of fact. *Suetrack USA v. Indus. Claim Appeals Office*, 902 P. 2d 854 (Colo. App. 1995).

Because Claimant has established that she sustained a compensable injury, Respondents are liable for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

Claimant has failed to establish by a preponderance of the evidence that the treatment rendered by Dr. MacDougall was authorized. As found, Claimant moved to South Dakota in August 2022, and initiated treatment with Dr. MacDougall without authorization or a referral from one of her ATPs. No credible evidence was admitted indicating Claimant was referred to Dr. MacDougall, or that Dr. MacDougall sought or received authorization from Insurer. Because the care Claimant received from and through referral from Dr. MacDougall was not “authorized,” Respondents are not responsible for payment of that care.

Claimant’s testimony that Insurer’s adjuster informed her that care outside Colorado would not be covered by workers’ compensation is inconsistent with her reports to Dr. MacDougall and is not credible. Claimant reported to Dr. MacDougall that her

workers' compensation coverage was "discontinued" because she was diagnosed with a cyst, not that her care outside Colorado would not be covered. As noted above, no credible evidence was admitted indicating Claimant's workers' compensation medical benefits had been terminated.

In position statements, Claimant argues that Dr. Villavicencio discharged Claimant for non-medical reasons, and because Respondents did not then appoint a new ATP, the right of selection passed to Claimant. Claimant last saw Dr. Villavicencio on August 10, 2021, but he did not discharge her or otherwise refuse to provide additional care. To the contrary, the August 10, 2021 record indicates Dr. Villavicencio requested Claimant return for a follow up visit in two weeks, and nothing in his record indicates that Claimant was being discharged from care or being refused further care. The evidence does not support that Claimant was either discharged or refused further care for non-medical reasons.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury arising out of the course of her employment with Employer on June 3, 2021.

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. Respondents are not liable for the unauthorized medical treatment Claimant received from Dr. MacDougall, or treatment Claimant received upon referral from Dr. MacDougall.

4. Claimant's average weekly wage is $1,419.00.

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

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

DATED: August 15, 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. WC 5-187-993-002

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she should be permitted to reopen her admitted May 24, 2021 Workers' Compensation injury based on a change in condition pursuant to §8-43-303(1), C.R.S. after reaching Maximum Medical Improvement (MMI) on January 27, 2022.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the left knee replacement performed by Craig Hogan, M.D. on October 31, 2022 was reasonable, necessary and causally related to her May 24, 2021 admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked as a school nutritionist for Employer. On May 24, 2021, while attempting to place a heavy tray into a refrigerator, Claimant suffered a compensable injury. She specifically twisted and felt a pop in her left knee.

2. Anticipating that her knee pain would subside, Claimant did not immediately seek medical treatment for her injury. Claimant eventually sought treatment on September 21, 2021 with Authorized Treating Physician (ATP) Martin Kalevik, M.D. Dr. Kalevik recounted that Claimant "twisted and felt a pop in her left knee. She did not fall but did have a limp." He assessed "pain in left knee" and recommended an MRI.

3. On September 27, 2021 Claimant underwent a left knee MRI. The imaging revealed "an 18 mm inferiorly displaced medial meniscal body flap tear and attenuation/tearing of the free apical margin of the central third of its posterior horn." On October 25, 2021 Jason L. Dragoo, M.D. recommended left knee arthroscopic surgery including a partial medial meniscectomy.

4. On November 3, 2021 Claimant underwent left knee surgery with Dr. Dragoo. The surgery consisted of a left knee arthroscopy with partial medial meniscectomy, synovectomy in all compartments, and chondroplasty of the lateral femoral condyle.

5. On January 26, 2022 Dr. Dragoo assessed Claimant. He determined that "her left knee is doing great" and recommended continued physical therapy. He permitted Claimant to return to "all activities per her strength and physical therapies' guidelines." Dr. Dragoo remarked that Claimant was "[d]oing well post-operatively."

6. On January 27, 2022 ATP Dr. Kalevik determined Claimant had reached MMI with an 8% permanent impairment of the lower extremity. Dr. Kalevik released Claimant to full duty without restrictions.

7. On February 25, 2022 Respondent filed a Final Admission of Liability (FAL). The FAL acknowledged medical maintenance benefits after MMI and a Permanent Partial Disability (PPD) award based upon the 8% lower extremity rating. Claimant did not object to the FAL and the claim closed by operation of law.

8. On May 3, 2022 Claimant returned to Dr. Kalevik with complaints of increased pain and swelling in her left knee for about the last six weeks. Although Claimant described pain and swelling, she denied any locking or giving out of the knee. Dr. Kalevik ordered a left knee x-ray. He permitted Claimant to continue working full duty without restrictions.

9. Claimant testified that on May 28, 2022 she was walking with her husband. Claimant's husband pointed out a bird flying to the left side. Claimant remarked that she looked over her shoulder to see the bird. However, she felt an immediate pop in her left knee followed by severe pain. Claimant explained that she did not pivot. She subsequently returned to Dr. Kalevik and Dr. Dragoo. Dr. Dragoo eventually referred Claimant to Craig Hogan, M.D. On October 31, 2022 Dr. Hogan performed a left knee replacement. Since the knee replacement, Claimant stated she has full range of motion and function.

10. On May 29, 2022 Claimant sought treatment from UC Health with Jason B. Guy, PA-C, for left knee pain. PA-C Guy recounted that "Yesterday she pivoted and heard a pop in her left knee." Claimant described that she had experienced pain since the May 28, 2022 injury to her left knee. PA-C Guy assessed "Acute pain of left knee."

11. On June 7, 2022 Claimant returned to Dr. Kalevik for an evaluation. Dr. Kalevik recounted that on May 28, 2022, while "outside and not at work, she was walking and has she pivoted her left knee popped. She was able to catch herself and did not fall on the ground." Dr. Kalevik maintained Claimant's release to work full duty without restrictions.

12. On June 8, 2022 Claimant was evaluated by PA-C Jamie Weiss. She reported left knee pain when she "felt a twist a few days ago in her knee when she had excruciating pain." PA-C Weiss diagnosed a left knee "acute traumatic lateral meniscus tear."

13. On June 9, 2022 Claimant underwent an MRI of the left knee. Corey Ho, M.D. noted the MRI revealed concerns for a "re-tear" and "new deep cartilage fissuring or flap formation along the lateral patellar facet."

14. Claimant returned to Dr. Kalevik on July 27, 2022. After reviewing the MRI and performing an orthopedic consultation, Dr. Kalevik noted the following:

> I have reviewed the reports and the MRIs again. An evaluation by Dr. Dragoo's PA impression is that it is "left knee acute traumatic lateral meniscus tear." This seems to be supported by the MRI. I relayed to [Claimant] that since it happened

> outside of work, it would most likely not be related to the work injury. And it appears that she has new aspects now involving the lateral meniscus since her surgery was for the partial medial meniscectomy.

Dr. Kalevik concluded "Causality Statement NOT WORK RELATED: Based on the information by the patient, MRI and specialist office, the incident is less than 51% likely related to the occupational events, if the history provided to me is accurate. This incident is determined NOT to be work-related." Dr. Kalevik maintained Claimant's release to work full duty without restrictions. He also reiterated that Claimant had reached MMI on January 27, 2022.

15. On August 29, 2022 Dr. Dragoo remarked "it became clear that [Claimant] was having pain and popping since approximately 3 months post left knee surgery and was not fully recovered." He then commented that Claimant had a bigger pop on May 28, 2022 that increased her pain. Dr. Dragoo summarized "this could be related to her existing postoperative state and never being completely healed." He recommended continued physical therapy for three months.

16. On January 27, 2023 Claimant underwent an Independent Medical Examination (IME) with Sander Orent, M.D. Dr. Orent also testified at the hearing in this matter. He explained that, when Claimant first returned to work following her May 24, 2021 admitted left knee injury and subsequent surgery, her knee had not fully recovered. He reasoned that, because of the physical demands of Claimant's job, the return to work compromised her recovery and left her knee in a fragile state. Dr. Orent commented that the medical records after the November 3, 2021 surgery revealed Claimant continued to experience pain and swelling. He also noted the May 3, 2022 visit to Dr. Kalevik's office where she reported unrelenting symptoms.

17. In addressing the May 28, 2022 incident, Dr. Orent explained that Claimant did not engage in an activity of daily living, but simply turned her head while walking. Using a hypothetical, Dr. Orent commented that, had the same mechanism occurred in the workplace, he would not consider it a work-related injury because the mechanism would not fall within the course and scope of employment. He also stated that the use of the word "pivot" in medical records may be misleading. Dr. Orent explained that it is unlikely Claimant pivoted because an individual normally pivots using the foot not the knee. He summarized Claimant was simply walking and turning her head when the pop occurred. Dr. Orent concluded that Claimant's "knee was getting progressively worse…and that simple step was the final straw."

18. Despite Dr. Orent's opinion, his hearing testimony reveals that he did not consider Dr. Kalevik's reports of June 7, 2022 and July 27, 2022 that explicitly addressed the cause of Claimant's ongoing left knee problems. Notably, Dr. Orent did not review ATP Dr. Kalevik's opinion that Claimant's May 28, 2022 left knee injury while walking with her husband was less than 51% likely related to occupational events. Furthermore, Dr. Orent also accepted at face value Claimant's account that the May 28, 2022 non-work-related incident did not involve a pivot or twist injury to the left knee. His report does not

include reference to the multiple contemporaneous medical records describing a pivot or twist event on May 28, 2022 causing an audible pop and the immediate onset of excruciating pain.

19. Claimant has failed to establish it is more probably true than not that she should be permitted to reopen her admitted May 24, 2021 Workers' Compensation injury based on a change of condition pursuant to §8-43-303(1), C.R.S. Initially, on May 24, 2021 Claimant suffered a compensable industrial injury to her left knee. She underwent surgery on November 3, 2021 and reached MMI on January 27, 2022. However, on May 28, 2022 Claimant again injured her left knee while walking with her husband. The record reveals that the May 28, 2022 incident constituted an intervening event that severed the causal connection to Claimant's May 24, 2021 industrial injury. Therefore, Claimant has failed to demonstrate a change in condition that entitles her to reopen her May 24, 2021 claim.

20. The record reflects that Claimant suffered an intervening non-work-related injury on May 28, 2022 when she pivoted or twisted her knee, suffered a pop, and experienced the onset of excruciating pain. Claimant consistently reported to medical providers a pivoting or twisting event on May 28, 2022 outside of work that caused an injury evidenced by an audible pop and the immediate onset of excruciating pain. The MRI on June 9, 2022 also revealed concerns for a "re-tear" and "new deep cartilage fissuring or flap formation along the lateral patellar facet." Importantly, the persuasive opinions of multiple authorized medical providers show that Claimant suffered an intervening injury on May 28, 2022 causing "acute pain of the left knee" and an "acute traumatic lateral meniscus tear."

21. Importantly, on July 27, 2022, after reviewing the MRI findings and performing an orthopedic consultation, ATP Dr. Kalevik determined that Claimant had "new aspects now involving the lateral meniscus since her surgery was for the partial medial meniscectomy." In assessing causality, Dr. Kalevik concluded that the May 28, 2022 incident was not work-related. He reasoned that, "based on the information by the patient, MRI and specialist office, the incident is less than 51% likely related to the occupational events, if the history provided to me is accurate. This incident is determined NOT to be work-related." Dr. Kalevik maintained Claimant's release to work full duty without restrictions. He also reiterated that Claimant had reached MMI on January 27, 2022.

22. In contrast, Dr. Orent explained that, when Claimant first returned to work following her May 24, 2021 admitted left knee injury and subsequent surgery, she had not fully recovered. He reasoned that, because of the physical demands of Claimant's job, the return to work compromised her recovery and left her knee in a fragile state. In addressing the May 28, 2022 incident, Dr. Orent explained that Claimant did not engage in an activity of daily living, but simply turned her head while walking. He explained that it was unlikely Claimant pivoted because an individual normally pivots using the foot and not the knee. Dr. Orent concluded that Claimant's "knee was getting progressively worse…and that simple step was the final straw." Similarly, on August 29, 2022 Dr. Dragoo remarked "it became clear that [Claimant] was having pain and popping since

approximately 3 months post left knee surgery and was not fully recovered." Dr. Dragoo speculated that the May 28, 2022 event "could be related to her existing postoperative state and never being completely healed."

23. Despite Dr. Orent's opinion, his hearing testimony reveals that he did not consider Dr. Kalevik's reports of June 7, 2022 and July 27, 2022 that explicitly addressed the cause of Claimant's ongoing left knee problems. Notably, Dr. Orent did not review ATP Dr. Kalevik's opinion that Claimant's May 28, 2022 left knee injury while walking with her husband was less than 51% likely related to occupational events. Furthermore, Dr. Orent also accepted at face value Claimant's account that the May 28, 2022 non-work-related incident did not involve a pivot or twist injury to the left knee. His report did not reference the multiple contemporaneous medical records describing a pivot or twist event on May 28, 2022 that caused an audible pop and the immediate onset of excruciating pain. The failure to consider the preceding medical record undermines Dr. Orent's opinion that Claimant was engaged in the "simple act of walking" without a "mechanism" of injury outside of work. Similarly, Dr. Dragoo noted that Claimant began experiencing symptoms approximately three months after her November 3, 2021 left knee surgery and the May 28, 2022 event "could be related to her existing postoperative state and never being completely healed." However, he did not conduct a causation analysis and only offered a speculative opinion.

24. Claimant's condition and need for additional medical treatment for her left knee did not proximately and naturally flow from the May 24, 2021 injury. The record reveals that the May 28, 2022 incident constituted an intervening event that severed the causal connection to Claimant's May 24, 2021 industrial injury. The May 28, 2022 event triggered her need for additional medical treatment and surgical intervention. Accordingly, Claimant has failed to establish it is more probably true than not that a change in condition of her May 24, 2021 left knee injury warrants reopening of her claim and additional medical treatment.

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. Section 8-43-303(1), C.R.S. specifically provides that a Worker's Compensation award may be reopened based on a change in condition. In seeking to reopen a claim, 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).

5. The existence of a weakened condition is insufficient to establish causation if the new injury is the result of an efficient intervening cause. *Owens v. Indus. Claim Appeals Off.,* 49 P.3d 1187, 1188 (Colo. App. 2002); *Martinez v. Thoutt Bros. Concrete Contractors, Inc.*, W.C. No. 5-139-017-001 (ICAO, June 2, 2022). No liability exists when a later accident occurs as the direct result of an intervening cause. *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). However, 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). If the need for medical treatment occurs as the result of an independent intervening cause, then the subsequent treatment is not compensable. *Owens,* 49 P.3d at 1188. The new injury is not compensable "merely because the later accident might or would not have happened if the employee had retained all his former powers." *In Re Chavez,* W.C. No. 4-499-370 (ICAO, Jan. 23, 2004). The determination of whether an injury resulted from an efficient intervening cause is a question of fact for the ALJ. *Id.*

6. As found, Claimant has failed to establish by a preponderance of the evidence that she should be permitted to reopen her admitted May 24, 2021 Workers'

Compensation injury based on a change of condition pursuant to §8-43-303(1), C.R.S. Initially, on May 24, 2021 Claimant suffered a compensable industrial injury to her left knee. She underwent surgery on November 3, 2021 and reached MMI on January 27, 2022. However, on May 28, 2022 Claimant again injured her left knee while walking with her husband. The record reveals that the May 28, 2022 incident constituted an intervening event that severed the causal connection to Claimant's May 24, 2021 industrial injury. Therefore, Claimant has failed to demonstrate a change in condition that entitles her to reopen her May 24, 2021 claim.

7. As found, the record reflects that Claimant suffered an intervening non-work-related injury on May 28, 2022 when she pivoted or twisted her knee, suffered a pop, and experienced the onset of excruciating pain. Claimant consistently reported to medical providers a pivoting or twisting event on May 28, 2022 outside of work that caused an injury evidenced by an audible pop and the immediate onset of excruciating pain. The MRI on June 9, 2022 also revealed concerns for a "re-tear" and "new deep cartilage fissuring or flap formation along the lateral patellar facet." Importantly, the persuasive opinions of multiple authorized medical providers show that Claimant suffered an intervening injury on May 28, 2022 causing "acute pain of the left knee" and an "acute traumatic lateral meniscus tear."

8. As found, importantly, on July 27, 2022, after reviewing the MRI findings and performing an orthopedic consultation, ATP Dr. Kalevik determined that Claimant had "new aspects now involving the lateral meniscus since her surgery was for the partial medial meniscectomy." In assessing causality, Dr. Kalevik concluded that the May 28, 2022 incident was not work-related. He reasoned that, "based on the information by the patient, MRI and specialist office, the incident is less than 51% likely related to the occupational events, if the history provided to me is accurate. This incident is determined NOT to be work-related." Dr. Kalevik maintained Claimant's release to work full duty without restrictions. He also reiterated that Claimant had reached MMI on January 27, 2022.

9. As found, in contrast, Dr. Orent explained that, when Claimant first returned to work following her May 24, 2021 admitted left knee injury and subsequent surgery, she had not fully recovered. He reasoned that, because of the physical demands of Claimant's job, the return to work compromised her recovery and left her knee in a fragile state. In addressing the May 28, 2022 incident, Dr. Orent explained that Claimant did not engage in an activity of daily living, but simply turned her head while walking. He explained that it was unlikely Claimant pivoted because an individual normally pivots using the foot and not the knee. Dr. Orent concluded that Claimant's "knee was getting progressively worse…and that simple step was the final straw." Similarly, on August 29, 2022 Dr. Dragoo remarked "it became clear that [Claimant] was having pain and popping since approximately 3 months post left knee surgery and was not fully recovered." Dr. Dragoo speculated that the May 28, 2022 event "could be related to her existing postoperative state and never being completely healed."

10. As found, despite Dr. Orent's opinion, his hearing testimony reveals that he did not consider Dr. Kalevik's reports of June 7, 2022 and July 27, 2022 that explicitly

addressed the cause of Claimant's ongoing left knee problems. Notably, Dr. Orent did not review ATP Dr. Kalevik's opinion that Claimant's May 28, 2022 left knee injury while walking with her husband was less than 51% likely related to occupational events. Furthermore, Dr. Orent also accepted at face value Claimant's account that the May 28, 2022 non-work-related incident did not involve a pivot or twist injury to the left knee. His report did not reference the multiple contemporaneous medical records describing a pivot or twist event on May 28, 2022 that caused an audible pop and the immediate onset of excruciating pain. The failure to consider the preceding medical record undermines Dr. Orent's opinion that Claimant was engaged in the "simple act of walking" without a "mechanism" of injury outside of work. Similarly, Dr. Dragoo noted that Claimant began experiencing symptoms approximately three months after her November 3, 2021 left knee surgery and the May 28, 2022 event "could be related to her existing postoperative state and never being completely healed." However, he did not conduct a causation analysis and only offered a speculative opinion.

11. As found, Claimant's condition and need for additional medical treatment for her left knee did not proximately and naturally flow from the May 24, 2021 injury. The record reveals that the May 28, 2022 incident constituted an intervening event that severed the causal connection to Claimant's May 24, 2021 industrial injury. The May 28, 2022 event triggered her need for additional medical treatment and surgical intervention. Accordingly, Claimant has failed to establish by a preponderance of the evidence that a change in condition of her May 24, 2021 left knee injury warrants reopening of her claim and additional medical treatment.

ORDER

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

1. Claimant's request to reopen her admitted May 24, 2021 claim based on a change in condition pursuant to §8-43-303(1), C.R.S. is denied and dismissed. Therefore, her request for additional medical benefits, including the left knee replacement performed by Dr. Hogan on October 31, 2022, is also denied.

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: August 16, 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 5-162-201-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury arising from the course of his employment with Employer.

2. If compensable, whether Claimant established by a preponderance of the evidence entitlement to reasonable and necessary medical treatment.

3. If compensable, whether Claimant established an entitlement to temporary total disability benefits for the period of December 31, 2020 to January 20, 2021, and temporary partial disability benefits from January 26, 2021 to July 28, 2021.

FINDINGS OF FACT

1. Claimant is a firefighter paramedic employed by Employer. Claimant's job duties include, among other things, providing patient assessment and treatment at a paramedic level.

2. On December 21, 2020, Claimant responded to a call for medical assistance in the course of his employment reporting an elderly woman ('patient") with breathing difficulty. The patient was in a small (approximately 600 square feet) apartment, and Claimant entered the apartment with others to assess Claimant's condition. The patient was located in the bedroom of the apartment and was not wearing a mask. Claimant entered the bedroom, knelt next to the patient, applied a blood pressure cuff and pulse oximeter, and then placed the Claimant on oxygen. Claimant testified that his direct interaction with the patient lasted a "couple" of minutes. During the encounter, Claimant was wearing appropriate EMS personal protective equipment (PPE) including gloves, a KN95 mask, and eye protection. Although it was not known to Claimant or his co-workers, the patient was COVID-positive at the time of the encounter.

3. After it was determined that the patient had a low pulse oximeter reading and was exhibiting symptoms of COVID, Claimant exited the bedroom and waited in the apartment until the ambulance arrived. Claimant testified that after his initial encounter with the patient, he remained at least six feet away from the patient for the remainder of the encounter. Claimant was present in the apartment for between 10-15 minutes.

4. On December 23, 2020, Respondent learned the patient was COVID-positive, and communicated this to Claimant on December 24, 2020. On December 29, 2020, Claimant began experiencing symptoms consistent with COVID, and tested positive on December 30, 2020. (Ex. D & 7).

5. Prior to December 21, 2020, Claimant had not tested positive for COVID, and had no symptoms associated with COVID. Claimant tested negative for COVID on December 1, 2020. (Ex. 4).

6. Claimant's initial symptoms were not severe, so he did not seek medical assistance. Claimant remained off work pursuant to Employer's policy from December 31, 2020 until January 20, 2021. On January 22 or 23, 2021, once Claimant returned to work, he began experiencing difficulty breathing and a fever. He then sought treatment from his personal medical provider at Kaiser Permanente on January 26, 2021. (Ex. 5). At Kaiser, Claimant was diagnosed with bilateral pulmonary emboli (*i.e*., blood clots) in his lungs, secondary to COVID, and placed on anticoagulant medication. (Ex. 4). It was also noted that Claimant had a history of factor V Leiden mutation, which can cause or contribute to blood clots.

7. On January 26, 2021, Claimant notified Employer. A first report of injury was completed on January 27, 2021, and Claimant was provided a list of authorized medical providers. (Ex. 1 & D).

8. On January 28, 2021, Claimant saw Annu Ramaswamy, M.D.[1] Dr. Ramaswamy opined that Claimant's COVID infection was more likely than not work-related and contracted from the elderly patient he saw on December 21, 2020, as this was Claimant's only known COVID exposure, and because the emergence of symptoms fell within the incubation period for the infection. Dr. Ramaswamy also noted that because Claimant was continuing to experience fatigue and dyspnea (*i.e.*, difficulty breathing), he was not currently working, and that as he improved, restricted duty would be recommended. He further indicated that Claimant could not return to full duty as a firefighter while on anticoagulation therapy. (Ex. D).

9. On January 29, 2021, Claimant's physician at Kaiser, Heath Henbest, D.O., opined that Claimant's lung blood clots were likely related to the effects of his COVID infection. He further indicated Claimant would be on blood thinners for up to six months. Because blood thinners increase the risk for prolonged bleeding in the event of trauma (either penetrating or blunt), Claimant should avoid situations in which trauma was possible. (Ex. 4).

10. On February 5, 2021, Respondent filed a notice of contest. (Ex. A).

11. Claimant's next documented medical visit was at Kaiser on July 19, 2021, where he saw Thomas Kenney, M.D.. At that time, it was noted that Claimant's pulmonary emboli was related to his COVID infection, and likely exacerbated by underlying factor V Leiden mutation. It was further noted that Claimant's blood clots had not completely resolved, and that he was unlikely to get additional clot resolution with longer-term anticoagulation, as the clot was likely chronic at this point. Dr. Kenney also indicated it was reasonable for Claimant to discontinue anticoagulation medications so he could return to work. (Ex. D). Claimant testified that he returned to work approximately one week after being taken off anticoagulants.

12. After testing positive for COVID on December 30, 2020, Claimant was unable to work for three weeks based on Employer's policies and guidelines. He returned to work

[1] The parties stipulated that if Claimant's claim is compensable, Dr. Ramaswamy would be an authorized treating physician.

on January 20, 2021. Claimant worked full duty from January 21, 2021 until January 25, 2021. Because Claimant was placed on anticoagulation therapy, he was unable to work full duty from January 26, 2021, until July 28, 2021. The evidence was unclear if Claimant worked modified duty during this time, or whether he was off work entirely.

13. Between December 21, 2020 and December 29, 2020, Claimant engaged in activities outside of work, including picking up take-out food at a bagel store, three trips to a grocery store, one trip to a Costco, and trips to a gym – [Redacted, hereinafter VF]. Claimant testified when he went to these locations he wore a mask and maintained social distance. Claimant testified he went to VF[Redacted] with his wife in the late mornings, on six occasions between December 22, 2020 and December 29, 2020. Claimant and his wife worked out for between 30-45 minutes on exercise machines such as treadmills, stair climbers or elliptical trainers. Claimant testified the VF[Redacted] was approximately 6,000 square feet (60 x 100 feet), with high (30 foot) ceilings, and large ceiling fans, and that approximately 30-40 people may have been at the gym during his visits. The VF[Redacted] enforced social distancing protocols, including limiting the number of people permitted in the facility, requiring members to reserve a time slot for workouts, and requiring members to wait outside, socially-distanced, until the reserved time slot. Once in the facility, Claimant testified that every other cardio machine was cordoned off to maintain distance between the machines, and Claimant wore a surgical mask while exercising.

14. As of December 21, 2020, Claimant lived with his wife, son, and daughter. Claimant testified that his family did not exhibit COVID symptoms prior to December 20, 2021. Claimant's wife tested negative for COVID on December 31, 2020. (Ex. 4). Claimant testified that his son and daughter also tested negative for COVID around that time. Claimant's wife eventually tested positive for COVID on January 5, 2021. Claimant testified that the only known COVID-positive person with whom he had contact prior to his wife testing positive was the elderly patient on December 21, 2020.

15. Daniel Mogyoros, M.D., is an infectious disease physician who performed a record review at Respondents' request and issued a report dated May 8, 2023. (Ex. C). Dr. Mogyoros was admitted as an expert in infectious disease, with expertise in COVID, and testified at hearing. Dr. Mogyoros opined that it was unlikely Claimant contracted COVID from the December 21, 2020 patient, based on the amount of time he was in close proximity to the patient, and the Claimant's use of PPE during the encounter. Dr. Mogyoros explained that individuals who contract COVID are typically contagious 48 hours before symptoms emerge, and remain contagious for approximately 5-7 days after the onset of symptoms. The virus is transmitted through aerosols or droplets that are expelled when breathing. The "incubation period," (*i.e.*, the time between exposure and the emergence of symptoms) varies from 3 days at the earliest, to as long as 12 days, with the average being 5-6 days. He also testified that there is some data that suggests the incubation period may be longer if a person is exposed to a lower viral load. Dr. Mogyoros indicated that it is not possible to determine the elderly patient's viral load, but that it was likely high.

16. Based on Dr. Mogyoros' testimony regarding the incubation period, and the emergence of Claimant's symptoms on December 29, 2020, it is more likely than not that Claimant contracted COVID from exposure to a COVID-infected person sometime between December 17, 2020 and December 26, 2020.

17. Dr. Mogyoros explained that the Center for Disease Control (CDC) defines "close contact" as being within 6 feet of an infected person for at least 15 minutes over a 24-hour period. Because Claimant was not in close proximity to the patient for 15 minutes, he indicated this would not meet the CDC definition of a "significant exposure." Exposure risk may be decreased through the use of PPE, including a KN95 mask, such as that worn by Claimant. Dr. Mogyoros opined that using a KN95 mask offers a high level of protection, which reduces the risk of COVID infection by 85-90%. Dr. Mogyoros opined that the Claimant's use of PPE during his encounter and the time of close contact, make it unlikely that Claimant's exposure on December 21, 2020 was the source of his COVID infection. Although, he did agree it is possible that Claimant could have contracted COVID from the patient on December 21, 2020.

18. Dr. Mogyoros believes it is more likely Claimant contracted COVID at VF[Redacted]. He indicated there were reports of COVID outbreaks associated with fitness centers in general, and that performing cardio exercises increased the rate of expulsion of the aerosols which transmit COVID. He further opined that the use of fans may spread aerosols within a room, which would increase the potential exposure. He also testified that Claimant's use of a surgical mask would not be as effective in decreasing the risk of exposure due to gaps on the sides of the mask. In his report, Dr. Mogyoros indicated the "risk of exposure being in proximity to vigorous gym-based exercise is no different than being in close proximity during a conversation with an infected person." He indicated that assuming both parties were masked, a 25-60 minute exposure to COVID-infected person at the gym could have been enough to infect Claimant. No credible evidence was presented to indicate that Claimant was exposed to a COVID-positive person at the gym. But Dr. Mogyoros indicated that it was a possibility given infected individuals are typically contagious for several days before COVID symptoms manifest. For example, Claimant worked out at VF[Redacted] on December 26, 28, and 29, 2020, when he was likely COVID-positive, but not exhibiting symptoms. While Dr. Mogyoros' testimony is credible, in the absence of credible evidence that Claimant actually encountered another COVID-positive individual at VF[Redacted] or elsewhere between December 21, 2020 and December 26, 2020, his opinion is speculative and not persuasive.

19. Dr. Mogyoros opined that the medical treatment Claimant received for his pulmonary emboli was reasonable and necessary, although he did not have the expertise to opine on the specific medications used. He further opined that Claimant's pulmonary emboli were likely due, in some part, to his COVID infection, but could not comment on how much Claimant's Factor V Leiden mutation may have contributed. (Ex. C).

20. Dr. Ramaswamy testified by deposition in lieu of live testimony, and was admitted as an expert in occupational medicine. Dr. Ramaswamy has treated COVID patients, but is not an infectious disease specialist. Dr. Ramaswamy testified that in his opinion,

Claimant contracted COVID from the December 21, 2020 patient. The primary rationale for this is that the exposure on December 21, 2020 was Claimant's only known contact with a COVID-positive person, and that Claimant's symptoms correlated with the accepted incubation period for that exposure.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of

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

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

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

Claimant has established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer. Claimant was exposed to a COVID-infected patient on December 21, 2020. He was in close proximity to the unmasked patient for several minutes while rendering paramedical care. Although Claimant's relatively low exposure time and use of appropriate protective equipment, including a KN95 mask, reduced the risk of transmission, it did not eliminate the risk of contracting COVID from the patient.

Claimant became symptomatic on December 29, 2020, indicating Claimant likely contracted the virus between December 17, 2020 and December 26, 2020 (*i.e.*, 3 to 12-day incubation period prior to symptoms). During this period, the December 21, 2020 patient is the only known COVID-positive person with whom Claimant had close contact. Although Claimant did go to VF[Redacted] and other places where he could have potentially encountered a COVID-positive person, no credible evidence was admitted indicating this occurred. While Dr. Mogyoros presented a potential alternative source of Claimant's infection, it is mere speculation to assume he had sufficient contact with a COVID-positive individual at VF[Redacted] or anywhere else. The ALJ finds it more likely

than not that Claimant became infected with COVID during the December 21, 2020 encounter with the elderly patient while delivering paramedical care in the course of his employment with Employer.

The ALJ finds credible the opinions of Claimant's treating providers at Kaiser Permanente that he developed pulmonary emboli as a result of his COVID infection. Because the pulmonary emboli were a proximal and natural result of Claimant's COVID infection, it constitutes a compensable injury as well.

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 established a compensable injury, Claimant is entitled to all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his injury. Claimant has established both that he contracted COVID arising out of the course of his employment, and that he developed pulmonary emboli as a result of the COVID infection. Respondents shall pay for all authorized, reasonable, and necessary treatment to cure or relieve these conditions.

Temporary Disability Benefits

To prove entitlement to temporary disability benefits, Claimant must prove his 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. *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) 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*, 898 P.2d 542 (Colo. 1995). 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).

Claimant has established by a preponderance of the evidence an entitlement to temporary disability benefits. Claimant was not able to work from December 31, 2020 until January 20, 2021 due to contracting COVID per Employer's policy. The evidence demonstrates that Claimant developed pulmonary emboli in his lungs as the result of the COVID infection. As a result of the pulmonary emboli, Claimant was placed on anticoagulation therapy for approximately six months. Because anticoagulants

significantly increase Claimant's risk of bleeding in the event of trauma, and because his work as a firefighter potentially exposed Claimant to the risk of trauma, he was unable to work full duty while on anticoagulation therapy from January 26, 2021 until July 28, 2021. Respondents shall pay Claimant temporary disability benefits for the period of December 31, 2020 to January 20, 2021, and from January 26, 2021 to July 28, 2021.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury arising out of the course of his employment with Employer on December 21, 2020, when he contracted COVID in the course of his employment. Claimant's subsequent pulmonary emboli were caused by the COVID infection and are also compensable.

2. Respondents shall pay for all authorized medical care that is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

3. Respondents shall pay Claimant temporary disability benefits for the periods of December 31, 2020 to January 20, 2021, and from January 26, 2021 to July 28, 2021.

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: August 16, 2023

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

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable injury in the course and scope of his employment.

FINDINGS OF FACT

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

1. Claimant is a 43 year-old man who worked for Employer from October 3, 2017 until January 23, 2023 as an insulation installer. Claimant testified that prior to his alleged injury, he primarily worked in residential homes. (Tr. 13:16-18).

2. Claimant alleged that he suffered an injury on October 27, 2022. Claimant testified he was working in a commercial building in Estes Park, and had been working at that location prior to his injury. He testified that the work in the commercial building required him to use a heavier spray gun, about 20 pounds, and he had to drag a hose that was three to four inches thick and weighed about 30 pounds. (Tr. 15:19-25). Claimant testified that he would aim the insulation gun at the ceiling, and he worked over eight hours a day with his hands either at shoulder height or higher. Claimant further testified that when he worked on a residential project, he only worked overhead half of the time, or about three to four hours per day. (Tr. 22:11-23:2). Claimant testified that his work in the commercial building caused his injury. (Tr. 23.3-5).

3. Claimant testified he had been working at the commercial building for a couple of weeks. When questioned by the ALJ, Claimant testified that he started working on the commercial building in September 2022 and worked on the project for two weeks. Claimant's testimony regarding the dates he worked in the commercial building was inconsistent. Nevertheless, it is uncontroverted that Claimant worked in a commercial building prior to October 27, 2022. The ALJ finds that Claimant worked in a commercial building for two weeks sometime between September 2022 and October 27, 2022.

4. Claimant was evaluated by Authorized Treating Provider (ATP), Jeffrey Baker, M.D., on November 1, 2022. Claimant noted on the patient information form, that his upper back, neck and shoulders were injured because of repetitive movements and "looking up every day." Claimant denied any specific injury. Dr. Baker assessed Claimant with a cervical strain, but specifically noted that causality needed to be determined and he ordered a work-site evaluation. He also referred Claimant to physical therapy. There is no mention of Claimant recently working in a commercial building, or him working in a different environment than normal. Notably, according to the medical record, Claimant told Dr. Baker he "has been getting neck and upper back pain for 2 years. He believes it is from his job because he has to look up a lot." (Ex. F).

5. At the hearing, however, Claimant testified that his pain began when he started working on ceilings in the commercial building. Claimant testified that prior to working in the commercial building, he was just working on walls or windows in houses, which were within his normal reach for his height. (Tr. 18:3-7). Claimant later testified he had neck and back issues before October 27, 2022. (Tr. 25:22-24).

6. Claimant testified he had a prior work incident involving his right shoulder. According to the Concentra records, in 2018, Claimant suffered a work-related injury to his right shoulder. (Ex. D). Claimant testified he received treatment for his shoulder, but it was never really resolved. (Tr. 18:8-18).

7. The ALJ finds that Claimant experienced neck, back and right shoulder issues prior to October 27, 2022.

8. A Job Demands Analysis (JDA)[1] was completed on December 15, 2022. According to the JDA, approximately 20-30% of Claimant's work involved using a foam gun to apply liquid foam to designated locations in walls and ceilings. (Ex. J). Claimant testified that the JDA was not representative of his work in the commercial building. (Tr. 21:21-22:1). Claimant primarily worked in residential buildings. The ALJ finds the JDA to be accurate and representative of Claimant's work for Employer.

9. Claimant continued to treat with Dr. Baker and others at Concentra. On January 6, 2023, Claimant had a follow-up appointment with Dr. Baker who had recently reviewed the JDA. Dr. Baker concluded, based on his treatment of Claimant and his review of the JDA that Claimant's presenting complaints were not work-related. (Ex. F).

10. On January 20, 2023, Claimant underwent imaging of his cervical spine. The impression was mild multilevel degenerative changes, most apparent at C5-C6. On January 22, 2023, Claimant was evaluated by Elias Hernandez, M.D. Claimant's chief complaint was joint pain, and he wanted to discuss testing for arthritis because his dad had inflammatory joint disease. Claimant reported having pain in his neck for six months, along with pain in his back and knee and elbow joints. He told Dr. Hernandez he felt his work installing insulation in houses and buildings could be causing the pain. Dr. Hernandez opined that Claimant's pain was musculoskeletal due to a strain over his neck and upper back. (Ex. 11).

11. Claimant filed his Worker's Claim for Compensation on January 20, 2023. He noted his date of injury as being October 27, 2022. In describing the accident he wrote "I have back, neck and pain in my shoulders due to constantly having to be looking up to spray foam on ceilings all day. My hands are constantly over my shoulders while spraying also." (Ex. 1).

12. Claimant continued to go to Banner Health for treatment. On February 18, 2023, Claimant had an MRI of his thoracic spine that indicated no significant thoracic facet arthropathy. According to his February 27, 2023 medical record, Claimant reported that he "was required to look overhead and hold things overhead repeatedly." The record

[1] This is the work-site evaluation Dr. Baker ordered.

states that he was seen for bilateral shoulder pain, myofascial pain, and spondylosis without myelopathy or radiculopathy in the cervical region. He was referred to orthopedics for his shoulder complaints, and to Dr. Shonk for his myofascial neck and upper back pain and possible trigger point injections. (Ex. H).

13. Claimant was evaluated on March 6, 2023, presumably by Dr. Shonk.[2] According to the record, Claimant was seen for cervical facet arthropathy, among other issues. And it was recommended that Claimant get injections to block the pain from the facet joints in his neck, and some trigger point injections to diminish the muscle spasms in his neck, shoulder, and upper back. (Ex. H). There is no objective evidence in the record, however, to explain the basis for the diagnosis of cervical facet arthropathy, or the recommended treatment.

14. At Respondents' request, Claimant underwent an Independent Medical Examination (IME) with Frederick Mark Paz, M.D. on May 2, 2023. Claimant told Dr. Paz he developed symptoms in his neck, back and shoulders six months prior to the date of his alleged injury. Claimant further told Dr. Paz that he had been spraying overhead, and his activity was "mostly up in the ceiling." Claimant said his work was in houses. According to Dr. Paz's IME report, Claimant "states that prior to the onset of symptoms, the spraying that he applied to the ceiling was limited and not frequent." Claimant also told Dr. Paz that he received injections in his neck, but they provided no benefit, and in fact temporarily worsened his symptoms. (Ex. I).

15. Based on a review of the medical records and the direct history provided by Claimant, Dr. Paz did not find objective evidence to support Claimant's subjective complaints. (Ex. I). Dr. Paz was unable to find a specific date of injury, or a specific diagnosis. Without a diagnosis, Claimant failed to meet the threshold criteria for a cumulative trauma disorder, and a work-related injury. (Tr. 30:25-32:3).

16. Dr. Paz's opinion was consistent with Dr. Baker's that Claimant's injury was not work-related and was more likely than not, idiopathic in nature, with no correlation between Claimant's subjective symptoms or any defined exposure. (Ex. I). Dr. Paz, consistent with Dr. Baker, found it was not medically probable that Claimant suffered a work-related injury on October 27, 2022. The ALJ finds Dr. Paz's opinion to be credible and persuasive.

17. Claimant testified that his symptoms began when he worked on the commercial project for two weeks sometime between September 2022 and October 27, 2022. Yet he told Dr. Baker he experienced pain for two years, and he told Dr. Paz that he experienced pain for six months. Claimant testified that it was while working on the commercial property that he sprayed the ceiling for the majority of the time. But Claimant told different medical providers that he was constantly looking up and spraying ceilings, not just doing this over a two–week period. The ALJ finds that Claimant's testimony is inconsistent and not credible.

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[2] Dr. Shonk's name is hand-written on the March 6, 2023 record, and only pages 1 and 2 out of 16 were submitted into evidence.

18. Based on the totality of the evidence, the ALJ finds that Claimant did not suffer an injury in the course and scope of his employment. Claimant did not prove by a preponderance of the evidence that he suffered a compensable injury.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

To establish a compensable injury, an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see Boulder v. Streeb*, 706 P.2d 786, 791

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

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa Cnty. Valley Sch. Dist.*, 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 a natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dep't Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *Boulder*, 706 P.2d at 791; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant's testimony concerning his alleged injury was inconsistent and not credible. Claimant testified that while working in a commercial building for two weeks, he injured his neck and back because he was using heavier equipment to spray the ceiling. Claimant testified that he predominantly worked in residential buildings where he was not spraying ceilings. Claimant, however, told his medical providers that he had been in pain anywhere from six months to two years, and that he always worked looking up and spraying ceilings. Dr. Paz conducted an IME and concluded that Claimant did not suffer a work-related injury. Dr. Paz credibly opined that Claimant's injury was more likely than not, idiopathic in nature. Claimant's ATP, Dr. Baker, also opined that it was not medically probable that Claimant suffered a work-related injury. Based on the totality of the evidence, the ALJ finds that Claimant did not prove by a preponderance of the evidence that he suffered a compensable injury.

ORDER

It is therefore ordered that:

1. Claimant did not suffer a compensable injury in the course and scope of his employment.

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: August 16, 2023

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is permanently and totally disabled as a result of the admitted work related injuries of August 10, 2019.

PROCEDURAL HISTORY

Claimant was placed at MMI by Dr. Zimmerman on October 14, 2021 with a 21% rating. Respondents filed an Application for a Division of Workers' Compensation Independent Medical Examination (DIME). Claimant was evaluated by Dr. Mark Winslow, the DIME physician on March 15, 2022.

Respondents filed a Final Admission of Liability on June 2, 2022 admitting to temporary total disability benefits paid based on an average weekly wage of $859.63 and a TTD rate of $573.09. Respondents also paid permanent partial disability benefits beginning the date of MMI. Respondents admitted to maintenance medical benefits.

Claimant filed an Application for Hearing on December 7, 2022 on multiple issues including permanent total disability benefits. Respondents filed a Response to Applcaiton for Hearing dated January 4, 2023. Present during the were [Redacted, hereinafter JG], Esq. from [Redacted, hereinafter MM]'s office, and Claimant's daughter, [Redacted, hereinafter MA], as observers; Claimant, Dr. David Yamamoto and Cynthia Bartman who testified on behalf of Claimant; and Dr. John Raschbacher and Katie Montoya, who testified on behalf of Respondents.

FINDINGS OF FACT

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

A. Generally:

1. At the time of the hearings, Claimant was fifty nine years old, lived with his wife and had a ninth grade education in Mexico. Claimant worked as a laborer in construction. While he mainly performed manual labor, he also used machinery including the mixer and a forklift tractor. He had been doing the same kind of work for more than 20 years and would essentially perform the same kinds of tasks each day, so he understood the instructions in English. He would use a coworker to interpret when he was unable to understand his supervisor. He would frequently be lifting the 80 to 90 lbs. of mix when operating the tractor. His job required lifting, walking, standing, climbing scaffolding. After his accident, he performed modified duty for approximately four months sorting materials, washing cars, cleaning floors.

B. The Accident:

2. On August 10, 2019 Claimant had been preparing the mix for the mixer, went up the scaffolding to put the mix in the mixer, when the weight of the bucket of cement mix overbalanced him, it threw him back and he fell to the floor. The mixer had a solid piece of concrete in it which was shaking the scaffolding. He injured his low back and had almost immediate pain going into his right lower extremity all the way to his foot. About three weeks after the accident the pain started getting worse, then about six weeks later, the pain was even worse causing numbness going down his leg. Approximately three months prior to the March 2023 hearing, he developed increasing nerve pain radiating into the groin.

3. Claimant last worked on February 10, 2020. He had surgery on February 12, 2020. He was happy initially with the surgical results. The pain in his low back seemed to get worse after about another month or two, especially in his low back, and his right lower extremity. After the surgery he received medications, injections and physical therapy. Both the physical therapy and the injections helped with the pain. The medications only helped for a while and then the pain and symptoms would return. He continues to take Gabapentin at nighttime and sometimes when he wakes up he may take more of the Gabapentin.

C. Medical and Vocational Records:

4. Claimant was first evaluated by Dr. Carrie Burns of Concentra – Centennial on August 12, 2019. She documented that Claimant was operating a cement mixer when he felt back pain which immediately radiated down his right leg, reporting right leg pain and paresthesias. Dr. Burns noted loss of lordosis, tenderness at the L1-L5 left and right paraspinal, worse on the right, right sided muscle spasms, limited range of motion (ROM) and positive right straight leg raise (SLR). She assessed lumbar strain, right wrist sprain and acute lumbar radiculopathy. She ordered physical therapy, a wrist brace, x-rays of the right wrist (normal) and spine; and medications. She noted degenerative joint disease of the lumbar spine and suspected some nerve irritation or compression. Dr. Burns ordered restrictions of sedentary duty, no lifting greater than 10 lbs., limited bending and twisting. Claimant started physical therapy at Concentra shortly thereafter.

5. By August 16, 2019 Dr. Burns ordered an MRI of the lumbar spine, diagnosing lumbar radiculopathy, lumbar strain and right wrist strain.

6. The August 16, 2019 MRI read by Dr. Brian Steele of Health Images showed as follows:

> 1. At L4-LS there is a medium-sized broad-based right paracentral/foraminal caudally-directed disc extrusion that causes moderate thecal sac stenosis and impinges on the transiting right L5 nerve root in the lateral recess. The disc also contacts the transiting left L5 nerve root to a lesser degree and contributes to mild bilateral foraminal stenosis.
>
> 2. A caudally-directed central disc extrusion at L5-S1 only slightly narrows the thecal sac but contacts both transiting S1 nerve roots, without nerve root compression or displacement.

3. At L3-L4 there is a broad-based right paracentral disc protrusion that contributes to mild-moderate thecal sac stenosis and contacts the transiting right L4 nerve root in the lateral recess.

4. Smaller disc protrusions at L1-L2 and L2-L3 does not cause thecal sac stenosis or specific nerve impingement. No sites of severe degenerative foraminal stenosis are present.

7. On August 19, 2019 Dr. Burns noted that the MRI showed a large disc extrusion with compression of the nerve root on the right at L4-5. Claimant continued to have right sided paraspinal spasms, limited ROM and positive SLR on the right. Claimant complained of increasing pain and numbness. She injected a Ketorolac Tromethamine intramuscular solution, prescribed pain medication and referred Claimant to Dr. Pehler, an orthopedic spine surgeon.

8. Dr. Stephen F. Pehler of Colorado Orthopedic Consultants evaluated Claimant on August 29, 2019 and diagnosed lumbar disc herniation with radiculopathy, spondylosis of the lumbar spine with radiculopathy and low back pain. He documented that Claimant had low back pain with right lower extremity radiculopathy, numbness and tingling, and was not able to work due to the pain and limped when walking. He documented Claimant had increased pain with prolonged sitting and at nighttime. He reviewed the MRI films and noted L4-5 lumbar disc herniation with right neuroforaminal narrowing and nerve root compression, and recommended a right-sided transforaminal epidural steroid injection. He commented that if symptoms did not subside, then Claimant would require a microdiscectomy. He prescribed gabapentin, flexeril and lidocaine patches.

9. Dr. Burns noted on September 6, 2019 that Claimant continued with severe pain in the low back and radiating pain down the right leg. He was having problems sleeping as he would wake up with pain down his leg and would have difficulty going back to sleep. Exam, diagnoses and restrictions remained the same. Dr. Burns administered another Ketorolac injection on September 27, 2019 while awaiting authorization for steroid injection with the specialist.

10. Claimant was attended by Dr. Barry A. Ogin of Colorado Rehabilitation & Occupational Medicine on October 10, 2019 for a right L4 and L5 transforaminal epidural steroid injection (ESI). The 7/10 pre injection pain level was immediately reduced to 0/10 post-injection. He was given a pain dairy and recommended follow up with Dr. Pehler.

11. On October 18, 2019 Dr. Burns reported that Claimant was working but that it was a struggle to make it to the end of the 4 hours and he was in significant pain, even with an extended lunch break. On October 23, 2019 Nurse Hanna Bodkin noted that she was very concerned that Claimant was having problems with getting and understanding proper instructions for follow up, medications, procedures and would benefit from a nurse case manager.

12. Dr. Pehler submitted a request for authorization on November 1, 2019 for the right sided L4-5 microdiscectomy surgery for the large herniated disc as Claimant had failed conservative treatment including therapy and injections.

13. On November 7, 2019 Dr. Burns noted that Claimant was being scheduled for surgery but it had not yet been authorized. Claimant was again out of medications on

December 19, 2019 and was still awaiting authorization for surgery. Claimant was getting some weakness down his right leg. His daily pain was a 9/10. Dr. Burns noted that it was clear that Claimant needed surgery as he had a definite disc herniation that was compressing on his nerve. He was weak on the right side and short relief with injections. She discussed consulting with Dr. Pehler to refile the request for authorization since it had been 5 months since his injury.

14. Dr. Burns noted on January 31, 2020 that Claimant's back and right leg were more painful, and had been doubling up on his medications as his employer was working him for longer shifts. Dr. Burns noted that Claimant was moving very slowly, obviously limping when transitioning from sitting to standing and walking.

15. Dr. Pehler performed the surgery on February 12, 2020 at The Medical Center of Aurora with a post-operative diagnosis of lumbar disk herniation with radiculopathy, right sided at L4-L5.

16. On February 24, 2020 Dr. Pehler noted that Claimant had improving back and leg pain though still had ankle tingling. Claimant was taking oxycodone, Robaxin (Methocarbamol) and Tizanadine for pain and spasms, which were helping.

17. Claimant was not doing well three weeks post-op, when Dr. Burns examined him on March 6, 2020, with low back pain radiating down into the right leg, though his leg pain was improving. At that time Claimant was taking 3 Vicodin for pain per day. Dr. Burns noted that Claimant had been having significant difficulties with the physical requirements of his job before surgery.

18. On March 30, 2020 Dr. Pehler continued to assert that Claimant had significant improvement to his right lower extremity radiculopathy, however still noted some right toe and foot numbness. He also documented Claimant had stiffness in his low back as well as spasms. He reported that the oxycodone and Robaxin had been helping. He referred Claimant to physical therapy and provided further medications.

19. By March 27, 2020 Dr. Burns noted that Claimant's pain in the low back had intensified and the pain down his right leg was also worsened, with the right foot going numb and walking too long causing pain and fatigue. On exam she palpated bilateral muscle spasms of the lumbar spine.

20. Claimant was treated by Devan Ohi, P.T. on March 31, 2020 who noted on exam that Claimant demonstrated high level of pain, reporting 8/10 pain, minimally changed with posture changes, except that pain increased with prolonged sitting or standing. He demonstrate limited LS ROM in all directions, most significantly with extension, which also reproduced right sided great toe numbness. He noted glute atrophy and that Claimant would benefit from physical therapy to address the deficits. Notes continued through May 13, 2020 with further recommendations for PT.

21. Dr. Burns documented on May 1, 2020 that Claimant could not stand for more than 20 minutes before his back started to hurt so bad he had to sit down, and was still having numbness in his right foot and pain behind his right knee. He continued to be on gabapentin, skelaxin and Lidoderm patches, which helped but when off medication he was miserable. She made a referral for a neurosurgery consult with Dr. Rauzzino

regarding the post-surgical radiculopathy. Dr. Burns still had Claimant off work at this point

22. On May 12, 2020 Claimant had the evaluation with Dr. Michael Rauzzino, who documented that following the L5 disc extrusion surgery, Claimant had worsening low back and right leg pain, was increasingly frustrated due to failure to improve post-surgery and was unable to work. On examination he noted a well-healed lumbar incision, positive straight leg raise on the right, negative on the left; loss of ROM, subjective weakness of his right EHL. Claimant complained of diminished sensation on the top of his toe and he walked with an antalgic gait secondary to pain. Dr. Rauzzino recommended a follow up MRI.

23. The MRI was performed at Health Images -- Diamond Hill on May 20, 2020, and was interpreted by Dr. Kevin Woolley. It showed evidence of a previous right L4-L5 laminotomy with a broad-based disk bulge, a small right paracentral protrusion with mild degenerative changes, mild right-sided foraminal tension, and mild spinal stenosis. The impression was interval right-sided L4-L5 laminotomy with decreased spinal stenosis and disk extrusion, a small residual disk protrusion was noted with no recurrent disk herniation.

24. On May 28, 2020 Dr. Pehler reviewed the MRI noting that there was improvement at the L4-5 level though some degenerative compression on the descending L5 nerve root and he planned on referring Claimant for an L4-5 transforaminal ESI. Claimant reported low back and leg pain but there was no interpreter present so communication was difficult. He continued to diagnose lumbar radiculopathy.

25. Dr. Burns documented on June 1, 2020 that Claimant was unable to stand up straight, was in a flexed position, had loss of normal lordosis, had mild swelling at the incision, and had tenderness at the L3-L5 level paraspinals with bilateral muscle spasms, limited range of motion and antalgic gait. She provided ibuprofen. In July she added a Medrol pack, stating he was no better and needed a functional capacity evaluation and kept him off work.

26. Dr. Ogin performed a right L4 and L5 transforaminal ESI on June 29, 2020 at Belmar Surgery Center.

27. On August 3, 2020 Dr. Burns provided the first work restrictions of working only 4 hours a day, lifting 5 lbs. occasionally, push/pull 5 lbs. occasionally.

28. Claimant had another transforaminal ESI on November 5, 2020 by Dr. Ogin, who documented pre-injection pain of 8/10 and a post-injection 0/10 pain level.

29. Dr. Burns commented on November 5, 2020 that Claimant had his second injection with Dr. Ogin and was feeling better already, making him hopeful it would help. He was out of medications again and she prescribed Lidocaine patches and Metaxalone.

30. On November 30, 2020 Claimant reported to Dr. Burns that the injection had helped for about 2 weeks, and now he was getting worse again, had a pain level of 8/10 and felt like he was being stabbed in the right foot. On exam she noted that Claimant had loss of normal lordosis, tenderness in the bilateral paraspinals and right sacroiliac joint, right sided muscle spasms, loss of range of motion, increased pain with facet loading on the right and was limping on the right. She noted that Claimant needed to return to

his surgeon for further evaluation. She also increased his work restrictions to lifting, pushing and pulling 10 lbs. occasionally but only up to 4 hours a day.

31. Dr. Pehler's PA, Maria Kaplan mentioned on December 30, 2020 that Claimant received approximately two weeks of relief from a third post-surgical ESI. Claimant continued to have significant pain in the low back and right lower extremity radiculopathy, with reduced quality of life and difficulties sitting and walking. She recommended a two level interbody fusion of L3-5 as he had failed continued conservative care.

32. Dr. Burns recorded on January 19, 2021 that Claimant continued to worsen with pain in his low back, with muscle spasms and a sensation of nails driven into his foot from time to time. She noted that Dr. Pehler was recommending a fusion. She sustained that objective findings were consistent with history and work related mechanism of injury, and she decreased restrictions to lifting 20 lbs., with no repetitive bending or stooping.

33. While Claimant awaited the decision for further surgery and an IME result, Claimant's pain in the low back continued to be documented by Dr. Burns, who ordered further medications for pain control.

34. At Respondent's request for an independent medical evaluation, Dr. Brian E. Reiss, an orthopedic spine surgeon, examined Claimant on March 17, 2021. He did an extensive medical record review including the films of both MRIs. He stated that Claimant continued with constant central low back pain of 8/10 with 9/10 at its worst and 6/10 at its best. Claimant also complained of posterior leg pain at the knee and some numbness at the bottom of his right foot. Dr. Reiss wrote that Claimant did not show pain behaviors.

35. On exam Dr. Reiss noted Claimant was able to heel and toe stand, had loss of ROM, had some tenderness centrally, and at the right SI ligament and sciatic notch. SLR was positive on the right, with decreased sensation of the right big toe and some groin pain with a Faber test. Dr. Reiss indicated that the first MRI showed a herniated disc at L4-5 but the second one was done without gadolinium, which was not optimal. He mentioned that there might be a retained central disc protrusion at the L4-5 which might be touching the right L5. He recommended a new MRI with gadolinium and an EMG to determine nerve root involvement, but stated that there was no indication for a fusion. He diagnosed post-laminectomy syndrome[1], deconditioning, and primarily back pain.

36. Following additional record review, on April 23, 2021 Dr. Reiss opined that a multilevel fusion for the low back in the absence of instability was unlikely to provide any benefit. He specifically noted that the pain generator had not been identified and conservative care had not been completed. He recommended core strengthening, aerobic conditioning and a stretching program.

37. On June 17, 2021 Dr. Burns noted that the surgery had been denied due to failure to reinstate physical therapy after the surgery and Claimant's post-surgical decline. Dr. Burns recorded that Claimant requested a second surgical opinion and that

[1] Dr. Raschbacher described post-laminectomy syndrome as failed back syndrome

medications were helping with his night pain. She prescribed physical therapy, and changed the lifting restrictions to 25 lbs. with no repetitive bending or stooping.

38. Dr. Rauzzino saw Claimant for a second opinion on July 6, 2021. On examination, he observed Claimant had bilateral negative SLR, limited ROM, was not able to walk on his toes or his heels. Reflexes were 1/4. Dr. Rauzzino recommended updated imaging and flexion and extension x-rays. He stated that it was not clear what was Claimant's pain generator given the diffuse nature of his axial lumbar pain. Claimant continued to take oxycodone for pain but his pain continued getting worse. Dr. Rauzzino also recommended Claimant return to see Dr. Pehler since Claimant had not been evaluated since the fusion surgery was initially recommended in December 2020. He stated that it would be difficult to know that performing a lumbar fusion would actually clinically improve Claimant's symptoms given Claimant's poor response to the microdiskectomy and the fact that he had continued persistent leg pain in the absence of a significant structural lesion.

39. Claimant's MRI of July 25, 2021 showed multilevel degenerative changes in the lumbar spine with associated disc bulging and annular fissuring at the L1-2 and L2-3; circumferential disc bulging indenting the ventral thecal sac resulting in moderate right subarticular recess stenosis at the L4-5 level which might have been impinging on the exiting L5 nerve root; and circumferential bulging at the L5-S1 level with mild foraminal narrowing.

40. On August 3, 2021 Dr. Burns emphasized that Claimant had most pain with standing, walking and driving, though medications helped, and he had pain chiefly in his right lower back which radiated down his right leg. He was unable to squat. She continued to prescribe medications and reduced restrictions to 15 lbs. maximum lifting, limited bending, twisting and stooping.

41. Dr. Pehler attended Claimant on August 5, 2021 noting that Claimant continued to have fairly significant back pain as well as right lower extremity pain, especially worse with standing and extension. Dr. Pehler remarked that the repeat MRI demonstrated some slight worsening at the L3-4 and L5-S1 levels. However, the biggest area of work-related pathology was at the L4-5 level, the site of his previous microdiscectomy. He thought it would be reasonable to consider a one level L4-5 oblique lateral interbody fusion with percutaneous fixation to address his most significant level of pathology. In the interim, he sent Claimant for a right-sided transforaminal epidural steroid injection at the L4-5 level. He noted Claimant was still continuing to have worsening pain symptoms that were affecting his quality of life and ability to work.

42. Claimant was referred by Dr. Burns to Dr. Zimmerman for an impairment rating on October 12, 2021 noting that Claimant should have permanent work restrictions in the sedentary category.

43. Dr. Frederic Zimmerman placed Claimant at maximum medical improvement on October 14, 2021. He noted that Claimant failed conservative care and proceeded with surgery in February 2020. He had also had epidural steroid injections, which did not significantly improve his symptoms long term. He recorded that Claimant had constant low back pain across the lumbosacral region that radiated down the right lower extremity with bending activities, paresthesia down the right lower extremity which

resolved with position changes, difficulty walking community distances and was forced to sit down after five minutes of walking. He also documented weakness and decreased sensation in the great toe.

44. On exam, Dr. Zimmerman observed that Claimant went from a seated to standing position in a very slow and stiff fashion, ambulated with antalgia/stiffness of the right lower extremity with a very short stride length, had weakness in the right EHL compared to the left with sensation subjectively decreased to light touch in the right great toe, an equivocal SLR test, positive neural tension on the right and valid ROM testing. He diagnosed low back injury status post L4-5 laminotomy and post-laminectomy syndrome with pain and radiculitis down the right lower extremity. He provided a 21% whole person impairment rating. Dr. Zimmerman issued light physical demand category work restrictions with no stooping, bending, crawling, crouching, or ladders, as well as limited to ambulating on level ground and stated he qualified for a disability parking pass.

45. Dr. Burns noted Claimant was at MMI on October 18, 2021, noting that objective findings were consistent with history and work related mechanism of injury. On exam, Dr. Burns noted that Claimant had decreased lordosis of the lumbar spine, tenderness present in right paraspinal muscles from L3-S1, but not the left and loss of range of motion. Dr. Burns diagnosed status post lumbar surgery with lumbar radiculopathy (acute). She provided work restrictions of maximum lifting to 15 lbs., limited bending, twisting, stooping, no ladders or crawling. She made a referral for a health club membership.

46. Dr. Rauzzino issued a letter to Respondents in response to specific inquires on October 26, 2021. He stated that he did not see a new large recurrent disc protrusion at L4-L5; the discs at L3-L4, L4-L5, and L5-S1 showed similar degeneration and disc protrusions. He did not see a clearly definable pain generator that would require surgery, that fusion surgery would likely not treat Claimant's pain or relieve his symptoms; and more likely would worsen his condition. He was interested in knowing whether Dr. Pehler would consider a one level L4-L5 fusion instead of the two level fusion.[2]

47. Claimant was evaluated by Dr. Mark Winslow, the Division Independent Medical Examination (DIME) physician on March 15, 2022. Claimant reported that subsequent to the surgery, he continued to worse with lower extremity symptoms though was not sure he wanted to move forward with further surgery unless surgery was assured to relieve his symptoms. On exam, he found increased paraspinal muscle tone and pain with range of motion and valid measurements. He found no focal neurologic deficits. He diagnosed acute lumbar radiculopathy, status post lumbar surgery with residual symptoms and stiffness. He opined as follows:

> I reviewed the opinions from the neurosurgeons and their opinions regarding surgery. On review of the medical record, on clinical examination of the patient I must agree with Dr. Rauzzino. It is my opinion based on the patient's past history, current presentation, and the known pathology that the patient would most likely not do well with a subsequent surgery. In addition, it is my opinion that as Dr. Rauzzino stated he might actually be worse. The patient has had a poor outcome to his previous surgery, is a smoker, deconditioned,

[2] Dr. Reiss may not have had Dr. Pehler's August 5, 2021 report that recommended a one level fusion at the L4-L5.

there is not a significant identifiable pain generator, there is no instability demonstrated on imaging that is available.

48. Dr. Winslow found Claimant to be at MMI as of October 14, 2021 as no further active treatment was likely to change Claimant's symptoms. He provided an impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (*Revised)*, of a Table 53IIE rating of 10% of the lumbar spine specific disorder and 14% for loss of range of motion for a combined impairment of 23% whole person. Under restrictions he stated "[l]ight physical demand category. No stooping, bending, crawling, crouching or climbing ladders. Level ground work with no stairs. Disabilities parking pass."

49. Claimant returned to see Dr. Pehler on April 1, 2022 who documented Claimant had persistent low back pain with right sided buttock and leg pain. Plain films showed spondylosis with an underlying spinal deformity and has a history of recurrent protrusion as well as progression of spondylosis at L4-5. He recommended a new MRI.

50. Respondents filed a Final Admission of Liability on June 2, 2022 consistent with Dr. Winslow's report, and admitted to maintenance medical care pursuant to Dr. Burns' October 18, 2021 report.

51. Claimant was evaluated by Cynthia Bartmann for an Employability Evaluation, who issued a report dated July 29, 2022. Ms. Bartmann interviewed Claimant and reviewed the medical records, specifically for restrictions. She relied upon the work restrictions provided by ATP Zimmerman and Dr. Winslow, of light physical demand category, no stooping, bending, crawling, crouching or ladders, ambulation on level ground only (no stairs) as well as noting he qualified for a disability parking pass. She also considered ATP Burns' restrictions of 15 lbs. lifting, limited bending, twisting, and stooping with no ladders and no climbing as well as DIME physician Winslow's light duty restrictions with no stooping, bending, crawling, crouching or ladder climbing, walking only on level ground and a disability parking pass. Ms. Bartmann noted that the lifting of 15 lbs. did not release Claimant to a full range of light work which requires up to 20 lbs. lifting. She noted that a physician's recommendation for a parking pass required limited walking no more than 200 feet without stopping.[3]

52. Claimant reported to Ms. Bartmann that he had typically 5/10 to 6/10 pain on a numeric pain scale, with pain radiating to his right leg to the knee and continuing down to his big toe, with numbness in the big toe, weakness in the right leg and occasional use of a cane. She highlighted that Claimant had a ninth grade education in Spanish and did not attend any English as a second language courses. Claimant reported working in a factory using a forklift and mixing cement to pour into molds, cutting down trees, picking up trash, and construction cement work. At his employer of injury, Claimant would lift 50 lb. bags of mix, standing and walking throughout the day. He was then moved to working modified duty, sorting materials in the shop, washing cars, and sweeping. Though while doing modified duty he required an extended break before he could complete the part time work. Claimant could not read or write English and for the majority of his time he had a bilingual supervisor, though was able to understand simple directions in English.

[3] Claimant only met the eligibility requirement of Colorado disabled parking permit eligibility guidelines for limited walking.

53. Ms. Bartmann opined that Claimant's entire work history involved working as a laborer in production, mainly unskilled work without transferable skills to other occupations. She opined that, considering Claimant's providers' restrictions, he fit more in the sedentary than light category of work, which comprised mainly of telemarketer, customer service, night auditor, concierge and front desk work, for which Claimant did not have the vocational skills. Ms. Bartmann opined that Claimant was permanently and totally disabled as any employment opportunities in the general labor market did not match Claimant's skills and work restrictions as well as the fact that employers would not be willing to train a 59 year old worker.

54. John Raschbacher, M.D. issued an Independent Medical Evaluation at Respondent's request on September 6, 2022. He took a history, reviewed the records and examined Claimant. Dr. Raschbacher noted no concerning findings on exam except for Claimant's exaggerated behaviors and complaints of pain and limitations, and that Patrick's test on the right produced groin pain. He opined that there was no physiologic or medical reason for him to have loss of range of motion, loss of strength and impairment. He mistakenly noted that Claimant qualified for a Table 53IIB impairment of 8% whole person for the lumbar spine and disagreed with both Dr. Zimmerman and Dr. Winslow regarding their assessments of restrictions and impairment. He provided a 40 lb. work restriction assuming that Claimant had any real symptoms at all, for the lumbar spine, "which he may well not, given his presentation" according to Dr. Raschbacher. ROM testing results were attached to the report August 25, 2022 Rule 8 IME but were not assessed for validity as Dr. Raschbacher did not believe them to be valid.[4] But the pain diagram attached showed a pain pattern consistent with Claimant's treaters' descriptions in the records.

55. Kristine M. Couch, OTR performed a Functional Abilities Evaluation on September 15, 2022. During the testing she noted that Claimant had a consistent and valid performance in 22 of 22 in multiple validity testing parameters. Testing showed Claimant was able to sit for up to 21 minutes, required position changes, and had increased low back with continual sitting. Claimant attempted the 12 minute treadmill test but was only able to complete 6:38 minutes and ambulated with an altered gait, favoring his right leg and leaned heavily on the rails. He reported low back pain radiating into the right groin with walking. Claimant had difficulty and limitations with positional tolerances. He was able to lift 15 lbs. shoulder to overhead, and 20 lbs. knuckle to shoulder but was unable to lift floor to knuckle. He was limited in his ability to lift with the bilateral upper extremities to 15 lbs. for 50 feet with an altered gait but only up to 10 lbs. with either the right or left upper extremity individually. Lifting testing was terminated due to increased pain in the lumbar spine.

56. Ms. Couch noted that Claimant's abilities demonstrated a capacity to lift between sedentary and light work categories as defined by the US Department of Labor. He was unable to demonstrate the ability to tolerate repetitive horizontal reaching and forward bending, the ability to tolerate repetitive supination/pronation of the forearms while stepping side to side, unable to demonstrate the ability to tolerate sustained

[4] Dr. Raschbacher did not take a second set of ROM numbers during his exam pursuant to the requirements of the *AMA Guides*.

standing while performing repetitive reaching between chest level and the overhead on an occasional basis, and was limited in his ability to tolerate stair climbing during the evaluation. Claimant was unable to complete any crouching, stooping, kneeling or repetitive bending testing, which was consistent with the restrictions provided by his ATPs. Claimant reported his abilities as less than what testing showed during the FCE. As found, Ms. Couch's findings were consistent with Dr. Burns and Dr. Zimmerman's work restrictions previously provided at MMI.

57. Claimant was evaluated by Dr. David W. Yamamoto of Peak to Peak Family Medicine at Claimant's request for an Independent Medical Evaluation (IME) on October 26, 2022. He interviewed Claimant, took a history, reviewed the medical records and examined Claimant. He was provided a mechanism of injury of being jerked back while mixing concrete using a portable mixer and being thrown back feeling immediate pain. Claimant reported a 7/10 pain with an aching in his lower back, radiating down his right leg and stated his great toe was numb . Claimant reported he had increased pain with standing and could only walk for 10 minutes before he had major pain. He stated that he could stand for only 20 minutes at a time, had difficulty putting his socks on and tying his shoes. He also conveyed he had depression and anxiety as a result of the work injury.

58. On exam, Dr. Yamamoto observed that Claimant appeared uncomfortable with movement, had tenderness over the inguinal area, noted the surgical incision, decreased ROM, antalgic gait favoring the right leg, positive straight leg test on the right, decreased sensation over the medial right foot and decreased EHL strength on the right compared to the left. He diagnosed lumbar radiculopathy, ongoing low back pain post lumbar surgery with residual symptoms and stiffness. He conveyed that Dr. Zimmerman and Dr. Winslow's evaluations, and permanent restrictions were consistent with the FCE performed by Ms. Couch. He averred that Dr. Raschbacher arbitrarily assigned a 40 lb. work restrictions without testing or evidence of ability. Dr. Yamamoto opined Claimant had sustained a lower back injury and was treated appropriately but did not do well with the L4-5 microdiscectomy. He disagreed with Dr. Raschbacher, noticing his mistaken citation to the *AMA Guides* for specific disorder and failure to properly assess ROM. He agreed with the restrictions that were provided by Dr. Winslow and Dr. Zimmerman. He further opined that Dr. Winslow had provided an accurate report and rating and that Claimant would be unlikely to find any work based on his chronic pain, lack of function and lack of English skills.

59. Ms. Bartmann provided an addendum report dated November 5, 2022. At that time she reviewed additional records including Ms. Couch's FCE, and IMEs from Dr. Raschbacher and Dr. Yamamoto. She noted that, even using Dr. Raschbacher's 40 lb. work restrictions, Claimant would be unable to return to his pre-injury job or any position he had performed in the past. She stated that these restrictions were categorically different and not consistent with the work restrictions of Dr. Zimmerman, Dr. Burns, Dr. Winslow, and Dr. Yamamoto. She stated that restrictions of no bending, crawling, crouching or stair climbing combined with the added work restrictions provided by Ms. Couch in her Functional Capacity Evaluation would eliminate all production and machine operator jobs. She agreed with Dr. Yamamoto's conclusion that Claimant would not be able to find any work based on his chronic pain, his lack of function and his lack of English

skills and opined that Claimant was essentially permanently and totally disabled from a vocational standpoint.

60. Katie G. Montoya performed a Vocational Assessment on November 15, 2022, though she interviewed Claimant on September 27, 2022. Claimant reported that he drove to the appointment five to ten minutes, but generally limited his driving as his low back pain would increase and his right foot would get tired. Claimant reported he had no prior injuries. Claimant reported he worked in cement, concrete and masonry work most of his working life, setting forms, making/mixing concrete, setting up scaffold, taking up materials, stacking materials, and bringing materials where they were needed. Claimant reported that he was never in a supervisory or lead position. Claimant reported to Ms. Montoya that he did not feel he could work, that he had gone to multiple companies, including restaurants, factories, and cement companies, they had seen him and had said no. Ms. Montoya reported Claimant stated he could not work because of the following:

> He explained it is due to the fact that he cannot walk long, cannot stand long, and cannot bend over. [Claimant] believes he can walk about five to 10 minutes. He can stand still approximately 20 to 30 minutes. [Claimant] is able to sit longer but explained that he still must move. He explained that he really does not lift from the floor at all. If he lifts from the table level it is 15 pounds. This is due to back pain. [Claimant] explained that he is able to use his hands at the table level. He does not use a cane but will use a cart when he is at the store. [Claimant] had been up and down during our interview, and he explained that was typical.

61. Ms. Montoya reviewed the medical records in this smatter, including Dr. Zimmerman's MMI report, Dr. Winslow's DIME report, Dr. Raschbacher's Respondent IME report, the FCE performed by Kristine Crouch and Dr. Yamamoto's Claimant IME report. She also reviewed Ms. Bartmann's vocational assessment. Ms. Montoya opined that Claimant's work history showed he was an unskilled worker. She noted that Dr. Zimmerman, Dr. Winslow and Dr. Yamamoto's work restrictions were substantially similar and opined they allowed for light duty work, so long as Claimant was not required to perform bending, crawling, crouching, stooping, ladders and ambulate only on level ground with no stairs. She stated that Claimant had limited options due to his unskilled Spanish speaking profile but could perform production and packaging work. She opined that, when considering Dr. Burns' 15 lb. restriction, that Claimant's work availability was further limited but included food preparation, packaging, office cleaning, and some forklift operation. She opined that when considering Dr. Raschbacher's decreased limitations, the job opportunities increased.

62. On February 3, 2023 Claimant was evaluated by Nurse Kelly F. as a walk-in patient with complaints of middle back and right foot swelling. Dr. Lesley Pepin ordered an ultrasound of the right lower extremity, which was normal. X-rays of the hip findings were inconclusive and unclear. He was advised to follow up with his primary doctor.

63. Claimant was attended at Platte Valley Medical Center for low back and right leg pain and foot swelling. Claimant reported two weeks' history of increased pain and symptoms. PA Noel Kiley noted a normal exam. Claimant reported no numbness or tingling to his legs, no weakness, no loss of bowel or bladder function and advised Claimant that an MRI of the lumbar spine was not medically indicated at that time and recommended Claimant return to see his surgeon, take Tylenol and Motrin for pain,

provided a muscle relaxer, lidocaine patches to help pain control and recommended ice or heat. She diagnosed lumbar spine pain.

D. Claimant's Testimony:

64. In the past Claimant worked as a laborer driving a forklift, trimming trees, and in construction and masonry. Some of his supervisors were only English speaking and Claimant would understand some of their instructions regarding work to be performed. However, if he did not understand his supervisor, while working for Employer, he would request that the supervisor's assistant, someone from the office, the mechanic or one of the truck drivers to interpret for him, but while working modified duty, most of the time it was the mechanic that was in the shop all the time. Occasionally, his supervisor would give him instructions to wash a car or clean the floor and he would understand those instructions in English. Claimant speaks some English, but he does not read or write English.

65. He did have to fill out paperwork when he began employment with Employer, all of which were in English. He had help completing them and only signed them. He also was provided with an employee handbook and a benefits package, both of which were translated by a coworker at the Employer's yard. This ALJ noticed that the completed forms handwriting in Exhibit O and the signature handwriting were distinctly different, with the exception that the Benefit Enrollment and Change form at bate stamp 423 seems that have been completed by the signatory (name and identifying information only).

66. Approximately two months after his surgery in February 2020, Claimant went to where his original supervisor was working and was not offered any further employment. He was instructed to contact the main office to see what his options for employment would be. Claimant contacted Employer's main office and enquired about work. He was informed that there was no space for him. Employer never contacted Claimant after that time.

67. Claimant contacted multiple businesses in search for employment. He provided his phone number but did not fill out any written applications for employment.[5] He did make some specific enquiries about jobs as a laborer and did not provide his restrictions. The prospective employers were for production factories, a thrift store, an electrical business, construction work and framing work. He would go to the job sites and speak with the supervisors who had the ability to hire laborers. Claimant believed he was not hired because they would notice how he was walking but none mentioned his problems with walking.

68. Claimant understood that Dr. Pehler recommended a second surgery, which was not authorized or approve by Insurer.

69. He used to visit his father daily. His father lived approximately five blocks away but Claimant would drive to his house, not walk. His father moved away, and is now living with his brother, who is taking care of him, though now he lives in Mexico most

[5] This ALJ infers that Claimant did not have anyone available to assist him in completing any formal applications for employment.

of the time, coming to live with his brother only two to three weeks at a time. In the spring, he would water his plants and flowers every day during the season, but he did not have any grass. He would either stand or sit on a wooden chair, both at his own home and when his father lived near, his father's garden, which was approximately 10 by 10 ft., a little larger than his own. He could stand for approximately 10 minutes then would need to sit down. He did not use other tools other than the hose.

70. Claimant would drive his father to the store, appointments and other errands. He would only drive thirty to forty minutes at a time due to his back pain. At around twenty minutes his back pain increases and by thirty the pain is not tolerable and goes to his lower extremity into his foot. He attempted to get a handicap placard for his vehicle but when he went to the DMV (Department of Motor Vehicle) he was told he needed a medical form. Claimant went to Eastside Family Health Center, his primary care provider, and was told by one of the physicians that he had to be in a wheel chair to qualify for one.

71. Claimant recently sought medical attention at Denver Health Medical Center due to the increased pain in his low back and right leg, which was hurting and was swollen, changing colors on the sole of the foot. He was also having groin pain and that was the first time he had groin pain. They provided him medication, they ordered x-rays and gave him an injection for the pain. They also did an ultrasound due to the swelling of the leg and groin pain.

72. He attempted to return to Concentra but they personally declined to attend him. He then went to Brighton Platte Valley Hospital. They referred Claimant back to his surgeon, Dr. Pehler, at Concentra. He continues to take medications which include, Cyclobenzaprine 10 mg, three times daily, Morphine but only one tablet at the time of the visit to Platte Valley, prednisone 40 mg, once per day in the mornings, and Gabapentin.[6]

73. He had a functional capacity evaluation with Ms. Couch. Claimant stated that they tested his ability to sit, stand, and required change in positions. He was able to walk on the treadmill approximately six minutes before he asked to stop the tests due to back and groin pain. He was also limited in performing the bending test, and other tests with his arms away from the body as it significantly increased his pain. There were also some tests that he declined to perform due to the back and leg pain, like crouching and squatting. He was able to do lifts from chest to shoulder level and other lifts, but not from the floor.

74. Claimant continues to have problems with pain in his low back and right leg since his injury. He is able to walk approximately 10 minutes, then he needs to rest or sit down. He is unable to bend down and lift an item from the floor. He has to lie down during the day for approximately one hour. His wife does the cooking, shopping and cleaning. He only makes the bed in the morning. Sometimes he does go with his wife to do the shopping so that he can walk for a little but goes out to wait in the car when he tires out. He generally proceeds to bed around 9 to 10 p.m. but will wake up in pain around 1 a.m. and stays up until around 5 or 6 a.m. when he returns to lay down. He then

[6] The Final Admission of Liability dated June 2, 2022 shows that Respondents admitted to maintenance medical benefits. Counsel for Respondents indicated he would contact his client to have Concentra authorize the follow up visits.

gets up again around 10 or 11 a.m. He has to alternate between laying down, standing, walking and sitting during the day. During the night he may watch TV or walk to distract him with the pain. The pain is what limits him. He is unable to bend at the waist, crouch, and squat without pain. When he needs to pick up something from the floor, he has to hold on to the wall or a table. He continues to perform his home exercise program to help with the pain. When he walks greater than ten minutes the pain increases, coming from his low back. He uses a cane to walk every so often.

75. Claimant stated that, but for the leg symptoms, he might be able to work, but the symptoms going down the leg prevent him from being able to work.

76. On multiple occasions Claimant requested to have questions repeated. This ALJ observed and noticed Claimant's confusion and lack of understanding on those occasions.

77. Claimant continues to have problems with his low back as he cannot bend forward and touch the floor. He also has problems with his foot and leg, which limit his movement and function. He stated that, if not for his leg, he might be able to work at a fast food restaurant or at a vegetable factory separating vegetables. Claimant declared his leg symptoms prevent him from working.

78. He can walk approximately 10 minutes before the pain in his back increases and now the pain is worse with groin pain. Claimant's biggest problems continue to be with the low back pain, the right leg pain and the groin pain.

79. At times, during the hearing, Claimant was visibly uncomfortable, moving around in his chair, as well as standing and sitting. This ALJ noted that Claimant took breaks from sitting on more than one occasion and request formal breaks.

Dr. Yamamoto's Testimony:

80. David W. Yamamoto, M.D., an expert in medicine generally, occupational medicine and family medicine as well as a Level II accredited physician by the Division of Workers' Compensation, testified at hearing on June 23, 2023. Dr. Yamamoto reviewed the medical records, Claimant's restrictions as well as reviewing Respondent's IME physician's report.

81. Dr. Yamamoto agreed with the restrictions imposed by the DIME physician, as they were consistent with his examination of Claimant. He was considered to be in the light duty category, which means occasional lifting to 20 lbs., no bending, no crawling, no crouching or climbing ladders. He specifically opined that Claimant should not perform any job that would require him to bend repetitively. He also agreed that Claimant should have a handicap permit. He reviewed Kristine Couch's Functional Capacity Evaluation and stated she was extremely professional in how she did her work, was well known in the community and provided very dependable reports every time. He opined that Dr. Raschbacher's assignment of a 40 lb. restriction with no other limitations was very arbitrary and subjective. This is based on the fact that Dr. Raschbacher provided no evidence that he had done any testing for lifting limitations. He opined that Dr. Winslow and Dr. Zimmerman provided valid and objective reports in a scientific administration of the test for range of motion.

82. Dr. Yamamoto stated that it was a physician's responsibility to provide physical restrictions which can be used by vocational experts to reach an opinion with regard to the work they may perform. He expressed that Claimant had not recovered the function he had hoped following the microdiskectomy surgery. He mentioned that the MRI of May 20, 2020 showed a right-sided laminotomy with decreased spinal stenosis, a disc protrusion and multi-level degenerative changes but no longer showed the extrusion on the right at L4-L5 and stenosis. Dr. Yamamoto did not find any sign of instability post-operatively. Both he and Dr. Zimmerman observed that there was a decrease in the spinal stenosis post-surgery and no recurrent disc herniation. He noted that, unlike his examination of a positive straight leg test, a subjective finding, Dr. Zimmerman opined that Claimant had a tight hamstring, not nerve pain, which he did not consider a significant point.

83. Dr. Yamamoto opined that Claimant's work injury was the straw the broke the camel's back. In essence, Claimant was able to work a heavy duty job for many years, up to the point that he was injured, which is something that happens with laborers that are his age. He voiced that it was not uncommon to have degenerative changes in addition to what looked like a treatable condition. He specifically pointed out that neither the ATP nor the DIME physicians rated the radicular symptoms. This ALJ infers that the reason for the choice not to rate was not clear from either report. Dr. Yamamoto explained that it is the rater's choice, but under the *AMA Guides for the Evaluation of Permanent Impairment*, Third Edition (*Revised*), under Table 53IIE, Claimant had a surgically treated disc lesion with residual, medically documented pain and rigidity with or without muscle spasm. Dr. Yamamoto agreed with both Dr. Winslow and Dr. Zimmerman that the surgery, while technically successful, did not help Claimant's symptoms, as Claimant continued with radicular symptoms and he did not regain function.

E. Testimony of Cynthia Bartman:

84. Ms. Cynthia Bartman, an expert vocational evaluations, testified at hearing on June 23, 2023. Ms. Bartman interviewed Claimant, reviewed the medical records, and considered Claimant's work restrictions as well as his residual labor market, if any. She noted Claimant had light duty restrictions, no stooping, bending, crouching, crawling and no ladders and the Functional Capacity Evaluation performed by Kristine Crouch. She noted that, she considers whether a patient has a valid profile on the FCE to consider whether a Claimant had an indication of maximal effort and Claimant met 22 of 22 for validity markers. She also considered that Dr. Zimmerman, Dr. Winslow and Dr. Yamamoto all agreed he should have a handicapped parking tag. The last requires limits on walking, which were consistent with the FCE. She stated that if a physician feels a claimant is able to walk over 200 feet, they should not recommend a parking permit.

85. Ms. Bartman opined that, contrary to Ms. Montoya's opinion, there is no work that would match Claimant's vocational skills and his sedentary to light work restrictions, and his limitations. She opined that the majority of the jobs identified by Ms. Montoya were primarily in the medium or heavy work categories and did not match Claimant's work restrictions or the overwhelming medical evidence. Those jobs identified fit only within the restrictions provided by Dr. Raschbacher. Further, in assessing Claimant's skill level based on the jobs and how he performed those jobs, he primarily

worked performing unskilled work and laboring manual jobs. Ms. Bartman opined that there were no jobs in the local labor market that he could perform within his skill set in the sedentary to light duty categories.[7] Ms. Bartman stated as follows:

> [Claimant] mainly worked in the unskilled work category, so what I indicated earlier is that there would be very few skills, if any, that would ever transfer into other occupations, so then you have to look at what is his chances of getting other unskilled work. But then you have to factor in his work restrictions. And when I look at his work restrictions, I do not believe there are any jobs in the local labor market that matches his vocational skills and his work restrictions and that would come available in his local labor market. There are no matches when I evaluate each one of those elements.
>
> …
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> I do labor market research every single week by calling employers and inquiring on the physical requirements of many different jobs, I feel like I have a firm understanding.

86. Ms. Bartmann stated that there were certain types of jobs that employers would be willing train workers at Claimant's age (59) such as front desk and customer service if they had prior computer skills. However, considering Claimant's background of no skills and work restrictions, she opined employers were not willing to train. Further, she noted that while packing job may sitting allow, very infrequently, that they would also require horizontal reaching, which Claimant was unable to perform pursuant to the FCE and Dr. Yamamoto's recommendations pursuant to the FCE. Others required the ability to read and write in English, which Claimant could not do. Ms. Bartmann consulted the Dictionary of Occupational Titles (DOT)[8] to determine whether the jobs identified by Ms. Montoya were appropriate for Claimant considering his limitations and restrictions. The jobs, such as packaging, cleaning, food prep, required occasional bending, were inappropriate for Claimant considering his restricted, Ms. Bartmann never found any

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[7] This ALJ takes judicial notice of the *Dictionary of Occupational Titles (4th Ed., Rev. 1991)* -- Appendix C by the U.S. Department of Labor job category list of physical demands as follows:
A) S-Sedentary Work - Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.
B) Light Work - Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.
C) Medium Work - Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work.

[8] The Dictionary of Occupational Titles, Volume I & II (Forth Edition, Revised 1991) U.S. Department of Labor, Employment and Training Administration, U.S. Employment Service, found at https://babel.hathitrust.org/cgi/pt?id=umn.31951d00357017o&view=1up&seq=1 and at https://babel.hathitrust.org/cgi/pt?id=umn.31951d00357018m&view=1up&seq=1 as they are in the public domain and not updated since 1991.

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positions suitable for someone with Claimant restrictions. Ms. Bartmann opined that Claimant was permanently and totally disabled from employment,

F. Testimony of General Superintendent:

87. The general superintendent testified that he supervised Claimant's supervisor, as well as Claimant when he worked in the shop on modified duty after his injury form October 8, 2019 to February 11, 2020. [Redacted, hereinafter MZ] stated that he gave Claimant instructions of the jobs to perform each morning. He stated that he did not give instructions to have his instructions translated but that the workers were continuously speaking in Spanish, which was their native language. He did not recall having Claimant's supervisor or the main office contact him if Claimant went to either of them about a job following his surgery, as neither informed him as was the company policy.

G. Testimony of Katie Montoya:

88. Ms. Montoya testified as an expert vocational rehabilitation and assessment. Ms. Montoya interviewed Claimant on September 27, 2022. She obtained a history including that Claimant had ongoing low back and right leg pain that was constant. He stated that he was not the same person he used to be and could not do what he used to do. Claimant reported physical limitations consistent with his testimony at hearing. Ms. Montoya reviewed the medical records including the work restrictions prescribed by different providers, including the parking pass eligibility and the FCE performed by Ms. Couch. She discussed the jobs Claimant had sought out but that he had filed no formal applications for employment, as he had been turned away.

89. Ms. Montoya performed labor market research in this case after reviewing all available information by looking at local employment posting and sources as well as the DOT for the job classifications and determining any transferable skills. She relied on those restrictions that allowed Claimant to work the full range of light work, identifying jobs that fit that category, and possible job leads in the general metropolitan labor market. Ms. Montoya did not identify any that were within 20 minutes of Claimant's home. She opined that Claimant could earn a wage within the light duty category. She agreed that the DOT classification for forklift operator fell within the medium unless there was a job with cross-classification. She also agreed that hand packager was also in the medium category under the DOT. Further, Ms. Montoya did not consider any walking limitations.

H. Testimony of Dr. Raschbacher:

90. Dr. John Raschbacher testified at the second hearing as an expert in occupational medicine. At the time of his examination on September 6, 2022 Claimant was complaining of low back and leg pain. He noted that the post-surgical MRI of May 2020 showed resolution of the disc extrusion that was supposedly pinching the nerve and that Dr. Rauzzino indicated that Claimant had persistent leg pain in the absence of structural lesion. He also opined that the July 26, 2021 MRI did not show any re-herniation. Dr. Raschbacher went on to state that the surgery was "technically successful" and could not explain why the Claimant continued with symptoms, going so

far as to state “that assumes he is, in fact, suffering leg pain. I don’t – I doubt that he is. That’s just what he’s saying.” This ALJ infers that Dr. Raschbacher is stating that Claimant is lying when he is reporting that he has leg pain. He also stated that things to look for to determine whether there is some abnormality are normal lumbar lordosis and the presence of lumbar spine spasms, positive SLR or positive tripod sign.

91. Dr. Raschbacher went on to exhaustively articulate the need for an EMG to be ordered by providers, then stated that it would not change the outcome, his complaints, his treatment or the need for further surgery. Dr. Raschbacher noted that he did not belief Claimant was telling the truth and if he were, the surgical outcome would be successful. He disagreed with Dr. Winslow that Claimant had a poor outcome to the surgery.

92. Lastly, he opined that FCEs were rarely indicative of a patient’s abilities or restrictions despite the validity criteria being met as patients rarely if ever give a good effort. He recommended a 40 lb. work restriction and stated that Claimant really does not need any restriction at all. Dr. Raschbacher opined that Dr. Winslow and Dr. Zimmerman’s opinions that Claimant had a poor outcome of his surgery was incorrect because Claimant was not telling the truth. However, he could not site to any medical records where any other physician found Claimant not credible or not truthful.

93. This ALJ finds Dr. Raschbacher’s opinions not credible and contrary to medical records. Nothing in the DIME report, Dr. Zimmerman’s, Dr. Burns’ or other treater’s, or Dr. Yamamoto’s reports support the conclusion that Claimant was not truthful to his providers. It is well noted that while surgeries can be “technically successful” because it takes away the source of the original offending tissue, it may leave patients with permanent conditions and ongoing symptomology. While Dr. Raschbacher did not believe this Claimant, this ALJ does not doubt the veracity of the Claimant and his complaints of symptoms that limit his abilities as Claimant has consistently been reporting the same symptoms as shown above for the last four years.

I. Ultimate Findings:

94. As found, Claimant had no significant or relevant medical conditions that limited his ability to perform work as a heavy masonry worker prior to his work injury of August 10, 2019. Claimant is found credible and persuasive.

95. As found, Claimant had ongoing consistent low back pain from the day of the work related accident on August 10, 2019 to the present that limit his function. As found, the work related injury caused the ongoing symptoms despite providers being unable to identify a specific pain generator that would be amenable to surgery. As found, Claimant’s work related injury was admitted and was the reason for the surgical treatment that resulted in Claimant’s failed back syndrome or post-laminectomy syndrome. As found, simply because there is no identified pathology that can be address by surgery does not naturally indicate that there is nothing wrong with the patient. Here, throughout most of the medical care, Dr. Burns document that Claimant had ongoing lumbar spine spasms on the right, stiffness and significant loss of range of motion. Multiple other providers, other than the ATPs also highlighted objective findings. Dr. Rauzzino found positive straight leg raise on the right, negative on the left; loss of ROM, subjective weakness of his right EHL. Dr. Reiss wrote that Claimant did not show pain behaviors,

had loss of ROM, had tenderness centrally, a positive SLR on the right, decreased sensation of the right big toe and some groin pain with a Faber test. Dr. Winslow found increased paraspinal muscle tone, and loss of range of motion. Dr. Yamamoto found decreased ROM, antalgic gait favoring the right leg, positive straight leg test on the right, decreased sensation over the medial right foot and decreased EHL strength on the right compared to the left. This ALJ makes is persuaded by the multiple providers that recorded objective findings over the lone physician that did not even believe Claimant had any symptoms. As found, Claimant has ongoing chronic pain cause by the work related August 10, 2019 injury.

96. As found, Dr. Winslow's opinion regarding a 'significant identifiable pain generator" was in the context of his opinion against recommending further surgery and not that Claimant was either symptom magnifying or was not truthful as Dr. Raschbacher suggests. It was simply noting that, from a surgical perspective, there was not sufficient identified pathology to operate again, and was not a comment about his credibility or disability, which are for this ALJ to determine and not a medical opinion. As found, Dr. Winslow, Dr. Zimmerman and Dr. Burns clearly found Claimant trustworthy as they provided ongoing care recommendations, work restrictions and formal significant impairment ratings. The opinions of Drs. Burns, Zimmerman, Winslow and Yamamoto were consistent and more credible than the contrary opinions of Dr. Raschbacher, who is specifically not found credible.

97. As found, Dr. Zimmerman, Dr. Winslow and Dr. Yamamoto all agreed Claimant qualify for a parking permit. As found, when a physician indicates that a patient qualifies for a permit, they are indicating that patient meets the legal criteria of limited walking up to 200 feet and ranges greater than that only with breaks or assistance.

98. As found, the job of office cleaner would require stooping, bending, crouching, and possibly stairs, which Claimant is unable to perform in a working capacity, which is fully document in the credible medical records. The job of hand packer and food prepare would require bending forward and horizontal reaching. Claimant was unable to perform these activities during the functional capacity evaluation, which is found credible, valid and consistent with Dr. Yamamoto's credible endorsement of the evaluation. These types of jobs would also require occasional bending to pick items off the ground, which Claimant credibly testified and Dr. Burns documented he was unable to perform. These jobs would also most likely involve standing and sitting for extensive periods of time, which Claimant is unable to do as he requires frequent rests to lay down during the day. As found, Claimant could not perform the job of fork lift driver pursuant to the work restrictions of his ATPs as it would involve climbing on to the machine, and would not be considered to be on level ground. As found, any of the job which were potentially identified as possibly available to Claimant do not meet all of the Claimant's functional limitations or work restrictions. As found, even if the work restrictions of the ATPs had fit within the parameters of the proposed jobs identified, Claimant is unable to obtain and retain a job because he is unable to rest a full night without frequently waking up for long hours at a time due to the unremitting low back and leg pain caused by the August 10, 2019 work injury.

99. As further found, considering Claimant's ongoing consistent complaints of low back pain and radicular symptoms, Claimant's background and experience, his

transferable skills or lack thereof, as well as the persuasive vocational evidence Claimant has proven that he is permanently and totally disabled. As found, despite the robust current labor market, Ms. Bartmann's opinions and testimony are found more credible and persuasive that those presented by Ms. Montoya. Not because Ms. Montoya is not credible, but because Ms. Montoya's assessment did not include all of Claimant's credible and persuasive work restrictions and physical limitations caused by the chronic pain that prevent him from performing the full range of light duty jobs identified. In light of Claimant's education, primarily Spanish language skills, limited unskilled laboring experience, the accumulation of work restrictions provided by his ATPs, the DIME physician and Dr. Yamamoto, related to the admitted work injury, and his ongoing functional limitations, from the totality of the credible and persuasive evidence, Claimant is permanently and totally disabled.

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

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility

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

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

B. Permanent Total Disability Benefits

To prove his claim that he is permanently and totally disabled, Claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Yeutter v. Indus. Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53 ¶ 26. Claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Wallace v. Current USA, Inc.* W.C. No. 4-886-464 (ICAO, Dec. 24, 2014).

The term "any wages" means more than zero wages. *See Lobb v. Indus. Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In weighing whether Claimant can earn any wages, the ALJ may consider various human factors, including Claimant's physical condition, mental ability, age, employment history, education and availability of work that Claimant could perform. *Weld County Sch. Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Yeutter* 2019 COA 53 ¶ 26. The ALJ may also consider Claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (ICAO. Apr. 10, 1998). The critical test is whether employment exists that is reasonably available to Claimant under his particular circumstances. *Weld County Sch. Dist. Re-12 v. Bymer*, *supra*; *Blocker v. Express Pers.* W.C. No. 4-622-069-04 (ICAO, July 1, 2013.). Whether Claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

This ALJ finds and concludes Claimant has proven, by a preponderance of evidence, that due to the restrictions that flow directly from his work injury he is permanently and totally disabled. Most important, the ALJ credits Claimant's testimony as it relates to his development of symptoms and limitations after his August 10, 2019 work injury and his surgery. This includes his limited ability to engage in activities of daily living, and physical activities necessary to obtain and retain employment.

The ALJ also credits the opinions of Dr. Burns, Dr. Zimmerman, and Dr. Winslow, all of whom listed work restrictions that were similar and substantially consistent. Those work restrictions include lifting no more than 15 to 20 lbs. occasionally, no bending, no stooping, no crouching, no crawling, no ladder climbing, as well as limited twisting, ambulating on level ground (no stairs or climbing) and was qualified to obtain a parking permit that includes limited walking up to 200 feet without breaks. These restrictions largely concurred with the findings of the Functional Capacity Evaluation which was later performed by Ms. Crouch. Ms. Crouch's evaluation is found to be persuasive, and markedly consistent with Claimant's acknowledged functional abilities.

This ALJ also credits and finds persuasive the testimony of Claimant's vocational expert, Cynthia Bartmann. Ms. Bartmann credibly explained Claimant's limited education, advanced age, lack of English skills including reading and writing, his limited work experience as an unskilled laborer, the physical restrictions as laid out by his ATPs Dr. Burns and Dr. Zimmerman, all support the conclusion that Claimant is permanently and totally disabled. Further, when these are considered with the opinions of Dr. Winslow and Dr. Yamamoto, and the findings of the FCE by Ms. Crouch, as well as the Claimant's inability to find, secure and retain any jobs that may have become available in the labor market due to his inability to sleep, requiring rest periods during the day and his ongoing chronic pain, are all human factors that, collectively, support the finding that Claimant is able to earn a wage due to his August 10, 2019 work related injuries, and therefore, is not employable in a competitive job market, despite its current robustness. This ALJ finds that Claimant has proven by a preponderance of the evidence that Claimant is permanently and totally disabled.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant is permanently and totally disabled.

2. Respondents shall pay permanent total disability benefits beginning October 14, 2021, which is the date Claimant reached MMI.

3. Based on the admission in the record, Claimant's TTD rate is $573.09. As a result, Claimant's PTD rate is currently $573.09.

4. Respondents may take credit for any temporary disability, permanent partial disability benefits or other allowable offset for benefits paid to Claimant after MMI against any retroactive PTD benefits payable to Claimant.

5. Respondents shall pay Claimant interest at the rate of eight percent (8%) per annum for all compensation benefits which were not paid when due.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. 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 18th day of August, 2023.

Elsa Martinez Tenreiro
Digital Signature

By: _____
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to a medical case manager of his choice and that [Redacted, hereinafter LB] should be removed as the nurse case manager on this claim.

II. Whether Claimant has proven by a preponderance of the evidence that family members are entitled to reimbursement for attendant care they provided to Claimant from November 23, 2021, through the present and the rate at which they should be reimbursed.

III. Whether interest is payable on the amount awarded for the care provided to Claimant.

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to the costs and fees for services of a probate attorney and conservator.

FINDINGS OF FACT

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

Procedural History of Claim

1. On September 24, 2021, Claimant was involved in work accident when he fell about 20–30 feet off a ladder and landed on the ground.
2. The claim was denied until an Order was issued by Administrative Law Judge Elsa Martinez Tenreiro on August 15, 2022, which found the claim compensable and the above-named Respondents liable for benefits.

Initial Medical Treatment

3. After the accident, Claimant was seen by Neurosurgeon Sara Menacho, M.D. at University of Utah Hospital as a transfer trauma 1 patient. Dr. Menacho noted that Claimant was found to have multiple supratentorial and infratentorial intraparenchymal hemorrhages, including in the brainstem, compatible with a severe Grade 3 DAI, as well as scattered traumatic subarachnoid hemorrhage and intraventricular hemorrhage. She documented that, upon arriving at the hospital, the patient was noted to be a GCS of 3. She also noted Claimant had a left fixed and dilated pupil and a sluggish right pupil. He had no motor response, no verbal response, eyes were closed, no corneal reflex but intact cough and gag reflex. He was taken for a CT scan, where repeat CT head demonstrated interval increase in diffuse intraparenchymal hemorrhages. During the CT scan, Claimant was both bradycardic and hypertensive and they were concerned of impending cerebral herniation. The providers also noted a right distal radius fracture and a trace right pneumothorax. Dr. Menacho noted that

Claimant did not open his eyes, make noise, or respond to pain. Following x-rays of the forearm Claimant was noted to have acute displaced fractures of the distal radius, ulnar styloid process and scaphoid. X-rays of the right wrist showed a comminuted fracture of the distal radius. More detailed x-rays showed a possible triquetral fracture. Dr. Menacho stated that "Unfortunately, this patient has suffered a severe closed head injury and currently is GCS 3T off sedation. As such, there are no plans for placement of an ICP monitor or operative intervention given the likelihood that it would not change the patient's poor prognosis." *Claimant's Exhibits 280-288*.

4. Despite the poor prognosis, Claimant survived the accident, but with severe impairments that prevented him from caring for himself.

Discharge from Hospital After
Two-Month Stay and Need for Emergent 24/7 Attendant Care

5. Claimant remained in the hospital for about two months. There came a point in time when Claimant was ready to be discharged so he could receive a different level of care. The original plan was to discharge Claimant into the care of Craig Rehabilitation Hospital in Colorado. However, Claimant could not be discharged and transferred to Craig because the workers' compensation carrier had not admitted liability for the claim at the time of Claimant's discharge. Thus, there was no payor to pay for Claimant's admission and treatment at Craig. *Claimant's Exhibits, page 107*.
6. Because Claimant could not be transferred to Craig Hospital, it was decided that Claimant would be discharged into the care of family members. Thus, before his discharge, the hospital staff in Utah trained Claimant's family members how to take care of Claimant's daily needs to keep him safe and alive.
7. On November 23, 2021, about two months after the accident, Claimant was discharged from the hospital into the care of his family. *Claimant's Exhibits, pages 293-323.*
8. Upon discharge into the care of his family, Claimant's impairments and disabilities were severe and he required "full time direct supervision" with "line of sight supervision." *Claimant's Exhibits, page 321*. The following impairments and disabilities were noted in the final discharge report:
    - Impaired safety awareness, insight, and impulse control.
    - Inability to recall conversations and directions, manage his medications, or manage complicated tasks.
    - Inability to independently perform activities of daily living such as bathing, toileting, eating, and getting dressed.
    - Claimant was also a high fall risk and could not walk without assistance. To prevent falls and additional injuries, Claimant was prescribed a bed alarm to alert caregivers if he tried to get out of bed and a chair alarm in case he tried to get up from his chair. He also needed assistance with bed mobility, including sitting, standing, and transferring to something else.

- Claimant was also at risk of aspirating on his food. Therefore, Claimant required assistance eating and had to be on a diet that included thin liquids. But even feeding Claimant thin liquids was problematic because Claimant was also having problems using a straw.

Claimant's Exhibits, pages 293-323.

9. Upon discharge, Claimant was also prescribed ongoing physical therapy, occupational therapy, and speech and language therapy. The discharge plan also prescribed ongoing patient caregiver training for Claimant's family members. Lastly, the discharge plan prescribed full-time direct supervision with a designated person to provide full-time line-of-sight supervision. Thus, based on Claimant's neurological and physical impairments, Claimant required, and was prescribed, 24/7 care and required the care immediately upon discharge. *Claimant's Exhibits, page 321*.

10. The Claimant's need for attendant care 24/7 immediately upon discharge from the hospital was emergent because without it, Claimant could not eat, get out of bed, use the bathroom, shower, or manage his hygiene, i.e., activities of daily living. Moreover, someone had to be available if Claimant decided got out of bed and tried to walk on his own – even though he could not. In other words, without 24/7 care being provided to Claimant immediately upon discharge, Claimant would suffer imminent harm and could not survive.

11. Based on Claimant's neurological and physical impairments and disabilities that existed at the time of his discharge, the need for 24/7 attendant care was reasonable, necessary, emergent, and related to his work injury.

12. Immediately upon discharge, Claimant's family members started taking care of Claimant by assisting him with all of his activities of daily living. This included eating, toileting, hygiene, medications, and keeping him safe, etc. This included watching Claimant at all times of the day to make sure he did not try to get out of bed or a chair – without assistance – and fall.

Initial Assessment After Discharge

13. On December 21, 2021, after his discharge from the hospital, Claimant was evaluated by Bethany Wallace, D.O. at Sinergy Medical Services. Dr. Wallace documented Claimant's fall from an indeterminate height in Utah. She noted Claimant was taken to the hospital and was noted to have multiple areas of bleeding seen in his brain imaging as well as a fractured right arm and blood in his right chest. She also noted that Claimant was placed on life support and his family was told his injuries were incompatible with life, but Claimant did improve, surviving the injuries. She also noted that he was discharged from the hospital on November 23, 2021, to his family's care in Colorado and that Claimant required 24/7 care, which his siblings have been providing. She also noted that while he continued to improve, he continued with multiple pain complaints and neurologic deficits.

14. Dr. Wallace performed a limited record review outlining Claimant's medical course while in the hospital. She stated the following:

On 10/01/21, he went to the operating room for a tracheostomy and PEG (feeding tube) placement. He was stable and then transferred to neuro acute care. He started to make progress, and the trach was downsized on 11/06. He was tolerating capping trials and was decannulated on 11/01. He progressed with SLP, and PEG was removed on 11/22. He was able to tolerate a regular diet. He made significant improvements in PT and OT. They were able to do family training since he had no funding. The family wished to take him back to Colorado where he has family support. He was given orders for outpatient PT, OT, and SLP (speech and language) therapy. It was recommended that he follow up with primary care in his area, attend therapy as able, and follow up with the University of Utah neurosurgery and orthopedics over telehealth until he can find providers in his area.

15. Dr. Wallace documented the following complaints through Claimant's sister, who acted as an interpreter:

- Neck, upper back, and lower back pain: Moderate and aching.
- Bilateral hip pain, knee pain, ankle pain, and shoulder pain: Aching.
- Bilateral elbow pain: Aching.
- Left wrist and hand pain: Moderate and aching.
- Right wrist and hand pain: Severe. This is where he has the three fractures.
- Dizziness and lightheadedness: Moderate and comes and goes.
- Vision changes: He has blurred vision in his left eye.
- Right leg: His right leg feels numb and it was severe.

16. Dr. Wallace further noted and concluded Claimant had to wear protection at night for loss of continence, had numbness of the right calf and leg, a locking right ankle that interfered with walking, a tremor in his head and neck, and blurry vision. She also noted and concluded Claimant had memory loss, difficulty with problem-solving, and getting lost or confused easily, had problems with bathing, showering, and dressing, could not perform any of complex self-care or household duties such as cleaning, financial management, vacuuming, sweeping, mopping, or managing his own medications. Claimant also had difficulty lifting above his shoulders, climbing stairs, and getting up from lying down, basic communication including with speaking, writing, typing, computer use, and texting.

17. On Exam, Dr. Wallace remarked Claimant had some spasticity with motion, a tremor, hypertonicity to palpation of the muscles in the cervical, thoracic and lumbar areas, mildly decreased range of motion of the shoulders bilaterally, right elbow tenderness to palpation, decreased motion of the right wrist and hand, tenderness in the right ankle, tremor in the head and upper body, his gait was antalgic with difficulty moving the right leg with abnormal reflexes bilaterally. Dr. Wallace diagnosed severe traumatic brain injury (TBI) with diffuse axonal injury and loss of consciousness, fracture of right wrist, resolved hemothorax, neck pain, back pain, bilateral shoulder

pain, bilateral hip pain, bilateral ankle injuries, history of tracheostomy and history of gastric feeding tube.

18. Dr. Wallace made a causation analysis and determined that, within a reasonable degree of medical probability, the traumatic fall of September 24, 2021 was the proximate cause of the injuries and disabilities listed. Dr. Wallace recommended a multidisciplinary team approach for recovery from the severe traumatic brain injury. She recommended Claimant be treated at Craig Hospital. She stated Claimant required ongoing neurology and neurosurgery consultations, physical therapy, occupational therapy, speech therapy, and an orthopedic consultation for the right hand wrist fractures. She also recommended care for his lower extremity mobility and coordination, visual distortions related to an eye injury or the brain injury, CT of the spine, MRIs of the cervical and lumbar spine, and acupuncture.

19. The ALJ finds Dr. Wallace's opinions and conclusions to be fully supported by the record and support the extent of Claimant's impairments and disabilities.

Treatment with Dr. Reinhard

20. On January 26, 2022, Claimant came under the care of Dr. Reinhard. Dr. Reinhard issued a detailed report. In his report, he summarized Claimant's injuries and the care he received to date. He noted that upon discharge from the hospital in Utah, the plan was for Claimant to transfer to Craig Rehabilitation Hospital, but that did not occur because the workers' compensation carrier had not admitted liability at that time for the claim. He also noted that Claimant was discharged from the hospital in Utah with no services and that his care had to be managed entirely by Claimant's sisters. *Claimant's Exhibits, pages 114-119*.

21. Dr. Reinhard discussed the physical problems Claimant was having and the need for his sisters to care for him because Claimant had significant motor control problems from the traumatic brain injury. For example, Dr. Reinhard noted Claimant was unable to independently dress himself, unable to write, and unable to feed himself and that his sister feeds him-and said that he often coughs after every bite. It was also noted that Claimant had involuntary movements of the neck and left upper extremity with a rhythmic cervical dystonia with torticollis and dystonic movements of the left upper extremity on the backdrop of ataxia. Moreover, he noted that Claimant had an ataxic gait and could not ambulate – walk - without assistance. *Claimant's Exhibits, pages 114-119*.

22. Dr. Reinhard concluded that due to his brain injury, Claimant has significant motor control problems with cervical dystonia with rhythmic torticollis, left upper extremity dystonia and ataxia, and gait ataxia. He noted Claimant has more of a pattern of clasp-knife spasticity affecting the right upper and right lower extremity. He has dysphagia, and though he was advanced to a regular diet in the hospital, he needed further evaluation of his swallowing to make sure he was not aspirating. He concluded Claimant had significant impairment in mobility, gait, activities of daily living, and also cognitive communication deficits. He also concluded that Claimant should be in inpatient rehabilitation at that point and the best option for him is Craig Rehabilitation Hospital. *Claimant's Exhibits, pages 114-119.*

23. Dr. Reinhard also addressed case management. He concluded that Claimant should have a case manager until he gets into Craig and will also require a nurse case manager to help coordinate medical care after he is discharged from Craig. *Claimant's Exhibits, pages 114-119*.

24. The ALJ finds Dr. Reinhards opinions to be credible, reliable, and persuasive. During his treatment of Claimant, Claimant remained severely disabled and impaired and could not perform activities of daily living such as dressing, eating, toileting, and walking-without assistance.

Treatment and Assessment at Craig Hospital

25. On March 9, 2022, Claimant started treating at Craig Hospital. The records from Craig also documented a fall from a ladder from 15 to 30 feet while working. They also noted a brain stem injury, significant cognitive impairments, hemorrhage to the right posterior midbrain and splenium of the corpus callosum, right cerebellum, dystonic posturing of the left arm, rhythmic torticollis of the cervical spine, and spasticity of the right upper extremity and lower extremities with non-sustained clonus of the right ankle. They noted Claimant continued to have blurred vision in the left eye and oculomotor dysfunction, dysconjugate gaze, diplopia on the left. He was evaluated for problems related to his vision, finding that the corrected vision was still lacking. They recommended he wear a patch over his left eye secondary to difficulties with prism correction for diplopia. They also noted and documented Claimant had additional impairments and disabilities. For example, he had difficulty with balance and would walk short distances with his arm over a family member's shoulders, which was very unsafe. He had cognitive impairments as shown by agitation, irritation, and was referred for psychological care with Dr. Torres. He also had problems swallowing, a right shoulder injury, right ankle sprain, and urinary incontinence. They were also concerned that Claimant might be aspirating while eating and drinking. They also noted that Claimant was living with his two sisters, [Redacted, hereinafter JL] and [Redacted, hereinafter MA], who shared caregiving duties. They also found that Claimant could not feed himself, unable to dress himself in a reasonable amount of time and needed help with general hygiene. They also concluded that Claimant still required 24/7 supervision for safety reasons.

26. On May 24, 2022, the records Craig hospital noted that Claimant presented as a "VERY high risk" for falls. As noted above, they documented that to walk, Claimant was putting an arm over a family member's shoulder and walking short distances. They also noted that using this method to help Claimant walk was very unsafe for both Claimant and his family members. *Claimant's Exhibits, page 205*.

27. While at Craig Hospital, Claimant remained severely disabled and impaired. He had problems with cognition, walking, seeing, eating, toileting, and required 24/7 care - which was being provided by his sisters JL[Redacted] and MA[Redacted].

Assignment of Medical Case Manager

28. On April 2, 2022, LB[Redacted], the medical case manager assigned by Respondents, provided her initial report. In her report, LB[Redacted] noted Claimant could not care

for himself and required assistance with many activities of daily living, such as eating, dressing, bathing, and ambulating. *Claimant's Exhibits, page 450-454*.

29. On May 2, 2022, LB[Redacted] issued her second medical case management report. In her report, she again documented that there were safety issues about Claimant and that he could not walk, eat, or perform other activities of daily living without assistance. It was also noted that Claimant was incontinent for urine and bowels. *Claimant's Exhibits, page 456, 457*.

Testimony of Dr. Reinhard

Need for 24/7 Attendant Care

30. Dr. Reinhard also testified via deposition on May 15, 2023, and June 1, 2023. Dr. Reinhard has been practicing for over 30 years and specializes in physical medicine and rehabilitation with an emphasis in brain injury rehabilitation. Dr. Reinhard concluded that Claimant suffered a very severe brain injury which will preclude Claimant from ever returning to some level of independence. *Dep. Vol. I, page 9*.

31. Based on Dr. Reinhard's testimony, which is credited, it is found that Claimant has the following limitations, impairments, and disabilities:

- He can be childlike and laugh inappropriately.
- He has basically lost the ability to effectively control and move his entire body.
- He is incontinent and his sisters have to take him to the bathroom every couple of hours.
- He cannot get up from a chair or get on and off the toilette without assistance.
- Claimant cannot stand or walk independently. At this time, his sister "basically puts him over her shoulder and then kind of drags him around. It's fairly dramatic how much sort of involuntary movement goes on when he tries to walk."
- Claimant needs help eating his food – and even with help - he still chokes a bit and has to clear his throat often.
- Requires maximal assistance with dressing, eating, cooking, hygiene, and bathing.
- Is completely dependent for all instrumental activities of daily living, such as planning, taking care of finances making medical decisions.

See Dep. Vol. I.

32. In the end, Dr. Reinhard concluded that "He can't take care of himself… He needs somebody there all the time to get him through the day. *Dep. Vol. I, page 49*. He further concluded that Claimant should have been placed in Craig Hospital for inpatient services when he was released from the University of Utah hospital. "You don't send somebody like this home. I'm so surprised that this ever happened this

way." *Dep. Vol. I., page 56*. He also commented that "It takes one special family to take care of somebody like this home where they have to then do everything for them with no home care. It's mind boggling." *Dep. Vo. I, page 56-57*.

33. Dr. Reinhard also commented on the level of care Claimant would have received at Craig compared to the care he received from his family members. He stated that Claimant could have better care [at Craig], instead of "basic care by untrained family members." *Dep. Vol. I, page 58*.

34. As for the need for 24/7 care, Dr. Reinhard concluded that a CNA would need to be hired to help Claimant with activities of daily living such as hygiene, bathing, brushing teeth, and getting fed. He also stated that if Claimant was home alone, the CNA would have to be there 24/7 because the Claimant would not be safe at home because:

> He can't move. He can't get up and leave the house if the house starts on fire. He can't make a meal or feed himself or bathe without assistance. All of those things – maybe you could put him in a chair and leave him for an hour; even there is a certain risk, so you need 24/7.

Dep. Volume 1, page 62.

35. Dr. Reinhard also concluded that Claimant could possibly die if left unattended - for example, "if he got ahold of some food and started eating, he could choke." *Dep. Vol. I, page 61-62, and 65*.

36. Dr. Reinhard also stated that because Claimant is not mobile and is cognitively impaired, "somebody has to be, at least, within the home and not necessarily in the same room with him but there in case if something happens that he needs assistance." *Dep. Vol. II, page 39*.

37. Dr. Reinhard concluded that the services provided by the family 24/7 are reasonably necessary to keep Claimant safe, clean, and hygienic and that the services provided by the family are not just reasonably necessary, they are mandatory.

38. Based on Dr. Reinhard's testimony, and the underlying medical records, it is found that Claimant has required 24/7 attendant care, that is medical in nature, since his discharge from the hospital in Utah. It is further found that such care has relieved the symptoms and effects of the injury and are directly associated with Claimant's physical needs.

Level of Care Being Provided by Family

39. Dr. Reinhard also testified about the level of care being provided by the family, especially MA[Redacted], as she provides most of the care for Claimant. Dr. Reinhard did not think MA[Redacted] was providing the level of care that a CNA would provide. *Dep. Vol. I, page 67*. But on the other hand, he concluded that the family was providing care that would be considered nursing services – such as dealing with Claimant's incontinence, medication management, and providing skin care when Claimant developed an ulcer. He did not, however, think they were providing any type of meaningful therapy. *Dep. Vol. II, pages 116-117*.

40. Although the family is caring for Claimant, Dr. Reinhard believes Claimant needs the assistance of a "home health aide as opposed to an RN" but yet he would need a CNA for bathing. *Dep. Vol. II, page 130*.

41. He also concluded that the family is basically providing basic care - or unskilled care – by family members.

42. Based on Dr. Reinhard's testimony it is found that Claimant's family members are providing Claimant basic attendant care-which is primarily unskilled care-and that such care is medical in nature because it relieves the symptoms and effects of the work injury and is directly associated with Claimant's physical needs.

43. Need for Conservator

44. In November 2022, Dr. Reinhard recommended and prescribed a conservator due to Claimant's limited abilities due to his work injury and inability to make medical and financial decisions. *Dep. Vol. I, pages 39-40*. He also concluded that having a bi-lingual conservator, since Claimant only speaks Spanish, would be appropriate. *Dep. Vol. I, pages 39, 40, 41, and 49.*

45. It is found that Claimant needs a conservator to help make medical and financial decisions.

46. *Need for a medical case manager.*

47. Dr. Reinhard also testified that a nurse case manager is critical in the case of a catastrophic brain injury – like this case - because there are multiple providers involved and multiple things that to be authorized. He also testified that having a bilingual nurse case manager would be even better. He concluded that placing the case management obligations on the family would be too much. *Dep*. V*ol. I, page 42*.

48. Dr. Reinhard also testified as to the qualities that a nurse case manager should have. Those qualities include, but are not limited to, being compassionate, prompt, a good communicator, and knowledgeable about the relevant medical conditions being treated. Dep. Vol. I, pages 42-46.

49. The ALJ finds Dr. Reinhard's testimony and opinions to be credible, reliable, and persuasive. His opinions are fully supported by the record and consistent with the other medical providers and observers of Claimant's injuries, impairments, and disabilities. As a result, it is found that Claimant needs a medical case manager and that one has been provided by Respondents.

Testimony and Affidavits of Family Members Taking Care of Claimant

MA[Redacted]

50. MA[Redacted], Claimant's sister, testified at the hearing and submitted an affidavit. Based on her testimony and affidavit, which the ALJ credits, it is found that since Claimant's discharge from the hospital in Utah on November 23, 2021, she has cared for Claimant by helping him with his activities of daily living. This care includes, but is not limited to, bathing, brushing his teeth, shaving, dressing, feeding, picking up and administering medications, providing physical therapy and occupational therapy,

monitoring his condition during the night while he is sleeping, getting him out of bed, getting him out of chairs, walking with him, helping him with drinking and eating, transporting him to medical appointments, and attending most of his medical appointments.

51. Along with helping Claimant with his activities of daily living, which are necessary to keep Claimant safe and alive, she also does his laundry, takes him to social outings, and provides a clean and safe living environment. However, doing Claimant's laundry, taking him on social outings can be done while she is watching Claimant and keeping him safe. In other words, her primary responsibilities and the care she provides Claimant is helping Claimant with his activities of daily living and being with Claimant so he remains safe, cared for, and alive.

52. Moreover, she was trained by the staff at the hospital in Utah and Craig Hospital how to care for Claimant by helping him perform his activities of daily living, provide various therapies, and keep Claimant safe and alive. She also trained other family members how to do the same tasks.

53. Since his discharge from the hospital on November 23, 2021, through June 30, 2023, she estimates she has provided Claimant 7,740 hours of care.

54. MA[Redacted] also testified about the medical case management being provided by LB[Redacted]. According to MA[Redacted], it is her opinion that LB[Redacted] is providing inadequate case management services and should be replaced by a new case manager.

55. Based on her testimony and affidavit, it is found that she has provided Claimant attendant home health care services since his discharge from the hospital in Utah and that she has provided Claimant approximately 7,740 hours of care up through June 30, 2023.

[Redacted, hereinafter BR]

56. BR[Redacted] also testified at the hearing and provided an affidavit. Pursuant to BR's[Redacted] affidavit, and testimony, which the ALJ credits, BR[Redacted] cared for Claimant by helping him with his activities of daily living, consistent with the care provided by MA[Redacted]. It is found that the attendant and home health care BR[Redacted] provided Claimant kept Claimant fed, safe, and alive. From November 23, 2021, through June 30, 2023, BR[Redacted] provided Claimant approximately 936 hours of attendant care from the date of his discharge from the hospital in Utah through June 30, 2023.

[Redacted, hereinafter SG]

57. SG[Redacted], who is Claimant's sister-in-law, also testified at the hearing and provided an affidavit. Pursuant to her testimony and affidavit, which the ALJ credits, she cared for Claimant by helping him with his activities of daily living, consistent with the care provided by SG[Redacted]. It is found that the care she provided kept Claimant fed, safe, and alive. From November 23, 2021, through June 30, 2023, she provided Claimant approximately 1,600 hours. In addition to caring for Claimant, she also cared for MA's[Redacted] baby. Thus, while taking care of Claimant, she also

had to take care of the baby. Despite having to take care of both at the same time, she was available for both and on call for Claimant. Thus, she still provided attendant health care services to Claimant for approximately 1,600 hours during the time period stated above.

JL[Redacted]

58. JL[Redacted], is Claimant's sister. She also testified at the hearing and provided an affidavit. Pursuant to her testimony and affidavit, which the ALJ credits, she cared for Claimant by helping him with his activities of daily living, consistent with the care provided by her sister, MA[Redacted]. It is found that the attendant and health care JL[Redacted] provided kept Claimant fed, safe, and alive. It is also found that from November 23, 2021, through June 30, 2023, JL[Redacted] provided Claimant approximately 3,652 hours of attendant care.

Type of Care Being Provided by Family Members.

59. The attendant care being provided by all family members is medical in nature and should be classified as a medical benefit under the Colorado W.C. Act and therefore a covered benefit because it is medical in nature and relieved Claimant from the symptoms and effects of his work injury and is directly associated with claimant's physical needs. This finding, however, is not a finding that the family members are providing the level of care that would be provided by a licensed, certified, or registered nurse, nurse aid, or nursing assistant.

60. Due to his injuries and inability to independently perform his activities of daily living, Claimant requires attendant care to provide attendant care services. The care provider is also required to remain nearby and "on call" 24/7 and the family members have been providing such care.

Hourly Rate of Pay for Family Members Providing 24/7 Care

Report of Ann Sandstrom and Kelli Gora

61. Claimant presented the report of Ann Sandstrom, who is a Certified Nurse Life Care Planner, Registered Nurse, Family Nurse Practitioner, and Doctor of Nursing Practice, and Keli Gora who is an RN, FNP, DNP, and a CNCLP.

62. Ms. Sandstrom was asked to determine the type and level of home health care the family members were providing Claimant as well as the hourly charges for those services in the Denver metro area. Ms. Sandstrom concluded that the type and level of care the family has been providing Claimant since he was discharged from the hospital in Utah as follows:

> Since his discharge from the Salt Lake City Hospital, he has been unable to independently manage activities of daily living (ADLs), including but not limited to hygiene, toileting, dressing, medication management, communication, household chores, meal preparation, feeding, transportation, community and social access, ability to leave home, ability to

> access medical care, and ability to perform other items required to sustain functional living without home health care services. Caregivers also provide assessment of psychological status, medication administration, assessment of vital signs, and performance of home therapy programs.

63. She also concluded that Claimant needs 24/7 care. In reaching her conclusion, she reviewed the deposition of Dr. Reinhard as well as Claimant's medical records. Based on her review of the Claimant's medical records and Dr. Reinhard's deposition, she concluded that Claimant's needs are often unpredictable and that varying levels of assistance are required at unpredictable times throughout the 24-hour daily period, including overnight. Thus, she concluded that the medical record supported Dr. Reinhard's opinion that 24/7 care was required.

64. She also concluded that the type and level of care Claimant's family is providing falls within the semi-skilled category. She reached that conclusion based on the following factors:

> Although Claimant's family has no formal training as Home Health Aides, the range of essential services required by [Redacted, hereinafter MQ] falls within the realm of semi-skilled (SVP 3: supervisory/companion for safety, personal care attendant for routine ADLs) and semiskilled to skilled (SVP 4 and higher: Skills required to perform and supervise home therapies, medication management including ordering, sorting, administration; medical case management, assessment and monitoring of vital signs, monitoring of psychiatric status, etc.)

65. In order to support her opinion about the level of work the family members were providing, Ms. Sandstrom included a "Skill Level" chart. The chart describes unskilled, semi-skilled, and skilled work. Unskilled work is work that requires little vocational preparation and judgment and can usually be learned within 30 days. Semi-skilled requires the requirement to be alert and to pay close attention to details. In this case, many of the skills used to take care of Claimant would appear to be skills that could be learned in less than 30 days. On the other hand, some of the skills, like providing Claimant with his medication, watching to see if Claimant starts choking or aspirating his food, requires alertness and attention to detail-which might be in the semi-skilled category. Based on the facts of this case, the ALJ finds that the majority of Claimant's care being provided by the family members could be learned in less than 30 days and can be classified as unskilled attendant/home health care.

66. Ms. Sandstrom then set forth the hourly rate an Agency would charge to provide the services of various providers. She provided the rates below, which are not the rates at which the actual care provider – employee - would be paid, but the rates charged by the Agency. The Agency rates are as follows:

- Home Health Care Companion: $29.50 per hour;

- Home Health Care Personal Care Services: $24.06 per hour; and
- Home Health Aid services: $50.00, per the WC Fee schedule and $75.00, if not paid under the fee schedule.

67. Ms. Sandstrom also provided the hourly minimum wage during time the family has been providing home healthcare. The hourly rate for 2021, 2022, and 2023, is $14.77, $15.87, and $17.29, respectively.

68. Ms. Sandstrom also testified about the training the family received from Salt Lake University Hospital as well as various people at Craig Hospital.

69. The ALJ finds her opinions to be persuasive and helpful.

Testimony of Kelli Gora

70. Ms. Gora also testified at the hearing. She is a Registered Nurse, Family Nurse Practitioner, and a Legal Nurse Consultant. She testified consistent with her report. As for the level of care being provided by the family members, she concluded that it includes companion type work, which is unskilled, and also semi-skilled work.

71. As for hourly rates, she concluded that the family provides more than companion care. Since companion care through an agency would cost about $29.50 per hour, she stated that obtaining a provider through an agency to provide more than companion care, a Home Healthcare Aid, would be $51.00 per hour under the Colorado Workers' Compensation Fee Schedule. Thus, she concluded that the family members should be paid more than the rate for a companion.

72. The ALJ finds her testimony to be helpful in determining the hourly rate at which Claimant's family members should be paid.

Report and Testimony of Sue Ann Knoblauch

73. Ms. Sue Ann Knoblauch, RN, BSN, CM, MSCC, CNLCP, also provided a report and testified at the hearing. She was also asked to determine the level and type of care Claimant's family has been providing Claimant and determine the average hourly rate agencies in the Aurora, Colorado, area charge to provide such services. She was not, however, asked to determine the rate the actual worker is paid in each category.

74. Ms. Knoblauch also analyzed the level of care Claimant's family is providing. After reviewing all of the records and the affidavits by the various family members, she concluded that most of the care being provided is unskilled.

75. To determine the level of care Claimant's Ms. Knoblauch reviewed Claimant's medical records and researched the average hourly rates in the Aurora, Colorado, area. She ultimately concluded that Claimant requires 24/7 care. In formulating her opinion, she stated that:

> The medical records were reviewed, especially focusing on the most recent set of evaluations from Craig Hospital and the

> treating providers in Colorado. It appears that [Claimant] required at the minimum unskilled attendant care for Activities of Daily Living as evidenced by the medical records documentation of his deficits both physical and cognitively. His family has outlined the care that they provided during those weeks, and this appears to match his functional deficits and needs. His difficulty with mobility, transferring, and toileting also would suggest that [Claimant] would require nighttime attendance or at least someone in the house to be alerted that he needed assistance. Therefore, it seems reasonable that 24/7 care would have been required.

76. She also assessed the level of care that the family is providing. She basically concluded that the level of care being provided by the family is unskilled. She based her opinion on the following rationale:

> The family that provided the care, it seems likely, was not licensed or certified in nursing. They most likely received family education on all aspects of home care needed by the Craig Hospital medical professionals before discharge and at evaluations. The fact that the family state that they provided monitoring and assessing for medical complications and conditions, could be described as the function of a nursing licensed professional. However, family are routinely involved in discharge planning and training for home care of discharging individuals. Craig Hospital most likely provided this family training and also "signs and symptoms" of medical complications to contact medical professionals. These are also higher-level skills that of a trained nursing professional, that was not likely provided at the home.

77. Regarding the hourly rate, she concluded that an unskilled, but agency trained, home health attendant could be hired for $28.00 per hour.

> As far as the hourly rate is concerned, research of the available services in the area show a rate of $28.00 per hour for an unskilled home aide that is trained by the hiring home health nursing agency. As the family has most likely less training than an unskilled home attendant aide. Therefore, it could be considered that the pay rate would be lower than that of an agency trained home health attendant.

Claimant's Exhibits, pages 357-371.

78. The ALJ finds Ms. Knoblauch's opinions to be reliable, persuasive, and helpful.

79. The ALJ finds that the attendant care services being provided by Claimant's family fall primarily in the unskilled area. On the other hand, the family members were trained to do various tasks such as physical therapy, occupational therapy, how to take Claimant's blood pressure, how to use the TENS unit, and how to use the Heimlich

maneuver in case Claimant is choking. But they have not been formally trained by an agency. As a result, the ALJ finds most of the time spent taking care of Claimant and being "on call" is unskilled attendant care that is medical in nature.

80. As for the rate of pay, the ALJ finds that the testimony provided by the witnesses only provides the rate that would be paid to an Agency for the service of a worker and not the rate of pay each worker would receive. But Ms. Sandstrom did provide the minimum wage for workers, and the court finds those rates helpful in determining the rate of pay for each family member-who is primarily providing Claimant unskilled attendant care. As a result, the ALJ finds that a rate of $22.00 per hour, since Claimant's discharge, is reasonable.

Need for a Conservator

81. In November 2022, Dr. Reinhard recommended-prescribed-a conservator due to Claimant's limited abilities due to his work injury and inability to make medical and financial decisions. *Dep. Vol. 1, pages 39-40*. He also concluded that having a bi-lingual conservator, since Claimant only speaks Spanish, would be appropriate. *Dep. Vol. 1, pages 39, 40, 41, and 49*. The ALJ credits this testimony and find that it supports the need for a conservator.

Testimony of [Redacted, hereinafter DS] - Conservator

82. DS[Redacted] testified at the hearing. DS[Redacted] is an attorney who is bilingual and speaks English and Spanish. Therefore, when working with a client that speaks Spanish, such as Claimant, he does not need an interpreter. He has specialized for the last 26 years in probate, disability law, and protective proceedings. The protective proceedings include guardianships, conservatorships, and disability trusts. He also has experience setting up conservatorships in workers' compensation cases. DS[Redacted] has set up approximately 100 conservatorships and has served as a conservator approximately 30-40 times. As a result of his expertise, he was admitted as an expert in his areas of practice.

83. DS[Redacted] testified that he charges $375.00 per hour for his services and that his fee might be a little on the high side. He also testified that the fees for a conservator can range from $100 to $500 per hour – depending on the services being provided. But DS[Redacted] does speak Spanish and speaking Spanish will negate the need for an interpreter and the associated costs.

84. DS[Redacted] concluded that based on his interactions with Claimant, Claimant cannot make decisions involving any financial decisions, including entering into agreements with experts to secure medical benefits under his workers' compensation case. *Hearing Tr. 48-49*.

85. In order to have DS[Redacted] appointed as the conservator, the Claimant had to retain the services of a probate attorney. In this case, Claimant's counsel retained [Redacted, hereinafter KK], Esq., to procure the appointment - through the probate court - of DS[Redacted] as Claimant's conservator. *Hearing Tr. 60-61.*

86. As set forth in the pleadings from the probate court, and after Dr. Reinhard recommended and prescribed a conservator, KK[Redacted] filed a Petition for

Appointment of Conservator for Adult on February 17, 2023. In the Petition, she set forth the basis for why a conservator was required. She stated in the Petition that the Claimant suffers from the effects of a traumatic brain injury and in support of his injuries and disability she provided the court the November 30, 2022, report from Dr. Reinhard. In addition to providing the court with the need to appoint a conservator, she also set forth the duties of the conservator. In the Petition, she asked for the following:

> [T]he appointment of the Special Conservator be limited in scope acting on behalf of Respondent in the Worker's Compensation case, any ancillary or third-party claims, litigation decisions, settlement negotiations, mediations and all other matters related to the his injury until all litigation or legal claims are concluded or at a point that Respondent's physician opines Respondent is able to manage property and business affairs because he is able to effectively receive and evaluate information or both or to make or communicate decisions regarding these matters.

Claimant's Exhibits, page 603-611.

87. On March 15, 2023, the probate court issued an order appointing a Court Visitor to investigate the allegations made in the Petition for Appointment of a Conservator. The Court Visitor was authorized to interview Claimant and review his medical records to determine whether the appointment of a conservator was reasonable, necessary, and appropriate. *Claimant's Exhibits, page 590*.

88. On May 31, 2023, a hearing was held in Denver Probate Court to determine whether Claimant was legally incapacitated and required a conservator and whether DS[Redacted] should be appointed as Claimant's conservator. On the same day as the hearing, the Court issued an Order appointing DS[Redacted] as the conservator for Claimant, *i.e.*, finding Claimant was legally incapacitated. *Claimant's Exhibits, page 575-577*.

89. The ALJ finds DS's[Redacted] testimony to be credible, reliable, and persuasive.

90. The ALJ finds that based on the record as a whole, and due to his work injury, Claimant is unable to effectively receive and evaluate information and communicate decisions to such an extent that that he lacks the ability to satisfy essential requirements for physical health, safety, and self-care. As a result, Claimant is legally incapacitated due to his work injury.

91. The ALJ finds that the medical records, opinions of Dr. Reinhard and DS[Redacted], combined with the findings of the probate court, establish that the retention of KK[Redacted] to appoint DS[Redacted] as Claimant's conservator, and for DS[Redacted] to be Claimant's conservator, is reasonable and necessary to help Claimant, who is legally incapacitated, make decisions regarding his workers' compensation claim and other associated financial matters as set forth in the Order appointing DS[Redacted] as the conservator.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to a medical case manager of his choice and that LB[Redacted] should be removed as the nurse case manager on this claim.

Section 8-42-101(3.6)(p)(II) provides that Respondents shall offer at least managed care or medical case management. In this case, Respondents appointed

LB[Redacted]. to provide medical case management – and she did provide medical case management. Claimant is arguing that because LB[Redacted] is not providing adequate medical case management, Claimant has the right to have a new medical case manager assigned to the case.

Even if she is providing substandard medical case management, medical case management can only be offered by Respondents and rejected by Claimant. Claimant lacks the right to request a particular medical case manager or to have particular case manager replaced. *See Muir v. King Soopers*, W.C. No. 4-350-892 (ICAO May 20, 2003). In *Muir*, Claimant was arguing that Respondents had to pay for a case manager that one of her authorized treating providers had designated. The ICAO affirmed the ALJ's determination that Respondents would not be responsible for payment of case management services based on the ATP's designation of that case manager. The ICAO, interpreting Section 8-42-101(3.6)(p)(II), concluded that it was Respondents, in the first instance, that are allowed to designate the case manager and that statutory provision does not allow for an authorized treating provider to designate a different case manager-even if the currently assigned medical case manager is not doing an adequate job.

Therefore, even if the current medical case manager is not doing an adequate job, this ALJ does not have the authority to appoint a new medical case manager. Such authority is vested with the Respondents. Thus, based on the rationale in *Muir,* Claimant's request for the removal of the current medical case manager, LB[Redacted], and to have her replaced with a new medical case manager is denied.

II. Whether Claimant has proven by a preponderance of the evidence that family members are entitled to reimbursement for attendant care they provided to Claimant from November 23, 2021 through present and the rate at which they should be reimbursed.

a. Whether the family members are entitled to reimbursement for home health care.

The determination of whether attendant care services are reasonably necessary is one of fact for determination by the ALJ. *Suetrack v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995); *Edward Kraemer & Sons, Inc. v. Downey*, 852 P.2d 1286 (Colo. App. 1992). To be compensable as medical benefits, the expenses must be for medical or nursing treatment or incidental to obtaining such medical or nursing treatment. The service must be reasonably needed to cure and relieve the effects of the injury and be related to a claimant's physical needs. *Bellone v. Indus. Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997). In assessing the evidence, the ALJ may consider whether the services were medically prescribed, and whether they are directly associated with Claimant's physical needs. *See Bellone, Supra.* Moreover, there is no requirement that the attendant care services be provided by a licensed medical professional, and such services may encompass assisting Claimant with activities of daily living, including matters of personal hygiene. *Suetrack v. Industrial Claim Appeals Office*, *Supra*.

Claimant suffered catastrophic injuries. Due to his injuries, Claimant was hospitalized for approximately two months. During his hospitalization it was noted that Claimant had problems with all activities of daily living and that he needed assistance with

his activities of daily living upon discharge. Thus, while he was hospitalized, family members were taught how to care for Claimant.

Claimant was discharged from the hospital on November 23, 2021, and into the care of his family. Upon discharge, Claimant was prescribed 24/7 care, which was to be provided by his family. The attendant care was necessary for Claimant to be able to eat, bathe, walk, get out of bed, go to the bathroom, take his medication, get to medical appointments, and be safe, etc. Moreover, the need for the care was emergent. Without the provision of attendant care – that was medical in nature - immediately upon discharge, Claimant's health would have quickly deteriorated, he could have been severely injured, and he would have died.

Upon discharge, it was anticipated that Claimant would be admitted to Craig Hospital for care and rehabilitation. His admission would result in Claimant having 24/7 care until discharged from Craig. However, Claimant's claim was still being denied and Craig Hospital would not admit him. As a result, Claimant's family started providing Claimant attendant care 24/7 as of November 23, 2021, and immediately upon discharge.

The need for Claimant to have 24/7 attendant care, since he was discharged from the hospital in Utah, is supported by the medical records, the opinions of the experts who evaluated the need and cost of providing home health care, and the reports and testimony of Claimant's authorized treating physician, Dr. Reinhard.

The care provided to Claimant is medical in nature because the care relieved Claimant from the symptoms and effects of his catastrophic injury and is directly associated with Claimant's physical needs. The care was also incidental to medical treatment because the services were provided as part of an overall home healthcare program designed to treat Claimant's condition.

Respondents contend that because Claimant's family members provided some care that is not medical in nature, such as ordinary household services, which might have included cleaning and laundry, that 24/7 care is not necessary. But Respondents fail to appreciate that, as found, the care providers in this case must be available, or "on call" 24/7 to assist Claimant as needed. For example, someone needs to be available during the night if Claimant needs to get out of bed to go to the bathroom, if there is a fire in the house, or if he decides to engage in a dangerous activity, like using the treadmill unsupervised, or chokes on water while drinking during the night. Thus, as here, when Claimant's injury is of a nature that requires an attendant to remain nearby or "on call," the fact that a caretaker may be able to perform household tasks when not actually rendering a specific service to Claimant does not alter the essential nature of the services being provided by the family member. This is so because, if the employer provided the services of an outside professional, that professional would be entitled to pursue their own interests during such "on call" periods without diminution of compensation. *See Edward Kraemer & Sons, Inc. v. Downey*, 852 P.2d 1286, 1289 (Colo. App. 1992).

Since his discharge from the hospital, Claimant's family members have been providing Claimant attendant care 24/7. The care consists of, but is not limited to, helping Claimant get out of bed, get dressed, walk, eat, bathe, take his medications, get to medical appointments, and go to the bathroom, etc. This care is found to be attendant

care that is medical in nature, incidental to obtaining medical treatment, and part of an overall home healthcare program designed to treat Claimant's condition.

Respondents did not endorse the issue of authorization. But Respondents stated on their Application for Hearing that the home healthcare was not initially "recommended." Moreover, they did not raise this issue in their proposed order. However, home healthcare benefits do not have to be "prescribed" for Respondents to be liable for such treatment. *See Bellone, Supra.* Moreover, Respondents are liable for emergency medical treatment reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). In *Sims*, the Colorado Court of Appeals held that in cases of medical emergency the claimant need not seek authorization from the employer or insurer before obtaining medical treatment from an unauthorized provider. A medical emergency affords an injured worker the right to obtain immediate treatment without undergoing the delay inherent in notifying the employer and obtaining a referral or approval.

There is no precise legal test for determining the existence of a medical emergency. Rather, the question of whether a bona fide emergency exists is one of fact and is dependent on the circumstances of the particular case. *See Timko v. Cub Foods*, W. C. No. 3-969-031 (June 29, 2005). In this case, the ALJ finds and concludes that the need for home attendant care upon discharge was recommended and prescribed by the hospital and was also emergent and continues to be emergent.

Respondents also contend that the Colorado Nurse and Nurse Aide Practice Act § 12-255-10101, et., seq, C.R.S., precludes Respondents from being liable to the family members for home attendant care services because the services are that of a certified nurse's aide or nurse. As found, the majority of the services being provided by Claimant's family members are unskilled attendant care. Moreover, the family members are not holding themselves out as certified nurse aides or certified nurses. Plus, there is no requirement that the attendant care services be provided by a licensed medical professional to be payable, and such services may encompass family members assisting Claimant with activities of daily living, including matters of personal hygiene. *See Suetrack USA v. Indus. Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). Therefore, the ALJ finds and concludes that the Colorado Nurse and Nurse Aide Practice Act does not preclude the reimbursement to family members for the attendant care services they provided.

As a result, the ALJ finds and concludes Claimant has established by a preponderance of the evidence that the attendant care services, which were and are emergent, are reasonably necessary, and related to Claimant's work injury and that Respondents are liable for the attendant services provided by Claimant's family members since the date of discharge from the hospital in Utah on November 23, 2021 – 24/7.

b. <u>The hourly rate to pay Claimant's family members for providing home healthcare – assistance</u>.

The reasonable value of medical services is a question of fact for resolution by the ALJ. *See Edward Kraemer & Sons, Inc. v. Downey*, 852 P.2d 1286 (Colo. App. 1992).

One of the factors to consider in determining the rate at which to compensate the family members is to determine the type of care being provided. In this case, there was testimony about the type of care being provided. The evidence here provides and defines various levels of work. For example, one report defines the type of work that is considered unskilled, semi-skilled, and skilled. The report indicates that unskilled work is considered work tasks that can be learned in 30 days or less. Semi-skilled is work that requires more training and attention to detail.

In this case, none of the family members are licensed healthcare providers. Moreover, none of them have gone through professional training classes. However, they have undergone training by Claimant's medical providers to do certain tasks required by Claimant.

Each expert that evaluated and provided the hourly rate Claimant would have to pay an agency to obtain home services. The problem with these rates is that they are the rate at which an agency would be paid, but not the rate at which an employee providing the care would be paid. One expert did, however, provide the minimum wage for workers, and the ALJ finds that information, combined with the other wage information to be helpful in determining the hourly rate at which to pay the family members.

In this case, the ALJ finds and concludes that Claimant's family members are mostly providing unskilled care, with a bit of care maybe rising to the level of semi-skilled.

While the agency rates have been considered, the ALJ finds that paying family members the rate at which an agency charges would overpay the family members since those rates do not take into consideration other factors, such as the overhead incurred by an agency, and is not an accurate representation of what an employee who is providing the service would be paid.

Considering the minimum wage, which is the wage that is probably paid to an unskilled worker, and the wages paid to an agency for what appears to be an agency trained home health aide, the ALJ finds and concludes that an hourly wage for each family member providing home health care to Claimant shall be $22.00 per hour.

III. Whether interest is payable on the amount awarded for the care provided to Claimant.

Section 8-43-410(2) provides the respondents "shall pay interest at the rate of eight percent per annum on all sums not paid on the date fixed by the award" for the payment thereof. Pursuant to *Stephens v. Gary North & Air Package Express Services, Inc.*, W.C. No. 4-492-570 (February 16, 2005), interest is also payable on unpaid medical expenses.

In this case, the payment of home healthcare services is found to be a medical expense. As a result, the ALJ finds and concludes that Claimant has established that interest is payable on the unpaid medical expenses for home healthcare services provided by the family members.

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to the costs and fees for services of a probate attorney and conservator.

Section 8-42-101, C.R.S., provides that in addition to medical benefits, every employer shall furnish conservator services that are reasonably needed due to the work injury and that such fees shall include reasonable attorney fees and costs that are required to appoint a conservator through the probate court. *See* 8-42-101(a).

As found, Claimant is legally incapacitated due to his work injury and requires a conservator to manage Claimant's affairs, such as medical and financial decisions, as set forth in the Order appointing DS[Redacted] as the conservator. Moreover, an attorney, KK[Redacted], was required to get DS[Redacted] appointed as the conservator.

As a result, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the need for the probate attorney, KK[Redacted], and the need for a conservator, DS[Redacted], is reasonably necessary, and related to Claimant's work injury and shall be paid for by Respondents.

ORDER

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

1. Claimant's request to have the current case manager removed and replaced is denied.
2. Claimant's request for the payment of attendant care services is granted. Respondents shall pay Claimant for 24/7 attendant care services as of November 23, 2021, at an hourly rate of $22.00 per hour. Such money, plus interest, shall be distributed by Claimant to the people who provided Claimant's care based on the hours of care they provided.
3. Should an agency be retained to provide any care during a 24-hour period, Respondents shall not be required to pay Claimant for the hours of care provided by an outside agency. For example, if Claimant's family members provide 16 hours of home healthcare and then an agency provides 8 hours of home health, or attendant care, during a 24-hour period, Respondents only need to pay Claimant for 16 hours of care during that 24-hour period.
4. Respondents shall pay the fees and costs of the probate attorney and the conservator.
5. Respondents shall pay interest at the rate of eight percent per annum upon all sums - for 24/7 attendant care - not paid beginning November 23, 2021.
6. 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: August 21, 2023.

/s/ Glen Goldman

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

ISSUES

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

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment of his right shoulder is reasonable, necessary, and related to the work injury?

3. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits?

4. If the claim is found compensable, what is Claimant's average weekly wage {AWW)?

5. If the claim is found compensable and Claimant is entitled to TTD benefits, have Respondents demonstrated, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment, thereby severing his entitlement to TTD benefits?

FINDINGS OF FACT

1. Claimant began working for Employer on August 29, 2022. Claimant was hired as a production operator on the cleaning and inspection crew. Claimant worked full-time and was paid $16.20 per hour. Claimant testified that he worked 10 hour shifts, specifically, the 4:00 a.m. to 2:30 p.m. shift, five days per week. Claimant had two 15 minute breaks in the morning, a 30 minute lunch, and then a 15 minute break in the afternoon.

2. Claimant testified that his job duties involved cleaning and inspecting parts called "setters". Setters are used to hold other parts when placed in the kiln. After setters were used in this way, they were sent to Claimant for cleaning and inspection. The setters came to Claimant in tubs. Claimant would lift full tubs and then remove the setters from the tub and place them into the cleaning machine. Once the items were cleaned, Claimant would inspect the items for damage. Then he would place the newly cleaned parts into tubs and lift those full tubs. Claimant would repeat these steps during his 1O hour shift. Claimant estimated that he cleaned and inspected between 3,500 and 4,000 setters each shift.

3. Claimant estimates that a full tub weighed between 20 and 30 pounds. Individual setters would vary in size and weight. Claimant estimates that the heaviest setter would weigh approximately one-half of a pound.

4. Claimant testified that in the first few weeks of his employment, he experienced pain and soreness throughout his body. This included pain and soreness in his bilateral shoulders. Over time, these symptoms subsided in all areas of Claimant's body, with the exception of his right shoulder. Claimant testified that he is not sure exactly when his right shoulder pain began, but in the month of October his right shoulder was the only body part that continued to be painful.

5. On November 2, 2022, Claimant reported his right shoulder pain to his lead. Claimant did so at that time because he lifted a full tub of setter parts and his right shoulder pain was so intense that he dropped the tub. Claimant further testified that at that moment his pain intensified and felt like he had been "stabbed with a knife". Claimant testified that prior to dropping the tub at work on November 2, 2022, he had non-stop right shoulder pain and he could barely lift his right arm.

6. On November 4, 2022, an accident report was completed by Employer. In that document, the date of injury is identified as October 20, 2022. Claimant testified that when he reported his right shoulder pain he indicated that he did not know exactly when his pain started. As a result he and the individual from human resources "decided on October 20".

7. Thereafter, Employer referred Claimant for medical treatment. On November 4, 2022, Claimant was seen by Dr. Lori Fay. At that time, Claimant reported right shoulder pain due to "over use at his new job." Claimant also reported a prior right shoulder injury that occurred 20 years ago. Claimant told Dr. Fay that following that prior injury his symptoms resolved. With regard to his current symptoms, Claimant reported that "on Tuesday of this week [claimant] was in so much pain he could not raise his arm."

8. Dr. Fay ordered a right shoulder x-ray, which was performed on that same date. The x-ray showed no acute fracture or traumatic malalignment. The radiologist, Dr. Bryan Stover, noted minor osteoarthritic changes.

9. Dr. Fay identified a diagnosis of right shoulder tendonitis and/or bursitis. She recommended rest, ice, gentle range of motion exercises, and anti-inflammatories. In addition, Dr. Fay assigned work restrictions of no right arm lifting, carrying, pushing, pulling, pinching, gripping, reaching overhead, and reaching away from the body. In the WC164 form completed by Dr. Fay on November 4, 2022, she indicated that her objective findings were consistent with a work related injury.

10. On November 9, 2022, Claimant was seen at SCL Health Medical Group - Occupational Health by Dr. Spencer Olsen. In the medical record of that date, Dr. Olsen notes that after starting a new job, Claimant experienced several weeks of bilateral shoulder pain, with his left shoulder pain resolving. Claimant also reported a right

shoulder injury that occurred 18 years prior. Dr. Olsen noted the prior issue resolved following physical therapy and the right shoulder remained asymptomatic thereafter. Dr. Olsen opined that Claimant had impingement syndrome of the right shoulder. Dr. Olsen further noted that Claimant's condition was "not clearly work related". Dr. Olsen opined that "cumulative trauma disorder was unlikely." In addition, Dr. Olsen noted that "[i]ndustrial aggravation of [Claimant's] underlying shoulder pathology is unlikely under the circumstances."

11. Dr. Olsen recommended light duty and physical therapy. In addition, he ordered magnetic resonance imaging {MRI) of Claimant's right shoulder. Dr. Olsen issued work restrictions of "light duty" with no lifting, carrying, pushing, or pulling over ten pounds, no overhead work, and no forceful or repetitive use of the right arm.

12. On November 17, 2022, Claimant returned to Dr. Olsen. On that date, Dr. Olsen opined that Claimant had right shoulder impingement syndrome. Dr. Olsen further opined that there was probably "no aggravation of patient's underlying condition". Dr. Olsen assessed the same work restrictions.

13. On December 14, 2022, a right shoulder MRI showed, *inter alia,* tendinosis with mild partial-thickness intrasubstance tearing of the distal infraspinatus tendon; moderately severe acromioclavicular (AC) joint arthrosis with narrowed supraspinatus outlet; and teres minor atrophy.

14. On December 18, 2022, Claimant returned to Dr. Olsen to discuss the MRI results. Dr. Olsen opined that claimant had a "nonwork related right shoulder condition." Dr. Olsen specifically noted that "his work with his new employer for several weeks likely flared up his right shoulder condition, but there is no clear evidence of aggravation." Dr. Olsen recommended further treatment that would include a steroid injection and surgical consultation. However, Dr. Olsen noted that further treatment should be done through Claimant's personal physician.

15. On December 19, 2022, Respondents filed a Notice of Contest in this matter.

16. The last day Claimant earned wages with Employer was November 2, 2022. Claimant has not returned to work for Employer, or any other employer. Claimant provided Employer with all work restrictions assigned by Ors. Fay and Olsen. Claimant testified that he was informed that Employer had no work for him within those restrictions.

17. Claimant testified that he did not quit his job with Employer. In early 2023, Claimant received written notification from Employer that his employment was terminated as of February 17, 2023. The reason provided for the termination was "poor job performance". Claimant was not aware that Employer had any concerns regarding his job performance. Claimant did not work after November 2, 2022, because his work restrictions prevented him from performing his normal job duties for Employer.

18. Claimant's current symptoms include right shoulder pain. Claimant testified that if he is sitting and engaging in no activity, his right shoulder pain will be at a four to five out of ten. If he attempts any activity, the pain will increase to as much as eight to nine out of ten.

19. Claimant provided testimony regarding the prior right shoulder injury that he reported to Ors. Fay and Dr. Olsen. Claimant testified that 18 or 19 years ago, he was working as a mechanic and he injured his right shoulder. This occurred when a vehicle transmission fell off a jack, and Claimant reached out to try to stop it. Claimant further testified that following that incident, his right shoulder symptoms completely resolved and he had no further issues until the autumn of 2022.

20. The ALJ credits Claimant's testimony regarding the nature of his job duties and the onset of his symptoms. The ALJ credits the medical records and the opinions of Dr. Fay over the contrary opinions of Dr. Olsen. The ALJ finds that Claimant has demonstrated that it is more likely than not that he suffered a right shoulder injury arising out of and in the course and scope of his employment with Employer. The ALJ further finds that an acute right shoulder injury occurred on November 2, 2022, when Claimant was lifting a tub of parts and felt immediate right shoulder pain, causing him to drop the tub. The ALJ finds that at that time, Claimant suffered an aggravation of his pre-existing right shoulder condition, resulting in the need for medical treatment.

21. The ALJ credits the medical records and finds that Claimant has successfully demonstrated that it is more likely than not that treatment of his right shoulder is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury.

22. The ALJ credits the medical records and Claimant's testimony and finds that after November 2, 2022, Claimant suffered a wage loss as the direct result of his work injury. Claimant's work restrictions prevented him from performing any job duties for Employer, which has resulted in a wage loss. The ALJ finds that Claimant has successfully demonstrated that he is entitled to temporary total disability (TTD) benefits beginning November 3, 2022 and ongoing until terminated by law.

23. On the issue of average weekly wage, the ALJ credits Claimant's testimony regarding his hours and earnings.

24. On the issue of whether Claimant is responsible for the termination of his employment, the ALJ credits the medical records and Claimant's testimony on this issue. The ALJ finds that Respondents have failed to demonstrate that it is more likely than not that Claimant is responsible for the termination of his employment. Claimant's employment ended when Employer had no work for him within his work restrictions. Employer's decision to terminate Claimant's employment in February 2023, (more than two months after the first assignment of work restrictions), constitutes a factor or circumstance outside of Claimant's control.

CONCLUSIONS OF LAW

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

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

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

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

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

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a

proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

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

7. As found, Claimant has demonstrated, by a preponderance of the evidence, that on November 2, 2022, he suffered a work injury arising out of and in the course and scope of his employment with Employer. As found, on November 2, 2022, Claimant suffered an aggravation of his pre-existing right shoulder condition, resulting in the need for medical treatment. This aggravation occurred when Claimant was lifting a tub of parts and felt immediate right shoulder pain, causing him to drop the tub. As found, Claimant's testimony, the medical records, and the opinions of Dr. Fay are credible and persuasive on this issue.

8. 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).

9. As found, Claimant has demonstrated, by a preponderance of the evidence, that following November 2, 2022, treatment of his right shoulder is reasonable medical treatment, necessary to cure and relieve Claimant from the effects of the work injury. As found, the medical records are credible and persuasive on this issue.

10. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra,* requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TT□ 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 a claimant's inability to

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

11. As found, Claimant has demonstrated, by a preponderance of the evidence, that following November 2, 2022 he suffered a wage loss as the result of the work injury. Therefore, Claimant has also demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits beginning November 3, 2022, and ongoing until terminated by law. As found, the medical records and Claimant's testimony is credible and persuasive on this issue.

12. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's average weekly wage (AWW) on his earnings at the time of the injury. 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).

13. The ALJ credits Claimant's testimony and calculates that at the time of his work injury, Claimant's average weekly wage (AWW) was $769.50. The ALJ calculated the AWW as follows: with a 30 minute unpaid lunch, Claimant worked shifts of 9.5 hours, five days per week. This is a total of 45 hours each week. The first 40 hours were paid at the rate of $16.20 per hour (totalling $648.00 per week). The additional five hours of overtime would be paid at time and a half (or $24.30 per hour). Thus, Claimant received weekly overtime of $121.50. Therefore, his AWW is $648.00 plus $121.50, which is a total of $769.50.

14. Sections 8-42-105(4) and 8-42-103(1)(9), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office,* 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 {Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing,* W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In

that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

15. As found, Respondents have failed to demonstrate, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment with Employer. As found, the medical records and Claimant's testimony are credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. Claimant suffered a compensable right shoulder injury on November 2, 2022.

2. Respondents shall pay for reasonable and necessary medical treatment of Claimant's right shoulder.

3. Respondents shall pay Claimant temporary total disability (TTD) benefits beginning November 3, 2022 and ongoing until terminated by law.

4. Claimant's AWW for this claim is $769.50.

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

Dated August 22, 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 26. 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 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. In **addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she was injured while performing services for pay by Employer.

II. Whether Respondent has proven by a preponderance of the evidence that Claimant was an independent contractor.

III. Whether Respondent has proven by a preponderance of the evidence that Claimant is subject to Sec. 8-40-302(4), C.R.S.

IF CLAIMANT WAS AN EMPLOYEE, THEN:

IV. Whether Claimant has proven by a preponderance of the evidence that she was injured in the course and scope of her employment with Employer on August 29, 2022.

IF CLAIMANT HAS PROVEN COMPENSABILITY, THEN:

V. Whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits that are authorized, reasonably necessary and related to the alleged injury of August 29, 2022.

VI. Whether Claimant has proven what her average weekly wage was at the time of the incident in question.

VII. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from August 30, 2022 until terminated by law.

VIII. Respondents withdrew the issue of whether Respondents have proven by a preponderance of the evidence that Claimant is responsible for her termination or responsible for her wage loss.

FINDINGS OF FACT

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

Claimant's Testimony:

1. Claimant worked for Employer as a housekeeper in August of 2022 for approximately eight months. Her job primarily involved cleaning a very large mansion of over 50,000 square feet.

2. When she first started working at prior employer's mansion, there were three people cleaning. They would start at one end and continued during the following days until the house was completely clean and then would start all over again.

3. Claimant had worked with the prior employer approximately 19 years. The property was sold to Employer in December, 2021. Both the prior Estate Manager, N.M, and Claimant stayed on with Employer. The remaining housekeeping staff did not stay.

4. Claimant was paid every 28th of the month and a check would arrive at her house in the mail. She also received medical and dental insurance from Employer, and vacation for two weeks every year.

5. She identified the contract she had with Employer. That contract described her arrangement with Employer, which was an agreement that was adhered to during her employment with Employer, even after Mr. M.N., the prior Estate Manager, left in June, 2022.

6. Unlike the prior owner, the current owner lived in the mansion full time, and Claimant was by herself for a while, until they hired the second housekeeper. She did what she could, then they would assign Claimant on the top floor and the second housekeeper to the bottom level and vice versa, alternating them. She was working from 7:00 a.m. to 3:30 p.m. with a lunch break from 12:00 to 12:30 p.m. She had to punch a card in and out. When the current Estate Manager started, they gave her a key chain that they used to punch in, with a little camera. If she took even a couple minutes more than a half hour for lunch, that caused problems. The new Estate Manager instituted the new system so that they could keep track of her and her hours while she was on the premises. Her hours were established when she first worked for the prior property owner and that same scheduled was kept when she was hired by the new owner, Employer, with some modifications as to the cleaning schedule and areas. She worked 40 hours a week every week.

7. Claimant brought nothing with her to perform the job. Employer provided everything she needed to clean the premises of the property, including providing her with a cart, which was not something that she had used before working for Employer. She did not work for anyone else.

8. At the beginning, when Employer hired her, she was by herself. For a short time two other women went in to help clean the house once a week. Then Mr. M.N. asked Claimant if she knew someone that would come to work for Employer. She contact the second housekeeper through a friend and then that additional housekeeper started working with her full time.

9. Claimant knew the other housekeeper was paid differently as she did not get medical insurance, and her check would be a personal check every week. The other housekeeper did, however, work the same hours and days that Claimant did. The second housekeeper often car pooled with Claimant. Her co-worker was employed up through the time when Claimant was injured.

10. Claimant knew the job since she had been there for so long, but when Ms. K.M. started as the new Estate Manager in July 2022, she gave instructions on what and how she wanted things done. For example, Claimant had never used a maid's cart before but was instructed to use one. Then the new Estate Manager instituted other changes of how she required Claimant to clean and what areas to clean and when to clean them.

11. Claimant received a W-2 from the prior owner, but never received anything from Employer, neither a W-2 nor a 1099 for the year 2022. Claimant was never disciplined during her employment. No one complained to her about the work she performed.

12. Claimant never worked for anyone other than Employer and continued to be unable to work following her accident.

13. Other workers that had to clock in and out were the gardener and the handyman worker.

The injury:

14. On Monday, August 29, 2022 Claimant showed up at 7 a.m. She got her cart ready and went to the second floor.

15. Employer had purchased a popcorn machine that would make a mess all over the floor during the weekends. She went to first clean the theater lobby where the machine was, cleaning all the greasy machine parts. There was also construction happening in the little room. So the shelves, where there was glassware, were dusty. She got a ladder from an adjoining area. She cleaned the bottom two shelves first but could not reach the last shelf, so she went up two additional steps.

16. She did not know exactly what happened but she remembered falling off the ladder on her left knee. She rolled and attempted to get up. She could not and noticed that her knee was facing one way and her foot was facing the other way. She dragged herself from the little room out into the hallway on her bottom, propping herself against the hallway wall. She knew that the construction workers would be there soon because they needed to finish the work.

17. The painter arrived first. Claimant knew him and she called out to him. He ran to her and tried to help her up, saying that she had fallen but when Claimant told him she thought her leg was broken, he went to call an ambulance and Employer's wife. The EMTs arrived, gave her medication through an IV and took her to Parker Adventist Hospital.

18. Claimant was at the hospital for two days but they could not do the full surgery until the swelling went down. They placed some external rods on her knee.

19. She returned for the second surgery on September 8, 2022, when they placed two plates with six or seven screws into her knee area. Claimant has two scars. Both were approximately a 6 to 7 inches. One from the upper mid-calf through the knee on inner side of the leg. The second large scar was located on outer portion of the lower extremity through the knee including a large indention at the base with observable swelling and stippling. Both surgical scars are significant, keloid and disfiguring.

20. Claimant has been unable to return to work following her termination as she has not been able to walk well or bend her knee. For approximately six months she was

unable to put any weight on the leg and used a wheel chair that her children would help with. They also helped her with baths or showers. She started using a walker about six months after the last surgery, then progressed to a cane. The leg continues to get very swollen around the knee cap, especially when she walks greater than a block.

21. Dr. Fine performed the surgery and he sent her to physical therapy with Select Physical Therapy on Potomac. She has also had difficulty sleeping following the accident so Dr. Fine referred her to her personal care provider (PCP), Jennifer Olaf, M.D. at Strike Clinic in Aurora, to address the sleep problems. Dr. Olaf placed her on sleep medications. In addition, she had problems with controlling her glucose levels following the surgery, caused by the trauma of the injury, which was also handled by her PCP. She would see Dr. Olaf every two months. Dr. Fine provided her with restrictions but it had been some time since she had seen him because she was to complete her PT before returning to see him. As of the date of the hearing, she had another 10 sessions of PT to complete. She would attend PT twice a week.

22. All her medical care is being paid for by Medicaid because her health insurance stopped right after she was fired by Employer. The current Estate Manager, K.M., went to Claimant's house right after the accident to advise her that she was terminated because the current owner could not wait for her to heal, as they required immediate services, and she would be out too long.

Medical records:

23. Following the August 29, 2022 injury, Claimant was transported by ambulance to Parker Adventist Hospital. The paramedics (EMTs) were delayed in reaching the patient due to the gate to the property being locked. EMTs documented finding Claimant in the basement on the tile floor, leaning against the wall. Claimant reported that she worked on the property and was working when the accident happened. Claimant stated that she had been climbing on a step ladder and was about 4 feet off the ground, dusting a shelf, when she lost her balance, falling and hitting her knee on the tile floor. She had an obvious deformity of the left knee and lower leg below the knee cap. Claimant's pants were cut and the injury exposed. They administered an IV with Fentanyl. They splinted Claimant's left leg and secured her for transport to the ambulance. Claimant requested to be transported to Parker Adventist

24. On August 29, 2022, Samantha Mauck, M.D. documented that "The patient was at work, on a stepstool. She went to step down, and missed the step, falling and landing directly on a bent left knee. She did not strike her head. She immediately had severe pain in her knee and was unable to bear weight on it."

25. Seana L Benham, N.P. documented that:

> HLD who presented to the ED with Left leg pain after a fall from a ladder. Patient reports fall occurred this am while she was on a ladder trying to clean some bookshelves for her employer. She was on the same ladder the day before cleaning without any issues. This am when she got on the ladder; the side handles broke immediately throwing her forward while her knee was bent. She noted a deformity immediately and could not stand up. She scooted on the floor until she could get help.

26. They immediately ordered x-rays of the left knee and dosed Claimant with fentanyl, following which they ordered a CT of the knee and requested a consult from orthopedics. They also did multiple labs, which were abnormal, and an EKG. The records documented that Claimant was admitted with a left closed fracture of the tibial plateau after falling off of a ladder at work. They noted that she was a full time housekeeper at a "mansion." It was documented that Claimant was to go to the operating room.

27. The CT performed on August 29, 2022 showed:

> There is a comminuted proximal tibial plateau fracture. The fracture extends into the medial and lateral articular surfaces as well as the tibial spine. There is depression along the lateral tibial plateau articular surface by approximately 6 mm. Transversely oriented fracture extends into the tibial metaphysis. Sagittally oriented fracture extends distally into the tibial diaphysis. There is a nondisplaced fracture involving the anterior cortex of the proximal fibula.

There was also small joint effusion and surrounding soft tissue edema.

28. Dr. Landon R. Fine, the orthopedic surgical consultant, stated Claimant had a closed reduction with manipulation, external fixation and large joint aspiration evacuation hemarthrosis of the left knee on August 30, 2022. The preoperative diagnosis was a closed left bicondylar tibial plateau facture. He specifically noted that this was a staged procedure as the internal fixation could not be accomplished until the swelling and soft tissue recovered for the open reduction total fixation for definitive fixation.

29. Dr. Fine, documented that Claimant:

> …sustained a mechanical fall off a stepstool resulting in a left knee injury. Patient had swelling pain and inability to bear weight and as result was brought to the emergency department where imaging was taken demonstrating a bicondylar tibial plateau fracture that was complete displaced. Patient was initially treated in the knee immobilizer with ice and non-weightbearing. At the time of the consult the patient was in her hospital room she had pain that was 4 or 5 out of 10 that was relatively well controlled and tolerating the knee immobilizer. Patient swelling has progressed causing increasing pain but denies any loss of sensation motor function and states that pain is easily controllable at this time. This is patient's only injury or isolated injury.

30. During her hospital stay between August 29, 2022 and September 1, 2022 Lorette Johnson, M.D. at Centura Health documented that Claimant's glucose levels ranged from 186 to 382. The large majority of the voluminous medical records admitted into evidence involved discussion, monitoring and treatment of Claimant's trauma induced situational uncontrolled diabetes, development of sleep apnea and use of pain medications as well as a multitude of lab work up.

31. Claimant was also evaluated by physical therapy on September 1, 2022. Ms. Kristin M Jessen, PT, noted that Claimant was status post external fixation surgery and was to have an internal fixation surgery the following week. Claimant was demonstrating bed mobility, limited gait with a front wheel walker (FWW) and guard assist for stability and safety due to intermittent loss of balance with minimal assistance to steady. She noted Claimant was able to maintain non-weight bearing on the left lower extremity. She anticipated that Claimant would progress quickly post internal fixation and

recommended that Claimant be able to return home only with family support. She recommended a home health PT, a front wheel walker and a wheelchair.

32. Dr. Johnson used the AM-PAC (activity measure for post-acute care) to determine Claimant's mobility status and determined that, with assistance of family, she could be discharged safely so long as she did not use her FWW for distances greater than 50 ft.. He noted that she should use a wheel chair for most mobility requirements, with full non-weight bearing of the left lower extremity and continue to have an elevated leg. She was discharge with instructions, in addition to taking over the counter Tylenol and Motrin for pain, stool softeners and Miralax as well as reporting for surgery the following week.

33. On September 1, 2022 she was instructed to keep her left leg elevated as much as possible with a strict non-weight bearing restriction with the left leg by Dr. Johnson. The surgery was programed for September 6, 2022. The discharge note also documented the mechanism of injury. It stated as follows:

> [Claimant] is a 57 y.o. female who presented with a history of DM type II, HLD who presented to the ED with Left leg pain after a fall from a ladder. Patient reports fall occurred this am while she was on a ladder trying to clean some bookshelves for her employer. She was on the same ladder the day before cleaning without any issues. This am when she got on the ladder; the side handles broke immediately throwing her forward while her knee was bent. She noted a deformity immediately and could not stand up. She scooted on the floor until she could get help.

34. Claimant was admitted on September 7, 2022. Dr. Fine documented that Claimant was ready for surgical intervention. He discussed the risk and benefits as well as possible complications. He noted that swelling was still significant but believed that it was safe to proceed with the intervention. He recommended ice and elevation until they proceeded with the surgery.

35. The surgery was performed on September 8, 2022 for the external fixation removal and open reduction internal fixation of the bicondylar tibial plateau. Dr. Fine made a lateral side incision, lateral to the tibial plateau, allowing exposure to the fracture and after splitting through the iliotibial band, was able to expose the joint where the subtle meniscal arthrotomy was performed. He noted that the patient had a complex impacted lateral plateau fracture that required reopening the fracture site, tamping up the depressed segment of the joint, backfilling it and then securing the fracture. Claimant also had a displaced medial plateau fracture that was addressed elevating the meniscus with a tag stitch and completely separated from the rest of the bone, which allowed complete exposure of joint and the depressed middle lateral plateau segment. Dr. Fine secured multiple k wires to hold the joint. He placed the appropriate plates and secured with k wires and multiple screws including the locking screws. Following the procedure, he removed the external fixation. He obtained near anatomic reduction.

36. Films taken on September 8, 2022 showed at least nine or ten screws as well as two plates.

37. Victoria Franco, P.T. evaluated Claimant on November 22, 2022 noting Claimant had been referred to Select PT for treatment of the left lower extremity, status

post closed bicondylar fracture and surgical treatment with internal fixation. She noted that Claimant remained non-weight bearing since surgery and had a follow-up with Dr. Fine on December 5, 2022. She noted that Claimant fell off a ladder at work on August 29, 2022 from a height of approximately 4.5 feet. She noted that Claimant was a housekeeper and that she could not work at that time. She recommended treatment to reduce pain, improve balance, function, motor control, range of motion, strength, return to premorbid state and return to work. Ms. Franco noted that Claimant required skilled physical therapy to address the problems identified.

38. On December 27, 2022 Maeve Humphreys PT continued with therapeutic exercises, neuromuscular reeducation, manual therapy, gait training, self-care home management, electrical stimulation, heat/ice, traction, ultrasound, and dry needling.

Testimony of Prior Estate Manager, Mr. M.N:

39. Mr. M. N. is in financial services, was with the sheriff's department for 20 years and in addition was a real estate property manager. He had been a good friend of the prior owner of the property, and when the prior owner had decided to sell, he asked Mr. M.N. to manage the property in the interim. Mr. M.N. started working for the prior owner in approximately October, 2020. They had known each other for some time as his property was adjacent to the prior owner's property. His job was to deal with the real estate agent and prepare the property so that it would pass inspection. Both of the prior caretakers had decided to move and left the property around the October 2020 timeframe, so he started managing all aspects of the property, internally and externally. That encompassed managing the employees, including Claimant.

40. The property was sold to the current owner, Employer, on December 13, 2021. The property was a very large one of approximately 70 acres with an extremely large house that has approximately 58,000 square feet. It also had a separate large car barn that was two stories.

41. The current owner, Employer, also requested that Claimant stay on as a housekeeper.

42. Mr. M.N. continued on as the Estate Manager. He had a physical office in house, he managed all the vendors that came into the house, and managed Claimant. The housekeeper worked cleaning the house. Claimant had been there in the same capacity prior to the new owner, Employer, purchasing the property. The new owner asked that Claimant stay on because she knew the house. They then hired another woman that was also a housekeeper for a short period of time, a few months after Employer purchased the property. Mr. M.N. worked for Employer from the day he purchased the property on December 13, 2021 until June 7, 2022.

43. Both Claimant and the other housekeeper were expected to be on the job from 7:00 a.m. to 3:30 p.m. during the week, Monday through Friday. They each had a 30 minute lunch break in the middle of the day. They would clock in and out. At one point Employer upgraded the time clock.

44. Mr. M.N. was employed as contract labor, paid a flat rate and had no benefits. His situation was a little different than Claimant's. He was Claimant's immediate supervisor.

45. He had a conversation with Employer regarding what Claimant had been making in wages with the prior owner. He agreed to pay the same amount but he did not wish to deal with handling the day to day payroll taxes and withholdings. He decided that he would keep 25% of her wages and when he was to present her with her 1099 in January, he intended to also write Claimant a check for her so that she could pay her own taxes. Employer made the verbal agreement and a form was prepared but Employer simply declined to sign it as "he did not sign ANYTHING." Mr. M.N. authenticated the unsigned document identifying it as the document and agreement they had prepared and to which Employer agreed. Employer also paid for Claimant's insurance every single month as stated in the agreement. Mr. M.N. also wrote the checks from the household account for Claimant's premiums. At least through June 7, 2022, the document memorialized the agreement and was evidence that Claimant was an employee of Employer's.

46. Mr. M.N. stated that Claimant brought nothing to the job, in terms of supplies that were needed to perform the cleaning duties for the home. She did not bring any tools, mops, brooms, or other equipment. She was not required to wear a uniform while she was there. Neither was she free to come and go as she please. She was a salaried employee and was receiving a W-2 while she worked for the prior owner. Then Employer agreed to provide her with a 1099 because he did not want to get into paying for taxes. He stated that there should have been a clock in/out log. Both the prior and current owner insisted that Claimant clock in and out. The clock was in the laundry room first and was later moved into the small room where Claimant would take her breaks, right across from the laundry room. While he was the estate manager for Employer, Employer did not have any "official" W-2 employees. Claimant was not trained because she had already been trained as she had been there for 18 years, working 40 hours a week. He only knew Claimant to have worked for Employer.

47. Mr. M.N. terminated his arrangement with Employer because Employer became very difficult. He only spoke with the current Estate Manager, Ms. K.M. once and offered to be of any assistance needed for her transition.

Testimony of Current Estate Manager, Ms. K.M.:

48. Ms. K.M. worked for Employer as the Estate Manager since July 2022, for almost a year at the time of the hearing. She worked on site at Employer's property. She managed employees and vendors. She did hiring, training, termination, managed vendors and oversaw the assistant estate manager. She had a background in hotel management for a couple of hotels. She had since been working for private families, for the last 10 to 15 years.

49. She knew Claimant, who was providing housekeeping and cleaning for Employer. When Ms. K.M. started working for Employer, Claimant was already working for Employer. She denied that Claimant had set hours to work, but asserted Claimant had her own schedule. She also denied that Claimant clocked in or clocked out, though

agreed that both the landscaper and the handyman did, in fact, clock in and out. She denied that she provided Claimant with any instructions or training. She also denied that she was able to locate any personnel information of any individual that was working for Employer when she started her employment with Employer.

50. She stated that Claimant stopped providing any services for Employer the day she was hurt and denied that she had terminated Claimant. She was hurt and never returned to work for Employer. She did state that Employer no longer needed her services. She stated that as of November 2022 everyone working on the property was on payroll with W-2s. She was the one that implemented this change with Employer's permission. She never provided any tax information to Claimant.

51. Ms. K.M. stated that she never reprimanded Claimant and all supplies were provided by Employer. Claimant was not expected to bring any supplies or equipment to perform her work.

Wage information:

52. Claimant was issued checks in the amount of $3,769.00 on the 28th of each month, paid directly to Claimant in her own name. The checks were paid consistently from January 2022 through August of 2022.

53. The Employment Contract showed that Claimant was being paid $45,000.00 in an annual salary plus medical and dental insurance at the cost of $7,031.00 a year for a total of $52,031.00 per year. It noted that Employer would withhold 6,800.00 for taxes due from her 2022 income and would be paid on January 31, 2023 when she would be presented with a 1099. It also noted that Claimant was entitled to a two week vacation.

54. A monthly pay of $3,769.00 times twelve months is $45,228.00. When this is added to the $6,800.00 being withheld and the $7,031.00 in medical/dental benefits costs, it totals to a yearly income of $59,059.00, (not an income of $52,031.00 as noted in the agreement).

Ultimate Findings:

55. As found, Claimant has shown that she was performing services for Employer for pay. As found Claimant worked 40 hours a week, five days a week performing housekeeping duties and was an employee.

56. As found, Respondents have failed to show by a preponderance of the evidence that Claimant was an independent contractor. Claimant was under the control and direction of Employer at all times. Claimant did not have control of her schedule. She reported to work Monday through Friday at 7:00 a.m. and left work at approximately 3:30 p.m. each day. She would clock in and out and would only take a designated break each day. This is the reason the Estate Manager changed the clock-in system.

57. Claimant was not "customarily engaged in an independent trade or business." She had no business related to housekeeping activities for any other employer, and never performed similar services for anyone else. She worked exclusively

for employer, and had been cleaning the same mansion for over 19 years. Claimant's tasks for each day were dictated by Employer and there was no persuasive evidence Claimant had any control over the work assignments. Claimant credibly testified that under the prior employer, she knew the job and performed a scheduled cleaning. When hired by the new employer, the tasks, household cleaning schedule and order of cleaning the individual areas of the home were changed.

58. As further found, Employer paid Claimant a designated monthly salary, and additionally paid health and dental benefits. Further, Employer retained Claimant's taxes from her pay. As found, there was no persuasive evidence of any limitation on Employer's ability to terminate Claimant's services at will. In fact, when Claimant was injured, she was immediately terminated because Employer decided that they needed another housekeeper immediately and could not await Claimant's recovery. Further, Employer also terminated Claimant's health and medical benefits at that time as well. This was confirmed by the current Estate Manager. As found, the reason the current Estate Manager did not provide greater than minimal training was because Claimant had been cleaning the same mansion for approximately 19 years and was hired by Employer because of her intimate knowledge of how to clean and attend to the housekeeping duties of this particular mansion. As found, Employer provided all tools and cleaning supplies Claimant needed to complete her housekeeping work. Claimant did not bring anything to the mansion with which to complete her duties as a housekeeper.

59. As found, Claimant was expected to work daily, Monday through Friday from 7:00 a.m. to 3:30 p.m. each day. Claimant was credible and persuasive that this was her schedule and Employer required her to be at the mansion during these times. They installed and kept a timekeeping system to make sure that Claimant adhered to this schedule. As found, Employer paid Claimant personally and not in the name of any business. Employer never sent Claimant a 1099 or any other appropriate tax documentation consistent with being an independent contractor. Employer did not even send her a W-2 for 2022. Lastly, as found, Employer had no independent contractor agreements or similar documentation, consistent with the statutory requirements, to corroborate the assertion that Claimant and "all" Employer's employees were independent contractors. Claimant is found credible and persuasive over the contrary testimony of the current Estate Manager, Ms. K.M.

60. As found, Claimant was an employee not subject to the domestic worker exception. Claimant worked full time, 40 hours a week, five days a week. Respondents have failed to show that Claimant was subject to the domestic worker exception.

61. As found, Claimant was cleaning the theater room lobby area on August 29, 2022, when she climbed a step ladder to clean some glassware shelves and fell off the ladder, injuring her left lower extremity. Claimant was in the course and scope of her employment with Employer when the accident happened. Claimant has proven by a preponderance of the evidence that her claim is compensable.

62. As found, Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits that are authorized, reasonably necessary and related to the accident of August 29, 2022 and that she sustained disabling injuries to her left lower extremity that required surgical repair. Claimant was appropriately taken for emergent care to Parker Adventist Hospital by an ambulance service. These providers

are authorized, and the care she received was reasonably necessary and related to the injuries she sustained on August 29, 2022. Further, Claimant was treated by Dr. Fine, her orthopedic surgeon who referred her to her personal physician Dr. Olaf for sleep hygiene and control of her trauma induced uncontrolled diabetes as well as physical therapy, at Select Physical Therapy, who are found authorized, and the treatment that they and any other providers within the chain of referral provided was reasonably necessary and related to the injury.

63. As found, Claimant has proven that her average weekly wage is $1,135.75,[1] including the cost of medical and dental benefits, at the time of the work related August 29, 2022 injury.

64. As found, Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from August 30, 2022 until terminated by law. This is based on the fact that she was hospitalized and underwent surgeries on August 30, 2022 and September 8, 2022. Following this she was non-weight bearing for an extended period. The last records submitted noted that Claimant continued to have limitations and required assistance of family members to carry out activities of daily living. This is also confirmed by Claimant who stated that she continued to be unable to return to work.

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

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is

[1] Wages were calculated as the total earnings of $59,059.00 divided by 52 weeks.

not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

B. Services for Pay:

Section 8-40-202(2)(a) provides that "any individual who performs services for pay for another shall be deemed to be an employee . . . unless such individual is free from control and direction in the performance of the service . . . [and] is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." The claimant has the initial burden to prove they suffered an injury while performing services for another for pay. If the claimant carries that burden, the burden shifts to the employer to prove the claimant was an independent contractor. *Cordova v. Artistry Drywall*, W.C. No. 4-653-327 (April 10, 2006). As found, Claimant has shown that she was not free from her Employer's control and direction. Claimant reported to work each day, Monday through Friday from 7:00 a.m. to 3:30 p.m., taking only those breaks that she was allowed and performing the services her Employer dictated in the manner that they dictated. Claimant has shown that she was deemed an employee under the circumstances in this matter pursuant to the statutory definition.

C. Employee vs. Independent Contractor

The Act creates a balancing test to overcome the statutory presumption of employment and establish independence. *Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1998). Section 8-40-202(2)(b)(II) sets forth several factors the General Assembly considers particularly "important" in distinguishing employees from independent contractors. *Industrial Claim Appeals Office v. Softrock Geological Services Inc*., 325 P.3d 560, 565 (Colo. 2014). No single factor is dispositive, and the determination must be based on the totality of evidence. *Id*.

After considering the totality of circumstances, including the factors enumerated in Sec. 8-40-202(2)(b)(II), the ALJ concludes Claimant was an employee at the time of her accident. Some of the most significant factors are: (1) Claimant was not "customarily engaged in an independent trade or business." She had no business related to housekeeping activities for any other employer, and never performed similar services for anyone else. She worked exclusively for employer cleaning the same mansion for over 19 years. (2) Claimant's tasks for each day were dictated by Employer and there was no persuasive evidence Claimant had any control over the work assignments. Claimant credibly testified that under the prior employer, she knew the job and performed a scheduled cleaning. When hired by the new employer, the tasks, household cleaning schedule and order of cleaning the individual areas of the home were changed. (3) Employer paid Claimant a designated monthly salary, which included health and dental benefits. And Employer retained Claimant's taxes from her pay. (4) There was no persuasive evidence of any limitation on Employer's ability to terminate Claimant's services at will. In fact, when Claimant was injured, she was immediately terminated because Employer decided that they needed another housekeeper immediately and could not await Claimant's recovery. Further, Employer also terminated Claimant's health and medical benefits at that time. This was confirmed by the current Estate Manager. (5) The reason the current Estate Manager did not provide greater than minimal training was because Claimant had been cleaning the same mansion for approximately 19 years and was hired by Employer because of her intimate knowledge of how to clean and attend to the housekeeping duties of this particular mansion. (6) Employer provided all tools and cleaning supplies Claimant needed to complete her housekeeping work. Claimant did not bring anything to the mansion with which to complete her duties as a housekeeper. (7) Claimant was expected to work daily from Monday through Friday from 7:00 a.m. to 3:30 p.m. each day. Claimant was credible and persuasive that this was her schedule and Employer required her to be at the mansion at this time. They installed and kept a timekeeping system to make sure that Claimant adhered to this schedule. (8) Employer paid Claimant personally and not in the name of any business. Employer never sent Claimant a 1099 or other appropriate tax documentation consistent with being an independent contractor. He did not even send her a W-2 for 2022. (9) Employer had no independent contractor agreements or similar documentation to corroborate the assertion that Claimant and "all" its employees were independent contractors at the time of the injury. The only documentation was the draft agreement where Claimant was to be paid a certain amount a month, was entitled to vacation and medical benefits and that the amount for her taxes would be withheld, all of which points to Claimant being an employee, not an independent contractor.

Claimant was not "contracted" to perform any specific job or series of jobs but was hired on an open-ended basis to perform whatever tasks Employer designated, in this

case, the cleaning of a home that was approximately 58,000 square feet. In the estimation of this ALJ this kind of home is equivalent to a small hotel or a large size bed and breakfast. Claimant reported to work at Employer's mansion with no prior negotiations about cost or the scope of work and was paid a designated salary for the work she was assigned. This arrangement was far more akin to an employer-employee relationship than an independent contractor situation.

Employer was clearly motivated to avoid the regular payment of payroll taxes, and other requirements associated with having employees and despite that, Employer continued to pay for Claimant's continuing costs of medical and dental insurance. Employer specifically retained a portion of Claimant's salary for the sole purpose of paying for taxes at the end of the year. While Employer may have intended to provide those retained wages to Claimant so that Claimant could make the payment, there was no indication that Employer made that payment in January 2023 for the 2022 year. The parties' mutual willingness to avoid payroll taxes and other employment-related obligations is not dispositive of whether Claimant was, in fact, an independent contractor. The preponderance of persuasive evidence shows Claimant was Employer's "employee" working as a housekeeper, cleaning this vast mansion on a daily basis. As found, Claimant was an employee not an independent contractor.

D. Domestic Worker:

Section 8-40-302(4) provides that the Workers' Compensation Act is:

> … not intended to apply to employers of persons who do domestic work … or similar work about the private home of the employer if such employers have no other employees subject to ... [the Workers' Compensation Act] and if such employments are not within the course of the trade, business, or profession of said employers. This exemption shall not apply to such employers if the persons who perform the work are regularly employed by such employers on a full-time basis. For purposes of this subsection (4), 'full-time' means work performed for forty hours or more a week or on five days or more a week.

"Domestic work" is not defined in the Act. *Connor v. Zelaski*, 839 P.2d 501 (Colo. App. 1992). The Act provides that the Act is not intended to apply to "employers of persons who do domestic work," if such an employer has no other employees and if the employment is not within the course of the trade, business, or profession of the employers. This limitation upon the scope of the term does not apply, however, if the domestic worker is employed "on a full-time basis." And, for this purpose, a "full-time" worker is one who performs services "for forty hours or more a week or on five days a week." Thus, an employer who employs a domestic worker for 40 or more hours or five or more days per week must secure disability compensation for those workers, while an employer of a domestic worker less regularly employed need not do so. *Naiden v. Epps*, 867 P.2d 215 (Colo. App. 1993)

The characterization of the employment relationship depends on the particular facts of the case and is a question of fact for resolution by the AL J. *Kalmon v. Industrial Commission,* 583 P.2d 946 (Colo. App. 1978). *Victoria Roop v I.C.A.O*, WC No. 4-384-408 (November 9, 1999). Further, where the evidence is subject to conflicting inferences, it is the ALJ's sole province to determine the inference to be drawn. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). As found, Claimant was clearly

hired as an employee to work full time, starting each day at 7:00 a.m. and ending at 3:30 p.m., Monday through Friday. She was allotted two weeks' vacation each week and provided medical and dental insurance. She was also not the only employee as another housekeeper was working and was paid each week and had to clock in and clock out. Other workers that also had to do this were the gardener and the handyman. Because Claimant was a full time employee, she does not fall within the exception of Sec. 8-40-302(4), C.R.S. as a domestic worker.

E. Compensability:

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (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. Sec. 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 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); *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 is 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).

As found, from the totally of the credible and persuasive evidence presented at hearing, Claimant has proven by a preponderance of the evidence that she was at work when she fell from the ladder on August 29, 2022 and injured her left lower extremity. Claimant was in the performance of her housekeeping duties when she used the ladder to reach the last shelf of glassware to remove the dust caused by the construction work. Claimant had immediate onset of pain to the extent that she could not get up and had to drag herself into the hall to await someone to rescue her. Her co-worker, a painter, called 911. An ambulance arrived and EMTs assessed that she had a broken knee and splinted

her left leg, and administered pain medication before taking her to the hospital. All these facts and events amount to sufficient proof and nexus that Claimant was injured in the course and scope of her employment, and that it was more likely than not that the fall onto her left lower extremity caused her need for benefits. Claimant has shown that the claim is compensable.

F. Medical Benefits:

Once a claimant has established the compensable nature of her work injury, she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of 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*.

Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant required immediate attention, which she received. First, by ambulance staff then hospital staff and lastly care to cure and relieve her of the severe injury to her lower extremity that caused the need for two surgeries and rehabilitation, and included loss of sleep and trauma induced uncontrolled diabetes. Claimant has proven that it was more likely than not that the need for medical care was caused by the August 29, 2022 accident while working for Employer. As found, the ambulance provider, Parker Adventist, Dr. Fine, Dr. Olaf and any providers within the chain of referral were authorized, and the care reasonably necessary and related to the August 29, 2022 work injury.

G. 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 statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. 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(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 entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007); *Campbell v. IBM Corp*., *supra*. As found, the cumulative evidence shows that Claimant's fair computation of her average weekly wage is $1,135.75, which includes the cost of medical benefits and is based on the persuasive and credible evidence presented in the contract of hire as verified by the prior Estate Manager's testimony, the check stubs and Claimant's testimony.

H. Temporary Disability Benefits:

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sec. 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). Sec. 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic, supra*, at 833.

As found, Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from August 30, 2022 until terminated by law. This is based on the fact that she was hospitalized and underwent surgery on August 30, 2022. Following this she was non-weight bearing for an extended period. The last records submitted noted that Claimant continued to have limitations and required assistance of family members to carry out activities of daily living. This is also supported by Claimant's credible testimony that she continued to be unable to work.

From August 30, 2022 through the day of the hearing of June 6, 2023, at the rate of $757.17 per week, Claimant was owed $30,394.97. Pursuant to the statutory interest

mandated by Sec. 8-43-410(2), C.R.S., Claimant is owed interest on all benefits that were not paid when due. Interest was calculated on the Division's benefits calculator as follows:

[Redacted as interest rate calcuator including claimant's name, hereinafter RI]

As found, Claimant was owed a total of $31,300.99 through the date of the hearing of June 6, 2023 and continues to be owed benefits until terminated by law, including interest on benefits that were not paid when due.

Respondents shall continue to pay TTD until terminated by law and interest on benefits not paid when due.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has established, by a preponderance of the evidence, that she sustained a compensable injury to her left lower extremity including the sequelae of sleep disorder and situational trauma induced uncontrolled diabetes, on August 29, 2022.

2. Respondent is liable for Claimant's treatment with the ambulance provider, Parker Adventist, Dr. Fine and Dr. Olaf, and all treatment based upon referrals therefrom, including but not limited to her care/surgery with Dr. Fine and Select Physical Therapy.

3. Claimant's average weekly wage is $1,135.75 and her temporary disability rate is $757.17.

4. Respondents shall pay temporary total disability benefits beginning August 30, 2022 and ongoing until terminated according to law at the rate of $757.17 per week.

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

6. Respondents shall pay past due benefits, which includes interest, through the hearing of June 6, 2023 in the amount of $31,300.99. TTD benefits shall continue thereafter until terminated by law and interest shall continue for all benefits not paid when due.

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

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

section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 24th day of August, 2023.

Digital Signature

By: _____
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant established by a preponderance of the evidence that ketamine infusions and a trial spinal cord stimulator recommended by Vanston Masri, M.D., are deemed authorized by operation of law for Respondents' failure to comply with W.C.R.P. 16-7-1.

2. Whether Claimant established by a preponderance of the evidence that ketamine infusions and a trial spinal cord stimulator recommended by Dr. Masri are reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

FINDINGS OF FACT

1. Claimant sustained an admitted left hip injury on June 10, 2020 arising out of the course of her employment with Employer. (Ex. 3).

2. Claimant reported progressive hip and groin pain, and underwent left hip arthroscopy and labral reconstruction surgery on September 1, 2020 performed by Brian White, M.D. (Ex. 20). Following surgery, Claimant developed pain in the left leg extending to her foot and ankle, numbness and paresthesias in the left foot and ankle, and difficulties with dorsiflexion and plantar flexion of the left foot (*i.e.*, foot drop). Post-surgically, Claimant also developed a deep vein thrombosis, which required anticoagulant therapy.

3. On October 9, 2020, Dr. White opined that her symptoms sounded like a early form of chronic regional pain syndrome (CRPS), and recommended Claimant see Haley Burke, M.D. to evaluate Claimant for potential CRPS. (Ex. C).

4. Claimant saw Dr. Burke on October 21, 2020. Dr. Burke found Claimant's symptoms "suggestive of a CRPS-type picture however are somewhat atypical given the degree of weakness that she is endorsing along with the severe and acute nature of her symptoms." Dr. Burke prescribed medications, including Nucynta, which Claimant reported as reducing her pain. In November 2020, Dr. Burke referred Claimant for an EMG study of her left leg which demonstrated a severe neuropathy of the left peroneal nerve. (Ex. D & E).

5. On December 10, 2020, Dr. Burke indicated that if Claimant's symptoms had not improved, she would consider autonomic testing for CRPS. Dr. Burke also recommended MRIs of Claimant's left knee and ankle. (Ex. D). The MRIs were performed on January 5, 2021, and were interpreted as suggesting swelling in or around the peroneal nerve. (Ex. D).

6. Although autonomic testing was not performed, Dr. Burke diagnosed Claimant with CRPS Type I of the left lower extremity on January 13, 2021[1]. She also noted that it did not appear that Claimant's symptoms were the result of her September 1, 2020 hip surgery, and discussed performing a peroneal nerve steroid injection to address the swelling. (Ex. D).

7. By February 10, 2021, Claimant reported to Dr. Burke experiencing constant dull aching in the dorsal foot, ankle, and calf, reporting her pain at a level of 2/10 to 4/10. Claimant also reported substantial improvement in her pain levels, and gradual improvement in strength and motion of her foot. Dr. Burke indicated she was uncertain how Claimant's peroneal nerve inflammation began. (Ex. D).

8. In March 2021, Dr. Burke noted that Claimant's severe pain had resolved, but she continued to have pain in the knee and ankle, numbness in the left lateral knee radiating to the shin, and mild improvement in her foot drop. Dr. Burke felt a steroid injection would not likely be successful, given the amount of time Claimant's symptoms had persisted, and recommended an amniotic allograft to treat the peroneal nerve. Authorization for the recommended allograft was denied, and the treatment was not pursued. (Ex. D).

9. On June 10, 2021, Dr. Burke indicated Claimant's left knee pain and foot drop persisted. She noted mild cyanosis (discoloration) of the left foot, and diaphoresis between the toes with an "icy foot and ankle." She indicated that Claimant was a suitable candidate for a lumbar sympathetic block and superficial peroneal block. (Ex. D).

10. On July 27, 2021, Claimant saw Lynn Parry, M.D., a neurologist for an independent medical examination (IME) (apparently at Claimant's request). Dr. Parry diagnosed Claimant with CRPS Type II, and noted that it can have all the same autonomic characteristics as CRPS Type I, such as changes skin color and temperature. Dr. Parry further opined that Claimant did not have CRPS Type I, because she did not demonstrate characteristic findings and had a significantly abnormal EMG which accounted for her paresthesias, pain, weakness, and sensory loss. Based on this, Dr. Parry opined that Claimant did not require testing for CRPS Type I, because the CRPS Type II diagnosis was "clear." (Ex. 11).

11. On August 31, 2021 and September 21, 2021, Dr. Burke performed lumbar sympathetic nerve blocks and a superficial peroneal nerve block. (Ex. 9). At her follow up appointment on October 5, 2021, Claimant reported at least a 60% improvement in pain, and continued ankle weakness, but an improved ability to walk since the injections.

[1] Two types of CRPS exist. CRPS I is "a syndrome that usually develops after an initiating noxious event, is not limited to the distribution of a single peripheral nerve, and appears to be disproportionate to the inciting event." WCRP 17, Ex. 7, § C. CRPS II "is the presence of burning pain, allodynia, and hyperpathia usually in the hand or foot after partial injury to a nerve or one of its major branches. Pain is within the distribution of the damaged nerve but not generally confined to a single nerve." *Id*.

Claimant reported her pain was “almost non-existent” at a level of 0.5/10. Dr. Burke indicated if Claimant’s symptoms regressed, a third block may be considered. (Ex. 9).

12. Claimant returned to Dr. Burke on December 28, 2021, reporting that she had continued numbness in the foot, “some days without pain” in her left leg, and other days she had spasms in her foot and ankle. Claimant’s current pain was 1.5/10 up to 4/10 on a “bad day.” Claimant reported being unable to stand, walk or sit for more than one hour, and reported substantially worsened symptoms with any activity level. For reasons that were not explained, Claimant did not pursue a third sympathetic block. (Ex. D).

13. In March 2022, Claimant was referred to neurosurgeon Giancarlo Barolat, M.D., for evaluation of other pain management options. Claimant reported a pain level of 3/10 up to 10/10. Dr. Barolat noted that Claimant had gone through extensive treatment, which had not provided lasting relief of her symptoms, and opined that Claimant was an appropriate candidate for a trial spinal cord stimulator and ketamine infusions, and referred Claimant to Vanston Masri, M.D., for evaluation and consideration of these approaches. (Ex. G).

14. Claimant saw Dr. Masri on May 2, 2022, and has not seen him since. Dr. Masri was admitted as expert in anesthesiology and pain management and testified by deposition in lieu of live testimony. Dr. Masri testified he saw the Claimant one time, and that his exam of the Claimant was consistent with CRPS. He testified he recommended ketamine infusions and neuromodulation because Claimant had failed conservative treatment, including physical therapy,[2] rehabilitation, medication management and sympathetic blocks. He described neuromodulation as “first-line treatment” for individuals with refractory CRPS. He indicated it was atypical to prescribe ketamine infusions, and that he typically recommended ketamine infusions for patients who had failed other aspects of CRPS treatment. He testified that ketamine is sometimes used in conjunction with neuromodulation, and at times is used to address ongoing symptoms that exist once neuromodulation is in place. He further testified that in some patients, neuromodulation alone may provide sufficient relief of CRPS symptoms. Dr. Masri testified that patients with 3/10 pain levels can benefit from neurostimulation.

15. When Dr. Masri examined Claimant in May 2022, he recommended that Claimant undergo neuromodulation, but did not specify the specific type. (Ex. H). He later recommended and requested authorization for a spinal cord stimulator, rather than a peripheral stimulator, because that was the approach the Claimant chose. He opined that differentiation between CRPS type I and type II is not necessary because his treatment recommendations would remain the same.

16. On August 29, 2022, Dr. Masri faxed a request for authorization to Insurer seeking authorization of a spinal cord stimulator and ketamine infusions. The request for authorization was faxed to Insurer, and attached medical records in support of the request. (Ex. 4 & 10). Insurer did not respond to the request for authorization until January

[2] From September 2020 through October 2021, Claimant underwent approximately one year of physical therapy with Panther Physical Therapy for treatment of both her hip pain and the pain in her left distal leg. (Ex. 16).

20, 2023. At that point Insurer, through counsel, notified Dr. Masri that the request for authorization of a spinal cord stimulator and ketamine infusions had been received, and that the request was "not a properly formatted request" under the WCRP, without further explanation. Insurer indicated an IME was pending with Barton Goldman, M.D., and that the results of the IME would be forwarded to him, regarding whether authorization would be granted or denied. (Ex. 5). Dr. Masri testified he did not receive Dr. Goldman's IME report until his June 21, 2023 deposition.

17. On October 25, 2022, Dr. Parry, M.D., reexamined Claimant in follow up to her prior IME. Dr. Parry noted that Claimant's examination was similar to her July 2021 examination, with some improvement in her foot drop. She noted that Claimant had not done well on a variety of medications, and had a limited response to sympathetic and peroneal nerve blocks. She opined that Claimant has a chronic pain syndrome not likely to respond to sympathetic blocks. Dr. Parry opined that Claimant is a candidate for a trial of spinal cord stimulation, and that it is unlikely that ketamine injections would provide long-term relief. She also indicated Claimant's long-term treatment may include management on Nucynta, and long-term access to physical therapy. (Ex. 11)..

18. In January 2023, Dr. Goldman performed an IME of Claimant at Respondents' request. Dr. Goldman issued a report dated February 27, 2023 (Ex. A), and testified at hearing. Dr. Goldman was admitted as an expert in physical medicine and rehabilitation. Based on his examination of Claimant and review of medical records, Dr. Goldman opined that Claimant meets the diagnostic criteria for a partially sympathetically mediated left lower limb CRPS Type II, associated with a chronic common peroneal neuropathy which may or may not meet criteria for CRPS Type I . He agreed the diagnosis is causally-related to Claimant's June 10, 2020 work injury, and that Claimant had not yet reached maximum medical improvement. Dr. Goldman opined that further diagnostic work up is needed to determine Claimant's appropriate treatment option for her work-related conditions. (Ex. A).

19. Dr. Goldman addressed the reasonableness and necessity of the proposed treatment at issue (*i.e.*, ketamine infusions and spinal cord stimulator ("SCS")). He opined that ketamine infusions are considered experimental and not recommended as a preliminary treatment for CRPS, and that there is not good data showing significant effectiveness of ketamine for chronic pain.. Thus, he opined that ketamine infusion is not reasonable or necessary. In Dr. Goldman's opinion, the simultaneous use of ketamine infusions and an SCS is also not reasonable because the use of ketamine would make it difficult to determine the effectiveness of the SCS, because the source of any symptom relief could not be differentiated.

20. Dr. Goldman explained there are several types of neuromodulation, including SCS and peripheral nerve stimulation. With respect to an SCS. Dr. Goldman opined that a trial SCS is not reasonable treatment of Claimant's condition for several reasons. Dr. Goldman testified that SCS is a broader type of neuromodulation that may be less effective for CRPS affecting a limb, as in Claimant's case. He opined that a trial SCS would be premature because Claimant's diagnosis has not been sufficiently defined. He indicated that with peripheral common peroneal neuralgia and/or CRPS Type II, Claimant has a

potentially better prognosis through peripheral nerve stimulation than SCS, and believes Claimant should undergo additional testing to confirm the diagnosis and identify an appropriate pathway for treatment. Dr. Goldman also recommends that Claimant's symptoms be managed through medication, including Nucynta, gabapentin, ibuprofen, and acetaminophen.

21. Dr. Goldman opined that neuromodulation is likely to be of limited benefit to Claimant. He testified that with neuromodulation, most patients do not achieve complete pain relief, and that the best results typically achieved are to reduce pain to a level of 4/10. Claimant has consistently reported her pain levels at approximately 2-4/10. Because Claimant's existing baseline pain levels are at or below those levels, he does not anticipate that the use of neuromodulation would improve Claimant's condition. He also opined that neuromodulation carries a risk of worsening Claimant's CRPS symptoms in the left leg.

22. Claimant testified at hearing that she has not yet received a spinal cord stimulator or ketamine infusions. Claimant has resided in Texas since April 2023. She has not seen a physician in Texas for her work-related injuries. Claimant has difficulty traveling and has not returned to Colorado for further evaluations, although Respondents have apparently requested she do so.

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

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

"Authorization" and Compliance with WCRP 16

Claimant contends that Respondents failed to timely deny Dr. Masri's August 29, 2022 request for authorization, and thus the ketamine infusions and trial spinal cord stimulator are "authorized" by operation of WCRP 16-7 (E). WCRP 16-7(B) provides that a payer denying a request for prior authorization must do so within seven business days of the completed request. WCRP 16-7 (E) provides "Failure of the payer to timely comply in full with section 16-7(A), (B), or (C) shall be deemed authorization for payment of the requested treatment unless the payer has scheduled an independent medical examination (IME) and notified the requesting provider of the IME within the time prescribed for responding set forth in section 16-7 (B)."

"'Authorization' and the reasonableness of treatment are separate and distinct issues. *Repp v. Prowers Med. Center*, W.C. No. 4-530-649 (ICAO Sep. 12, 2005), *citing One Hour Cleaners v. Indus. Claim Appeals Office, 914 P.2d 501* (Colo. App. 1995). "Authorization" refers to the physician's legal status to treat the injury at the respondents' expense, and not the particular treatment provided. *Popke v. Indus. Claim Appeals Office*, 797 P.2d 677 (Colo. App. 1997); s*ee also*, *One Hour Cleaners*, 914 P.2d at 504 ("authorized medical benefits" refers to legal authority of provider to deliver care). Treatment provided by an "authorized treating physician" is "authorized." *Bray v. Hayden*

School Dist. RE-1, W.C. No. 4-418-310 (ICAO Apr. 11, 2000). "However, treatment is not compensable unless it is also 'reasonable and necessary' to cure or relieve the effects of the industrial injury." *Id*.

Dr. Masri submitted a request for authorization on August 29, 2023. Insurer did not respond to the request until January 30, 2023, well outside the time for response under WCRP 16-7. Contrary to Claimant's position, however, a respondent's failure to timely deny authorization of treatment under WCRP 16 does not render treatment that has not yet been provided compensable. Instead, a respondent's default under Rule 16 only requires them to provide the treatment until the issue is resolved by an administrative law judge following a hearing. *See Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (ICAO May 10, 2007). Although Dr. Masri sought authorization of the ketamine infusions and trial spinal cord stimulator in August 2022, the treatment has not been provided, and Respondents are entitled to challenge the reasonableness, necessity, and relatedness of the proposed treatment. Accordingly, Respondents' compliance or non-compliance with Rule 16, and whether Dr. Masri's request was "not properly formatted," (as Respondents argue) are moot issues.

Neuromodulation (Spinal Cord Stimulator)

Claimant has established by a preponderance of the evidence that neuromodulation is reasonable and necessary to cure or relieve the effects of her industrial injury.

The evidence establishes that Claimant meets the diagnostic criteria for CRPS Type II. Whether Claimant also has CRPS Type I is undetermined. Claimant has undergone extensive treatment to address her symptoms, including multiple sympathetic blocks, physical therapy, and medication management. Although Claimant has had moderate improvement in her symptoms, they have not resolved and continued to affect her function.

Although Dr. Goldman's testimony was credible, his primary opinion is that Claimant's condition should be further investigated and treated with alternative modalities before pursuing neuromodulation. He also opined that it has not yet been determined whether Claimant would benefit more from SCS or peripheral nerve stimulation. In contrast, Dr. Parry opined that Claimant does not require further evaluation because her diagnosis is clearly defined, and opined that Claimant was an appropriate candidate for SCS. Additionally, Dr. Barolat opined that Claimant was an appropriate candidate for SCS. Dr. Masri testified that he considered both options and elected to request authorization for SCS, based on the Claimant's election to pursue that course of treatment. He further opined that his treatment recommendation would not be different if Claimant had CRPS Type I versus Type II. Given the extensive treatment Claimant has already undergone, the lack of significant improvement or resolution of her CRPS symptoms, and the fact that her EMG demonstrated a peroneal nerve injury, the ALJ finds persuasive Dr. Parry's opinion that Claimant does not require further testing. Based on the totality of the evidence, the ALJ finds it more likely than not that a trial of neuromodulation is reasonable and necessary to cure or relieve the effects of Claimant's

industrial injury. Whether Claimant receives a spinal cord stimulator or peripheral nerve stimulation is a medical decision for Claimant's authorized treating physicians.

Ketamine infusions

Claimant has failed to establish by a preponderance of the evidence that ketamine infusions are reasonable and necessary to cure or relieve the effects of her industrial injury.

The ALJ finds persuasive the opinions of Dr. Parry and Dr. Goldman that ketamine infusion is not a reasonable or necessary treatment for Claimant's condition. Dr. Goldman credibly opined that ketamine is considered experimental, not recommended as a preliminary treatment for CRPS, and that there is not good data showing significant effectiveness of ketamine for chronic pain. Similarly, Dr. Parry opined that ketamine was not likely to provide long-lasting relief for Claimant's condition.

Dr. Masri's testimony regarding the rationale for his recommendation of ketamine was not persuasive. He testified he requested authorization of ketamine because Claimant elected to pursue that course of treatment, and that it can be used in conjunction with neuromodulation, but otherwise offered no cogent medical basis for using both treatments in Claimant's case at this time. The ALJ also finds persuasive Dr. Goldman's testimony that concurrent use of ketamine and neuromodulation is not appropriate (at least in the trial stage) because one cannot assess the effectiveness of neuromodulation. Dr. Masri's testimony that ketamine is atypical, and that neuromodulation may, by itself, resolve Claimant's symptoms raises doubt as the need to treat Claimant with both modalities simultaneously. Based on the totality of the evidence, ketamine infusions are neither reasonable nor necessary at this time.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of neuromodulation is granted.

2. Claimant's request for authorization of ketamine infusions 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: August 24, 2023

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

ISSUES

I. Whether Claimant has shown by a preponderance of the evidence that she was injured in the course and scope of her employment with Employer on December 20, 2022.

IF CLAIMANT HAS PROVEN COMPENSABILITY, THEN:

II. Whether has proven by a preponderance of the evidence that she is entitled to medical benefits that are reasonably necessary and related to the injury.

III. Whether Claimant has shown what her average weekly wage is.

IV. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary disability benefits beginning December 2022 until terminated by law.

IF CLAIMANT IS ENTITLED TO TTD, THEN:

V. Whether Claimant has shown that she is entitled to reinstatement of leave.

FINDINGS OF FACT

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

1. Claimant has worked for Employer from August 1, 2001, to the present. She has held her current role with Employer as a Corrections Case Manager I from November 1, 2008, to the present. This job is primarily a sedentary, office job, meeting with offenders. Recently, due to staffing shortage problems, she has had to do other post position duties that included going up and down stairs, especially during a shakedown of the prison. Claimant testified that her knee started getting sore and became a problem after having to do stairs repeatedly, as well as standing, crouching, and walking, which caused her to start limping. She self-treated with Ibuprofen two to three times a day, applied ice and would rest but the right knee pain did not abate.

2. On December 12, 2022 she was working in the control center, which was reached by going up stairs that were steep, with worsening symptoms, including pain and stiffness. Then, while walking into the building on December 20, 2022, the pain increased while walking over the uneven surfaces of the parking lot, including the snow on the ground. Claimant notified her supervisor on December 20, 2022 that she was having symptoms, which by the end of the day, became more of a problem.

3. On December 21, 2022 Claimant completed the paperwork to report a right knee injury to Employer and to seek medical attention. She first consulted with the Triage Nurse as instructed, who referred her to the Banner Health Clinic in Brush, CO.

4. Claimant indicated that she had experienced stiffness and gradual pain in her knee for the past two months, and the pain had worsened by the date that she reported it. Claimant was unable to pinpoint an exact day that the pain had started but that it was gradual, and increasing as she was required to go up and down stairs multiple times a day, including walking and standing. Claimant stated that no slipping, falling, or any other specific event caused the onset of symptoms.

5. Claimant denied she had any problems with her knee prior to October 20-22 and had no medical treatment for the right knee prior to being seen after she reported a work injury.

6. Outside of work, Claimant engages in activities such as walking, yard work, gardening, camping, fishing, and reading. She would bend, walk and do stairs on an occasional basis and only did standing on an occasional basis.

7. Claimant also assists her partner, who is disabled, on a daily basis. Her tasks include assistance with bathing and hygiene, food preparation, laundry, transportation to appointments, and lifting a light walker that also serves as a chair for her partner to rest from walking.

8. The X-rays from December 21, 2022 showed mild medial compartment and mild to moderate patellofemoral compartment degenerative changes with no acute fracture, lesion, erosion, or periostitis or significant joint effusion. Dr. Samuel Fuller noted there was no evidence of acute radiographic abnormality.

9. The Banner Health Hospital-East Morgan Physician Report of Workers' Compensation Injury of January 5, 2023 issued by Mr. Reiss noted Claimant had right knee pain, was prescribed physical therapy and pain medication. She was also provided with restrictions that included 25 lbs. lifting, carrying, pushing/pulling, standing up to six hours a day but no more than 30 minutes at a time, no stairs, and should be allowed to sit and stand as needed.

10. Ryan S. Reiss, NP documented on January 6, 2023 a history of present illness as follows:

> Patient states that pain in the right knee kind of built up over time. There was no direct fall or twisting mechanism of injury. Patient states her right knee just slowly became stiff as her duties at work changed. Patient for years has had a desk position at local correctional facility. However recently has been required to ambulate more through the jail. Going up and down stairs walking on concrete floors. Over a week or so. Patient eventually could not make it up the stairs. Does not recall any direct date of the injury occurred on but patient believes injury started around December 20, 2022.

11. The State denied liability for this claim on January 11, 2023. Employer's third-party administrator (TPA) advised that all conservative treatment would be paid for through the date of denial, including mileage reimbursement to and from medically related appointments.

12. Claimant continued to receive full time pay since the date of injury, as she used a combination of sick leave, vacation time, and FMLA benefits anytime she had to miss work for medical appointments and recovery.

13. On February 14, 2023 Claimant stated that she had ongoing right knee pain. Nurse Reiss noted that Claimant had developed right knee pain with just "walking at work and got worse over time." He further documented that there was no known date of injury. On exam, Nurse Reiss reported that she had joint line tenderness, had difficulty bearing weight with an extended right leg, and when proceeding downstairs the pain was reproduced along the joint line. He found no significant weakness with flexion or extension and took note that there might have been a "mild amount of swelling likely present although no palpable fluid on the right knee." He diagnosed right knee pain and osteoarthritis.

14. The February 16, 2023 MRI of the right knee performed at ProActive MRI without contrast was notable for a mild effusion. Dr. Shobi Zaidi stated that there was a complex tear in the posterior root of the medial meniscus but no other abnormality.

15. Claimant filed an Application for Hearing to challenge Employer's denial of benefits on February 17, 2023.

16. On March 15, 2023 Dr. Steven Sides, of the Orthopedic Clinic, noted that Claimant reported "[S]he does not remember 1 specific injury but does remember tweaking on the stairs and also with a twisting motion getting out of a chair having some increased pain about that time." [This is not consistent with Claimant's testimony at hearing or the majority of the medical records in evidence, and is not credible.] He observed possible effusion, intact straight leg test, good active flexion, noted the knee was stable upon testing though she had a positive for McMurray's test and Bounce home test, and had an intermittent click. He diagnosed a meniscal tear of the right knee and recommended arthroscopic surgery.

17. X-rays taken at Dr. Sides' office of the bilateral knees showed bilateral knee mild to moderate compartment degenerative changes as well as mild degenerative changes involving the articulation of the lateral femoral condyle and lateral intercondylar eminence in both the right and left knees. Otherwise they were normal with no evidence of acute bony or soft tissue abnormality.

18. Dr. Sides noted on exam that Claimant ambulated with a heel-toe gait pattern, rose from a chair with some discomfort, had an antalgic gait, and was favoring her right knee as she moved around.

19. Dr. Mark S. Failinger conducted an independent medical examination at Respondent's request on April 20, 2023, and issued a report. Dr. Failinger, an orthopedic surgeon and sports medicine specialist, took a history, consistent with Claimant's testimony, reviewed the medical records available and examined Claimant. Claimant reported to Dr. Failinger that she could be standing up to an hour at a time and walk up and down two flights of stairs between nine and ten times a day. She also reported that these staffing jobs were generally up to three times a week, but sometimes only once a week, and that she would have to be on her feet for longer periods of time. She stated her standing times each day would vary from "just a little" time on her feet to multiple hours per day, and that her standing time was quite intermittent and unpredictable as to how much she was working on her feet.

20. On exam, Claimant was positive for right thigh decreased bulk and tone of the quadriceps and loss of range of motion of the right knee. Dr. Failinger noted retropatellar crepitus with range of motion of a mild-to-moderate degree. He also noted posterior popliteal tenderness to palpation and significant tenderness to palpation on the lateral aspect of the right knee, but otherwise, Claimant's exam was normal.

21. Dr. Failinger noted that there was no significant trauma reported to the emergency staff, to subsequent providers or himself. He opined that the diagnosed LCL sprain was not reasonably probable or consistent with a lack of injury or trauma of some kind. He stated that Claimant would have to have had some kind of trauma, like a slip and fall with a varus torque (or inward bending) of the knee, which did not occur, for the injury to be work related.

22. Dr. Failinger's observation of the MRI films was that it showed a complex tear of the posterior root of the medial meniscus, but there was preservation of chondral surfaces, though no significant high grade chondromalacia, which was unusual. He commended that the MRI films were of very poor resolution and of poor quality. There was poor visualization and clarity of whether there was any significant medial and lateral meniscus tear. She was noted to have an apparent posterior and medial meniscus tear, although he did not clearly identify it. There was apparent chondral thinning of the medial femoral condyle articular surface. The anterior cruciate ligament, the posterior cruciate ligament, and the collateral ligaments all appeared to be intact. He noted that Dr. Sides was recommending arthroscopic surgery.

23. Dr. Failinger, stated in his report that "although [Claimant] may have noted increasing symptoms in the fall and winter 2022, the degenerative findings on the MRI are not due to a work injury. [Claimant]'s symptoms are due to the ongoing degeneration which are experienced by millions of people every year."

24. Dr. Failinger opined that the surgery was not related to any incident at work. He stated as follows:

> With the gradual and progressive onset of right knee pain, and with no work injury nor activity that reasonably would have created a meniscus tear, it is not with reasonable medical probability that the recommendation for knee arthroscopy, and that the pathology identified on the MRI scan of 02-16-2023, are related to the patient's work activities. That is to say, it is with high medical probability that the patient's meniscus pathology and "tearing" were due to progressive degeneration, and not due to a work "incident or injury." Although stairs and walking can initiate "symptoms" due to a degenerative meniscus or due to chondromalacia, it is not with reasonable medical probability that the tearing of the meniscus was due to any work injury, even in a case where the patient was walking more than she previously had been.
>
> …
>
> Although the recommendation for an arthroscopy may not be unreasonable, the need for arthroscopy is not due to any pathology created due to her work activities, nor due to any injury that occurred on the job. The patient is not involved in heavy physical manual labor which could possibly provide significant stresses on a knee that was undergoing degeneration. Therefore, the need for the surgery is most reasonably due to ongoing degeneration, and not reasonably due to any work pathology that was created. Although the symptoms may have increased while performing job duties, that does not equate to the creation of pathology nor the acceleration of pre-existing pathology.

25. At hearing, Claimant indicated that the only issues she was pursuing were the return of her sick and vacation leave and reimbursement of her medical bills. Claimant also referenced incurring out of pocket expenses in her opening statement. However, Claimant did not tender any persuasive testimony or documentary evidence that she paid for any care out of pocket, to whom such payments may have been made, or the amounts.

26. Dr. Failinger testified at hearing as an expert in orthopedic surgery and sports medicine, specializing in knees and shoulder surgeries for the prior 30 years. He testified that Claimant's loss of range of motion, including flexion and extension, had more to do with Claimant's body habitus than Claimant's knee degeneration as the contralateral knee had similar limitations. On exam he noted that Claimant had tenderness on the outer side of the knee and not the inner knee where the meniscus tear was shown. Dr. Failinger noted that the x-rays and imaging were representative of a degenerative process and not a traumatic injury.

27. He explained that it is clear from the medical records, Claimant's testimony, and his own evaluation that there was no significant traumatic event in this case that could have caused the tearing and that the tearing was a result of the degenerative process. Dr. Failinger testified that having to walk quickly up the stairs at work or having to walk on cement at work, would have no extra impact on a knee problem than walking or taking the stairs anywhere else. Dr. Failinger also testified that Claimant's symptoms reasonably could have occurred in any activity she took in her daily life, including anything that involved walking, taking the stairs, or squatting. He agreed that the activities Claimant testified she engaged in could easily have caused Claimant's knee pain. He also noted in the emergency visit record that Claimant was assessed with no tenderness or swelling and full range motion of the right knee.

28. Lastly, Dr. Failinger explained that this is a classic case of having developed arthritis in the right knee with degenerative changes and an atraumatic meniscal tear which developed due to the degenerative condition without any likelihood that activities at work, as described by Claimant, including walking on concrete and up/down stairs, could have caused any part of the right knee condition. Claimant simply had wear and tear of the knee. Dr. Failinger opined that within a reasonable degree of medical probability Claimant's right knee condition was not caused by any event, conditions, or activities at work but was the consequence of a degenerative joint and, if any activities at work may have caused symptoms, they did not cause the pathology itself.

29. As found, Claimant has failed to show by a preponderance of the evidence that she incurred a work related injury. Dr. Failinger was credible and persuasive that simply walking or going up stairs could not have caused the complex tear of the posterior root of the medial meniscus, or aggravated the underlying condition, for which Claimant requires surgery. He opined that a trauma needed to have occurred or an incident of traumatic twisting of the knee. There is no persuasive or credible evidence that such an incident occurred in this matter. Also as found, Claimant has failed to show she has an occupational disease or aggravation of her preexisting condition. Dr. Failinger explained that simply walking, going up stairs, and squatting at work are activities Claimant likely also performed equally outside of the work setting. Further, Dr. Failinger opined that for an occupational disease to have any merit, Claimant would have had to work on her feet, on the concrete continuously for many years to actually cause any occupational disease

caused by employment related activities. Claimant's claims for benefits under the Workers' Compensation Act are denied.

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

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seek medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

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

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).

Section 8-41-301(1)(c), C.R.S. states that a claimant is entitled to worker's compensation when "the injury…is proximately caused by an injury or occupational disease arising out of or in the course of the employee's employment…" Claimant has stated on multiple occasions that there was no specific fall, slip, or trauma that caused her knee pain. Claimant cannot point to a specific work activity that caused the knee pain, or even the exact day when this pain began to occur.

A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment or working conditions. *See, Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77, 81 (Colo. App. 1993).

The Act imposes additional requirements for compensability of a claim based on an occupational disease. A compensable occupational disease must meet each element of the four-part test mandated by Section 8-40-201(14), C.R.S. that defines "occupational disease" as:

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

This section imposes additional proof requirements beyond that required for an accidental injury by adding the "equal exposure" element, the "peculiar risk" test, which requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The employment must expose the claimant to the risk causing the disease "in a measurably greater degree and in a substantially different manner than are

persons in employment generally." *Id.* at 824. The conditions of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*. at 824. If the condition resulted from multiple or concurrent causes, the respondents may mitigate their liability by proving an apportionment of benefits. *Id*. If the claimant proves that the hazards of employment caused, intensified, or aggravated the disease process "to some reasonable degree," the burden shifts to the respondents to prove the existence of nonindustrial causes and the extent to which they contribute to the disability or need for treatment. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992); *Vigil v. Holnam, Inc*., W.C. No. 4-435-795 & 4-530-490 (August 31, 2005).

The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *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 (ICAP, April 10, 2008). Simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008).

Dr. Failinger, an expert in orthopedic surgery and sports medicine, stated in his report that despite Claimant noting increasing symptoms in the fall and winter of 2022, the degenerative findings on the MRI were not due to a work injury. Further, he opined that Claimant's symptoms were due to the ongoing degeneration which is experienced by millions of people every year. At hearing, Dr. Failinger testified that having to walk quickly up the stairs at work or having to walk on cement at work, would have no extra impact on a knee problem than walking or taking the stairs anywhere else. Dr. Failinger also testified that Claimant's symptoms reasonably could have occurred in any activity she took in her daily life, including anything that involved walking, taking the stairs, or squatting. He agreed that the activities Claimant testified she engaged in could easily have caused Claimant's knee pain. He further testified that in order for Claimant to experience effects directly from taking the stairs and walking at work, she would have had to be standing and walking upstairs for about ten hours a day for thirty years. This is not the case for Claimant, who testified that her normal job position was primarily sedentary other than the new tasks she was asked to do intermittently when the facility was short-staffed.

Claimant presented no credible testimony or medical evidence that the effect of walking up the stairs and standing at work would have any more of an effect on her right knee than engaging in activities outside of work. The activities Claimant engaged in outside of work involved standing, stairs, and squatting, thereby making these actions hazards that Claimant was equally exposed to outside of her employment. Therefore, Claimant has failed to establish that she was exposed to a greater hazard at work than she was outside of work.

In this case, Dr. Failinger clearly and credibly found that no part of Claimant's condition could be accurately attributed to work. To the extent any of Claimant's treating providers made statements to the contrary, those providers failed to establish in their notes a credible and proper causation analysis taking into consideration all of Claimant's

non-work-related tasks. Nor did they explain the progression of Claimant's symptoms after the stairs at work had been removed from the equation. Therefore, Claimant's knee condition is not a compensable injury nor is it an occupational disease. Claimant has failed to show by a preponderance of the evidence that she sustained either a traumatic injury or an occupational disease caused by her work for Employer on or about December 20, 2022.

Any other issues are moot in light of Claimant's failure to prove compensability in this matter.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant failed to prove that she sustained a compensable injury or occupational disease on or about December 20, 2022. Claimant's claim is *denied* and *dismissed*.

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

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

DATED this 25th day of August, 2023.

By: /s/ *Elsa Martinez Tenreiro*

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury as an employee for Respondent on February 14, 2022.

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to reasonably necessary medical treatment arising from his February 14, 2022 injury.

3. What amount most fairly represents Claimant's average weekly wage for purposes of Claimant's February 14, 2022 injury.

4. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits arising from his February 14, 2022 injury.

5. Whether Claimant proved by a preponderance of the evidence that he is entitled to a disfigurement award for his February 14, 2022 injury.

FINDINGS OF FACT

1. Claimant is a truck driver who on February 14, 2022, was working at a loading dock for Respondent when he fell backward to the ground. He reached backward and landed on his outstretched left hand, fracturing his left wrist.

Medical History

2. Claimant was taken to the Platte Valley Medical Center emergency department. There, he reported that he had left wrist pain after falling four feet off a truck bed falling backward onto an outstretched hand. The attending physician took an X-ray of Claimant's left wrist. The X-ray showed a "displaced Colles' type fracture of the distal radius with extension close to but not definitively reaching articular surfaces." Claimant was taken to the operating room where Dr. Aaron Baxter performed a "closed reduction." He discharged Claimant home that day with instructions for Claimant to return to the office the following week, mentioning the possibility for a need for a future fixation.

3. Claimant returned to Platte Valley Medical Center one week later on February 21, 2022, for a follow-up X-ray. The X-ray showed "stable alignment from initial post reduction radiograph although remains dorsally impacted with dorsal tilt of the radial articular surface. The Fracture line does demonstrate osteolysis indicating

early healing. Positioning on this exam demonstrates 4mm of negative ulnar variance."

4. Claimant returned the next day on February 22, 2022, where he was attended by Dr. John Mangelson. Dr. Mangelson reviewed the most recent X-rays and noted a 14-degree dorsal tilt. Dr. Mangelson recommended surgery and Claimant chose to proceed.

5. On February 24, 2022, Claimant underwent another open reduction internal fixation surgery. However, this time, Dr. Mangelson implanted a distal radius plate. The procedure was completed without complication.

6. Claimant returned for an X-ray on March 11, 2022. Again, on April 11, 2022, Claimant underwent an X-ray of his wrist. The X-ray showed the implant appeared intact with stable alignment and no acute findings. Claimant was instructed by Nickolas Curcija, PA-C, to wean out of the splint over the next two weeks, to follow up with physical therapy, and to return in six to eight weeks for a final check.

7. Claimant returned to Platte Valley Medical Center on August 12, 2022, where he was seen by PA Curcija. Claimant reported pain coming back in his pinky and ring fingers, as well as in the ulnar aspect of his wrist when lifting. Claimant also noticed numbness in his pinky and ring finger when sleeping on his arm bent at the elbow. Claimant reported that he did not participate in physical therapy and missed multiple follow-up appointments because he had to return to work. He also reported that lifting heavy things made his symptoms worse, and he requested work restrictions from lifting anything heavy.

8. Claimant underwent a repeat X-ray that same day. The X-ray was unremarkable. Claimant was diagnosed with cubital tunnel syndrome. PA Curcija restricted Claimant to lifting no more than five pounds with the left hand, noting that ulnar pain could persist for up to a year. Claimant was to follow up in two months. PA Curcija excused Claimant from work for the day.

9. On October 12, 2022, Claimant returned to Platte Valley Medical Center where he was seen by Dr. Mangelson. Claimant reported hand weakness as well as numbness and pain in his fingers that would come and go, though it would be worse with ulnar deviation and flexion of the wrist. Dr. Mangelson noted that Claimant almost certainly had cubital tunnel syndrome, but noted the timing with surgery was suspect given the wide displacement and open wound on the ulnar side of the wrist. Dr. Mangelson recommended an EMG to ensure that the neurological issue was localized to the elbow. However, Claimant wanted to wait until he had insurance.

Procedural History

1. On April 14, 2022, the Division of Workers' Compensation issued a letter to Claimant notifying him that Respondent had denied his workers' compensation claim. Respondent had filed a Notice of Contest[1] denying the claim, noting that it did not have workers' compensation insurance coverage for Claimant because Claimant was an independent contractor.

2. On April 25, 2023, Claimant filed an Application for Hearing endorsing the issues of compensability, medical benefits, average weekly wage, disfigurement, and temporary total disability benefits from February 14 to December 7, 2022. Claimant asserted in the AFH that he was out of work for three weeks with no pay. Respondent did not file a response to the AFH.

August 8, 2023 Hearing

3. Hearing took place on August 8, 2023. At hearing, Claimant testified on his own behalf. His testimony was as follows. While working on a shipping platform on February 14, 2022, Claimant slipped and fell, sustaining a wrist injury. [Redacted, hereinafter MO] tried to assist him, and they went to the hospital. Claimant could not stand due to pain and confirmed he broke his wrist in the fall.

4. Claimant could not recall how he got on the platform but affirmed that he fell from it. Claimant indicated that workers often climbed the platform, using various points of access, but he was not sure where he climbed that day.

5. Claimant clarified that his request for temporary total disability benefits was based on a reduced work capacity due to the injury. Claimant clarified that he received payments both as checks and cash from [Redacted, hereinafter TT], and his last recorded work for the company was reflected in the last check in his exhibits. Claimant admitted that he was working for another employer, [Redacted, hereinafter JT], performing tasks like tie-down straps and driving, with varying paychecks, during the period of time for which he seeks temporary disability benefits.

6. Regarding the nature of his employment, Claimant testified that [Redacted, hereinafter CB] hired him over the phone. CB[Redacted] told Claimant that he needed a driver. Claimant testified that he worked according to the schedule indicated by CB[Redacted] using TT[Redacted] trucks and loader.

7. The Court finds Claimant's testimony credible.

8. Claimant also called coworker MO[Redacted] to testify. MO[Redacted] recounted the events surrounding the accident, stating that he witnessed Claimant's fall from a red truck belonging to TT[Redacted]. MO[Redacted] was in the cab of the truck and the truck was positioned in the classic-brick section near the pallets where

[1] The NOC is undated.

trailers were loaded, from where MO[Redacted] saw the incident unfold. The accident occurred on the driver's side of the truck in an area now marked as “F1.”

9. Though MO[Redacted] was parked at the time, he was about 30 feet away from the platform when he noticed Claimant falling. MO[Redacted] tried to assist Claimant after the fall, and eventually, other individuals arrived to aid Claimant. It appeared to MO[Redacted] that Claimant’s wrist may have been broken. Claimant was then taken to the hospital by safety personnel.

10. During cross examination, MO[Redacted] admitted that he could not precisely recall the manner in which Claimant fell, as it happened quickly. However, he reasoned that most people instinctively use their hands when falling. He also mentioned that the color and name on the truck led him to believe it was a TT[Redacted] vehicle, although he could not specifically remember where on the truck he saw the name.

11. MO[Redacted] clarified that he testified voluntarily and was not coerced or offered any incentives to testify against the Respondent. He recalled that the accident involved one of Claimant’s hands being injured but could not confirm whether it was the right or left wrist.

12. The Court finds MO’s[Redacted] testimony to be credible.

13. Respondent was represented at hearing by the owner of Respondent TT[Redacted], CB[Redacted]. CB[Redacted] testified about how he regarded his workers at TT[Redacted]. He mentioned that when hiring, he communicates the worker’s pay, tasks, working hours, and all necessary details. CB[Redacted] would monitor workers’ arrival, departure, and adherence to rules to ensure the correct handling of product. He would remain involved in overseeing their work.

14. CB[Redacted] testified that he would convey to his workers the safety instructions, specifying where climbing is allowed or required. CB[Redacted] explained that workers do not need to be on the platform of the loading dock in order to do their work.

15. CB[Redacted] personally instructed Claimant in tasks such as strapping and safety protocols, including the use of safety equipment like helmets and an automatic loader in the truck. He directed where strapping could be done and emphasized safety rules and the importance of wearing safety gear.

16. CB[Redacted] defended his classification of workers as independent contractors, highlighting that various workers have distinct arrangements. TT’s workers understand they are contractors whose compensation depends on the work done, are paid through 1099s, need to pay their own taxes, and must obtain their own insurance. CB[Redacted] consistently communicated this arrangement to Claimant in particular.

17. Regarding the injury, CB[Redacted] recounted Claimant's accident his communications with Claimant afterward. CB[Redacted] received a call from the delivery supervisor, who reported the accident to CB[Redacted] and arranged to transport Claimant to the hospital. While Claimant was en route to the hospital, Claimant and CB[Redacted] spoke on the phone. Claimant explained the incident to CB[Redacted], describing how he fell and injured his wrist.

18. Claimant later reached out to CB[Redacted] to obtain financial assistance with paying medical bills from the accident. Claimant resumed work with TT[Redacted] with modified pay, and CB[Redacted] provided additional compensation to support medical costs.

19. CB[Redacted] also disputed that he never paid Claimant in cash. CB[Redacted] testified that he would pay Claimant in checks or via Zelle.

20. The Court finds CB's[Redacted] testimony credible. However, the Court does not defer to CB's[Redacted] characterization of Claimant as an independent contractor rather than an employee.

21. Claimant proved by a preponderance of the evidence that he sustained a compensable left wrist injury on February 14, 2022, while employed by Respondent. Respondent's involvement in training Claimant, supervising Claimant's work, monitoring working hours, and establishing workplace rules, leads the Court to find that Claimant was not free from control and direction in the performance of the services for Respondent. Claimant was most likely an employee of TT[Redacted] at the time of the injury, not an independent contractor.

22. Claimant has proved by a preponderance of the evidence that he has out-of-pocket medical expenses for medical treatment reasonably necessary to cure and relieve him of the effects of his February 14, 2022 injury, totaling $16,272.32. He has also proved by a preponderance of the evidence that he has been billed for an additional $4,104.01 in medical expenses for medical treatment reasonably necessary to cure and relieve him of the effects of his February 14, 2022 injury that have yet to be paid.

23. The Court finds the expense report admitted as Claimant's exhibit C, bates 145, to be consistent with the medical bills admitted into evidence and the dates of service for which Claimant obtained treatment for his wrist injury. The expense report reflects that Claimant's total medical expenses as of June 2023 were $20,376.33, and that Claimant had paid $16,272.32. The Court finds this to accurately reflect Claimant's medical bills and payment of those bills as of that date.

24. Although CB[Redacted] testified that he paid Claimant additional money after the injury to compensate Claimant for medical expenses, there is insufficient evidence in the record for the Court to determine how much extra CB[Redacted] paid to

Claimant. Therefore, the Court makes no findings as to whether Respondent is entitled to a credit toward medical benefits.

25. Claimant submitted at hearing paychecks received from Respondent, which are summarized in the table below:

DATE	AMOUNT	DATE	AMOUNT
5/4/2021	$ 1,500.00	10/7/2021	$ 1,500.00
5/13/2021	$ 2,000.00	10/14/2021	$ 1,800.00
5/19/2021	$ 1,500.00	10/20/2021	$ 1,500.00
5/26/2021	$ 1,500.00	10/27/2021	$ 1,500.00
6/3/2021	$ 1,650.00	11/2/2021	$ 1,700.00
6/8/2021	$ 1,300.00	11/10/2021	$ 1,700.00
6/22/2021	$ 1,500.00	11/17/2021	$ 1,700.00
6/30/2021	$ 1,940.00	11/24/2021	$ 1,300.00
7/6/2021	$ 2,800.00	12/3/2021	$ 1,100.00
7/23/2021	$ 1,500.00	12/8/2021	$ 1,500.00
8/5/2021	$ 1,600.00	12/14/2021	$ 1,800.00
8/12/2021	$ 1,500.00	12/30/2021	$ 1,500.00
8/17/2021	$ 1,500.00	1/5/2022	$ 1,000.00
8/25/2021	$ 1,500.00	1/11/2022	$ 1,200.00
9/1/2021	$ 1,800.00	UNDATED	$ 1,500.00
9/9/2021	$ 1,500.00	6/2/2022	$ 2,000.00
9/16/2021	$ 1,500.00	6/7/2022	$ 2,000.00
9/24/2021	$ 1,500.00	6/22/2022	$ 1,900.00
9/30/2021	$ 1,500.00	7/6/2022	$ 1,360.00

26. The Court finds that each paycheck was compensation for a period up to and including that date. Based on Claimant's records of earnings from May 5, 2021, to January 11, 2022, the Court finds that Claimant's average weekly wage during that time was $1,399.72.

27. The Court finds that Claimant has failed to prove by a preponderance of the evidence entitlement to temporary total disability benefits. Although Claimant asserted on his Application for Hearing that he had three weeks of lost wages, Claimant also testified that he had secondary employment with another employer, JT[Redacted], during the period during which he is requesting temporary total disability benefits. There is insufficient evidence in the record for the Court to determine whether Claimant sustained a total wage loss for any period of time.

28. Claimant also submitted into evidence a photograph of what the Court finds to be a surgical scar on the volar aspect of Claimant's left wrist. The scar is approximately three inches long and one-half inch wide, consisting of a central line that would coincide with an incision and point scars running parallel on either side which would correspond with stiches. The Court finds the scarring to be the result

of Claimant's multiple surgeries to his left wrist. The scarring consists of a serious permanent disfigurement to an area of the body normally exposed to public view.

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

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the injury both he and the employer were subject to the provisions of the Workers' Compensation Act, he was performing service arising out of and in the course of his employment and the injury was proximately caused by the performance of such service. §§8-41-301(1)(a)-(c), C.R.S. 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); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo.App.2000).

As found above, Claimant sustained an injury to his left wrist when he fell backwards working at the loading dock for Respondent on February 14, 2022. Respondent contests, however, whether Claimant was an employee at the time of the accident.

The term "employer" is defined to include every person, firm or corporation "who has one or more persons engaged in the same business or employment, except as expressly provided in articles 40 to 47 of this title, in service under any contract of hire, express or implied." §8-40-203(1)(b), C.R.S. The term "employee" is defined as any person in the service of any person or corporation "under any contract of hire, express or implied." §8-40-202(1)(b), C.R.S.

An employer-employee relationship is established when the parties enter into a "contract of hire." §8-40-202(1)(b), C.R.S.; *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991). A contract of hire may be express or implied, and it is subject to the same rules as other contracts. *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (Colo.App.1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement and mutuality of obligation. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994); *Martinez Caldamez v. Schneider Farm*, W.C. No. 4-853-602 (July 16, 2012). A contract of hire may be formed even in the absence of every formality attending commercial contracts. *Rocky Mountain Dairy Products v. Pease*, 422 P.2d 630 (1966).

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

Section 8-40-202(2)(b)(II), C.R.S., enumerates nine factors to be considered in evaluating whether an individual is deemed an employee or independent contractor. However, the test considered by the Colorado Supreme Court in the unemployment insurance case of *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014) concerning whether a worker is an employee or an independent contractor applies to workers' compensation claims. The test requires the analysis of not only the nine factors enumerated in § 8-40-202(2)(b)(II), C.R.S. but also the nature of the working relationship and any other relevant factors. *Pella Windows & Doors, Inc. v. Indus. Claim Appeals Office*, 458 P.3d 128 (Colo.App.2020). The *Softrock* decision noted indicia that would normally accompany the performance of an ongoing separate business in the field and included whether: the worker used an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance. *Softrock Geological Services*, 325 P.3d 565.

In this case, Respondent argues that it classifies its workers as independent contractors, and therefore, so should the Court. In defense of classifying its workers as independent contractors, Respondent points to the following facts: workers are told at the time of hire that they are independent contractors; the workers understand that their compensation is based on the work completed; the workers are paid through form 1099; and that the workers are expected to pay their own taxes and obtain their own insurance. Respondent also pointed to the fact that the paychecks made out to Claimant clarified that Claimant was an independent contractor.

On the other hand, as found above, there are numerous facts that lead the Court to find that Claimant was not free from control and direction in the performance of the services for Respondent. For example:

- When hiring, Respondent communicates the worker's pay, tasks, working hours, and all necessary details;
- Respondent would monitor workers' arrival, departure, and adherence to rules to ensure the correct handling of product;
- Respondent would remain involved in overseeing the work performed by its workers;
- CB[Redacted], on behalf of Respondent, would convey to the workers the safety instructions, specifying where climbing is allowed or required;
- CB[Redacted], on behalf of Respondent, personally instructed Claimant in tasks such as strapping and safety protocols, including the use of safety equipment like helmets and an automatic loader in the truck. He directed where strapping could be done and emphasized safety rules and the importance of wearing safety gear.

Based on these findings, the Court concludes that Claimant was an employee of Respondent at the time of the injury. Therefore, Claimant has sustained a compensable injury while employed by Respondent.

Medical Benefits

Claimant seeks an order granting him entitlement to medical benefits arising from the February 14, 2022 injury. In support thereof, Claimant has submitted medical records for his treatment consistent with the above findings concerning his medical history. He has also submitted medical bills and proof of payment of those medical bills as found above.

The Colorado Workers' Compensation 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. "If a claimant has paid for medical treatment that is admitted or found to be compensable and that costs more than the amount specified in the workers' compensation fee schedule, the employer . . . shall reimburse the claimant for the full amount paid. . . ." Section 8-42-101(6)(b), C.R.S.

As found above, Claimant has proved by a preponderance of the evidence that he has out-of-pocket medical expenses for medical treatment reasonably necessary to cure

and relieve him of the effects of his February 14, 2022 injury, totaling $16,272.32. He has also proved by a preponderance of the evidence that he has been billed for an additional $4,104.01 in medical expenses for medical treatment reasonably necessary to cure and relieve him of the effects of his February 14, 2022 injury that have yet to be paid.

The Court concludes that Claimant is entitled to reimbursement from Respondent of $16,272.32 pursuant to § 8-42-101(6)(b), C.R.S. The Court also concludes that Respondent is responsible for paying the remaining $4,104.01 in medical bills that remain unpaid, as well as all other medical expenses for treatment reasonably necessary to cure and relieve Claimant of the effects of his February 14, 2022 injury.

Average Weekly Wage

Claimant endorsed the issue of average weekly wage for hearing. In support thereof, he submitted copies of pay checks he received from Respondent dated between May 4, 2021, and July 6, 2022.

The entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corporation*, 867 P.2d 77, 82 (Colo.App.1993); *Loofbourrow v. Indus. Claims Office of State*, 321 P.3d 548, 555 (Colo. App. 2011) *aff'd sub nom Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327; *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (May 7, 1997). In general, an ALJ is to compute a claimant's AWW based on the claimant's earnings at the time of injury.

In this case, the parties did not present any argument as to the correct average weekly wage applicable in this case. However, as found above, each paycheck was compensation for a period up to and including that date. Based on Claimant's records of earnings from May 5, 2021, to January 11, 2022, the Court finds that Claimant's average weekly wage during that time was $1,399.72. Therefore, for purposes of Claimant's February 14, 2022 injury, Claimant's average weekly wage was $1,399.72.

Temporary Total Disability Benefits

Claimant seeks temporary total disability in this claim. In his Application for Hearing, he noted that the issue was temporary total disability from the date of injury, February 14, 2022, to December 7, 2022. However, on the Application for Hearing, Claimant also indicated that he had three weeks of lost wages.

Temporary total disability benefits are designed to compensate an injured worker for wage loss while employee is recovering from work-related injury. *Pace Membership Warehouse, Div. of K-Mart Corp. v. Axelson,* 938 P.2d 504 (Colo. 1997). Claimant bears the burden of establishing three conditions before qualifying for TTD benefits: (1) that the industrial injury caused the disability; (2) that Claimant left work because of the injury; and (3) that the disability is total and last more than three working days. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997).

The pay checks Claimant provided ended on January 11, 2022, followed by an undated check, with the next check in chronological order being on June 2, 2022. Claimant testified at hearing that he had secondary employment with another employer, JT[Redacted], during the period during which he is requesting temporary total disability benefits.

As found above, given Claimant's testimony that he had secondary employment with JT[Redacted] during the time that Claimant seeks temporary total disability benefits, the Court finds and concludes that Claimant has failed to prove by a preponderance of the evidence that he has sustained a temporary disability resulting in total wage loss of at least three working days.

Disfigurement

Claimant submitted in support of his endorsement of the issue of disfigurement a photograph of his left wrist, including scarring on the volar aspect of that wrist.

Section 8-42-108(1), C.R.S. permits an ALJ to award disfigurement benefits up to a maximum of $4,000 if the claimant is "seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view. . . ." The ALJ may award up to $8,000 for "extensive body scars" and other conditions expressly provided for in § 8-42-108(2), C.R.S. These awards are subject to annual adjustment by the Director of the Division of Workers' Compensation pursuant to §8-42-108(3), C.R.S.

As found above, the scar on Claimant's left wrist is approximately three inches long and one-half inch wide, consisting of a central line that would coincide with an incision and point scars running parallel on either side which would correspond with stiches. The Court finds the scarring to be the result of Claimant's multiple surgeries to his left wrist. The scarring consists of a serious permanent disfigurement to an area of the body normally exposed to public view, which entitles Claimant to additional compensation pursuant to § 8-42-108(1), C.R.S. As a result, the Court awards Claimant $901.00 in disfigurement benefits.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury on February 14, 2022, while employed for Respondent.
2. Respondent shall reimburse Claimant $16,272.32 for out-of-pocket medical expenses for treatment that was reasonably necessary to cure and relieve Claimant of the effects of the February 14, 2022 injury.

3. Respondent shall pay the unpaid medical bills totaling $4,104.01 for treatment that was reasonably necessary to cure and relieve Claimant of the effects of the February 14, 2022 injury.

4. Respondent shall pay for all medical treatment reasonably necessary to cure and relieve Claimant of the effects of the February 14, 2022 injury.

5. Claimant's average weekly wage is $1,399.72.

6. Claimant's request for temporary total disability benefits is denied.

7. Respondent shall pay Claimant $901.00 for disfigurement of Claimant's left wrist.

8. All matters not determined herein, including credits for amounts already paid, 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: August 28, 2023

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

ISSUES[1]

1. Whether Claimant has proved by a preponderance of the evidence that she has experienced a change of condition of her work injury warranting a reopening of her claim.

2. Whether Claimant has proved by a preponderance of the evidence that she is entitled to a change of authorized treating physician.

FINDINGS OF FACT

1. Claimant sustained a compensable injury to her right thumb, hand, and wrist on February 27, 2020, when she fell backward while using a pallet jack. As a result of the accident, Claimant fractured her right distal radius.

2. Claimant underwent wrist surgery on July 8, 2020 with Dr. Bret Peterson, as well as follow-up treatment through Dr. Peterson for recovery from her surgery. The records document Claimant being prescribed tramadol throughout her course of treatment.

3. Claimant underwent a functional capacity evaluation on March 31, 2021, in anticipation of maximum medical improvement. At that appointment, Claimant reported that her right hand and wrist pain was about three or four out of ten. However, Claimant also reported that her pain over the past thirty days, when at its worst, would be at a seven out of ten. This would be when Claimant would be gardening or after engaging in activities. Claimant reported that gardening, lifting, swinging a golf club, and opening lids on medications would exacerbate her symptoms. Claimant's current medications noted at that appointment included Tylenol and Aleve.

4. Claimant's authorized treating physician, Dr. Pamela Rizza placed Claimant at maximum medical improvement on April 19, 2021, with an 11% impairment of the right upper extremity. At that appointment, Claimant complained of right hand pain of three out of ten, worse with overuse. Claimant complained of cramping in her hand and an ache that would arise from use. Claimant reported some difficulty with repetitive gripping or pinching and wrist-motion tasks. Dr. Rizza assigned Claimant permanent work restrictions as well, limiting Claimant to medium work,

[1] A third issue was endorsed for hearing: "*Grover* medicals." The Court dismissed this issue in a June 5, 2023 Order granting partial summary judgment. The Court concluded the issue was not ripe, as Respondents had already admitted for maintenance medical benefits in their FAL and had not denied any specific medical treatment.

lifting no more than fifty pounds at a time with frequent lifting or carrying up to twenty-five pounds. No medications were recommended for maintenance care. Dr. Rizza recommended maintenance medical care consisting of visits with Dr. Peterson over the eighteen months following surgery.

5. Respondents filed a final admission of liability (FAL) on May 4, 2021, admitting for the impairment rating assigned by Dr. Rizza and admitting for maintenance medical care. Claimant objected to the FAL and requested a Division independent medical examination (DIME).

6. The DIME took place on April 18, 2022, with Dr. Alicia Feldman. At the DIME, Claimant reported difficulty writing at times, some numbness and weakness in her hand, and right elbow, shoulder, and neck pain. Claimant reported that she was able to return to riding her road bike, but had not returned to playing golf. She also reported dropping things at times, presumably due to a loss of grip strength. She told Dr. Feldman that she was taking Voltaren for pain. Voltaren is diclofenac.[2]

7. Among the records that Dr. Feldman reviewed was a February 10, 2019 record, approximately one year prior to the date of injury, that documented that Claimant had difficulty feeling low back pain at that time due to the use of tramadol.

8. Dr. Feldman concurred with the date Dr. Rizza determined for MMI but assigned an 18% impairment of the upper extremity. Dr. Feldman agreed with Dr. Rizza's recommendation for maintenance medical treatment of follow-up visits with Dr. Peterson for the eighteen months following the date of surgery.

9. Respondents filed an amended FAL on May 4, 2022, based on the DIME report, revising the permanent partial disability award to reflect the new impairment rating. Other than the admission for ongoing maintenance medical treatment, the claim closed on the amended FAL.

10. On August 2, 2022, Claimant's counsel sent an e-mail to Respondents' counsel, requesting, "Would you kindly make sure that Claimant is authorize [sic] to seek Grover meds."

11. Claimant's counsel sent a second e-mail to Respondents' counsel on January 12, 2023, and requested "a one time [sic] evaluation with Dr. Peterson."

12. Claimant's counsel's office sent four more e-mails on January 26, January 31, and February 2, and February 9, 2023, renewing the January 12 request. Respondents neither "authorized" nor "denied" the requests. All of these requests were made by Claimant's counsel on behalf of Claimant. None were made by a treating provider.

[2] *See* Rule 17, WCRP, Exhibit 9, page 119.

13. On March 14, 2023, Claimant filed an Application for Hearing (AFH) endorsing the issues of reopening, "Grover medicals,"[3] and change of physician.

14. There is no persuasive evidence in the record that any authorized provider declined to see Claimant after MMI, that Respondents impeded Claimant's ability to schedule appointments with any authorized provider, that any medical provider has provided inadequate treatment, or that any authorized provider submitted to Respondents a post-MMI request for prior authorization for medical treatment. The Court finds that it is more likely than not that Claimant has not reached out to her medical providers directly to schedule follow-up appointments.

15. Claimant underwent an independent medical examination with Dr. Lloyd Thurston on May 4, 2023, at Respondents' request.

16. During the IME, Claimant informed Dr. Thurston that she had taken a break from playing golf and only resumed the sport in the fall of 2022. She described to Dr. Thurston that she experienced hand cramping after biking, with the cramping appearing to worsen over time. Notably, she noted that since her surgery, she had been dropping objects frequently. In addition, she informed Dr. Thurston that her range of motion was limited, and she would often feel a pronounced ache during activities such as biking, golfing, shoveling, gardening, and any physical exertion. She also mentioned to Dr. Thurston that she had been utilizing diclofenac to alleviate her pain, although it was causing stomach discomfort.

17. Claimant expressed some frustration to Dr. Thurston that she had attempted to communicate her persistent right-sided neck and shoulder pain to her previous doctors, a pain she characterized as a constant, unchanging ache.

18. Dr. Thurston asked Claimant whether the hand had gotten worse or why she believed it should be reopened. Claimant responded, "It's just, well, you know, I don't have the full range of action. . . . It cramps like crazy. . . . I mean, it just cramps, and I don't understand it. There's an aching pain in it. . . . I just feel like there could be more range of motion, or, you know, when I go golf. It's really hard for me to golf anymore and ride my bike, and that's what I've done all my life, you know."

19. The Court finds that this statement was non-responsive and reflects that Claimant is motivated by frustration with a lack of improvement since MMI rather than any actual worsening of condition.

20. Dr. Thurston issued a report on May 7, 2023. In his report, Dr. Thurston noted that Claimant "admits her hand condition has not changed since she was placed at MMI. She is disappointed she did not get a better outcome." Dr. Thurston's report noted that the physical exam of Claimant's hand was virtually identical to that of

[3] The issue of *Grover* medicals, or maintenance medical benefits, was dismissed on summary judgment prior to hearing.

Dr. Rizza's (presumably at the time of MMI). Dr. Thurston felt that no further treatment was necessary under the claim as none would positively affect her condition or outcome. Further, he opined that Claimant's condition resulting from the February 27, 2020 injury had not materially worsened since she was placed at MMI.

21. The parties took a prehearing deposition of Dr. Thurston on June 6, 2023. At the deposition, Dr. Thurston testified that it would be expected for Claimant to be dropping things more in light of Claimant's injury and surgery. Although Dr. Thurston acknowledged that a worsening of grip strength or range of motion could be evidence of a change of condition, Dr. Thurston felt that Claimant was simply noticing her tendency to drop things more because she was using her hand more.

22. Regarding Claimant's complaints of cramping, Dr. Thurston testified that the cramping would be more problematic the more active Claimant is. He felt that increased pain could be an indication of increased use.

23. Dr. Thurston clarified that he did not use a goniometer to test Claimant's range of motion. Therefore, Dr. Thurston admitted on cross examination that his statement in his report that Claimant's range of motion remained unchanged since the DIME was an inaccurate statement, since having not measured Claimant's range of motion using a goniometer he did not know for certain what Claimant's range of motion was. Dr. Thurston also admitted on cross examination that his statement that Claimant "admits her hand condition has not changed since she was placed at MMI" was probably inaccurate.

24. The Court finds Dr. Thurston's accounts of what Claimant said at the IME to not be credible. The Court instead relies on the IME audio transcript. The Court also finds Dr. Thurston's determinations regarding Claimant's range of motion and strength exhibited on physical examination to be not credible, as he acknowledged during his deposition that those findings in his report were probably inaccurate. However, the Court does find his opinions credible and persuasive in other regards, including his opinion that Claimant most likely was simply noticing her tendency to drop things more because she was using her hand more.

25. At the July 12, 2023 hearing, Claimant testified on her own behalf. Claimant testified that she works full time and uses her hand more than she was when she reached MMI. She also testified that she has increased pain since MMI, causing a need to now take medications, including diclofenac, Tylenol, and tramadol.

26. Claimant also testified that she experiences cramping as well as daily stiffness. She also testified that she drops things daily, which she did not recall doing much before, that her grip has worsened, affecting her golf game, and that she can no longer carry fifty pounds with her right hand without pain, cramping, and stiffness afterward.

27. Claimant testified that she made five to twelve attempts to schedule follow-up appointments and that Respondents never authorized the requests. Claimant also testified that she tried to see Dr. Rizza for maintenance care, but that the treatment was denied. Claimant also testified that she attempted to see Dr. Peterson. Claimant was asked whether Dr. Rizza and Dr. Peterson refused to see her. Claimant acknowledged that Dr. Rizza never refused to see her, but, regarding Dr. Peterson, Claimant responded only that she tried to go through her attorney. She did not clarify whether Dr. Peterson ever actually refused to see her.

28. The Court finds Claimant credible, except insofar as Claimant testifies that she has experienced worsening of her symptoms, and except insofar as noted below.

29. Although Claimant testified that she now must take Tylenol, diclofenac, and tramadol, the Court finds significant that Claimant was taking Tylenol at the time of her functional capacity evaluation just shortly prior to MMI, that Claimant reported to Dr. Feldman at the DIME that she was taking diclofenac, and that Claimant had been taking tramadol since well prior to her injury in this matter. Claimant's needs for these medications did not arise after reaching MMI. The Court does not find Claimant's testimony credible insofar as Claimant testified that her need for medication has changed.

30. The Court also finds significant that, despite Claimant's testimony that she now experiences cramping and stiffness, and that she now drops things on a daily basis, these symptoms are not new. Claimant complained at her MMI appointment with Dr. Rizza that she had cramping and aching that would arise from use. She also complained at the DIME that she had some numbness and weakness in the hands and would drop things at times. Although Claimant testified that she now drops things more often, the Court does not find this credible.

31. Furthermore, Claimant was restricted to lifting up to fifty pounds at the time she was placed at MMI. At that time, she also complained of increased pain corresponding with increased use of her hand when gardening, lifting, swinging a golf club, and opening lids on medications. If indeed Claimant experiences pain, cramping, and stiffness after lifting fifty pounds, the Court does not find this to be persuasive evidence of a change of condition. Rather, the Court finds this to be consistent with Claimant's condition at the time she was placed at MMI.

32. The Court finds that Claimant has not experienced a change of condition since MMI.

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).

Reopening

Claimant seeks to reopen the claim on the basis of a change of condition.

Once a claim is closed, it may be reopened only on grounds of fraud, overpayment, error, mistake, or change in condition. § 8-43-303, C.R.S. A "change in condition" refers

to a "change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Cordova v. Indus. Claims Comm'n*, 55 P.3d 186, 189 (Colo.2002); *Caraveo v. David J. Joseph Co.*, W.C. No. 4-358-465 (October 25, 2006). Reopening is appropriate when the claimant's degree of permanent disability has changed since MMI or where the claimant is entitled to additional medical or temporary disability benefits that are causally connected to the compensable injury. *See Duarte v. Glen Ayr Health Ctr.*, W.C. No. 4-521-453 (June 8, 2007).

As found above, Claimant has not proved by a preponderance of the evidence that she experienced a change of condition since reaching MMI. The symptoms of which she currently complains are well documented as existing at the time Claimant was placed at MMI and evaluated by the DIME physician. Although Claimant testified that the magnitude of those symptoms have changed, the Court does not find testimony credible. Claimant has testified that she now takes medications to alleviate her allegedly increased symptoms. However, as the Court found above, each of those medications were either medications Claimant was taking at the time of MMI or which Claimant had been taking since prior to the work injury. The Court does not find Claimant's testimony credible insofar as Claimant alleges that she has an increased need for these medications due to a change of condition. The Court finds it most likely that Claimant notices her symptoms more when she is active, and Claimant has been more active since reaching MMI. Furthermore, the Court finds that Claimant's pursuit of the issue is motivated more by frustration with a lack of progress or follow-up from her providers post-MMI rather than a genuine change of condition.

Therefore, the Court concludes that reopening is not warranted.

Change of Authorized Treating Physician

Claimant seeks a change of authorized treating physician.

There are three means by which a claimant may seek a change of physician.[4] First, a claimant may, as a matter of right, change physicians within ninety days of the date of injury if he or she has not yet reached MMI. § 8-43-404(5)(a)(III), C.R.S. See Rule 8-5, WCRP. Second, a claimant may obtain a change of physician where the claimant submits a written request, on a Division form, to the respondents for a change of physician and the respondents fail to deny the request. § 8-43-404(5)(a)(VI)(A), C.R.S. See Rule 8-6, WCRP. This second means permits a claimant to obtain a change of physician without obtaining a hearing should the respondents either grant the change or fail to timely deny such request. The third means is where the claimant requests a hearing before the Director or an ALJ and requests a change of physician upon a "proper showing." Specifically, section 8-43-404(5)(a)(VI)(A), C.R.S., provides that "[u]pon the

[4] These exclude the mechanism whereby a claimant may select a new physician of his or her choice where the respondents receive notice that the original treating physician refuses to treat the claimant for non-medical reasons and the respondents fail to designate a new physician. *See* § 8-43-404(10), C.R.S. (2022).

proper showing to the division, the employee may procure the division's permission at any time to have a physician of the employee's selection treat the employee . . . ." (Emphasis added.) This last means does not require the filing of any division forms or compliance with Rule 8, WCRP.

In this case, Claimant argues for a change of physician on the third basis—the "proper showing" basis.

In support of Claimant's showing, Claimant argues that Respondents have denied authorization for Claimant to seek treatment with her authorized providers, despite having admitted for maintenance medical care, thus unlawfully thwarting Claimant's ability to obtain maintenance medical treatment. Claimant argues that Respondents have thus "made a voluntary waiver of its right to have Claimant continue to treat with its designated providers." Claimant did not specify whom she wished the Court to designate as Claimant's new authorized treating physician.

The Court is not persuaded that Claimant has made a proper showing for a change of authorized treating physician.

Notwithstanding Claimant's argument that Respondents have impeded Claimant's access to maintenance medical care with her authorized treating providers by denying Claimant's counsel's requests for prior authorization, the Court finds no persuasive evidence that Respondents have in fact impeded Claimant's access to medical treatment.

First, the Court notes that the record is devoid of any persuasive evidence of a denial of prior authorization. Although Claimant's counsel reached out to Respondents' counsel on several occasions requesting that Respondents provide assurance that maintenance medical treatment was authorized and requesting authorization of a visit with Dr. Peterson, Respondents did not respond. Respondents, however, were under no legal obligation to authorize or deny Claimant's counsel's requests or provide any assurance of future authorization, since those requests were not from a provider.

Rule 16-7, WCRP, provides that "Prior Authorization for payment shall only be requested when: (1) A prescribed treatment exceeds the recommended limitations set forth in the MTGs; (2) the MTGs require Prior Authorization for that specific service; (3) A prescribed treatment is not priced in the Medical Fee Schedule or is identified in Rule as requiring Prior Authorization for payment." Where prior authorization is not otherwise required by Rule 16-7, Rule 16-6 provides a means whereby a provider may nevertheless request assurance that the insurer will indeed pay the medical bill when it comes due. Requests for prior authorization under Rules 16-6 and 16-7 may be submitted only by medical providers. There is no legal mechanism by which a Claimant may request prior authorization, and therefore no legal obligation for Respondents to respond to any such request.

There is no persuasive evidence of the record that Claimant or her attorney in fact reached out to any of Claimant's authorized treating providers' offices to schedule a

follow-up appointment, let alone that any of the providers declined to see her for non-medical reasons. While it may be customary for respondents in workers' compensation matters to assist with scheduling medical appointments, Claimant identifies no legal authority for the proposition that Respondents were obligated to schedule any such appointment on Claimant's behalf. In other words, Respondents have not impeded Claimant's ability to seek medical treatment, even if they have not volunteered to facilitate scheduling of appointments or provided assurances to Claimant.

The Court further finds significant that Claimant has not identified whom she wishes the Court to designate as Claimant's new authorized treating physician. Rather, she has requested a blank check to choose at some future date the undisclosed physician of her choice.

When considering whether Claimant has made a proper showing for a change of authorized treating provider, one relevant consideration is whether the prior authorized treating physician provided inadequate medical care. *See Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (December 5, 1995) (ICAO affirmed ALJ's refusal to order a change of physician when the ALJ found claimant receiving proper medical care); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (August 23, 1995) (ICAO affirmed ALJ's refusal to order a change of physician where physician could provide additional reasonable and necessary medical care claimant might require); and *Guynn v. Penkhus Motor Co.*, W.C. No. 3-851-012 (June 6, 1989) (ICAO affirmed ALJ's denial of change of physician where ALJ found claimant failed to prove inadequate treatment provided by claimant's authorized treating physician). Another relevant consideration, which naturally follows, would be whether the new authorized treating provider would be in a better position to provide the claimant with adequate medical treatment. Without knowing whom Claimant identifies as the new authorized treating physician—let alone why that new authorized treating physician is in a better position to provide Claimant with adequate medical treatment—the Court is inclined to find an incomplete showing as to why a change of physician is warranted.

The Court finds and concludes that Claimant has failed to prove by a preponderance of the evidence a proper showing justifying a change of authorized provider.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen this matter is denied.

2. Claimant's request for a change in authorized treating physician 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: August 28, 2023

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

OFFICE OF ADMINISTRATIVE COURTS STATE OF COLORADO

WORKERS' COMPENSATION NO. 5-235-415-001

ISSUES

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

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

FINDINGS OF FACT

1. Claimant testified at hearing that he met Respondent (although not for the first time) on March 12, 2023 at a mutual friend's house where they discussed Claimant working on a job trimming trees that Respondent was working the next day. Claimant testified that during their discussion Respondent agreed to pay Claimant $20 per hour for his work. Claimant testified that he told Respondent he would not fill out a 1099 form for his work.

2. Claimant testified Respondent picked him up the next morning, March 13, 2023, and took him to the job site where Respondent started gearing up. Claimant testified he picked up a chain saw and began operating the chain saw. Claimant testified that later, Respondent told him to come grab the rope which was attached to part of the tree they were felling and wrap it around the trunk of a tree. Claimant testified that as the part of the tree fell, he was pulled into the air and thrown to the ground. Claimant was later transported to the hospital by ambulance.

3. Respondent testified at hearing and confirmed portions of Claimant's testimony. Respondent testified that he had met Claimant through a friend/neighbor and spoke to Claimant on March 12, 2023 where they discussed Claimant working for Respondent. Respondent denied that he agreed to hire Claimant or that they had agreed on a compensation rate of $20 per hour.

4. Respondent testified he picked Claimant up in the morning and took Claimant to the job site where Claimant picked up a chain saw and began operating the chain saw. Respondent testified that it appeared as though Respondent could use a chain saw, but he did not provide Claimant with any personal protective equipment ("PPE"). Respondent testified he did not instruct Claimant to pick up the chain saw and Claimant was not authorized to operate the chain saw. Respondent did not testify that he advised Claimant to cease using the equipment when Claimant began operating the

chain saw.

5. Respondent testified Claimant was supposed to observe the work being performed in the morning, and if Claimant decided he wanted to work for Respondent, they would fill out the paper work in the afternoon and agree at that time on the terms of employment. Respondent testified that Claimant did not sign anything and did not complete any on boarding documents.

6. Respondent testified that Claimant at one point took hold of the rope and was thrown into the air and to the ground when the tree fell. Respondent denied telling Claimant to grab the rope before Claimant's accident. Respondent testified that Claimant's fall caused some damage to the property.

7. Following the injury, Claimant was taken by ambulance to the St. Mary's Hospital Emergency Room ("ER"). The medical records document that Claimant presented with complaints of trauma that were sustained when a rope he was holding onto tightly flung him into the air as a tree it was attached to fell to the ground. Claimant reported being thrown approximately 20 feet in the air and presented with pain over his low back. The ER noted that Claimant had a prior history of IV drug abuse and alcohol abuse.

8. Claimant underwent a computed tomography ("CT") of the head, neck chest, abdomen, and pelvis as well as initial portable chest x-ray and x-rays of the lumbar spine. The diagnostic testing showed no intracranial hemorrhage on the head CT scan and no acute fracture on the cervical spine films. The CT scan of the chest demonstrated no pneumothorax or rib fractures or pulmonary contusion. The CT scan of the abdomen demonstrates no solid organ injury, intraperitoneal fluid or blood, and no spine fracture, though swelling and hematoma in the subcutaneous tissues of the lumbar area was noted. The initial chest x-ray was unremarkable with the exception of a deformity that was later determined to be a rib shadow. The lumbar spine films demonstrated no obvious displaced fracture.

9. Claimant subsequently became combative with the ER staff. The records note that Claimant was writing in pain, yelling and screaming at the staff to "do fucking something". It was noted in the medical records that Claimant stated "I'm in pain and your (sic) fucking useless." Claimant also stated to the ER staff "I could get better drugs off the street, fuck you all ... and fuck this!!" When Claimant was transferred to the bed, he refused to turn in order to visualize the lumbar sacral area. Claimant was advised that no verbal abuse would be tolerated.

10. The medical records note that Claimant refused to turn or get out of bed. Claimant eventually became agitated and got dressed and stated he was leaving when a few visitors showed up. The nurse tried to educate Claimant on leaving against medical advice, but was unable to address Claimant before he left. The physician was made aware that Claimant was leaving and discharge orders were placed.

11. It was noted in the medical records that Claimant's only documented condition during the ER visit was the large hematoma on his low back.

12. According to the medical bill entered into evidence at hearing, Claimant's ER bill came to $33,551.25.

13. The ALJ credits the testimony of Respondent in this case that he transported Claimant to the job site and Claimant began performing actions associated with the work being performed by Respondent, including operating a chain saw and holding the rope attached to the tree that was being cut down. While Respondent maintains that Claimant was not an employee at that time as Claimant was only to be obseiving the work in order to decide if he wanted to work with Respondent, Claimant's actions indicate that he was performing work for Employer at the time he was thrown to the ground.

14. The ALJ finds that Claimant has established that it is more probable than not that a contract for hire was entered into in which Claimant agreed to go with Respondent to the job site on March 13, 2023 and perform work associated with Respondent's business. Claimant was taken to the job site by Employer, and while at the job site, was performing work associated with Respondent's business, including operating a chain saw and holding a rope attached to a tree that was being cut down.

15. While Respondent maintains that Claimant had not signed any documents and may not have had proper identification to sign the employment paperwork when Claimant was taken to the job site on March 13, 2023, this is not dispositive of an Employer-Employee relationship.

16. The ALJ credits the testimony of Respondent and finds that Claimant has established that it is more likely than not that he was an employee of Respondent on March 13, 2023. The ALJ makes no determination as to average weekly wage or temporary disability benefits as that issue was not before the court.

17. Claimant was taken by ambulance to the emergency room after the injury where Claimant was treated for injuries sustained in the fall that included diagnostic testing. The ALJ credits the medical records entered into evidence at hearing and finds that Claimant has proven that it is more likely than not that the treatment at the ER was reasonable and necessary to cure and relieve Claimant from the effects of his industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.

A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. 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. The Colorado Workers' Compensation Act defines an "Employee" in Section 8-40-202(1)(b) in pertinent part:

> Every person in the service of any person, association of persons, firm, or private corporation, including any public service corporation, personal representative, assignee, trustee, or receiver, under any contract of hire, express or implied, including aliens and also including minors, whether lawfully or unlawfully employed, who for the purpose of articles 40 to 47 of this title are considered the same and have the same power of contracting with respect to their employment as adult employees, but not including any persons who are expressly excluded from articles 40 to 47 of this title or whose employment is but casual and not in the usual course of the trade, business, profession, or occupation of the employer.

4. For purposes of the Colorado Workers' Compensation Act, an employer-employee relationship is established when the parties enter into a "contract of hire." Section 8-40-202(1)(b), C.R.S.; *Younger v. City and County of Denver,* 810 P.2d 647 (Colo. 1991). It is the contract of hire with the respondent employer that triggers coverage under the Act, and the reciprocal benefits and duties of the workers' compensation system flow to each party because of their entry into that contract of hire. A contract of hire may be express or implied, and it is subject to the same rules as other contracts. *Denver Truck Exchange v. Perryman,* 134 Colo. 586, 307 P.2d 805 (Colo. App. 1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. *Aspen Highlands Skiing Corp. v Apostolou,* 866 P.2d 1384 (Colo. 1994). A "contract of hire• is created when there is a "meeting of the minds" which creates a mutual obligation between the worker and the employer. Id. A contract of hire may be formed even though

not every formality attending commercial contracts is found to exist. *Rocky Mountain Dairy Products v. Pease,* 161 Colo. 216,220,422 P.2d 630,632 (1966).

5. As found, Claimant has established by a preponderance of the evidence that he was an employee of Respondent as they had discussed Claimant appearing on the job site and performing work for Respondent. As found, when Claimant arrived on the job site, he began operating a chain saw and held a rope that was attached to a tree that was being cut down by the operations of Respondent. While holding the rope, Claimant was involved in an accident that caused his injury.

6. The mere fact that Claimant had not yet signed his paperwork does not negate the fact that the evidence establishes that Claimant and Respondent had entered into a contract of hire for the work being performed on March 13, 2023.

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

8. As found, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Respondent when he was holding a rope at the job site attached to a tree that was being cut down and was subsequently thrown into the air and landed on the ground causing injury to the Claimant which took Claimant to the ER.

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

10. As found, Claimant has proven by a preponderance of the evidence that the medical treatment he received at the ER was reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury.

ORDER

It is therefore ordered that:

1. Respondent is liable for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury.

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

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.** 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. 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.

DATED: August 29, 2023

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence that Respondents are subject to penalties for violation of § 8-43-404 (5)(a)(v), C.R.S.

2. Whether Claimant established by a preponderance of the evidence that Respondents are subject to penalties for violation of § 8-43-503 (3), C.R.S.

FINDINGS OF FACT

1. Claimant sustained an admitted low back injury on November 20, 2020 arising out of the course of his employment with Employer.

2. On November 20, 2020, Employer provided Claimant a "Designated Provider List" which identified four physicians from whom Claimant could chose for treatment. (Ex. B). Claimant selected Daniel Bates, M.D., at Banner Health as his authorized treating physician. (Ex. B).

3. On November 24, 2020, Claimant initiated treatment at Banner, and saw Douglas Drake, PA-C, a physician assistant for Marc Chimonas, M.D. (Ex. D). On November 30, 2020, Claimant saw Douglas Scott, M.D., at Banner, and continued to see Dr. Scott through September 23, 2021, during which time Dr. Scott served as Claimant's authorized treating physician (ATP). (Ex. D). Sometime after September 23, 2021, Dr. Scott left Banner, and Claimant elected to continue care at Banner, with Dr. Bates.

4. On October 21, 2021, Claimant saw Dr. Bates for the first time. Beginning on October 21, 2021 Dr. Bates served as Claimant's primary ATP. Claimant saw Dr. Bates monthly from October 21, 2021, until June 15, 2022. (Ex. D). Dr. Bates directed Claimant's care, prescribed medications, and referred Claimant for consultations with specialists. (Ex. D).

5. By his June 15, 2021 visit with Dr. Bates, Claimant had undergone diagnostic SI joint blocks, and was considered a candidate for SI joint fusion surgery. Dr. Bates noted that Claimant's pain management physicians had recommended a trial spinal cord stimulator, and Dr. Bates agreed with that recommendation. He noted that Claimant's weight may prevent Claimant from undergoing either procedure, and he referred Claimant to Banner's bariatric department for weight management options to help facilitate Claimant's ability to receive the spinal cord stimulator and/or the SI joint fusion. At that time, the only regular medications Dr. Bates prescribed was Percocet 5/325, which he prescribed in a thirty-day supply. Dr. Bates also assigned work restrictions. Claimant was advised to return to the clinic in four weeks. (Ex. D).

6. Sometime between June 15, 2022 and July 5, 2022, Dr. Bates left Banner, and moved his practice to Workwell. Both Banner and Workwell are "corporate medical providers" as that term is defined in section 8-43-404 (5)(a)(I)(A), C.R.S.

7. On July 5, 2022, Claimant's counsel emailed Respondents' counsel, indicating Dr. Bates had moved his practice to Workwell, and that Claimant would "continue treating with Dr. Bates." (Ex. 9).

8. On July 12, 2022, Claimant emailed his counsel, indicating that Dr. Bates' office would not schedule an appointment or see him, until it was approved by Insurer. (Ex. 11).

9. On July 20, 2022, Claimant returned to Banner. Claimant and saw Mark Krisburg, M.D. Claimant received treatment at Banner through Dr. Krisburg until October 13, 2022. During this time, Dr. Krisburg consistently refilled Claimant's Percocet prescriptions, and agreed with Dr. Bates' work and treatment recommendations, including the recommendation for SI fusion surgery, spinal cord stimulator, and a referral for a bariatric consultation. Although he noted the request for a spinal cord stimulator had been denied. Dr. Krisburg also referred Claimant for dietary assistance for weight loss. On September 16, 2022, Dr. Krisburg responded to an August 19, 2022 letter from Claimant's counsel indicating his support for the recommendations for SI fusion surgery, and a bariatric consult. (Ex. D).

10. On August 17, 2022, Claimant's counsel emailed Respondents' counsel indicating that Dr. Bates had agreed to continue Claimant's care and that Claimant would like to continue his care with Dr. Bates "if Respondents will agree." Claimants counsel also indicated that Claimant was "low on his medications and needs to see [Dr. Bates] as soon as possible." (Ex. 12).

11. Claimant was scheduled for an appointment with Dr. Krisburg on August 17, 2022, at which his medications could have been refilled, but Claimant was documented as a "No Show" for the appointment. At Claimant's September 15, 2022 visit, Dr. Krisburg refilled Claimant's pain medications. (Ex. D). Claimant's final visit with Dr. Krisburg was October 13, 2022, at which time Dr. Krisburg refilled Claimant's medications, and indicated that a dietary consultant was recently authorized. Claimant was scheduled to return to Dr. Krisburg on November 23, 2022, but did not attend the appointment. (Ex. D).

12. Between August 2022 and November 2022, counsel for the parties exchanged emails regarding Claimant's request that Respondents authorize Dr. Bates to continue treating Claimant and remain as his ATP. (Ex. 13, 14, 15, 16, 17, 18, 19).

13. On November 1, 2022, Respondents' counsel emailed Claimant's counsel indicating that Insurer was "authorizing [Claimant] to treat with Dr. Bates." Respondents' counsel directed Claimant to schedule an appointment with Dr. Bates and Insurer would authorize it. (Ex. A).

14. On November 8, 2022, Insurer's adjuster [Redacted, hereinafter LG] sent a letter to Dr. Bates indicating that Respondents were "agreeing to allow [Dr. Bates] to be the ATP on this case file." (Ex. A).

15. On November 18, 2022, Claimant re-initiated care with Dr. Bates now at Workwell. Claimant saw Dr. Bates four times between November 18, 2022 and December 29, 2022. During this time, Dr. Bates continued to prescribe Claimant's medications and did not alter his course of treatment, with the exception of requesting a functional capacity evaluation prior to issuing an impairment rating. On December 29, 2022, Dr. Bates placed Claimant at maximum medical improvement (MMI), and assigned Claimant a permanent impairment rating. (Ex. E). Claimant continued to see Dr. Bates for maintenance care after being placed at MMI.

16. On December 7, 2022, Claimant filed the Application for Hearing in the present case, seeking penalties for alleged violations of § 8-43-304 and 8-43-404(5) C.R.S.

17. Claimant testified at hearing that after Dr. Bates moved his practice from Banner to Workwell, he had no choice but to return to Banner for treatment because Respondents had not authorized Dr. Bates to remain as Claimant's ATP. Claimant testified that Dr. Bates and Dr. Krisburg made the same treatment recommendations, including a spinal cord stimulator.

18. LG[Redacted], Insurer's claim adjustor assigned to Claimant's claim, testified at hearing. LG[Redacted] testified that Insurer did not authorize Claimant to continue to see Dr. Bates after he moved his practice to Workwell because Insurer took the position that Banner was the designated "corporate provider" and that all patients would continue to receive treatment at Banner. LG[Redacted] agreed that before moving his practice, Dr. Bates was Claimant's primary ATP. She agreed that Insurer denied Claimant's transfer of care to Dr. Bates until November 2022. She testified that Dr. Bates did not request a transfer of care to him at Workwell until November 2022, and once that request was made, Respondents agreed and informed Dr. Bates' office on November 8, 2022.

19. [Redacted, hereinafter JC] was a clinic manager or center administrator for Workwell during the relevant period. JC[Redacted] testified that she requested authorization for Dr. Bates to treat Claimant at Workwell from Respondents in November 2022. She testified that the request for authorization was not expressly denied, although she had difficulty reaching Respondents or their representatives. She testified that the only direct communication she received from Insurer was the November 8, 2022 letter authorizing Dr. Bates as Claimant's ATP.

20. JC[Redacted] also testified that Workwell was previously on Employer's panel of clinics designated to treat Employer's injured workers, but was no longer on the panel as of 2019. Sometime in May or June 2022, Workwell was restored to Employer's workers' compensation panel, although only two providers at Workwell were permitted to treat Employer's injured workers. Dr. Bates was not one of the designated providers. JC[Redacted] had no direct knowledge of why Dr. Bates was not included on the panel of designated physicians.

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).

Penalties

Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any person who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S. is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty, and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

In relevant part, section 8-43-304(1) provides: "Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates articles 40 to 47 of this title 8, or does any act prohibited thereby, or fails or refuses to perform any

duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, … shall also be punished by a fine of not more than one thousand dollars per day for each offense …"

Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

If it is determined that a person violated a statute or order, the question then turns to whether the insurer's conduct was objectively unreasonable. This is a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Alleged violation of Section 8-43-404 (5)(a)(V), C.R.S.

Claimant has failed to establish that Respondents violated § 8-43-404 (5)(a)(V), and has therefore failed to establish a basis for imposition of penalties.

Penalties may be imposed under § 8-43-304 (1), where a person or party "violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby." "It follows that no penalty may be imposed under § 8-43-304 (1) unless the challenged conduct is a violation of the Act." *Moseley v. U.S. Express Enterp*., W.C. No. 4-530-546 (ICAO Dec. 12, 2002). In determining whether a statutory violation has occurred, the "ALJ must look to the express duties and prohibitions imposed by the statutory language in determining whether the challenged conduct violates the Act, and should not create implied duties and responsibilities." *Id*., citing *Allison v. Indus. Claim Appeals Office,* 916 P2d 623 (Colo. App. 1995); see also *See Kraus v. Artcraft Sign Co.*, 710 P.2d 480,482 (Colo. 1985) (court should not read nonexistent provisions into the Act.").

In relevant part, § 8-43-404(5)(a)(V), provides "If the authorized treating physician moves from one facility to another, or from one corporate medical provider to another, an injured employee may continue care with the authorized treating physician …" While the statute confers upon injured workers the right to continue care with a relocating ATP, it imposes no express duties on injured workers, insurers, or employers. Claimant asserts that Respondents violated § 8-43-404(5)(a)(V) by failing to timely authorize Claimant's treatment with Dr. Bates after he relocated his practice to Workwell. Had the General Assembly intended § 8-43-404(5)(a)(V) to require injured workers to seek approval for

continuing care, or imposed obligations upon the insurer to "authorize" a relocating ATP, it could and would have included mechanisms for doing so, as it did in § 8-43-404 (a)(5)(III) and (VI). Claimant's request for penalties would require the ALJ to improperly impose implied duties and responsibilities upon Respondents that are not contained in § 8-43-404(5)(a)(V). Because Respondents have not violated any express duty or obligation imposed by § 8-43-404(5)(a)(V), Claimant's request for penalties for violation of this section is denied.

Alleged violation of Section 8-43-503 (3), C.R.S.

Claimant has failed to establish that Respondents violated section 8-43-503(3), C.R.S. Section 8-43-503(3), C.R.S. provides that "Employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment. This section precludes an insurer or its representative from "issuing commands to a treating physician concerning the type or duration of treatment to be provided to the claimant." *Williams v. City of Colorado Springs,* WC 4-565-576 (ICAO, Feb. 15, 2008). Evidence that the conduct of the insurer or its representative influenced an ATP to "engage in a specific course of conduct because of the actions of the respondents," or that treatment "was delayed or that course of treatment was altered because of the actions of the respondents" may be considered in determining whether treatment was dictated. *Gianzero v. Wal-Mart Stores, Inc.,* WC 4-669-749 (ICAO, July 14, 2009).

Although Respondents did not facilitate Claimant's continuation of care with Dr. Bates until November 2022, no credible evidence was admitted indicating that Respondents dictated the type or duration of treatment provided to Claimant. No credible evidence was admitted that Respondents issued any commands to any treating physician regarding his treatment, or that Claimant's treatment was delayed or altered.

At his June 15, 2022 visit, Dr. Bates recommended Claimant return in four weeks. Claimant saw Dr. Krisburg on July 20, 2022, and continued to see him at the same frequency he saw Dr. Bates until October 13, 2022. Dr. Krisburg did not alter Dr. Bates' treatment plan. He continued to regularly refill Claimant's pain medication, imposed Dr. Bates' work restrictions, and continued to advocate for the same treatments Dr. Bates recommended, such as SI joint fusion surgery, spinal cord stimulator and a bariatric consult. When Claimant did return to Dr. Bates after November 18, 2022, he did not alter Claimant's course of treatment. He continued to prescribe the same medications, and did not make any further referrals for treatment. Dr. Bates then placed Claimant at MMI within six weeks of resuming his care.

Because Respondents did not dictate either the type or duration of treatment Claimant was prescribed or received, the evidence does not establish that Respondents violated section 8-43-503(3), C.R.S. Claimant's request for penalties for dictation of medical care is denied.

ORDER

It is therefore ordered that:

1. Claimant's request for penalties is denied and dismissed.

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

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

DATED: August 29, 2023

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

ISSUES

I. Whether the Claimant proved by a preponderance of the evidence that she sustained a compensable work injury on September 26, 2021.

IF THE CLAIMANT PROVED COMPENSABILTIY, THEN:

II. Whether Claimant proved by a preponderance of the evidence that she is entitled to medical benefits which are authorized, reasonably necessary and related to the compensable September 26, 2021 work injury.

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

IV. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability benefits from September 26, 2021, until terminated by law.

STIPULATIONS OF THE PARTIES

The parties stipulated that, if Claimant's claim was deemed compensable and TTD benefits awarded, the issue of offsets, either short term or long term benefits, is reserved for future determination.

The parties further stipulated, if the claim is deemed compensable, that Dr. Mitchel Robinson is an authorized treating physician.

FINDINGS OF FACT

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

A. Generally

1. Claimant was a customer service agent for Employer for over fourteen years and was 53 years old at the time of the hearing. She assisted passengers and met the planes at the gate. She would bring the mobile swing gate to the plane so passengers could disembark from the plane and would then disconnect them so the aircraft could depart.

2. Claimant started with Employer as a line station worker. This position involved all the work of a customer service agent as well as having to go below the wings and bring in the planes and load and unload bags. She then moved to Denver where she worked as a customer service agent.

B. The Injury

3. On September 26, 2021, Claimant was at the gate, meeting planes, which had to be performed quickly when there were back-to-back flights. She had a plane at the gate and was using a swing gate, which had to be connected to the mobile bridge adapter (MBA) to the aircraft. She went to grab the MBA, a 150 pound piece of steel, and pulled it quickly, and the adapter "got hung up." When she pulled up on it to get it unstuck, she felt a pop in her right shoulder. She pulled back and it didn't release, and she jerked it again and it came loose. This occurred at approximately 7:30 p.m. She felt immediate pain, but since she had to get the next plane deplaned, she had to work quickly and ignored the immediate onset of pain. She stated that she was working quickly and was under time pressure which caused her to have an adrenaline rush. She believed this helped her control the pain, so it was not crippling.

4. The pain continued to increase through the evening until she arrived home at around 9 p.m. She rushed home because she knew she had to be back to work by 6:30 a.m. the following morning. The pain was sharp and caused her to not be able to move her extremity well. The pain was so severe, that she was unable to take off her sweater and required her husband to assist her to undress. As she unhooked her bra, whatever was being held by the pressure of the bra released and the sharp pain became unbearable. It was sharp and pinching, not like what she had experienced before, which was only an achy soreness. It was something that she had never felt before.

5. She described the location of the pain after the injury as "indicating the top portion of her shoulder along the edge from the neck down to the glenohumeral joint and the trapezius muscle in the back up to the neck."

6. By 3 a.m. the following morning, on September 27, 2021, she could not stand the pain. She called the call-in number for Employer, to be excused from work. She went to St. Anthony's emergency room where they took x-rays, prescribed a medication regimen and put her in a sling, referring her to orthopedics.

7. The following day, on September 28, 2021 she went to Panorama Orthopedics. They ordered x-rays and an MRI. She also saw Dr. Hugate at Panorama, who was an orthopedic oncologist. She was treated primarily with physical therapy, to the extent that, because she was gaining range of motion, Dr. Robinson no longer recommended surgery.

C. Medical Records

8. Claimant was attended at St. Anthony Hospital in Lakewood on September 27, 2021 by Gina Soriya, M.D. She documented that Claimant presented with right shoulder pain after sustaining a work-related injury, when she was moving a heavy object at work and not protecting her arm when she had the onset of pain, with pain of 10/10.[1] She ordered x-rays and medications, including Tylenol, Flexeril, and Lidoderm patches. She denied Claimant any narcotic pain medication. She provided a differential diagnosis

[1] Dr. Soriya noted a history of prior rotator cuff tear but no prior surgery but this is deemed a mistake in the record and not credible.

and acute pain in the right shoulder. Claimant was referred to her primary care physician (PCP) regarding her x-ray results of small nonspecific sclerotic lesion of the proximal humeral head, recommending a whole body scan and to an orthopedist with regard to other symptoms in her shoulder. Lastly, Dr. Soriya provided Claimant with light-duty restrictions until cleared by her primary care provider (PCP).

9. The September 27, 2021 x-rays read by Dr. William Berger showed very mild degenerative joint disease (DJD) of the acromioclavicular joint and no significant evidence of glenohumeral DJD, and noted the 7 mm sclerotic lesion of the right humeral neck.

10. On September 28, 2021 Claimant was seen at Panorama Orthopedics and Spine Center by Samuel F. McBride, PA-C, for the right shoulder. Claimant provided a history consistent with her testimony at the hearing. At that time Claimant described the pain as aching, burning, numbing, radiating, sharp, and tingling (in alphabetical order). Her pain was a 9/10. Claimant had associated symptoms of a limited range of motion, tingling and numbness in the right hand, and swelling. Her symptoms were exacerbated by lifting, pushing/pulling, twisting/turning, activities for an extended period of time, driving, standing and walking. Her symptoms were alleviated by ice, rest, elevation, stretching, massage, ibuprofen, and Tylenol. Functionally, Claimant reported difficulty with daily activities such as sleeping, opening her medication bottle, and putting on her clothes.

11. On exam, Mr. McBride found a limited range of motion but no instability. He noted positive empty can and Hawkins tests. Mr. McBride stated that they would move forward with an MRI of the right shoulder to evaluate the patient's right rotator cuff for further treatment plan. They provided Claimant prescriptions for Tramadol and Mobic since her pain was not well controlled at that time and she was having a lot of difficulty sleeping and performing her daily activities.

12. The x-rays from September 28, 2021 showed mild to moderate degenerative changes of the acromioclavicular joint and the glenohumeral joint with a type 2 acromion. Mr. McBride also identified an acute on chronic calcification superior to the greater tuberosity of the humerus.

13. The MRI performed on September 30, 2021 read by Andrew Sonin, M.D., showed calcific tendinopathy of the distal rotator cuff eroding into the humeral head with some calcification in the adjacent superolateral humeral head. Additional areas of signal void[2] in the proximal humeral shaft were surrounded by marrow edema with a thin irregular linear low signal connection between the erosion proximally and the low signal more distally, possibly representing an extension of calcification into the humeral shaft. He also noted significant delamination of the distal rotator cuff with areas of linear nondisplaced full-thickness tearing in the distal supraspinatus and infraspinatus. Dr. Sonin recommended an MRI of the entire humerus to assess the extent of abnormal marrow signal and to assess for the possibility of a more distal lesion such as a tumor or

[2] "Signal void" is interpreted by this ALJ as an area of the MRI which was unable to be clearly visualize due to accumulation of fluid.

fracture. He also recommended a CT of the proximal humerus to distinguish between this process and separate ossifications in the humerus.

14. Dr. Robinson referred Claimant to Dr. Hugate, an orthopedic oncologist with Panorama when the MRI taken on September 30, 2021, showed not only the calcific tendinitis of the shoulder joint and a tear of the rotator cuff but also a differential diagnosis of a more distal lesion such as a tumor or fracture.

15. An MRI was performed of the right humerus at Health Images at Church Ranch on October 8, 2021 was read by Eric Handley, M.D. He identified the calcific infiltrates into the bone but no cortical bone marrow edema. He also identified some moderate supraspinatus tendinopathy and some edema surrounding the bone.

16. On October 14, 2021 Claimant was seen by Ronald R. Hugate of Panorama Orthopedics, for an interoffice referral. Claimant provided a history of having had some aching pain in her shoulder off and on for a few years, but on September 26, 2021 she was pulling a heavy object while at working for Employer and she felt a pop and significant pain in the shoulder.[3] He noted that Claimant had no personal history of cancer. It was noted Claimant was there to determine if she had a tumor. On exam ,Dr. Hugate noted loss of active range of motion with significant pain, but otherwise normal. He noted the calcific tendinitis but also calcium in the proximal humerus. He observed that she had a partial rotator cuff pathology with mixed signal edema in the proximal humeral metaphysis (neck), which affects the physeal scar (growth plate at the neck) and some surrounding edema around the humerus. He did not believe that anything looked like a mass but referred her to Dr. Peter Horner, an interventional radiologist for a needle biopsy and culture to rule out infection or malignancy. He also referred Claimant back to Dr. Robinson for further care of the right shoulder pain.

17. On November 10, 2021 Dr. Robinson continued Claimant off work until further workup could be completed to assess the underlying bone lesion and treatment of the acute right shoulder injury.

18. A CT and bone biopsy of the right shoulder was completed by Dr. Peder Horner on November 12, 2021. The interpretation was not available.

19. On December 2, 2021 Claimant returned to see Dr. Robinson with unrelenting, but improving right shoulder pain. She continued having problems sleeping. He observed that the needle biopsy showed no evidence of abnormality, and was negative for cancer. He diagnosed strain of the muscles and tendons of the rotator cuff of the right shoulder and calcific tendinitis. He made the following medical decisions:

> She has a very unusual case of calcific tendinitis, which then made its way into her approximate humerus. She has some scattered degenerative changes and some wear and tear of the rotator cuff with a large calcium deposit. We talked about treatment options. We are going to move forward with physical therapy for the next 4-5 weeks. We might repeat her MRI. We are trying to decide whether or not the rotator cuff requires repair. I would like some of the inflammation to settle down, probably repeating her MRI and making her final decision.

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[3] This history provided to Dr. Hugate is considered roughly consistent with the Claimant's testimony at hearing. The reference to a "conveyor belt" is simply a misinterpretation of Claimant's explanation of the mechanical parts involved.

…

> We discussed surgery as a possible treatment course and the patient elected to consider options before deciding. We also discussed the patient's history of thyroid disease, which may increase the level of risk associated with this surgery.
>
> The procedure risks, benefits, side effects, and alternatives of the procedure were discussed at length with the patient. We discussed the following risks of arthroscopy: Allergic reactions to anesthesia, postoperative infection, stiffness, swelling, blood clots, continued pain, and in some severe cases osteonecrosis or rapid deterioration of the surrounding cartilage.

20. Dr. Robinson referred Claimant to physical therapy for rotator cuff tear arthropathy of the right shoulder, to begin with isometric, and progress to PRE's (progressive resistance exercises) as tolerated, but to avoid impingement positions. He also ordered scapulothoracic strengthening, stretching, soft tissue manipulation and mobilization, and modalities as needed.

21. Claimant had a virtual appointment with Dr. Hugate on December 6, 2021. He reported Claimant was negative for cancer but commented that she had an unusual condition that caused the calcific tendinitis to infiltrate the marrow space of the humerus bone, which was very rare. He recommended Claimant be evaluated by Dr. Stuart Kassan, a rheumatologist. The diagnosis history was a strain of muscles and tendons of the rotator cuff of the right shoulder, calcific tendinitis of right shoulder, acute pain of the right shoulder, arm mass, and other calcification of muscle of the right shoulder.

22. Dr. Robinson wrote down on March 16, 2022 that Claimant continued to have work restrictions regarding her work-related injury, which included, not opening aircraft doors, pulling off mobile bridge adaptors; and no pushing, pulling, lifting, or overhead pressing more than 5 lbs.

23. On March 30, 2022 Dr. Robinson took a history of improving right shoulder pain with unremitting difficulty sleeping. He continued physical therapy for another 18 visits for range of motion and strengthening. He ordered an updated MRI. Claimant reported that she was having difficulty with workers' compensation and her personal insurance had been terminated.

24. On April 1, 2022 Dr. Robinson wrote that Claimant:

> … is a patient of mine at Panorama Orthopedics and Spine Center. Due to her recent injury we are ordering an MRI of her shoulder. This will be a necessary diagnostic test in order to help us decide how to move forward. She will need the MRI and to follow up with us afterwards. At that time we will discuss how it is best to move forward with the injury.

25. Claimant was also seen by Panorama Orthopedics Physical Therapy on April 1, 2022. Claimant reported she had a 3-4/10 pain all the time and sharp pain occasionally up to 8/10. Ms. Martha Myers documented Claimant was unable to work due to the injury. The history of the mechanism of injury was consistent with Claimant's testimony at the hearing. She mentioned Claimant continued to have signs and symptoms of rotator cuff tear with decreased ROM, strength, impairments in body mechanics, posture, soft tissue restrictions, edema, and pain. She recommended ongoing physical therapy.

26. The MRI performed on April 28, 2022 showed a small full-thickness perforation of the posterior supraspinatus, and that the previously noticed edema had nearly resolved. Though there was a hyperintensity[4], likely a bone infarct (osteonecrosis) as a result of the previous biopsy.

27. Dr. Robinson reexamined Claimant on May 11, 2022. He commented that Claimant had continued right shoulder pain that was sore and sharp. Associated symptoms included tightness and stiffness. Her symptoms were exacerbated by certain movements and alleviated by rest. Functionally, Claimant reported being limited by pain with certain motions. He mentioned that Claimant had been previously advised that her case was likely surgical and was a work-related concern from September 26, 2021 with continued functional limitations. He noted Claimant had loss of ROM but otherwise had a stable exam. Dr. Robinson continued to diagnose calcific tendinitis[5] and strain of the right shoulder. Dr. Robinson reviewed the MRI and noted no surgical pathology as the rotator cuff was nearly entirely intact with only a small perforation of the posterior supraspinatus. He continued physical therapy regularly and recommended Claimant avoid movements that were causing her pain for the time being.

28. Dr. Robinson completed a Physician's Report of Workers' Compensation Injury dated June 1, 2022, noting Claimant's therapy, medications and diagnostic testing. He stated Claimant continued to be unable to work. He further provided restrictions which included no lifting, repetitive lifting, carrying, pushing, pulling, gripping, reaching overhead, and reaching away from the body.

29. On June 18, 2022 Dr. Robinson ordered physical therapy for another 12 visits.

30. Claimant continued to attend physical therapy. Ms. Myers remarked, on August 2, 2022, that Claimant had pain of 6/10 if she moves "wrong" with external rotation, and wakes with pain, though with medications the pain was reduced to 2/10. She recorded Claimant had been unable to lift items out of the oven as her arm was unreliable. She highlighted that Claimant was showing signs of improvement, yet still experiencing restricted range of motion. She recommended ongoing PT. The last note by Ms. Myers was from October 18, 2022 noting that PT was suspended because of problems with insurance.

31. On August 4, 2022 Dr. Robinson noted, on exam, that Claimant was much improved but continued with painful ROM, specifically external and internal rotation. He indicated that, in addition to PT Claimant was doing pool therapy. He also gave Claimant a referral to a rheumatologist for a second opinion and to follow up with him within six weeks.

32. Claimant followed up with Dr. Robinson on November 23, 2022. He noted that Claimant continued to improve her ROM, with stable stability and negative tests otherwise. He attributed her improvement to the pool therapy though she did not feel

[4] This ALJ understands that "hyperintensity" shown in an MRI report refers to white spots that denote some problematic area on an image.

[5] Dr. Robinson commented that the calcific tendinitis was a rare form that infiltrated the bone, which caused some concern for cancer, but which was ruled out early on.

confident enough in her shoulder to perform significant movement overhead, lifting, pushing, pulling and Dr. Robinson agreed with her. He recommended continued therapy.

33. On January 30, 2023 Claimant was evaluated by Sander Orent, M.D. by virtual examination at Claimant's request. He took a history consistent with Claimant's testimony at the hearing. He reviewed the medical records and noted Claimant's motions on the video call, which were still limited. He opined that Claimant was clearly not at MMI and was unclear as to why Claimant would be discharged with ongoing symptomology and no impairment rating. He documented that Claimant continued having significant pain with simple activities such as putting her arm into flexion, sleeping at night, lifting pans from the oven, and getting dressed. He recommended a second opinion with a different orthopedic surgeon such as Scott Gottlob, M.D. to consider possible surgical repair, injections, physical therapy or a combination of treatments depending on the evaluation of the consulting orthopedist.

34. Dr. Orent opined that Claimant required substantial work restrictions of no lifting at or above the shoulder level, and lifting from floor to shoulder of no more than 5 lbs. on an occasional basis. He opined that Claimant required an impairment rating as Claimant continued with a significant amount of functional limitations. He also mentioned the possibility of a functional capacity evaluation.

35. Claimant was evaluated by Lawrence Lesnak, D.O., of Colorado Rehabilitation and Occupational Medicine on June 13, 2023, at Respondent's request. Dr. Lesnak took a history, reviewed the medical records, and examined the Claimant. The reported mechanism of injury was consistent with what Claimant testified at the time of the hearing. Dr. Lesnak ultimately opined, after reviewing the medical records and critiquing Claimant's memory regarding them, that while there may have been an incident during working hours on September 26, 2021, there was no medical evidence to support the assertion that she sustained any type of injury to her right shoulder as a result of her work activities on that day. Dr. Lesnak partially based his opinion on his interpretation of the March 2021 physical examination conducted by Dr. Ozbay, which repeated the previous diagnoses from 2019 and earlier. (It is not evident to this ALJ whether Dr. Ozbay was reporting a new or ongoing complaint.)

D. Prior medical records

36. Claimant was evaluated by Julie Sefcik, DO, at Rocky Mountain Primary Care on November 5, 2019 regarding shoulder pain. She noted that Claimant presented with right shoulder pain after having an upper respiratory infection (URI) the prior September. She was having problems moving her arm with pain when using it overhead. She reported that it was pain like a toothache but did not have any further URI symptoms. She documented some loss of range of motion due to pain, a positive Hawkins and crossover test. She diagnosed rotator cuff impingement. Ms. Sefcik injected the shoulder with Toradol and stated that Claimant should follow up for a steroid injection if she did not have relief of her symptoms. She also ordered therapy. Claimant did not return to the Clinic for over a year and did not follow up for therapy.

37. The Health Images x-ray read by Dr. Brian Cox on November 5, 2019 showed a calcific conglomeration and he interpreted it as calcific tendinosis of the rotator cuff. He also noted Claimant had mild acromioclavicular degenerative joint disease. He recommended a follow-up MRI.

38. Later that afternoon, on November 5, 2019, Dr. Sefcik reviewed the x-ray and changed her diagnosis to calcific tendinosis of the rotator cuff. She noted that the calcium deposits were causing pain with shoulder movement. She continued with the prior recommendations that if the Toradol injection did not improve her symptoms, they would recommend a steroid injection and referral to an orthopedic specialist.

39. Claimant's next appointment with her PCP, Dr. Behice Ozbay at RMPC was March 23, 2021 for a general physical. Her only "present concerns" was "easy bruising." The records were standard for review of every one of Claimant's chronic conditions as well as routine wellbeing exams. While the report mentions chronic shoulder[6] problems this is inferred as a reference to the calcific tendinosis and there were little in recommendations for treatment nor were there referrals made at that time, other than advice to continue stretching.

40. Lastly, Claimant was evaluated at Colorado Center for Arthritis and diagnosed with fibromyalgia, morphea (scleroderma), and a positive ANA in 2016. Prateek Chaudhary, DO, performed a physical exam in 2016, 2017 and 2018 that showed no abnormalities, including no tenderness, no swelling, no erythema, no nodules or cysts, no deformities, no crepitus, normal range of motion and normal alignment of all four extremities.

41. Other records from prior to 2016 were not considered relevant other than the diagnosis of calcium pyrophosphate arthropathy, as this showed Claimant was at least aware that she had calcium crystals deposits in her joints that were causing her multiple symptoms.

E. Wages

42. Claimant testified that she worked full time and was working some overtime hours or double shifts.

43. The payroll records submitted by Respondents showed earnings beginning with the pay period ending January 16, 2021.

44. There were no wages before this date and no significant explanation as to why wages prior to this date were not submitted for consideration or why Claimant was not earning wages, other than some indications of Claimant being on medical leave from October 2020.

45. Based on the total wages earned from pay period ending January 16, 2021 (beginning as of January 3, 2021) through pay period ending September 25, 2021, Claimant earned a total of $41,087.32, which divided by 38 weeks provides an average weekly wage of $1,081.25.

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[6] This ALJ determined that any reference to an "old work injury" was incorrect and not credible.

F. Pleadings

46. Respondent's third-party administrator (TPA) filed a Notice of Contest on March 14, 2022 stating the denial was for further investigation.

47. Claimant filed a Workers' Claim for Compensation on May 31, 2022 noting that she was pulling an MBA off the aircraft and the MBA got hung up on the ledge of the swing gate. When the MBA got stuck she pulled and felt a pop in her shoulder. She noted that she had a torn rotator cuff of the right shoulder. Claimant had started the day at approximately 6:15 a.m. and was injured at approximately 7:30 p.m. on September 26, 2021. She notified her supervisor on September 27, 2021.

G. Claimant's Testimony

48. Claimant testified she had multiple preexisting conditions. One of them was calcific tendinosis, which she treated with anti-inflammatory medication, and she was unaware of a cure for this condition. She also reported she had two autoimmune system conditions. The first was Hashimoto's disease, where her immune system fights her thyroid function. The second was scleroderma. Further, she noted her body reacted to stress, food, activity, and different triggers. She had also been diagnosed with fibromyalgia, as documented in her medical records as if it were another symptom of her autoimmune system disease. Prior to her work injury, she had not seen the diagnosing provider since 2018.

49. Claimant acknowledged that she had previous inflammation in her right shoulder as a result of the calcific tendinitis, and had achiness in her right shoulder prior to September 26, 2021, but they were not the kind of symptoms that rendered her unable to work. The inflammation caused by the calcific tendinitis was only an achy sensation and much different than the stabbing sharp pain she felt following the work injury of September 26, 2021. The pain that she felt after this accident was an intense sharp pain that did not go away. She could not move her arm and there was nothing that she could do to get rid of the pain.

50. She had received a cortisone injection in approximately 2009 or 2010 for the inflammation due to the calcific tendinitis. Then in 2019 she had a Toradol injection, as she could not take ibuprofen or anti-inflammatories because she was having stomach problems. She did not see any providers between November 2019 and the March 2021 physical, in part due to the COVID-19 pandemic. Claimant denied that she had complained to her personal care provider that she was having right shoulder problems at that time of her physical in March 2021, but that it had been a complaint carried over from when she saw Julie in 2019.

51. Claimant testified that with the inflammation from the calcific tendinitis, she was able to lift her arm overhead for years while working for Employer opening aircraft doors and moving the MBA, as well as loading bags and other tasks.

52. She could not perform all of these tasks after the September 26, 2021 injury. It was the injury to her rotator cuff that was causing her the pain in conjunction with the

aggravation of the tendinitis. Initially they had told her she would be scheduled for surgery in January 2022 but that never took place as she continued to improve with therapy and time.

53. Claimant testified that she had not yet been placed at maximum medical improvement (MMI) by her treating provider, Dr. Robinson, as of the date of the hearing. Nor had Employer offered her any modified job duties.

54. As she has not recovered full range of motion, which is a necessary function to open aircraft doors and to move the MBA, she has been unable to return to work. Neither could she pick up bags as required of a customer service agent due to the pain associated with movements. She could do reservation service. In fact, she had been trying to get into reservations without any response from Employer.

55. Claimant testified that Employer never referred her to a medical provider or doctor for medical care and treatment following her report to her supervisor. Her supervisor never mentioned a different provider or she would have shown up for care to see any physician that they had identified.

56. Claimant never had any workers' compensation claims regarding her right shoulder prior the accident on September 26, 2021 while working for Employer or any other employer.

H. Conclusion of Findings

57. As found, Claimant was injured on September 26, 2021 when she attempted to release the MBA from the airplane, while she was in a hurry, and the MBA got caught. She pulled to get it dislodged and felt a pop in her right shoulder and had immediate pain. She was diagnosed with a rotator cuff strain and calcific tendinosis.

58. As found, while calcific tendinosis was a preexisting condition, Claimant's insult to an already affected body part caused edema and a small tear of the rotator cuff. As found, the original MRI showed a full-thickness tearing in the distal supraspinatus and infraspinatus. While these were small tears, this does not void the effect the injuries had on Claimant, which aggravated Claimant's intermittent symptoms of pain and discomfort experienced due to the occasional complaints of fibromyalgia or calcific tendinosis over the years.

59. The ALJ has reviewed the reports of both Dr. Lesnak and Dr. Orent and has considered those reports in light of the medical records before the ALJ from Drs. Robinson, Hugate, Ozbay, and St. Anthony's Hospital as well as the previous records from Christ Hospital, and Colorado Center for Arthritis, and finds that prior to the injury of September 26, 2021, Claimant had been diagnosed with autoimmune issues, thyroid disease, calcific tendinitis in her right shoulder, and fibromyalgia among other issues.

60. As found, although Claimant had a history of calcific tendinitis and fibromyalgia that predated the on-the-job injury of September 26, 2021, there was no persuasive or substantial evidence that such resulted in a disability to Claimant prior to the on-the-job injury of September 26, 2021.

61. As found, Claimant heard a pop in her shoulder, developed immediate pain, and the care and treatment for that condition was described in the records reviewed above. The X-Rays performed on September 28, 2021, indicated an "acute on chronic" calcification superior to the greater tuberosity of the humerus," as well as edema surrounding the humeral head. These records indicated to this ALJ that Claimant sustained an aggravation of the calcification at the time of the September 26, 2021 injury as well as an injury to her rotator cuff, both of which Dr. Robinson has been treating since the onset of his treatment of Claimant beginning September 28, 2021.

62. As found, Claimant worked full time as a customer service agent for an airline, opening aircraft doors, moving very heavy bridges and bridge adaptors in order to perform her job for the airline, without significant difficulty, despite her preexisting medical diagnosis. As found, Claimant's injury aggravated her preexisting condition in addition to cause a new injury as represented by her small rotator cuff tear. This is supported by Dr. Robinson's records above.

63. As found, the medical records reflect that Claimant sustained an injury that resulted in the need for medical treatment on September 26, 2021, and that the diagnostic testing performed shortly thereafter showed a supraspinatus rotator cuff tear and calcification going into the humerus head and a condition that Dr. Robinson described as complex. As found, the medical care and treatment was authorized, reasonably necessary and related to the injury.

64. As found, the fair approximation of Claimant's average weekly wage is $1,081.25 per week.

65. As found, Claimant was unable to return to work after the September 26, 2021 work-related injury and is entitled to temporary total disability benefits beginning as of September 27, 2021 until terminated by law.

66. 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

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

"Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *See Triad Painting Co, supra*; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014). The "arising out of" element is narrower and requires Claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

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

Claimant has established by a preponderance of the evidence that she sustained a compensable injury arising from the course of her employment with Employer on September 26, 2021. The evidence demonstrates that, although Claimant had a preexisting calcific tendinosis in the right shoulder and fibromyalgia, Claimant was, while not free from any symptoms, able to perform her full time job with Employer, which required her to perform heavy activities on a daily basis. Those included opening aircraft doors, moving the bridge and mobile bridge adapter in order to allow flying customers to get on and off the planes, and moving or loading baggage. Claimant was in the process of detaching the MBA when it got stuck. Claimant hurried to pull it free, felt a pop and immediately intense pain. This occurred at approximately 7:30 p.m. in the evening. She was able to complete her work that evening and went home by 9:00 p.m., at which time, after the adrenaline rush she felt had subsided, she could not even undress herself. This is supported by the history given in the emergency room, to her treating providers as well as the IME physicians whom examined Claimant on her own behalf as well as on behalf of Respondents.

It is specifically persuasive to this ALJ, Dr. Robinson's multiple indications that Claimant had a right shoulder strain and small rotator cuff tear caused by the work-related events of September 26, 2021. Further, it is persuasive and supports a finding of compensability that the there was a showing on the MRI performed in April 28, 2022, of a small full thickness perforation of the posterior supraspinatus, and that the previously noticed edema had nearly resolved. The fact that there was edema that resolved is another indication that there was a traumatic aggravation of the tissue surrounding the humerus where the calcification was present. As found, from the totality of the evidence, including Dr. Robinson's opinion and Dr. Orent's opinion that Claimant sustained injuries on September 26, 2021 whose opinions were more credible and persuasive than the contrary opinions of Dr. Lesnak, Claimant has shown than her claim is compensable. Dr.

Lesnak concentrates his review of the records going back years showing that Claimant had chronic health problems but did not offer a cogent opinion that no actual injury occurred and this ALJ does not find Dr. Lesnak's opinions credible or persuasive. The reality is that those preexisting problems were not interfering with Claimant's work in September of 2021. The accident and injuries which Claimant sustained on September 21, 2021 did prevent Claimant from returning to work. As found, while Claimant had a history of chronic complaints and had occasional right shoulder problems that were prone to exacerbation, Claimant was not experiencing ongoing symptoms in the months before September 26, 2021, when the symptoms returned and were aggravated while Claimant was performing her work for Employer. Regardless of any inconsistencies in Claimant's memory of past chronic problems, the specific injury she sustained to her right rotator cuff, including the strain, the small tendon tear and the aggravation of the calcific tendonitis were proximately caused by the incident which occurred when Claimant, on September 26, 2021, pulled on the MBA to dislodge it and move it so the next aircraft to be hooked up. Claimant has shown by a preponderance of the evidence that she was injured within the course and scope of her employment with Employer and that the injuries to her right rotator cuff, including the strain, the small tendon tear and the aggravation of the calcific tendonitis were proximately caused by the September 26, 2021 accident. The ALJ finds it more likely than not that Claimant's work-related accident caused injuries and an aggravation of her preexisting conditions. As such, Claimant has established that it is more likely than not she sustained a compensable injury.

C. 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). 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).

Because Claimant sustained a compensable injury, she is entitled to reasonable and necessary authorized medical treatment to cure or relieve the effects of his injury. Claimant's treatment at the emergency room at St. Anthony's, with Panorama Orthopedics and providers within the chain of referral are authorized, reasonably necessary and related to the injury.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM*

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

This ALJ determined that the fair approximation and calculation was to average out the Claimant's wages beginning on January 3, 2021 with pay period ending January 16, 2021 through pay period ending September 25, 2021. Claimant earned a total of $41,087.32, which divided by 38 weeks provides an average weekly wage of $1,081.25. As found, the fair approximation of Claimant's average weekly wage is $1,081.25 per week.

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

As found, the persuasive evidence shows Claimant was disabled by the September 26, 2021 injury because she could not use her right upper extremity. She was initially given temporary restrictions by the emergency physician. Later, Dr. Robinson, her authorized treating physician, kept Claimant off of work. Claimant credibly testified that with the inflammation from the calcific tendinitis she was able to lift her arm overhead for years while working for employer opening aircraft doors and moving the MBA, as well as loading bags and other tasks. She could not perform all of these tasks after the September 26, 2021 injury. It was the injury to her rotator cuff and the aggravation of her calcific tendinosis that caused her to be unable to return to work for Employer at her same job duties. Further, Claimant testified that she had not yet been placed at maximum medical improvement by Dr. Robinson, and nothing in the records and evidence submitted at the time of the hearing were persuasive otherwise. Nor had Employer offered her any modified job duties. As found, Claimant was unable to return to work beginning on September 27, 2021. Claimant credibly testified that she was unable to return to work due to her injuries of September 26, 2021 and continued to be unable to perform her job. Claimant has proven by a preponderance of the evidence that she is entitled to temporary disability benefits beginning on September 26, 2021 until terminated by law. Claimant is owed TTD benefits from September 27, 2021 until terminated by law.

Based on Claimant's AWW of $1,081.25, Claimant's TTD rate is $720.83. TTD benefits calculated through and including the date of the hearing of July 26, 2023 (628 days or 95 week and 3 days) are in the amount of $68,842.97.

Further, Claimant is owed statutory interest at the rate of eight percent (8%) on all benefits not paid when due, which is calculated through the date of hearing as follows:

[Redacted, hereianfter IRT]

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has proven by a preponderance of the evidence she suffered compensable work-related injuries to her right upper extremity and shoulder on September 26, 2021 while in the course and scope of her employment with Employer.

2. Respondents shall pay all authorized, reasonably necessary and related medical benefits including but not limited to St. Anthony Hospital, and Panorama Orthopedics as well as medical providers within the chain of referral. All payments shall be made pursuant to the Colorado Fee Schedule.

3. Claimant's average weekly wage is $1,081.25 and her temporary total disability benefits rate is $720.33.

4. Respondents shall pay temporary total disability benefits beginning on September 27, 2021 and continuing until terminated by law.

5. Respondents shall pay interest at the statutory rate of 8%, pursuant to Section 8-43-401 (2)(a), C.R.S. (Cum. Supp. 2023), on all benefits that were not paid when due.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. 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 31st day of August, 2023.

By: /s/ Elsa Martinez Tenreiro

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-201-267-002

ISSUES

- Did Claimant prove that the L4-5 surgery recommended by Dr. Crowther's office is causally related to her February 6, 2022 industrial injury and if so, is it reasonable and necessary?

- Whether claimant's work restrictions on and after February 14, 2023, are causally related to claimant's injury covered by this claim, and, if not, whether Respondent is relieved of any obligation to pay Claimant ongoing TTD benefits on and after February 14, 2023?

FINDINGS OF FACT

1. Claimant worked for the Employer stocking grocery items. On February 6, 2022, she was stocking potato chip bags from boxes on a pallet on to a shelf. She testified that as she was about to put the last bag on the shelf, she was twisting around reaching for the last bag to put on the shelf when she experienced severe pain in her low back. She screamed "ouch". A co-worker asked if she was ok. She told him she was in pain. She sat down on the step stool that she was using. She tried to go back to work and picked up the bag of chips to put it on the shelf when she experienced pain again and screamed "ouch" again. She and the co-worker went to the break room and the co-worker contacted the head clerk in the front of the store to let the clerk know what had happened.

2. After reporting the injury, the Claimant went to the emergency department at St. Francis Hospital. Claimant was seen by Physician Assistant Justin Jester. He noted "This a 41 y.o. female with no significant medical problems presents here complaint of back pain. Is located in the left lower back. She was at work today stocking potato chips she states she was pushing and it made it hurt in the left lower back. It radiates into her buttocks. It does not go below that area." In the physical exam section, he notes "Positive tenderness in the left lower back. No midline tenderness. It radiates into the buttocks. Negative straight leg raise. No saddle anesthesia. Normal flexion-extension of her feet and toes. No paresthesias below the buttocks". The final diagnosis was "strain of lumbar region, initial encounter". (Exhibit I, pp. 259 -260).

3. Claimant was next seen at [Redacted, hereinafter OM] by Dr. McNulty on February 7, 2022. He took a history that "the patient is a 41-year-old female who is a Worker's Compensation injury. Apparently yesterday she experienced pain in the left side of her lumbar spine after pushing a 5 pound box of potato chips at work. She said the pain is now starting to go over onto the right side and is going into her buttocks. She denies any weakness or loss of function or sensation in the lower extremities. She went to the emergency room where she had a fairly extensive work-up but no x-rays. She was

diagnosed with a lumbar strain and given lldocaine patches, IV fluids, cyclobenzaprine and ibuprofen. She said her pain is somewhat better with these medicines. She works as an all-purpose clerk at a local grocery store where she only stocks food on shelves. Her job description however says that she needs to be able to lift and carry upwards of 75 pounds. She works 4-hour shifts with a 15-minute break and spends most of her shift standing. She has been doing this job for 15 years. Her past medical history is significant for seizures and hypertension, she only smokes medical marijuana for her seizures and she is on lisinopril and hydrochlorothiazide for her hypertension. Her social history is positive for smoking marijuana but she does not smoke tobacco and she does not use alcohol or any other recreational drugs by history." Objectively, Dr. McNulty noted near full lumbar flexion actively with some acute tissue changes in the paralumbar musculature from L3-S1 bilaterally. It was worse on the left than the right. There was no straight leg raising noticed. He ordered x-rays which did not reveal any acute osseous abnormalities. He diagnosed the Claimant with a lumbar sprain. He recommended continuing the medication she was taking, recommended physical therapy and recheck in 2 weeks. (Respondent's Exhibit C, p. 30). Dr. McNulty imposed restrictions of 2 pounds lifting, carrying, pushing and pulling. He also gave a restriction of sitting for 30 minutes for each hour of work.

4. Claimant went back to Dr. McNulty on February 21, 2022. He noted that Claimant took it upon herself not to return to work with the restrictions he provided. He also noted that Claimant had not gone to physical therapy as ordered. His impression was "lumbar sprain, no clinical improvement". He maintained the previous restrictions. In his treatment plan, he noted that she had acute left-sided low back pain without sciatica. He recommended a referral to "orthopedics". He also noted in his treatment plan that she had lumbar paraspinal muscle spasm and re-recommended physical therapy. In order to ensure that Claimant went to physical therapy, Dr. McNulty had his staff escort the Claimant to Colorado Institute of Sports Medicine. Claimant's restrictions remained the same.

5. Claimant was next seen by Virginia Quiroz, N.P. at OM[Redacted] on February 23, 2022. In addition to managing her medications, Ms. Quiroz administered a cortisone injection into Claimant' left SI joint.

6. On March 16, 2022, Claimant returned to OM[Redacted] and was seen by Dr. McNulty. In his objective evaluation, He notes that "She has full range of motion in her lumbar spine today and no real acute tissue changes. She has full active flexion extension and sidebending left and right". His impression was "Lumbar sprain and symptomatic but with full function". He also noted that Claimant stopped physical therapy due to her hospitalization for some gastrointestinal illness.

7. Ms. Quiroz, at OM[Redacted], saw the Claimant on March 23, 2022. Claimant was following up on low back pain. She reported pain level of 7 out of 10. Claimant stopped taking muscle relaxants because she thought she was having pancreatitis. She went to the hospital, and was told her pain was due to her colon. Ms. Quiroz noted that Claimant had a cortisone injection previously on February 23, 2022, which helped a little. Claimant reported that she was sore for five days after the injection

and slowly got better after that. The physical exam only revealed tenderness in the left sciatic notch and muscle spasms on the left side. The straight leg raise was negative.

8. Dr. McNulty next saw Claimant on April 13, 2022 and continued with the diagnosis of lumbar sprain. He also noted in the treatment plan that they were waiting on worker's compensation to establish causality and compensability. The pain diagram the Claimant filled out on this day showed pain localized to the lower back and was rated a 6 out of 10. He scheduled the Claimant to be seen on May 19, 2022.

9. The next treatment visit note was on June 24, 2022. Dr. McNulty indicated that her worker's compensation case had been "reactivated". However, prior to this visit the Claimant had not been treating. Objectively, Dr. McNulty noted she was in no apparent distress and was ambulating easily without a limp. She had lost 60% of active flexion and extension in her lumbar spine and there was no midline tenderness and straight leg raising was negative. He continued with the diagnosis of lumbar sprain. He referred the Claimant to outside orthopedics. He also order PT to be restarted and prescribed muscle relaxants. The pain diagram filled out by Claimant still showed lower back pain that was localized and was not radiating down either leg.

10. When Claimant was seen on July 8, 2022, the assessment was lumbar paraspinal muscle spasm and acute left-sided low back pain without sciatica. Claimant was prescribed continued physical therapy.

11. Dr. McNulty saw her again on August 1, 2022. For the first time, Claimant's pain diagram including pain emanating from her low back and down the back of her left leg. Also new was the diagnosis of lumbar radiculitis. The chief complaint was "pain from low back is now starting to shoot down to above the knee". In addition to a referral to pain management was the continued referral to orthopedics that was awaiting precertification.

12. An MRI was taken on September 11, 2022. The findings included mild facet arthropathy at L4-5 with disk herniation or stenosis. It also showed that the L5-S1 disk was narrow and desiccated with Modic type 2 changes and a broad-based right paracentral and lateral disc protrusion which narrowed the right inferior foramen and right lateral recess. There was mild facet arthopathy at that level.

13. Claimant saw Dr. Crowther, an orthopedic physician, on December 22, 2022. The history given to him was "This pleasant 42 year-old present to clinic for evaluation of her back and bilateral leg pain. Patient states that she had a work injury earlier in 2022 which has caused significant pain and discomfort in her back and down her legs." This history is different than that given to Dr. McNulty at the inception of the work injury. Initially, the Claimant reported pain in the lower back, only. The history given to Dr. Crowther now includes low back pain and bilateral leg pain. Dr. Crowther recommended ongoing conservative care. This included additional injections and physical therapy. Claimant was to follow up with Dr. Crowther after completion of the conservative care.

14. When claimant returned to Dr. Crowther on February 2, 2023, Claimant said the injections did not give her any relief or improvement. Claimant had not, despite his recommendation and referral, had physical therapy. He recommended claimant continue with conservative treatment and medications including physical therapy and chiropractic care. (Ex. F, pgs. 198-199).

15. Claimant still had not gone to or attempted physical therapy or chiropractic treatment when she saw Brianne Wagner, N.P. at Dr. Crowther's office on March 16, 2023. She still maintained no treatment she had received had given her any improvement or relief. Sensation in her lower extremities, and provocative testing, were all normal. Despite claimant not attempting physical therapy, Nurse Wagner wrote claimant had failed conservative therapies for her lumbar spine, and she recommended surgery, a right L5-S1 hemilaminotomy and discectomy with facet cyst excision (Ex. F, pgs. 200-201). Nurse Wagner did not address causation or relatedness, or document review of any of claimant's medical records from her other providers.

16. Claimant saw Dr. Michael Rauzzino for an IME on February 13, 2023 at Respondent's request. A recording of the evaluation was submitted by both parties and was reviewed in its entirety by the ALJ in addition to Dr. Rauzzino's report and testimony. Claimant complained of low back pain and pain going down her right leg. Claimant denied prior low back pain. In addition to taking a history, Dr. Rauzzino performed a physical examination which included range of motion measurements. At the conclusion of the evaluation, Claimant was crying and complained of pain of 10 out of 10.

17. In Dr. Rauzzino's report, he states "I do not have an anatomic diagnosis to account for [Redacted, hereinafter SA] severe pain complaints. Her mechanism of injury is very benign and not likely to injure the lumbar spine or musculature. I don't believe that the chronic changes seen at L5-S1 are the cause of her current symptomatology. Based on my experience as a practicing neurosurgeon, I do not believe that the chronic changes seen there would produce the progressive and severe types of symptoms she is reporting…I therefore do not believe that her current symptoms and subjective complaints are related to the mechanism of injury described: they are not consistent with the radiographic findings seen on MRI. At best, SA[Redacted] may have sustained some sort of lumbar strain, but that should have resolved in a very brief period of time." (Respondent's Exhibit A, p. 21).

18. In addition to these opinions, Dr. Rauzzino testified at hearing that the initial pain diagram did not document a disc herniation injury since the pain was localized to the low back and did not radiate to the lower extremities. (Respondent's Exhibit C, p.35). He added that if the injury did include a disc herniation, there would be an indication of pain down to the lower extremities.

19. Dr. Rauzzino also opined that the surgery proposed by Dr. Crowther is not reasonable and necessary. This opinion is based on the risks of surgery which include scarring in the area of the surgery, weakening of the structure of the spine, chronic pain and failed back syndrome. He also questioned the reasonableness of surgery based on positive Waddell's testing. Finally, Dr. Rauzzino opined that the surgery proposed by Dr.

Crowther is to treat pain, and not to correct any anatomical or structural defect that is generating the pain.

20. Dr. Rauzzino's causation opinions and opinions on reasonableness and necessity are credible and persuasive.

21. Claimant testified that none of the treatment provided has improved her condition. She is worse now than when the injury occurred.

22. Dr. Rauzzino testified at hearing and wrote in his report there are no current diagnoses, need for medical treatment, or restrictions causally related to claimant's incident covered by this claim. (Ex. A, pp. 21-23).

22. The last report in the exhibits is from Dr. McNulty and is dated April 10, 2023. He noted that surgery had been denied by the workers compensation carrier. He maintained restriction of 2 pounds lifting, carrying, pushing and pulling. He also indicated that Claimant was not at MMI since she needed surgery.

CONCLUSIONS OF LAW

A. Medical Treatment

The Respondent is liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even if the respondent admits liability, it retains the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment to the same body part was proximately caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondent disputes the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The existence of a preexisting condition does not disqualify a claim for medical benefits where an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce the need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not prove an injury objectively caused any structural anatomical change to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have

required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). But the mere fact a claimant experiences symptoms after an accident at work does not necessarily mean the employment aggravated or accelerated a preexisting condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Ultimately, the ALJ must determine if the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

Claimant failed to prove the L4-5 hemilaminectomy and discectomy is reasonable necessary and causally related to her industrial injury. I am persuaded by the opinions of Dr. Rauzino that the Claimant's request for surgery is not reasonable and necessary or related to the incident on February 6, 2022.

B. Temporary Disability

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*.

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

ORDER

It is therefore ordered that:

1. Claimant's request for L5-S1 hemilaminotomy and discectomy with facet cyst excision surgery is denied and dismissed.

2. Respondent's request for termination of TTD is denied since Respondent has failed to satisfy any of the requirements of §8-42-105(3).

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 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: August 31, 2023

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

ISSUES

The issues addressed in this order concern the calculation of Claimant's average weekly wage (AWW). The specific question answered is:

I. Whether Claimant established, by a preponderance of the evidence, that she is entitled to a post injury increase in her AWW due to the loss of her employer paid health insurance coverage and other fringe benefits?

FINDINGS OF FACT

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

1. Claimant is a former Certified Nursing Assistant (CAN) and transportation driver for Respondent-Employer. She sustained compensable injuries to her low back on August 21, 2020.

2. Respondent admitted liability for Claimant's injuries and paid lost wage benefits based upon an AWW of $825.21 pursuant to a General Admission of Liability (GAL) filed by [Redacted, hereinafter LC] on October 21, 2022. (Resp. Ex. A, p. 1; Clmt's. Ex. 1, p. 1). It is unknown what information LC[Redacted] used to compute Claimant's AWW as no calculations are included on the GAL admitted into evidence. *Id*.

3. At hearing, Respondents asserted that Claimant's earnings from August 1, 2019 through July 31, 2020 support an AWW of $811.10 rather than $825.21. Respondents rely on Claimant's earnings history contained at Exhibit B, pp. 5-6 for their contention that Claimant's AWW equals $811.10. Claimant contends that Respondents AWW calculation is incorrect and that she is entitled to an increase above any calculated AWW because of the cost associated with replacing the loss of her employer paid group health insurance.

4. Respondents' Hearing Exhibit B, pp. 5-6 consists of a compilation of Claimant's wages extending from August 1, 2019 through July 31, 2020. Careful review of this exhibit supports a conclusion that Claimant is paid a recurring amount of $2,750.00 on the last day of each month. The ALJ infers from the evidence presented that this payment probably reflects Claimant's regular monthly salary. The remaining payments reflected on Claimant's earnings history probably represent periodic payments for ancillary services Claimant provided to Respondent-Employer or mileage reimbursement for distances traveled in connection with her driving position. Regardless, Respondents seemingly agree that these additional payments also constitute wages for inclusion in Claimant's AWW calculation.

5. Careful review of the admitted earnings history report supports a finding that for the 52 week work history beginning August 1, 2019 and ending with her July 31, 2020 paycheck, Claimant earned $42,177.07. Dividing Claimant's total wages by 52 weeks supports Respondents AWW calculation of $811.10. ($42,177.07 ÷ 52 weeks = $811.10). (Resp. Ex. B, pp. 5-6). Nonetheless, Claimant's employment was terminated and she lost her employer paid health insurance effective January 31, 2022. (Resp. Ex. C, p. 7). Claimant qualified for [Redacted, hereinafter CA] coverage beginning February 1, 2022. *Id.*

6. Although she qualified for CA[Redacted] coverage beginning February 1, 2022, the evidence presented supports a conclusion that Claimant did not continue her health coverage through CA[Redacted] following the loss of her employer paid group health insurance plan. Indeed, Claimant testified that she "did nothing" to replace her health insurance for "quite a while" until she "finally went out and purchased [her] own" coverage.

7. The evidence presented supports a finding that Claimant obtained replacement health insurance through a "[Redacted, hereinafter CH]" plan through [Redacted, hereinafter KR]. (Resp. Ex. D, p. 16). Her coverage was effective December 15, 2022. *Id.* Claimant's cost of conversion to the CH[Redacted] plan is $251.31/month or $58.00/week. ($251.31 × 12 months ÷ 52 weeks = $58.00). *Id*.

8. Claimant also had dental and vision insurance coverage while working for Respondent-Employer. The cost to continue Claimant's dental and vision insurance coverage through CA[Redacted] is $37.52/month and $4.49/month respectively. (Resp. Ex. C, p. 14). Respondents indicated that for purposes of calculating Claimant's AWW after the loss of her employer paid health insurance and conversion to her private plan on December 15, 2022, they added the weekly cost ($58.00) of Claimant's private health insurance and the monthly CA[Redacted] related costs for continued dental and vision insurance to her average weekly wage of $811.10. Respondents maintain that when the cost of Claimant's conversion to a similar or lesser health insurance plan and the CA[Redacted] cost for dental and vision coverage is added to her average weekly wage of $811.10, her new AWW equals $911.11. ($811.10 + $58.00 (weekly health insurance cost) + $37.52 (monthly dental cost) + $4.49 (monthly vision cost) = $911.11).

9. Claimant requests that the value of other "incidental" benefits she was receiving at the time of her injury be included in her AWW calculation, including employer paid contributions for [Redacted, hereinafter PA], life insurance and short term disability insurance. (Claimant's Testimony; Clmt's Ex. 4).

10. Based upon the evidence presented, the ALJ generally adopts Respondents' methodology in calculating Claimant's AWW. Indeed, the wage records submitted into evidence support Respondents' asserted AWW of $811.10. Moreover, the evidence presented substantiates a finding that Claimant converted to a private health insurance plan at a weekly cost of $58.00, which the ALJ finds should be included in her AWW pursuant to C.R.S. § 8-40-201 (19)(b) and 8-42-103 (2). Where the ALJ diverges from Respondents' AWW calculation is their inclusion of the monthly

rather than the weekly CA[Redacted] cost for continuing dental and vision insurance coverage. The weekly cost of Claimant's dental coverage through CA[Redacted] continuation is $8.66. ($37.52 × 12 months ÷ 52 weeks = $8.66). The weekly cost to continue Claimant's vision coverage through CA[Redacted] is $1.04. ($4.49 × 12 months ÷ 52 weeks = $1.04). Accordingly, the ALJ finds that Claimant has proven that her AWW should be increased to $878.80 ($811.10 + $58.00 + $8.66 + $1.04 = $878.80).

CONCLUSIONS OF LAW

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

Generally

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

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

Average Weekly Wage

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

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

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

discretionary authority under, § 8-42-102(3) C.R.S. 2020, to use an alternative method to determine AWW. *Campbell v. IBM Corp., supra*.

E. Pursuant to § 8-40-201 (19)(b) provides:

> The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan, and gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns and the reasonable value of board, rent, housing, and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19).

F. The workers' compensation act also provides that upon termination of a fringe benefit or advantage enumerated in § 8-40-201 (19)(b), including the loss of employer paid group health insurance requires an injured workers' employer, or if insured the employers' workers' compensation carrier or third-party administrator to recalculate the AWW and pay benefits in accordance with this recalculation with interest beginning on the date the benefit was terminated. (C.R.S. § 8-42-103 (2)).

G. The best evidence of Claimant's actual wage loss and therefore a fair approximation of her diminished earning capacity at the time of her industrial injury comes from the wage records admitted into evidence. As found here, careful review of the wage records (Resp. Ex. B) persuades the ALJ that the computation of Claimant's AWW based upon 52 weeks of earnings yields an AWW of $811.10. Moreover, the evidence presented persuades the ALJ that Claimant is entitled to a recalculation of her AWW based upon the loss of her employer paid health, dental and vision insurance following the termination of her employment. Because the value of the additional advantages, including employer paid PA[Redacted] contributions, life insurance payment and short term disability insurance contributions are not enumerated in C.R.S. § 8-40-201 (19)(b), the request that they be included in the calculation of Claimant's AWW must be denied. Accounting for the cost of the conversion to a similar of lesser health plan and the CA[Redacted] cost to continue her dental and vision coverage, Claimant has established that she is entitled to an increase in her AWW to $878.80.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that she is entitled to an increase in her AWW to $878.80.

2. Pursuant to § 8-42-103 (2), Respondent-Employer shall pay benefits in accordance with the above outlined recalculated AWW with interest beginning on the date Claimant's employer paid health, dental and vision insurance was terminated.

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

DATED: August 31, 2023

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

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