OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-215-456-001

STIPULATIONS

The parties agreed to the following:

1. Claimant's designated Authorized Treating Physician (ATP) is Nicholas K. Olsen, D.O.;

2. Claimant's Average Weekly Wage (AWW) is $883.87;

3. Claimant received wages between September 2, 2022 and October 5, 2022 at the rate of $800.00 per week or $113.97 per day;

4. Claimant is owed Temporary Partial Disability (TPD) benefits between September 2, 2022 and October 5, 2022 at the rate of $55.91 per week, or $7.99 per day. The amount is based upon the difference between the admitted AWW of $883.87 and the paid weekly wage of $800.00 x 2/3;

5. Claimant is owed Temporary Total Disability (TTD) benefits from October 6, 2022 through November 30, 2022, and then beginning again on December 8, 2022 and continuing until terminated by statute.

ISSUE

Whether Claimant is entitled to receive TTD or TPD benefits, and if so at what rate, for the week of December 1, 2022 through December 7, 2022. Respondents assert that the $500 bonus Claimant received on December 1, 2022 should be considered in the calculation of TPD. In contrast, Claimant contends that the $500 bonus does not constitute "wages" and thus should not be considered in the calculation of PPD. Instead, he should receive TTD benefits for the December 1-7, 2022 pay period.

FINDINGS OF FACT

1. Claimant is a 74-year-old male who has been working for Employer since 1974. On September 2, 2022, while working as a Field Supervisor, Claimant sustained injuries to his right leg, bilateral elbows and left arm. Claimant specifically tripped on a lead wire in Employer's steel factory and fell.

2. Claimant has not returned to work for Employer since his industrial injuries. He remains significantly disabled and ambulates with the use of a wheelchair. Claimant's treating providers have continually assigned work restrictions since the date of his injuries.

3. Employer's wage records at Respondents' Exhibit G-83 reflect that during the period December 1-7, 2022 Claimant received a Bonus-O in the amount of $500.00. Wage records do not reveal why this bonus was paid. There was also no evidence presented at the hearing regarding the origin of the bonus. Claimant did not receive any other wages or temporary disability benefits from Employer for the period December 1, 2022 through December 7, 2022.

4. Employer's wage records at Respondents' Exhibit G-83 also show that Claimant received a series of other bonuses in the total amount of $1813 as reflected in the following:

- Bonus-O - $900
- Bonus-S - $493
- Birthday Bonus - $100
- COVID Bonus - $160
- COVID Bonus - $160

The wage records show that the preceding bonuses were paid at various times throughout the year 2022.

5. Claimant's December 1-7 bonus does not constitute "wages." Initially, there was no evidence presented with regard to the basis for Bonus-O in the amount of $500.00. Notably, because Claimant had not been working for three months at the time the bonus was received, it is unlikely that it was given for work performed or because Claimant had satisfied some condition of employment. The record is unclear regarding the basis for the bonus, and it may have been purely gratuitous in nature. Because it has already been determined and paid, Claimant has no further access to the bonus and no expectation of earning any additional bonuses. Accordingly, Claimant had no "reasonable access on a day-to-day basis, actually or potentially, to the benefit, or an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances." The December 1-7, 2022 Bonus-O in the amount of $500.00 is thus a fringe benefit not enumerated in §8-40-201(19) and thus does not constitute "wages."

6. The parties have stipulated to Claimant's AWW in the amount of $883.87. The parties presumably considered the total income Claimant received from Employer. In addition to wages, Claimant received Bonus-O during the week of December 1-7, 2022 as well as $1813 in additional bonuses during the year 2022. Therefore, Claimant's AWW is not at issue. Instead, after determining that the December 1-7, 2022 bonus in the amount of $500 does not constitute "wages," the central inquiry is whether Claimant is entitled to receive TPD or TTD benefits for the period.

7. Although Respondents seek to reduce Claimant's stipulated AWW with his December 1-7, 2022 Bonus-O in the amount of $500, Claimant's bonus constituted a fringe benefit and not wages. Specifically, Respondents' stipulated AWW of $883.87- Bonus-O of $500 = $383.87. Multiplying $383.87 x 2/3 = $255.91**.** Respondents contend that $255.91 is Claimant's TPD benefit for the week of December 1-7, 2022. However,

because Claimant's December 1-7, 2022 bonus does not constitute "wages" he did not suffer a partial wage loss during the period. Instead, because Claimant earned no wages or suffered a complete wage loss during the period, he is entitled to receive TTD benefits for the period December 1-7, 2022.

8. Claimant has demonstrated that it is more probably true than not that he is entitled to receive TTD benefits for the period December 1-7, 2022. Initially, the parties agreed that Claimant is owed TTD benefits from October 6, 2022 through November 30, 2022, and then beginning again on December 8, 2022 and continuing until terminated by statute. The record reveals that Claimant's industrial injuries during the period December 1-7, 2022 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. Notably, during the December 1-7, 2022 period, Claimant did not work for Employer or earn any other wages. Moreover, TTD benefits may only be terminated pursuant to one of the specific instances enumerated in §8-42-105(3), C.R.S. None of the instances have occurred in the present case. Claimant has not reached MMI or returned to regular employment. Furthermore, he has not received a written release to return to regular employment or received a written offer to return to work in a modified capacity but declined. Instead, Claimant remains completely off work and has not been receiving wages since Employer terminated wage continuation on October 6, 2022. Respondents thus owe Claimant TTD benefits for the period December 1-7, 2022.

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).

Whether the December 1-7, 2022 Bonus Constituted Wages

4. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. Indus. Claim Appeals Off.,* 18 P.3d 867, 869 (Colo. App. 2001). The preceding method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." *Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777, 780 (Colo. 2010). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Id*.

5. Under §8-40-201(19)(a), C.R.S., the term "wage" is defined as "the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury…" When the Workers' Compensation Act was enacted in 1919, "wages" included "the reasonable value of board, rent, housing, lodging or any other similar advantage received from the employer." Colo. Sess. Laws 1919, ch. 210, 47 at 716; *see Ganser v. Mountain Energy, Inc.* WC 5-128-084-002 (ICAO, June 4, 2021). In 1989 the General Assembly narrowed the definition of "wages." It still included board, rent, housing and lodging, specifically added gratuities and certain costs of continuing or converting health insurance, but for the first time excluded "any similar advantage or fringe benefit not specifically enumerated." Colo. Sess. Laws 1989, ch. 67, 8-47-101(2) at 411; *Ganser v. Mountain Energy, Inc.* WC 5-128-084-002 (ICAO, June 4, 2021). The preceding provision remains essentially unchanged. *See* §8-40-201(19)(b), C.R.S.

6. In *Meeker v. Provenant Health Partners*, 929 P.2d 26 (Colo. App. 1996), the court of appeals reviewed the addition to the AWW of the claimant's accrual of paid time off. Specifically, the employer credited the claimant with 9.5 hours of paid leave for each pay period. The court of appeals applied the terms of §8-40-201(19)(a) and (b). Section 8-40-201(19)(a) defined 'wages' "to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied." Subparagraph (b), however, limited the definition to exclude "any similar advantage or fringe benefit not specifically enumerated in this subsection (19)." To determine if the claimant's accrued time off constituted an included "wage" or an excluded "fringe benefit," the decision applied criteria inquiring "whether a reasonable, present-day, cash equivalent value can be placed upon it and whether the employee has reasonable access on a day-to-day basis, either actually or potentially, to the benefit, or an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances." *Meeker,* 929 P.2d at 28.

7. The *Meeker* court determined the claimant's accrued time off qualified as "wages" to be included in the AWW. The hours credited to the claimant had an easily discernable, immediate cash value derived by multiplying each hour accrued by the claimant's hourly rate of pay. Moreover, once earned, the time off was never forfeited and the claimant had reasonable access to the benefit. Notably, the claimant's weekly wage rate was increased by the hourly value of the number of time-off hours earned each week. *See Burd v. Builder Services Group, Inc.*, WC 5-058-572-001 (ICAO, July 9, 2019). Conversely, in *City of Lamar v. Koehn*, 968 P.2d 164 (Colo. App. 1998), the court of appeals affirmed the application of the *Meeker* test and concluded that vacation and sick leave earned by the claimant did not constitute "cash equivalents" for purposes of §8-40-201(19)(a) because the benefits were subject to forfeiture if the claimant accrued a specified maximum number of leave days.

8. In *Orrell v. Coors Porcelain*, WC 4-251-934 (ICAO, May 22, 1997) and *Yex v. ABC Supply Co*., WC 4-910-373-01 (ICAO, May 16, 2014), the Panel considered the addition of bonuses paid from employers' profit sharing plans to a wage calculation. In both cases the prior receipt of the bonuses was excluded as fringe benefits rather than included as wages. Applying the *Meeker* test, the bonus was deemed contingent and without a present day cash equivalent value. Importantly, the size of the bonus could only be established at the conclusion of the year or quarter. The claimant also had no access to the bonus on a day-to-day basis and had no immediate expectation of receiving the bonus.

9. As found, Claimant's December 1-7 bonus suffers from similar defects to the plans in *Orwell* and *Yex* and thus does not constitute "wages." Initially, there was no evidence presented with regard to the basis for Bonus-O in the amount of $500.00. Notably, because Claimant had not been working for three months at the time the bonus was received, it is unlikely that it was given for work performed or because Claimant had satisfied some condition of employment. The record is unclear regarding the basis for the bonus, and it may have been purely gratuitous in nature. Because it has already been determined and paid, Claimant has no further access to the bonus and no expectation of earning any additional bonuses. Accordingly, Claimant had no "reasonable access on a day-to-day basis, actually or potentially, to the benefit, or an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances." The December 1-7, 2022 Bonus-O in the amount of $500.00 is thus a fringe benefit not enumerated in §8-40-201(19) and thus does not constitute "wages."

10. As found, the parties have stipulated to Claimant's AWW in the amount of $883.87. The parties presumably considered the total income Claimant received from Employer. In addition to wages, Claimant received Bonus-O during the week of December 1-7, 2022 as well as $1813 in additional bonuses during the year 2022. Therefore, Claimant's AWW is not at issue. Instead, after determining that the December 1-7, 2022 bonus in the amount of $500 does not constitute "wages," the central inquiry is whether Claimant is entitled to receive TPD or TTD benefits for the period.

TPD or TTD Benefits

11. Section 8-42-106(1), C.R.S. provides for an award of TPD benefits based on the difference between a claimant's AWW at the time of injury and earnings during the continuance of the disability. Specifically, an employee shall receive 66.66% of the difference between his wages at the time of his injury and during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (TPD benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). Section 8-42-106(2), C.R.S. provides that TPD benefits shall continue until either of the following occurs: "(a) The employee reaches maximum medical improvement; or (b)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." *See Evans v. Wal-Mart*, WC 4-825-475 (ICAO, May 4, 2012).

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

13. As found, although Respondents seek to reduce Claimant's stipulated AWW with his December 1-7, 2022 Bonus-O in the amount of $500, Claimant's bonus constituted a fringe benefit and not wages. Specifically, Respondents' stipulated AWW of

$883.87- Bonus-O of $500 = $383.87. Multiplying $383.87 x 2/3 = $255.91**.** Respondents contend that $255.91 is Claimant's TPD benefit for the week of December 1-7, 2022. However, because Claimant's December 1-7, 2022 bonus does not constitute "wages" he did not suffer a partial wage loss during the period. Instead, because Claimant earned no wages or suffered a complete wagste loss during the period, he is entitled to receive TTD benefits for the period December 1-7, 2022.

14. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive TTD benefits for the period December 1-7, 2022. Initially, the parties agreed that Claimant is owed TTD benefits from October 6, 2022 through November 30, 2022, and then beginning again on December 8, 2022 and continuing until terminated by statute. The record reveals that Claimant's industrial injuries during the period December 1-7, 2022 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. Notably, during the December 1-7, 2022 period, Claimant did not work for Employer or earn any other wages. Moreover, TTD benefits may only be terminated pursuant to one of the specific instances enumerated in §8-42-105(3), C.R.S. None of the instances have occurred in the present case. Claimant has not reached MMI or returned to regular employment. Furthermore, he has not received a written release to return to regular employment or received a written offer to return to work in a modified capacity but declined. Instead, Claimant remains completely off work and has not been receiving wages since Employer terminated wage continuation on October 6, 2022. Respondents thus owe Claimant TTD benefits for the period December 1-7, 2022.

ORDER

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

1. Claimant's designated ATP is Dr. Olsen.

2. Claimant's AWW is $883.87.

3. Claimant received wages between September 2, 2022 and October 5, 2022 at the rate of $800.00 per week or $113.97 per day.

4. Claimant is owed TPD benefits between September 2, 2022 and October 5, 2022 at the rate of $55.91 per week or $7.99 per day. The amount is based upon the difference between the admitted AWW of $883.87, and the paid weekly wage of $800.00 x 2/3.

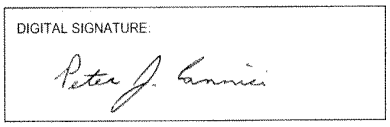
5. Claimant is owed TTD benefits from October 6, 2022 through November 30, 2022, and then beginning again on December 8, 2022 and continuing until terminated by statute.

6. Because Claimant's December 1-7, 2022 $500 bonus did not constitute "wages," he shall receive TTD benefits for the pay period December 1-7, 2022.

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

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

DATED: March 3, 2023.



Peter J. Cannici
Administrative Law Judge
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-176-394-002

ISSUE

Whether Claimant has proven by a preponderance of the evidence that his 9% scheduled right upper extremity impairment rating should be converted to a 5% whole person rating.

FINDINGS OF FACT

1. Claimant was born on December 24, 1974 and has worked as a firefighter for Employer since September 27, 2010. During a team building exercise on June 6, 2021, Claimant was injured when he felt a pop in his right shoulder and numbness that traveled down his right arm to his hand. He selected Annu Ramaswamy, M.D. as his Authorized Treating Physician (ATP).

2. Dr. Ramaswamy began treating Claimant on June 6, 2021. He subsequently referred Claimant to In Sok Yi, M.D. for possible right elbow surgery and Thomas John Noonan, M.D. for consideration of right shoulder surgery.

3. On August 26, 2021 Claimant underwent right elbow surgery with Dr. Yi. On November 8, 2021 Claimant underwent right shoulder surgery with Dr. Noonan. The surgery included the following: (1) a right shoulder arthroscopy; (2) arthroscopic rotator cuff repair; (3) arthroscopic subacromial decompression; (4) arthroscopic distal clavicle resection; (5) arthroscopic bicep release; (6) arthroscopic debridement/tear; (7) arthroscopic debridement anterior labral tear and; (8) arthroscopic debridement partial tearing subscapularis.

4. On June 16, 2022 Dr. Ramaswamy determined that Claimant had reached Maximum Medical Improvement (MMI). On examination of the right shoulder, Dr. Ramaswamy found mild tenderness in the biceps tendon region anteriorly, no crepitus in the joint, minimal trigger point activity in the posterior shoulder girdle and negative impingement with provocative maneuvers. He determined that Claimant could continue full duty work and thus did not impose any work restrictions. Dr. Ramaswamy assigned a 7% upper extremity impairment for right elbow range of motion loss, a 3% upper extremity impairment based on sensory ulnar neuropathy, and a 3% upper extremity rating for the right shoulder. Combining the ratings yields a 13% right upper extremity impairment. On July 8, 2022 Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Ramaswamy's MMI and impairment determinations.

5. Claimant challenged the impairment rating and requested a Division Independent Medical Examination (DIME). On September 26, 2022 Claimant underwent a DIME with Paul Ogden, M.D. Dr. Ogden agreed that Claimant had reached MMI on June 16, 2021. On examination, Dr. Ogden found no tenderness of the trapezius, scapular, and periscapular areas, no tenderness over the supraspinatus muscle, and no

tenderness over the acromioclavicular joint. There were also no findings of glenohumeral instability. Regarding Claimant's clinical diagnosis, Dr. Ogden determined Claimant had suffered a right rotator cuff labral injury to his right shoulder, arthritis of his right acromial clavicular joint, bicep tendonitis, impingement of the right shoulder and right ulnar nerve entrapment.

6. Dr. Ogden documented that Claimant experiences sharp pains in his right trapezius area that respond to stretching and physical therapy. There is also a binding sensation in the right shoulder area with shoulder abduction in rotation. Claimant further has difficulties washing his back because of limited range of motion in his right shoulder and elbow. Dr. Ogden assigned a total 17% right upper extremity impairment rating for Claimant's June 6, 2021 industrial injuries. Specifically, for the right shoulder area Dr. Ogden assigned a 7% right upper extremity rating due to range of motion loss and an additional 2% upper extremity impairment for Claimant's distal clavicle excision. The ratings for the right shoulder area combined to yield a 9% upper extremity impairment.

7. Claimant testified at the hearing in this matter. He remarked that he returned to full duty work for Employer on June 7, 2022. Claimant explained that he experiences right shoulder weakness that limits his ability to use his right arm. Specifically, the impairment of Claimant's right shoulder inhibits his ability to perform various functions of his job. He notably suffers functional limitations that require use of his left or non-dominant extremity to throw ladders and open doors. Claimant also wears a hose pack containing 100 feet of fire hose over his left shoulder because of diminished strength in his right shoulder area. Claimant commented that he continues to experience referred pain and limitations at the primary situs of his initial right shoulder injury.

8. Ronald Swarsen, M.D. testified at the hearing in this matter. He maintained that, because Claimant suffered an injury to his right shoulder and not arm, his impairment requires conversion to a whole person rating. Dr. Swarsen stated that the shoulder is not a part of the arm, but rather the scaffolding on which the arm is attached. He remarked that the shoulder has its own range of motion separate from the arm itself.

9. Dr. Swarsen marked Claimant's Demonstrative Exhibits 6-7 to identify the areas of right shoulder anatomy that were surgically addressed by Dr. Noonan. He relied on Exhibits 6 through 10 for his opinion and noted that they were from the first volume of the *Netters* compendium. Dr. Swarsen used the color orange to reflect where the arthroscopic rotator cuff debridement and the arthroscopic labral debridement occurred. He relied on Exhibit 8 to show the arthroscopic subacromial decompression at the glenohumeral joint to identify the open subpectoral long head biceps tenodesis and delineate the plane of the glenohumeral joint. He used Exhibit 6 to show the distal clavicle excision.

10. Dr. Swarsen commented that all of the preceding procedures, with the exception of the subpectoral long head biceps tenodesis, occurred above the plane of the glenohumeral joint. He testified that the scheduled impairment rating issued by Dr. Ogden should be converted into a whole person impairment. Dr. Swarsen detailed that Claimant suffered a functional impairment above the glenohumeral joint in his right shoulder. He

determined it was reasonable to convert the scheduled shoulder rating to a whole person impairment because Claimant's right upper extremity deficiency was due to weakness of the shoulder girdle musculature. The weakness flowed from the shoulder into the arm. Dr. Swarsen thus summarized that the 9% upper extremity impairment rating for Claimant's right shoulder should be converted to a 5% whole person rating.

11. Dr. Ramaswamy also testified at the hearing in this matter. He was Claimant's primary ATP from June 7, 2021 through June 16, 2022 and saw Claimant approximately 12-15 times. Dr. Ramaswamy placed Claimant at MMI and assigned a 3% upper extremity impairment for Claimant's right shoulder. After hearing all of the areas described by Claimant regarding functional limitations, Dr. Ramaswamy remarked that they all were limited to the right arm. Consequently, Dr. Ramaswamy determined the situs of functional impairment did not extend beyond the arm and, therefore, the best measurement of Claimant's permanent partial disability was on the schedule. Accordingly, conversion of Claimant's right upper extremity rating was not warranted.

12. Claimant has proven that it is more probably true than not that his right upper extremity rating should be converted to a whole person impairment. Initially, on June 6, 2021 Claimant suffered admitted industrial injuries to his right upper extremity during the course and scope of his employment with Employer. Claimant subsequently underwent right shoulder surgery including the following: (1) a right shoulder arthroscopy; (2) arthroscopic rotator cuff repair; (3) arthroscopic subacromial decompression; (4) arthroscopic distal clavicle resection; (5) arthroscopic bicep release; (6) arthroscopic debridement/tear; (7) arthroscopic debridement anterior labral tear; and, (8) arthroscopic debridement partial tearing subscapularis. On June 16, 2022 Claimant reached MMI. Subsequently, DIME Dr. Ogden assigned a 7% right upper extremity rating due to range of motion loss and a 2% upper extremity impairment for Claimant's distal clavicle excision for the right shoulder area. The ratings combined to yield a 9% upper extremity impairment.

13. Medical records reflect that Claimant's course of medical treatment, aside from his elbow, has involved his right shoulder area and not his arm. Claimant credibly explained that he experiences right shoulder weakness that limits his ability to use his right arm. He testified that, although he was released to full duty employment, his right shoulder limitations inhibit his ability to perform various functions of his job. Claimant notably suffers functional limitations that require use of his left or non-dominant extremity to throw ladders and open doors. He also wears a hose pack containing 100 feet of fire hose over his left shoulder because of diminished strength in his right shoulder area. Furthermore, during his DIME Dr. Ogden documented that Claimant experiences sharp pains in his right trapezius area that respond to stretching and physical therapy. There is also a binding sensation in the right shoulder area with shoulder abduction in rotation. Finally, Claimant has difficulties washing his back because of limited range of motion in his right shoulder and elbow.

14. Dr. Swarsen persuasively explained that Claimant suffered a functional impairment above the glenohumeral joint. The scheduled rating issued by Dr. Ogden should thus be converted into a whole person impairment. Dr. Swarsen emphasized that

the shoulder is not a part of the arm, but rather the scaffolding on which the arm is attached. He commented that all of Claimant's surgical procedures on November 8, 2021 with Dr. Noonan, with the exception of the subpectoral long head biceps tenodesis, occurred above the plane of the glenohumeral joint. He detailed that Claimant suffered a functional impairment above the glenohumeral joint in his right shoulder. Dr. Swarsen determined it was reasonable to convert the scheduled shoulder rating to a whole person impairment because Claimant's right upper extremity deficiency was due to weakness of the shoulder girdle musculature. The weakness flowed from the shoulder into the arm.

15. In contrast, Claimant's ATP Dr. Ramaswamy maintained that Claimant warranted a scheduled right upper extremity impairment for his June 6, 2021 industrial injuries. After hearing all of the areas described by Claimant regarding functional limitations, Dr. Ramaswamy remarked that they only involved the right arm. Consequently, Dr. Ramaswamy determined the situs of functional impairment did not extend beyond the arm. The best measurement of Claimant's permanent partial disability was thus on the schedule. However, Dr. Ramaswamy failed to address Dr. Swarsen's comments that Claimant's right shoulder surgery primarily occurred above the plane of the glenohumeral joint. Claimant's range of motion loss is thus attributable to physiological structures beyond the arm at the shoulder. Specifically, it is necessary that muscles, tendons, and ligaments in the shoulder and torso activate in order to move the arm. Accordingly, based on the medical records, Claimant's credible testimony and the persuasive opinion of Dr. Swarsen, Claimant suffered functional impairment proximal to the glenohumeral joint in his right shoulder as a result of his June 8, 2021 admitted industrial injuries. Therefore, the 9% scheduled right upper extremity impairment rating issued by Dr. Ogden should be converted into a 5% whole person rating.

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. Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." *See* §8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO, June 11, 1998). When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S.

5. Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under §8-42-107(8)(c), C.R.S. is determined on a case-by-case basis. *See DeLaney v. Indus. Claim Appeals Off.*, 30 P.3d 691, 693 (Colo. App. 2000).

6. The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO, Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson–Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

7. Under the functional impairment test, neither the situs of the injury nor the anatomical distinctions found in the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* (*AMA Guides*) controls the issue. *Garcia v. Terumbo BCT*, W.C. No. 5-094-514 (ICAO, July 30, 2021). Rather, the ALJ must consider all relevant evidence and determine the parts of the body that have been functionally impaired. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996). Even if the claimant proves tissue damage and pain in structures beyond the schedule, the ALJ may still find a scheduled injury. *Strauch,* 917 P.2d at 367-68. Depending on the particular facts of a claim, damage to the structures of the "shoulders" may or may not reflect a "functional impairment" that is enumerated on the

schedule of disabilities. *Walker v. Jim Fouco Motor Co.,* 942 P. 2d 1390 (Colo. App. 1997)*; see Henke v. United Airlines,* W.C. Nos. 4-456-163, 4-490-897 (ICAO, Sept. 10, 2003). In the case of a shoulder injury, the question is whether the injury has affected physiological structures beyond the arm at the shoulder. *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (ICAO, July 8, 2021).

8. The portion of the *AMA Guides* pertaining to the upper extremities is not a model of clarity. *Id.* The *AMA Guides* do not rate impairments of the shoulder but only of the upper extremity. However, the applicable statutory schedule of impairments reads, *"*loss of an arm at the shoulder.*"* §8-42-107(2), C.R.S. The arm, without other bodily tissue, is unable to move. Thus, without other bodily tissue, the arm lacks range of motion and has no functional ability. For range of motion to exist in the arm, it is necessary that muscles, tendons, and ligaments in the shoulder and torso activate. *Id.*

9. When a claimant seeks to challenge a scheduled impairment rating, the claimant must show by a preponderance of the evidence that the scheduled rating is incorrect. *See* W.C.R.P. 5-5(E)(1)(c)(i); *see also Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998) (DIME procedures of §8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments); *Gebregeorgis v. ISS Facility Services*, WC 5-135-393-003 (ICAO, Feb. 27, 2023).

10. As found, Claimant has proven by a preponderance of the evidence that his right upper extremity rating should be converted to a whole person impairment. Initially, on June 6, 2021 Claimant suffered admitted industrial injuries to his right upper extremity during the course and scope of his employment with Employer. Claimant subsequently underwent right shoulder surgery including the following: (1) a right shoulder arthroscopy; (2) arthroscopic rotator cuff repair; (3) arthroscopic subacromial decompression; (4) arthroscopic distal clavicle resection; (5) arthroscopic bicep release; (6) arthroscopic debridement/tear; (7) arthroscopic debridement anterior labral tear; and, (8) arthroscopic debridement partial tearing subscapularis. On June 16, 2022 Claimant reached MMI. Subsequently, DIME Dr. Ogden assigned a 7% right upper extremity rating due to range of motion loss and a 2% upper extremity impairment for Claimant's distal clavicle excision for the right shoulder area. The ratings combined to yield a 9% upper extremity impairment.

11. As found, medical records reflect that Claimant's course of medical treatment, aside from his elbow, has involved his right shoulder area and not his arm. Claimant credibly explained that he experiences right shoulder weakness that limits his ability to use his right arm. He testified that, although he was released to full duty employment, his right shoulder limitations inhibit his ability to perform various functions of his job. Claimant notably suffers functional limitations that require use of his left or non-dominant extremity to throw ladders and open doors. He also wears a hose pack containing 100 feet of fire hose over his left shoulder because of diminished strength in his right shoulder area. Furthermore, during his DIME Dr. Ogden documented that Claimant experiences sharp pains in his right trapezius area that respond to stretching and physical therapy. There is also a binding sensation in the right shoulder area with

shoulder abduction in rotation. Finally, Claimant has difficulties washing his back because of limited range of motion in his right shoulder and elbow.

12. As found, Dr. Swarsen persuasively explained that Claimant suffered a functional impairment above the glenohumeral joint. The scheduled rating issued by Dr. Ogden should thus be converted into a whole person impairment. Dr. Swarsen emphasized that the shoulder is not a part of the arm, but rather the scaffolding on which the arm is attached. He commented that all of Claimant's surgical procedures on November 8, 2021 with Dr. Noonan, with the exception of the subpectoral long head biceps tenodesis, occurred above the plane of the glenohumeral joint. He detailed that Claimant suffered a functional impairment above the glenohumeral joint in his right shoulder. Dr. Swarsen determined it was reasonable to convert the scheduled shoulder rating to a whole person impairment because Claimant's right upper extremity deficiency was due to weakness of the shoulder girdle musculature. The weakness flowed from the shoulder into the arm.

13. As found, in contrast, Claimant's ATP Dr. Ramaswamy maintained that Claimant warranted a scheduled right upper extremity impairment for his June 6, 2021 industrial injuries. After hearing all of the areas described by Claimant regarding functional limitations, Dr. Ramaswamy remarked that they only involved the right arm. Consequently, Dr. Ramaswamy determined the situs of functional impairment did not extend beyond the arm. The best measurement of Claimant's permanent partial disability was thus on the schedule. However, Dr. Ramaswamy failed to address Dr. Swarsen's comments that Claimant's right shoulder surgery primarily occurred above the plane of the glenohumeral joint. Claimant's range of motion loss is thus attributable to physiological structures beyond the arm at the shoulder. Specifically, it is necessary that muscles, tendons, and ligaments in the shoulder and torso activate in order to move the arm. Accordingly, based on the medical records, Claimant's credible testimony and the persuasive opinion of Dr. Swarsen, Claimant suffered functional impairment proximal to the glenohumeral joint in his right shoulder as a result of his June 8, 2021 admitted industrial injuries. Therefore, the 9% scheduled right upper extremity impairment rating issued by Dr. Ogden should be converted into a 5% whole person rating. *See Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (ICAO, July 8, 2021) (affirming ALJ's conversion of extremity rating to whole person impairment for shoulder injury because, based on range of motion loss, the anatomical disruption or functional impairment of the claimant's extremity not only involved the arm or glenohumeral joint, but also the shoulder complex proximal to the torso from the glenohumeral joint).

ORDER

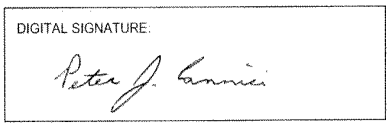
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's 9% right upper extremity rating shall be converted to a 5% whole person impairment. The payments to Claimant shall be calculated based on the formula in §8-42-107(8)(d), C.R.S.

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: March 9, 2023.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-106-637-005

ISSUE

Whether Claimant has proven by a preponderance of the evidence that he is incapable of earning any wages and is entitled to receive Permanent Total Disability (PTD) benefits as a result of industrial injuries he sustained during the course and scope of his employment with Employer on December 26, 2018.

FINDINGS OF FACT

1. Claimant is a 39-year-old former diver/project manager for Employer. On December 26, 2018 Claimant was involved in a diving accident while at a depth of between 120 and 160 feet. Instead of being oxygenated with air, Claimant received 100% oxygen for approximately 15-20 minutes. He was rendered unconscious while underwater and suffered an oxygen toxicity condition.

2. Claimant was brought back to the surface and assessed on site, He was then evaluated at Parker Adventist Hospital. Kevin Merrell, M.D. noted Claimant exhibited minor tongue cuts from his seizure, slight memory loss and confusion, and petechiae. Dr. Merrell consulted with the medical director of the "DAN network who is a dive medicine specialist," The director of the DAN network determined that Claimant did not have the bends or a barotrauma. There were also no long-term symptoms from oxygen toxicity. Claimant declined Dr. Merrell's suggestion to remain hospitalized.

3. Claimant returned to work of the following day. However, he then took off for a week in early January, 2019 because of sinus difficulties.

4. Claimant was evaluated by Justin Moon, M.D. on January 16, 2019. He reported his memory, vertigo and headaches had improved since the incident. A brain MRI on January 25, 2019 showed an area of abnormality in the cerebellum. An EEG on February 15, 2019 revealed a possible seizure disorder. Dr. Moon recommended Claimant discontinue work as a diver due to his abnormal EEG.

5. On March 1, 2019 Claimant first visited Concentra Medical Centers for an evaluation. Claimant complained of daily headaches and a panic attack "which he had never had before," and "[h]e had no problems with panic attacks from his [military] service." Carrie J. Burns, M.D. assigned work restrictions of no diving, no ladders and no working in confined spaces.

6. On March 30, 2019 Claimant reported intensifying headaches after driving to Utah. On April 1, 2019 Dr. Burns noted Claimant relayed that, he was struggling with computer screens. She thus took him off work for one week and referred him to Kevin Reilly, M.D. for a neuropsychological evaluation.

7. Claimant returned to work for Employer in April, 2019. He traveled to Nevada to inspect the Hoover Dam for a prospective job. However, Claimant resigned in mid-April, 2019. He filed a Federal Maritime lawsuit in the US District Court for the State of Colorado on April 23, 2019.

8. Psychologist John Mark Disorbio, Ed. D. evaluated Claimant September 19, 2019. Dr. Disorbio did not document a history of prior mental health conditions. He assessed an adjustment disorder, anxiety disorder, a pain disorder with anxiety and depression, and PTSD.

9. On August 27, 2020 psychiatrist Gary Gutterman, M.D. evaluated Claimant. Claimant denied "psychiatric or psychological treatment prior to this injury." His recent and remote memory were intact with adequate attention/concentration, he was focused and organized with thoughts, and he displayed no cognitive, speech, or word finding problems. Dr. Gutterman assigned Claimant a 9% mental impairment on October 8, 2020.

10. John Aschberger, M.D. assigned Claimant a combined 28% impairment rating. The rating consisted of 15% for headaches, 10% for erectile dysfunction, and 5% for equilibrium. Ronald Wise, M.D. also assigned a 14% impairment for Claimant's vision.

11. On March 16, 2021 Dr. Burns placed claimant at Maximum Medical Improvement (MMI). She assigned permanent restrictions of no diving, no work in confined spaces, no ladders or working at heights, and no driving company vehicles.

12. Brian Mathwich, M.D. performed a Division Independent Medical Examination (DIME) of Claimant on January 25, 2022. He agreed that Claimant reached MMI on March 16, 2021. Dr. Mathwich assigned a combined 36% whole person physical and mental permanent impairment rating. He incorporated Dr. Wise's and Dr. Gutterman's impairments, and assigned a 19% nervous system rating inclusive of a 10% seizure rating and 10% rating for sexual function. Dr. Mathwich noted Claimant's abnormality on MRI was not work-related. He recommended restrictions of no diving, no work in confined spaces, no ladders or working at heights, and no driving company vehicles.

13. Respondents subsequently filed a Final Admission of Liability (FAL) acknowledging the 36% combined physical and mental impairment rating assigned by Dr. Mathwich. Claimant filed an application for hearing asserting that he was permanently and totally disabled.

14. On April 21, 2022 neurologist Eric Hammerberg, M.D. performed an independent medical examination of Claimant. Claimant reported his headaches were "becoming more frequent and more intense." Dr. Hammerberg determined Claimant's abnormality on brain MRI was not work-related. In a June 8, 2022 supplemental report, Dr. Hammerberg clarified there was no physiologic explanation for Claimant's worsening headaches, dizziness, and cognitive complaints over time. Symptoms and functional abilities should improve following a single toxic event. Claimant's impairment demonstrated on testing was indicative of significant dementia to an extent he would not

even be able to provide a verbal history or drive a vehicle. Dr. Hammerberg recommended a neuropsychological evaluation to measure validity and potential symptom magnification.

15. On May 10, 2022 Lynn Parry, M.D. performed an independent medical examination of Claimant. She determined Claimant certainly experienced a decompression syndrome and an oxygen toxicity event. Dr. Parry diagnosed vestibular and possible TMJ dysfunction. She also determined he required vocational counseling to return to employment.

16. On April 27 and May 19, 2022 Claimant underwent a Functional Capacity Examination (FCE). Because Claimant reported headaches, dizziness, and nausea symptoms during the evaluation, it occurred over two days. The stair climbing test, occasional crouching/squatting reach tests and kneeling to standing and back reach tests were declined altogether. Remaining tests were delayed or halted due to Claimant's subjective reports.

17. On May 18, 2022 Roger Ryan performed a vocational evaluation. Claimant reported daily headaches as well as migraines 2-3 times each week. Additional complaints included blurry vision while driving and using a laptop. Mr. Ryan determined Claimant is employable and identified twenty-two entry level jobs in the Denver, Colorado area based upon the work restrictions recommended by Dr. Burns, Dr. Mathwich, Dr. Hammerberg, Dr. D'Angelo and Dr. Parry. Mr. Ryan also performed labor market research for the following three positions: unarmed security guard; janitor; and night auditor. Claimant fit the employment profile for five of the security companies that had both full and part time work available. Claimant also met the profile for five janitorial companies. Notably, all but one of the companies had part-time work available in addition to full-time work. Finally, Claimant fit the profile for six night-auditing companies. All but one of the companies had part and full-time work available.

18. On July 20, 2022 Kathleen D'Angelo, M.D. authored an independent medical examination report. In response to a question inquiring about his primary difficulties, Claimant noted the following: headaches, memory loss, problems thinking, depression and stress. Dr. D'Angelo documented that Claimant had normal physical, mental, and neurological exams. He was articulate and thorough in his discussions, "which belies his complaints of cognitive compromise." Dr. D'Angelo did not believe Claimant's complaints had a clear etiology. She also noted Claimant's pre-existing panic attacks and PTSD were contrary to reports he had given to providers. Dr. D'Angelo determined that Claimant did not suffer decompression illness as a result of his December 26, 2018 diving accident. She agreed Claimant should undergo a neuropsychological evaluation.

19. On July 20, 2022 Kevin Reilly, M.D. performed a neuropsychological independent medical examination. Dr. Reilly remarked that Claimant had no deficits in recall and presented in a normal manner. However, his psychometric testing was indicative of a negative response bias and invalidity consistent with exaggerated symptom reporting. Therefore, the testing results could not be considered valid. Dr. Reilly stated

there was no objective data to support Claimant's reported symptoms, and his worsening was contradictory to the natural course for brain injuries. Dr. Reilly stated there was no valid or reliable data to support Claimant's claim of impairments. He thus diagnosed Claimant with Malingering.

20. On August 24, 2022, after reviewing Dr. Reilly's results, Dr. Hammerberg issued an addendum report. He explained that, based on Dr. Reilly's findings, Claimant's test results at his own independent medical examination were not valid. Claimant had no evidence of cognitive impairment and only his seizure disorder was related to his diving accident. Dr. Hammerberg recommended permanent restrictions of no climbing ladders, no working at heights, no diving and no driving company vehicles.

21. On August 26, 2022 Dr. D'Angelo issued an addendum report. She reasoned that, based upon the new psychometric testing data and her own evaluation of Claimant, Claimant's only work-related diagnosis was a seizure disorder. She explained that, based on Claimant's diagnosis of malingering, only diagnoses supported by objective findings, can be attributed to his December 26, 2018 diving accident. Dr. D'Angelo recommended permanent restrictions of no commercial driving, no diving, no working on ladders or at heights, and no operation of heavy equipment.

22. Claimant testified at the hearing in this matter and through a rebuttal deposition. He explained that his normal job duties for Employer included managing employees, preparing project bids, working on contracts, handling client communication, and coordinating materials and vendors. Claimant explained that he would have continued working with Employer after his diving accident, but it became too hard for him to perform basic tasks. He told IS[Redacted] he was leaving Employer due to medical difficulties.

23. Claimant testified that he suffers daily headaches and experiences migraines 2-3 times per week. The migraines incapacitate him. Claimant remarked he also suffers blurry vision that can trigger headaches. Furthermore, Claimant noted daily dizziness and nausea, including almost daily vomiting. Claimant stated that he wants to work but the biggest issues are the unpredictable generalized headaches and migraines. Once he begins feeling a headache, he can barely function, has trouble putting words together, cannot focus and lies down. Claimant remarked that, when the migraines occur, he is "literally laid up for the day." He detailed that "[a]ll I can do is lay in the dark and try to ice my head and just pray that it will end. It's –it feels like my head is literally going to explode, and if I move, it hurts. Claimant feared being fired from a job due to missing too much work.

24. [Redacted, hereinafter JM] testified through a rebuttal evidentiary deposition in this matter on February 2, 2023. She remarked that in the two months she had been dating Claimant prior to the diving injury, he never complained of headaches. Claimant was also not limited in any way physically or emotionally in what he could do before the accident. JM[Redacted] described Claimant's worsening memory issues and forgetfulness since the diving accident. She commented that, when Claimant gets a headache or migraine, it is very obvious because his face turns red, he cannot focus, his

eyes become squinty, his mood changes and he becomes physically nauseous. JM[Redacted] remarked that Claimant suffers migraines five days per week and becomes incapacitated.

25. Neurologist Dr. Parry testified at the hearing in this matter. She maintained that Claimant sustained a brain injury from oxygen toxicity as a result of his December 26, 2018 diving accident. The oxygen toxicity was so severe that it resulted in a seizure disorder and decompression injury during his ascent. Based on the significance of the seizure disorder, Dr. Parry determined it was certainly reasonable and foreseeable that Claimant would experience an ongoing headache and migraine disorder.

26. Dr. Parry explained that Claimant has headaches and migraines related to his injury that most likely constitute vestibular migraines. She commented that Claimant's generalized and migraine headaches are unpredictable. Triggers are activities that cannot be suppressed such as visual scanning or tracking. Claimant's headaches, combined with vestibular components, interfere with concentration and result in significant disability issues. Claimant is unemployable because he cannot attend work on a regular and consistent basis. Finally, Dr. Parry remarked that the neuropsychological testing performed by Dr. Reilly four years after the diving accident would not be helpful because of interference from other factors such as pain, mood changes and depression. Furthermore, interpretation involves subjective assessment. Dr. Parry summarized that Claimant is currently unable to earn any wages in any capacity. However, he may be able to earn wages in the future with additional care and treatment.

27. Katie Montoya testified as an expert in vocational rehabilitation through an evidentiary deposition on October 27, 2022. She also authored a report on July 22, 2022 and an addendum report on September 3, 2022. Ms. Montoya maintained that Claimant is incapable of earning any wages in any capacity. Specifically, Claimant has been consistent regarding his limitations caused by headaches, migraines, balance and vision issues. Because of Claimant's unpredictability as to whether he can show up for full or part-time positions based on his physical limitations, he is currently incapable of earning any wages in any capacity.

28. On January 6, 2023 the parties conducted the deposition of Dr. D'Angelo. She maintained that Claimant's only condition caused by the December 26, 2018 diving accident was a seizure disorder from oxygen toxicity. After considering emails, text messages, and Claimant's testimony, she determined he was very functional for several months after his diving accident. Dr. D'Angelo noted Claimant's initial symptoms and functionality at work suggested he did not have an organic abnormality. She explained Claimant's complaints of headaches should not be credited, because they were inconsistent with his expected course of recovery, his invalid neuropsychological testing with Dr. Reilly and Claimant's lack of candor about his medical history. Dr. D'Angelo reasoned that Claimant did not have a work-related headache or migraine condition that prevented him from working.

29. Owner of Employer IS[Redacted] testified at the hearing in this matter that Claimant returned to full-time work after the diving accident. He commented that after the

accident he and Claimant were in the office 75% of the time. [Redacted, hereinafter IS] further testified Claimant did not miss work on a regular basis until a few weeks before his resignation. Claimant otherwise completed his job tasks without difficulty or delay, traveled to work sites in and out of state, worked on a computer for hours at a time, held conversations with clients, and displayed no memory or concentration issues. He remarked that Claimant never complained of concentration issues, dizziness, or vision problems. Claimant only mentioned a headache on one occasion after the diving accident.

30. Respondents' Exhibit G contains text messages between Claimant and IS[Redacted] discussing work and personal issues from the date of the diving accident on December 26, 2018 until Claimant's resignation in April, 2019. For example, January 23, 2019 texts discuss working on the [Redacted, hereinafter CG] tunnel job. IS[Redacted] explained CG[Redacted] was a job in California that they worked on together. IS[Redacted] also explained texts on February 11, 2019 pertaining to a 1 ½ mile long 5' x 8' tunnel he and Claimant inspected. On March 20, 2019 Claimant and IS[Redacted] texted regarding a job they had traveled to in Grand Junction, Colorado. IS[Redacted] testified Claimant resigned in mid-April, 2019 because he wanted to find a new career, was considering becoming a day trader, or perhaps go back to school. Claimant did not mention medical symptoms as a reason for quitting.

31. Dr. Reilly testified at the hearing in this matter as an expert in the fields of clinical and neuropsychology. He explained that neurocognitive symptoms are typically worst shortly after a brain injury. If symptoms increase six months or more after a brain injury without an intervening event, that is typically a strong indication for psychosocial factors influencing symptoms. Dr. Reilly commented that Claimant displayed no issues of fatigue or memory issues over the testing and interview process, and the test results were incongruent with Claimant's presentation. Claimant's testing identified over-reporting of symptoms/symptom magnification, and test data was not valid for interpretation.

32. Dr. Reilly explained that malingering is defined as the intentional production or exaggeration of symptoms for external incentives. He assigns the diagnosis in only 1-2% of patients. Dr. Reilly remarked that his diagnosis was based on all the testing batteries and influenced by Claimant's denial of pre-existing mental health conditions from military service.

33. Dr. Reilly testified that he had reviewed the testing that Dr. Andrews performed in April, 2019. He acknowledged the battery was quite extensive and did not reveal any evidence of malingering or negative response bias. Nevertheless, Dr. Reilly acknowledged that neuropsychological testing is largely based upon different interpretive approaches and Claimant scored much worse on his testing than Dr. Andrews because of the negative response bias. Claimant's performance was "much worse" at the more recent evaluation. Dr. Reilly also rejected Dr. Parry's opinion that neuropsychological testing would be of no value due to the presence of physical pain or a mood disorder. Instead, a neuropsychological assessment has increased efficacy in the presence of the preceding symptoms.

34. Mr. Ryan testified at the hearing as a vocational expert. He noted Claimant has a varied work history inclusive of supervisory experience, customer service, estimating, bidding, inspecting, and welding. The opinions of the physicians in the case were unanimous in recommending work restrictions. Mr. Ryan detailed his labor market contacts for the positions of unarmed security guard, janitor, and night auditor, included contacting numerous actual employers in the Denver metropolitan area. However, Claimant's employment opportunities are not limited to those employers who were contacted and additional opportunities with other employers for those types of jobs were available.

35. Mr. Ryan explained that work from home jobs, such as telemarketing and sales, are options for Claimant. He also remarked that Claimant could work temporary staffing day jobs on days he felt better. The positions included multiple entry level jobs within Claimant's work restrictions. Moreover, temporary day labor was an employment option even assuming Claimant's testimony he could not maintain regularly scheduled employment due to having migraines several times per week. Mr. Ryan testified there were no assigned working restrictions pertaining to Claimant's headaches, and Claimant had not tried returning to employment. He felt it was improper to inject limitations into his evaluation that are not based upon medical restrictions. Mr. Ryan thus concluded that Claimant is capable of earning wages in some capacity.

36. Claimant has failed to prove that it is more probably true than not that he is incapable of earning any wages and is entitled to receive PTD benefits as a result of the industrial injuries he sustained during the course and scope of his employment with Employer on December 26, 2018. The record reveals that physicians have assigned Claimant permanent physical restrictions of no commercial driving, no diving, no working on ladders or at heights, and no operation of heavy equipment. The restrictions permit him to function in the work environment and render him a suitable candidate for a number of employment opportunities.

37. Initially, Claimant was involved in a diving accident on December 26, 2018. He suffered an oxygen toxicity event resulting in a seizure disorder. The bulk of the evidence suggests there are no additional, expected long-term symptoms. Claimant was evaluated at Parker Adventist where, in conjunction with a dive medicine specialist, Dr. Merrell ruled out a decompression illness. None of the other physicians who have treated or evaluated Claimant, including Drs. Moon, Hammerberg, Burns, and Mathwich, have diagnosed a decompression illness.

38. The opinions of Drs. D'Angelo, Hammerberg, and Reilly reveal that Claimant's diving injury should have manifested as a typical brain injury and likely improved over time. Claimant's symptoms initially followed the expected course. Over the ensuing two months after the accident Claimant reported to Dr. Moon's office that his memory and dizziness were improving, and he had a complete resolution of headaches. After considering emails, text messages, and Claimant's testimony, Dr. D'Angelo specifically noted that Claimant was very functional for several months after his diving accident. She remarked that Claimant's initial symptoms and functionality at work suggested he did not have an organic abnormality. IS[Redacted] also credibly explained

that Claimant did not miss work on a regular basis until a few weeks before his resignation. Claimant otherwise completed his job tasks without difficulty or delay, traveled to work sites in and out of state, worked on a computer for hours at a time, held conversations with clients, and displayed no memory or concentration issues. He remarked that Claimant never complained of concentration issues, dizziness, or vision problems.

39. By March 16, 2021 DIME Dr. Mathwich determined that Claimant had reached MMI and assigned a combined 36% whole person physical and mental permanent impairment rating. Nevertheless, Claimant asserts that he has suffered worsening symptoms including daily headaches, incapacitating migraines, vision problems and mental health issues as a result of his diving accident. However, on July 20, 2022 Dr. Reilly conducted psychometric testing of Claimant that was indicative of a negative response bias and invalidity consistent with exaggerated symptom reporting. Dr. Reilly stated there was no objective data to support Claimant's reported symptoms, and his worsening was contradictory to the natural course for brain injuries. Dr. D'Angelo also explained that only diagnoses supported by objective findings can be attributed to Claimant's December 26, 2018 diving accident. She recommended permanent restrictions of no commercial driving, no diving, no working on ladders or at heights, and no operation of heavy equipment. Similarly, Dr. Hammerberg determined Claimant had no evidence of cognitive impairment and only his seizure disorder was related to his diving accident. Dr. Hammerberg also recommended permanent restrictions of no climbing ladders, no working at heights, no diving and no driving company vehicles. Notably, Claimant has received permanent work restrictions that are virtually unanimous from both treating and evaluating physicians.

40. Mr. Ryan noted Claimant has a varied work history inclusive of supervisory experience, customer service, estimating, bidding, inspecting, and welding. He determined Claimant is employable and identified twenty-two entry level jobs in the Denver, Colorado area based upon the work restrictions recommended by Dr. Burns, Dr. Mathwich, Dr. Hammerberg, Dr. D'Angelo and Dr. Parry. Mr. Ryan detailed his labor market contacts for the positions of unarmed security guard, janitor, and night auditor, and included contacting numerous actual employers in the Denver area. He also explained that work from home jobs, such as telemarketing and sales, are options for Claimant. Mr. Ryan remarked that Claimant could work temporary staffing day jobs on days he felt better. The positions included multiple entry level jobs within Claimant's work restrictions. Moreover, temporary day labor was an employment option even assuming Claimant's testimony he could not maintain regularly scheduled employment due to having migraines several times per week. Mr. Ryan testified there were no assigned working restrictions pertaining to Claimant's headaches, and Claimant had not tried returning to employment. He thus concluded that Claimant is capable of earning wages in some capacity.

41. In contrast, Claimant testified that he suffers daily headaches and experiences migraines 2-3 times per week. The migraines incapacitate him. Claimant remarked he also suffers blurry vision that can trigger headaches. Furthermore, Claimant noted daily dizziness and nausea, including almost daily vomiting. Claimant stated that

he wants to work but the biggest issues are the unpredictable generalized headaches and migraines. JM[Redacted] remarked that in the two months she had been dating Claimant prior to the diving injury, he never complained of headaches. Claimant was also not limited in any way physically or emotionally in what he could do before the accident. JM[Redacted] corroborated that Claimant suffers frequent migraines and becomes incapacitated. Dr. Parry explained that Claimant's headaches and migraines are related to his injury and most likely constitute vestibular migraines. She commented that Claimant's generalized and migraine headaches are unpredictable. Triggers are activities that cannot be suppressed such as visual scanning or tracking. Claimant's headaches, combined with vestibular components, interfere with concentration and result in significant disability issues. Claimant is unemployable because he cannot attend work on a regular and consistent basis. Ms. Montoya also maintained that Claimant is incapable of earning any wages in any capacity. Specifically, Claimant has been consistent regarding his limitations caused by headaches, migraines, balance and vision issues. Because of Claimant's unpredictability as to whether he can show up for full or part-time positions based on his physical limitations, he is currently incapable of earning any wages in any capacity.

42. Despite Claimant's testimony, as well as the conclusions of Dr. Parry and Ms. Montoya, the record reveals that Claimant is capable of earning wages. Claimant has been assigned and/or recommended permanent work restrictions that are nearly unanimous across the treating and evaluating physicians. Dr. Burns and Dr. Mathwich, the two non-retained medical providers who recommended restrictions, were aware of Claimant's severe subjective complaints yet chose not to assign additional restrictions. Furthermore, the record reflects that Claimant's abilities render him a suitable candidate for a number of employment opportunities. Considering Claimant's vocational attributes and human factors including age, education, work history, transferable skills, communication skills and work restrictions, he is capable of earning wages in some capacity. Accordingly, the record reflects that employment exists that is reasonably available to Claimant under his particular circumstances. Claimant's request for PTD benefits is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of 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. Permanent Total Disability (PTD) is defined as the inability to earn "any wages in the same or other employment." §8-40-201(16.5)(a), C.R.S.; *Christie v. Coors Transportation Co.,* 933 P.2d 1330, 1333 (Colo. 1997). A claimant is not permanently and totally disabled if he is able to earn some wages in modified, sedentary or part-time employment. *McKinney v. ICAO*, 894 P.2d 42 (Colo. App. 1995). The claimant carries the burden of proof to establish that he is permanently and totally disabled by a preponderance of the evidence. The question of whether the claimant has proven PTD is a question of fact for resolution by the ALJ. *Id.*

5. A claimant must demonstrate that his industrial injuries constituted a "significant causative factor" in order to establish a claim for PTD. *In Re Olinger,* W.C. No. 4-002-881 (ICAO, Mar. 31, 2005). A "significant causative factor" requires a "direct causal relationship" between the industrial injuries and a PTD claim. *In Re Dickerson,* W.C. No. 4-323-980 (ICAO, July 24, 2006); *see Seifried v. Industrial Comm'n,* 736 P.2d 1262, 1263 (Colo. App. 1986). The preceding test requires the ALJ to ascertain the "residual impairment caused by the industrial injury" and whether the impairment was sufficient to result in PTD without regard to subsequent intervening events. *See Joslins Dry Goods Co. v. Indus. Claim Appeals Off.*, 21 P.3d 866 (Colo. App. 2001). Resolution of the causation issue is a factual determination for the ALJ. *In Re of Dickerson,* W.C. No. 4-323-980 (ICAO, July 24, 2006).

6. In ascertaining whether a claimant is able to earn any wages, the ALJ may consider various "human factors," including a claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998); *Holly Nursing v. Indus. Claim Appeals Off.,* 992 P.2d 701, 703 (Colo. App. 1999). The critical test, which must be conducted on a case-by-case basis, is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Bymer*, 955 P.2d at 557. Ultimately, the determination of whether a Claimant suffers from a permanent and total disability is an issue of fact for resolution by the ALJ. *In Re Selvage,* W.C. No. 4-486-812 (ICAO, Oct. 9, 2007). The ability to earn wages inherently includes consideration of whether claimant is capable of getting hired and sustaining employment. *See Christie*, 933 P.2d at 1335; *Cotton v. Econ. Lub-N-tune*, W.C. No. 4-220-395 (ICAO, Jan. 16, 1997).

7. The test for determining "availability of work" is whether employment exists "that is reasonably available to claimant under his or her particular circumstances." *Christie*, 933 P.2d at 1335; *Bymer,* 955 P.2d at 554-55. Respondents are not required to prove the existence of a particular job that a specific employer has made available to the claimant. *Labiak v. Bader Burke & Co.,* W.C. No. 4-134-999 (ICAO, Oct. 14, 2009) *citing Beavers v. Indus. Claim Appeals Off.*, No. 96CA0275 (Colo. App., Sept. 5, 1996).

8. As found, Claimant has failed to prove by a preponderance of the evidence that he is incapable of earning any wages and is entitled to receive PTD benefits as a result of the industrial injuries he sustained during the course and scope of his employment with Employer on December 26, 2018. The record reveals that physicians have assigned Claimant permanent physical restrictions of no commercial driving, no diving, no working on ladders or at heights, and no operation of heavy equipment. The restrictions permit him to function in the work environment and render him a suitable candidate for a number of employment opportunities.

9. As found, initially, Claimant was involved in a diving accident on December 26, 2018. He suffered an oxygen toxicity event resulting in a seizure disorder. The bulk of the evidence suggests there are no additional, expected long-term symptoms. Claimant was evaluated at Parker Adventist where, in conjunction with a dive medicine specialist, Dr. Merrell ruled out a decompression illness. None of the other physicians who have treated or evaluated Claimant, including Drs. Moon, Hammerberg, Burns, and Mathwich, have diagnosed a decompression illness.

10. As found, the opinions of Drs. D'Angelo, Hammerberg, and Reilly reveal that Claimant's diving injury should have manifested as a typical brain injury and likely improved over time. Claimant's symptoms initially followed the expected course. Over the ensuing two months after the accident Claimant reported to Dr. Moon's office that his memory and dizziness were improving, and he had a complete resolution of headaches. After considering emails, text messages, and Claimant's testimony, Dr. D'Angelo specifically noted that Claimant was very functional for several months after his diving accident. She remarked that Claimant's initial symptoms and functionality at work suggested he did not have an organic abnormality. IS[Redacted] also credibly explained that Claimant did not miss work on a regular basis until a few weeks before his resignation. Claimant otherwise completed his job tasks without difficulty or delay, traveled to work sites in and out of state, worked on a computer for hours at a time, held conversations with clients, and displayed no memory or concentration issues. He remarked that Claimant never complained of concentration issues, dizziness, or vision problems.

11. As found, by March 16, 2021 DIME Dr. Mathwich determined that Claimant had reached MMI and assigned a combined 36% whole person physical and mental permanent impairment rating. Nevertheless, Claimant asserts that he has suffered worsening symptoms including daily headaches, incapacitating migraines, vision problems and mental health issues as a result of his diving accident. However, on July 20, 2022 Dr. Reilly conducted psychometric testing of Claimant that was indicative of a negative response bias and invalidity consistent with exaggerated symptom reporting. Dr.

Reilly stated there was no objective data to support Claimant's reported symptoms, and his worsening was contradictory to the natural course for brain injuries. Dr. D'Angelo also explained that only diagnoses supported by objective findings can be attributed to Claimant's December 26, 2018 diving accident. She recommended permanent restrictions of no commercial driving, no diving, no working on ladders or at heights, and no operation of heavy equipment. Similarly, Dr. Hammerberg determined Claimant had no evidence of cognitive impairment and only his seizure disorder was related to his diving accident. Dr. Hammerberg also recommended permanent restrictions of no climbing ladders, no working at heights, no diving and no driving company vehicles. Notably, Claimant has received permanent work restrictions that are virtually unanimous from both treating and evaluating physicians.

12. As found, Mr. Ryan noted Claimant has a varied work history inclusive of supervisory experience, customer service, estimating, bidding, inspecting, and welding. He determined Claimant is employable and identified twenty-two entry level jobs in the Denver, Colorado area based upon the work restrictions recommended by Dr. Burns, Dr. Mathwich, Dr. Hammerberg, Dr. D'Angelo and Dr. Parry. Mr. Ryan detailed his labor market contacts for the positions of unarmed security guard, janitor, and night auditor, and included contacting numerous actual employers in the Denver area. He also explained that work from home jobs, such as telemarketing and sales, are options for Claimant. Mr. Ryan remarked that Claimant could work temporary staffing day jobs on days he felt better. The positions included multiple entry level jobs within Claimant's work restrictions. Moreover, temporary day labor was an employment option even assuming Claimant's testimony he could not maintain regularly scheduled employment due to having migraines several times per week. Mr. Ryan testified there were no assigned working restrictions pertaining to Claimant's headaches, and Claimant had not tried returning to employment. He thus concluded that Claimant is capable of earning wages in some capacity.

13. As found, in contrast, Claimant testified that he suffers daily headaches and experiences migraines 2-3 times per week. The migraines incapacitate him. Claimant remarked he also suffers blurry vision that can trigger headaches. Furthermore, Claimant noted daily dizziness and nausea, including almost daily vomiting. Claimant stated that he wants to work but the biggest issues are the unpredictable generalized headaches and migraines. JM[Redacted] remarked that in the two months she had been dating Claimant prior to the diving injury, he never complained of headaches. Claimant was also not limited in any way physically or emotionally in what he could do before the accident. JM[Redacted] corroborated that Claimant suffers frequent migraines and becomes incapacitated. Dr. Parry explained that Claimant's headaches and migraines are related to his injury and most likely constitute vestibular migraines. She commented that Claimant's generalized and migraine headaches are unpredictable. Triggers are activities that cannot be suppressed such as visual scanning or tracking. Claimant's headaches, combined with vestibular components, interfere with concentration and result in significant disability issues. Claimant is unemployable because he cannot attend work on a regular and consistent basis. Ms. Montoya also maintained that Claimant is incapable of earning any wages in any capacity. Specifically, Claimant has been consistent regarding his limitations caused by headaches, migraines, balance and vision issues. Because of

Claimant's unpredictability as to whether he can show up for full or part-time positions based on his physical limitations, he is currently incapable of earning any wages in any capacity.

14. As found, despite Claimant's testimony, as well as the conclusions of Dr. Parry and Ms. Montoya, the record reveals that Claimant is capable of earning wages. Claimant has been assigned and/or recommended permanent work restrictions that are nearly unanimous across the treating and evaluating physicians. Dr. Burns and Dr. Mathwich, the two non-retained medical providers who recommended restrictions, were aware of Claimant's severe subjective complaints yet chose not to assign additional restrictions. Furthermore, the record reflects that Claimant's abilities render him a suitable candidate for a number of employment opportunities. Considering Claimant's vocational attributes and human factors including age, education, work history, transferable skills, communication skills and work restrictions, he is capable of earning wages in some capacity. Accordingly, the record reflects that employment exists that is reasonably available to Claimant under his particular circumstances. Claimant's request for PTD benefits is thus denied and dismissed.

ORDER

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

Claimant's request for PTD benefits is denied and dismissed.

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

DATED: March 17, 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 5-207-495-001

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on May 11, 2022.

2. Whether Claimant has established by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his May 11, 2022 industrial injuries.

4. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period May 11, 2022 until terminated by statute.

5. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits after May 10, 2022.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $2290.24.

2. Respondents are entitled to an offset for unemployment benefits under §8-42-103(f), C.R.S.

FINDINGS OF FACT

1. On November 16, 2021 Claimant began working for Employer as a Risk Manager. Claimant also received unemployment benefits during the period October 30, 2021 through December 14, 2021.

2. On February 28, 2022 Employer placed Claimant on a Performance Improvement Plan (PIP). Employer's Area Manager [Redacted, hereinafter KH], testified Claimant's performance was deficient in terms of productivity, efficiency, attendance,

teamwork, communication and quality of work. Despite signing the PIP, Claimant denied all of the performance deficiencies.

3. On April 7, 2022 Claimant underwent non-work related fusion surgery on his back with neurosurgeon Sean Markey, M.D. He then took paid time off and vacation leave for a few weeks to recover from his surgery. Claimant returned to work remotely and part-time in the last few days of April, 2022.

4. On May 10, 2022 Claimant attended a meeting with KH[Redacted] and Employer's Business Unit Manager [Redacted, hereinafter RN]. At the meeting he was terminated from employment. Claimant was terminated because he failed to improve his performance. There were also complaints from clients that Claimant was combative, argumentative, abrasive and he would not be on time or show up for meetings. Claimant received his final paycheck and was locked out of Employer's computer/IT system.

5. At the termination meeting, KH[Redacted] required Claimant to provide him with his key card and work tablet. However, Claimant did not have the items with him at the time because they were in his home office. Claimant told KH[Redacted] and RN[Redacted] that he would bring the tablet back to the office the following day. Claimant testified that he also told KH[Redacted] and RN[Redacted] that there was additional work he was going to do on behalf of the company to get his files and client lists transferred over to his co-worker and Risk Manager for Business Unit 1 [Redacted, hereinafter AK].

6. Despite being terminated, Claimant contends he continued to perform work after the meeting on May 10, 2022. Claimant remarked he received a phone call from client [Redacted, hereinafter LC] about an OSHA inspection. He commented that he then gathered information and files off his laptop and transferred them to a USB stick in order to pass them onto KH[Redacted].

7. KH[Redacted] testified that, after the termination meeting, he did not ask Claimant to meet with AK[Redacted] to transfer work. Claimant also did not have a meeting with RN[Redacted] to discuss OSHA concerns of client LC[Redacted]. KH[Redacted] explained that he only sought the return of the keycard and laptop from Claimant. He remarked that Claimant offered to bring the laptop back on the following day, and agreed that would be fine. KH[Redacted] did not invite Claimant back to the office on May 11, 2022 for any other purpose.

8. KH[Redacted] remarked that he did not plan any kind of an exit interview or expect any transfer of files. He noted that Claimant had stated after the termination meeting that he was willing to provide client information, but KH[Redacted] declined because Employer had Claimant's computer. He emphasized that AK[Redacted] was fully capable of assuming Claimant's job responsibilities without any input from Claimant. KH[Redacted] summarized that Claimant's "employment was terminated and that was it." Claimant was simply going to come into the office at 10:00 a.m. on May 11, 2022 to drop off the keycard and laptop.

9. On May 11, 2022 Claimant visited Employer's facility and met with KH[Redacted]. Claimant testified he was expecting to go over the work files he had passed on to AK[Redacted], the OSHA situation with LC[Redacted], and have his exit interview. After Claimant argued somewhat about his termination, he returned the keycard and laptop. Claimant requested to grab something from his office and KH[Redacted] acquiesced. KH[Redacted] did not ask Claimant to work because he had been terminated. He emphasized that, although Claimant wanted to provide information about the work he was doing, it was unnecessary because Claimant had been terminated. KH[Redacted] did not ask Claimant to perform any work on May 11, 2022 or recall providing him with a pen and notepad to write down information. Claimant then returned to KH's[Redacted] office after a couple of minutes and stated he had retrieved what he needed. KH[Redacted] walked Claimant out the front door of Employer's suite.

10. In contrast, Claimant testified that KH[Redacted] gave him a notepad and pen on May 11, 2022. He told Claimant to go to his cubicle to document everything he was passing onto AK[Redacted]. Claimant then went to his workstation to write notes for AK[Redacted] and prepare a USB drive containing his files. He remarked that, after he received a call from a client, he got up from his workstation to go to the photocopy machine. When he returned, he pulled his office chair to sit down, but it became caught on something. Claimant then tried to sit on the chair, fell and landed on the floor.

11. Employer's Payroll Manager [Redacted, hereinafter SJ] testified that while at work on May 11, 2022 he heard a bang, but did not think much of it. About thirty seconds later, Claimant called out to SJ[Redacted] for help. When SJ[Redacted] arrived at Claimant's cubicle, Claimant was either on his knees or on the floor. Because SJ's[Redacted] back had been toward Claimant in a different cubicle, he did not see Claimant fall. He asked Claimant if he could help him up because Claimant was on the floor unplugging "something." Claimant explained that he fell off his chair while getting an item from under his desk.

12. Claimant testified that KH[Redacted] then came out of his office and asked whether he was done with what he was doing. Claimant responded that he was just about done, and that he just hurt himself. KH[Redacted] responded, "[y]ou need to be a little more careful. I need you to wrap up what you are doing and get going."

13. KH[Redacted] explicitly denied that he had spoken to Claimant after the alleged fall on May 11, 2022. He explained that he did not realize Claimant had made an accusation of falling until a couple of days later. KH[Redacted] reiterated that walking Claimant out of the suite was the last time he has seen Claimant. He also recalled that on either May 10 or May 11, 2022 Human Resources Director [Redacted, hereinafter HG] called him and stated she had about a 45-minute conversation with Claimant. The conversation was somewhat of a tirade because Claimant had been terminated and felt wronged.

14. Business Development Manager [Redacted, hereinafter EQ] commented that on May 11, 2022 he arrived at work and saw Claimant in one of the breakout rooms

in the lobby of Employer's building. Claimant called his name and tried to get up. He told EQ[Redacted] he had a meeting with KH[Redacted] and that he "[f]ell and kind of jacked up his back." EQ[Redacted] helped Claimant stand, grabbed his backpack and walked Claimant to his car. He inquired whether Claimant wanted a ride home, but Claimant declined.

15. On May 16, 2022 Claimant underwent x-ray imaging of his lumbar spine at Porter Adventist Hospital. The visit was characterized as a postoperative follow-up. Providers compared the imaging to a lumbar spine MRI from April 10, 2022. The impression was "similar postoperative changes from instrumented posterior fusion without radiographic evidence of dynamic instability or acute hardware complication."

16. On May 24, 2022 Claimant had a telemedicine visit at Denver Health. He reported that he had fallen off his chair at work a couple of weeks earlier and hurt his back. Ali Zirzakzadeh, M.D. assessed Claimant with acute lower back pain.

17. On June 3, 2022 Claimant completed a Workers' Claim for Compensation. He described the accident as "I was in for a scheduled meeting, wrapping up my notes & laptop. I went to grab the chair to sit down. The back wheel of the chair got caught on the plastic carpet cover (in the damaged corner) the chair seat swiveled, my butt hit the seat" and I slid off and fell to the floor.

18. On July 7, 2022 Claimant's primary care doctor, Grace Ann Alfonsi, M.D., confirmed that he had been doing well following his initial surgery. However, he fell at work on May 13, 2022. Imaging subsequently revealed that Claimant had pulled out the L2 screw and suffered fractures of the pedicle.

19. On July 22, 2022 Claimant underwent a T10-L3 fusion, removal of hardware and bilateral steotomies. Dr. Markey documented that Claimant was on full restrictions for a spinal fracture from May 11, 2022 and continuing through 3-6 months following August 1, 2022.

20. Claimant has failed to demonstrate that it is more probably true than not that he suffered compensable injuries during the course and scope of his employment with Employer on May 11, 2022. Claimant's aggravation of his back condition did not arise out of his employment with Employer. The record reveals that on May 10, 2022 Claimant had been terminated. Claimant's purpose in visiting the office on May 11, 2022 was limited to simply returning his keycard and laptop. KH[Redacted] directed him not to carry out any further employment duties. Nevertheless, Claimant asserts that he was injured while performing work for Employer on May 11, 2022 when he fell off a chair in his cubicle. However, Claimant's argument fails and he did not suffer a compensable injury. Claimant had been terminated on the previous day, his activities on May 11, 2022 were not incidental to employment, and he was explicitly advised not to perform additional work that limited the sphere of the employment relationship.

21. Initially, Claimant worked for Employer as a Risk Manager. On April 7, 2022 he underwent non-work related fusion surgery on his back. He then took paid time off and vacation leave for a few weeks to recover from his surgery. Claimant returned to work remotely and part-time in the last few days of April, 2022. However, he was terminated on May 10, 2022 because he failed to improve his performance after receiving a PIP. Claimant's performance was deficient in terms of productivity, efficiency, attendance, teamwork, communication and quality of work. There were also complaints from clients that Claimant was combative, argumentative, abrasive and that he would not be on time or show up for meetings. Claimant received his final paycheck and was locked out of Employer's computer/IT system on May 10, 2022.

22. KH[Redacted] credibly testified that, after the termination meeting, he did not ask Claimant to meet with AK[Redacted] to transfer work. Claimant also did not have a meeting with RN[Redacted] to discuss OSHA concerns of client LC[Redacted]. KH[Redacted] remarked that he did not plan any kind of an exit interview or expect any transfer of files. He noted that Claimant had stated after the termination meeting that he was willing to provide client information, but KH[Redacted] declined because Employer had Claimant's computer. He emphasized that AK[Redacted] was fully capable of assuming Claimant's job responsibilities without any input from Claimant.

23. KH[Redacted] explained that he only sought the return of the keycard and laptop from Claimant. He remarked that Claimant offered to bring the laptop back on the following day, and he agreed the return of the laptop would be fine. Mr. KH[Redacted] did not invite Claimant back to the office on May 11, 2022 for any other purpose. He summarized that Claimant's "employment was terminated and that was it." Claimant was simply going to come into the office at 10:00 a.m. to drop off the keycard and laptop.

24. On May 11, 2022 Claimant visited Employer's office and met with KH[Redacted]. After Claimant argued somewhat about his termination, he returned the keycard and laptop. When Claimant requested to grab something from his office, KH[Redacted] acquiesced. He did not ask Claimant to work because he had been terminated. KH[Redacted] emphasized that, although Claimant wanted to provide information about the work he was doing, it was unnecessary because Claimant had been terminated.

25. In contrast, Claimant contends that on May 11, 2022 KH[Redacted] gave him a notepad and pen to take to his workstation to document everything he was passing onto AK[Redacted]. Claimant then went to his workstation to write notes for AK[Redacted] and prepare a USB drive containing his files. He remarked that, after he received a call from a client, he left his workstation to go to the photocopy machine. When he returned, he pulled his office chair to sit down, but it became caught on something. Claimant then tried to sit on the chair, but fell and landed on the floor suffering injuries.

26. Despite Claimant's account, his testimony lacks credibility. The record reflects that Claimant was irritated and dissatisfied after being terminated on May 10, 2022. On May 11, 2022 Claimant was expecting to go over the work files he had passed

on to AK[Redacted], the OSHA situation with LC[Redacted], and have his exit interview with KH[Redacted]. HG[Redacted] also had an approximately 45-minute conversation with Claimant that was somewhat of a tirade because he had been terminated and felt wronged. Claimant's actions subsequent to the termination demonstrate that he sought an exit interview and more information about the details of his termination. Claimant also repeatedly persisted in wanting to provide information and files to Employer. His account of returning to his office to do work after being terminated is simply not plausible. Claimant had already submitted his laptop and keycard, and been repeatedly told that no further information was necessary. Claimant's actions reflect a clear violation of KH's[Redacted] request to simply return the keycard and laptop. Finally, the actual occurrence of the accident was questionable because it was unwitnessed, Claimant called two co-employees over to him by name, and he merely recounted the alleged incident.

27. Claimant's actions in returning to his cubicle to perform work after retuning his laptop and keycard were also not incidental to employment. Claimant explained that he went to his cubicle to write notes for AK[Redacted] and prepare a USB stick containing his files. Claimant was not engaging in activities preparatory for employment or incidental to his job duties. Instead, he was performing work after termination in contravention of the clear instructions of KH[Redacted]. Claimant's injuries thus did not arise out of a risk that was reasonably incidental to the conditions and circumstances of his specific employment.

28. An employer's direction to an employee may potentially limit the sphere of the employment relationship. The direction must be specific and show a clear intent to limit the sphere of the employment relationship. Here, KH[Redacted] specifically directed Claimant to return to Employer's office on May 11, 2022 to simply return the keycard and laptop. Because Claimant had been terminated on May 10, 2022, Mr. KH's[Redacted] directive constituted an intent to limit Claimant's sphere of employment to simply return items and not engage in any work. Notably, KH's[Redacted] instructions were not an effort to control Claimant's method of completing his job duties. The directive negated the requisite causal relationship between Claimant's employment and resulting injury. Claimant's violation of Employer's instructions governing the sphere of employment thus severed the causal relationship between his employment and any injuries. Accordingly, Claimant did not suffer compensable injuries on May 11, 2022. His claim is therefore denied and dismissed.

CONCLUSIONS OF LAW

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

rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

5. As a general rule, the course of employment for employees having a fixed time and place of work encompasses a reasonable interval before and after official working hours during which the employee is engaged in preparatory or incidental acts. There is no requirement that the activity be a duty of employment if it is reasonably incidental to the employment. *Ventura v. Albertson's, Inc.,* 856 P.2d 35 (Colo. App. 1992). The employee's activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *In re Swanson,* WC 4-589-645 (ICAO, Sept. 13, 2006). It is sufficient "if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment." *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995). Incidental activities include those that are "devoid of any duty component, and are unrelated to any specific benefit to the employer." *In re Rodriguez,* WC 4-705-673 (ICAO, Apr. 30, 2008).

6. 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 Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

7. 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 (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.

8. Generally, an employer has the right to issue directives concerning what an employee may do and when she may do it. *In re Eelorriaga*, WC 5-047-389-01 (ICAO, June 19, 2018). In some cases, the claimant's disobedience of the employer's instructions concerning what is to be done and when it is to be done negates the requisite causal relationship between the employment and the resulting injury. In such circumstances the employer's instructions are said to limit the "sphere" of the employment. *In re Eelorriaga*, WC 5-047-389-01 (ICAO, June 19, 2018). The employee's violation of the employer's instructions governing the "sphere" of employment severs the causal relationship between the employment and the injury, rendering the injury non-compensable. *Bill Lawley Ford v. Miller*, 672 P.2d 1031, 1032 (Colo. App. 1983); *see Escobedo v. Midwest Drywall Company*, W.C. No. 4-700-127 (ICAO, July 13. 2007). Conversely, violation of rules and directives relating only to the employee's conduct within the sphere of employment do not remove injuries from the realm of compensability. *Bill Lawley Ford* 672 P.2d at 1032.

9. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on May 11, 2022. Claimant's aggravation of his back condition did not arise out of his employment with Employer. The record reveals that on May 10, 2022 Claimant had been terminated. Claimant's purpose in visiting the office on May 11, 2022 was limited to simply returning his keycard and laptop. KH[Redacted] directed him not to carry out any further employment duties. Nevertheless, Claimant asserts that he was injured while performing work for Employer on May 11, 2022 when he fell off a chair in his cubicle. However, Claimant's argument fails and he did not suffer a compensable injury. Claimant had been terminated on the previous day, his activities on May 11, 2022 were not incidental to employment, and he was explicitly advised not to perform additional work that limited the sphere of the employment relationship.

10. As found, initially, Claimant worked for Employer as a Risk Manager. On April 7, 2022 he underwent non-work related fusion surgery on his back. He then took paid time off and vacation leave for a few weeks to recover from his surgery. Claimant returned to work remotely and part-time in the last few days of April, 2022. However, he was terminated on May 10, 2022 because he failed to improve his performance after receiving a PIP. Claimant's performance was deficient in terms of productivity, efficiency, attendance, teamwork, communication and quality of work. There were also complaints from clients that Claimant was combative, argumentative, abrasive and that he would not be on time or show up for meetings. Claimant received his final paycheck and was locked out of Employer's computer/IT system on May 10, 2022.

11. As found, KH[Redacted] credibly testified that, after the termination meeting, he did not ask Claimant to meet with AK[Redacted] to transfer work. Claimant also did not have a meeting with RN[Redacted] to discuss OSHA concerns of client LC[Redacted]. KH[Redacted] remarked that he did not plan any kind of an exit interview or expect any transfer of files. He noted that Claimant had stated after the termination meeting that he was willing to provide client information, but KH[Redacted] declined because Employer had Claimant's computer. He emphasized that AK[Redacted] was fully capable of assuming Claimant's job responsibilities without any input from Claimant.

12. As found, KH[Redacted] explained that he only sought the return of the keycard and laptop from Claimant. He remarked that Claimant offered to bring the laptop back on the following day, and he agreed the return of the laptop would be fine. KH[Redacted] did not invite Claimant back to the office on May 11, 2022 for any other purpose. He summarized that Claimant's "employment was terminated and that was it." Claimant was simply going to come into the office at 10:00 a.m. to drop off the keycard and laptop.

13. As found, on May 11, 2022 Claimant visited Employer's office and met with KH[Redacted]. After Claimant argued somewhat about his termination, he returned the keycard and laptop. When Claimant requested to grab something from his office, KH[Redacted] acquiesced. He did not ask Claimant to work because he had been terminated. KH[Redacted] emphasized that, although Claimant wanted to provide information about the work he was doing, it was unnecessary because Claimant had been terminated.

14. As found, in contrast, Claimant contends that on May 11, 2022 KH[Redacted] gave him a notepad and pen to take to his workstation to document everything he was passing onto AK[Redacted]. Claimant then went to his workstation to write notes for AK[Redacted] and prepare a USB drive containing his files. He remarked that, after he received a call from a client, he left his workstation to go to the photocopy machine. When he returned, he pulled his office chair to sit down, but it became caught on something. Claimant then tried to sit on the chair, but fell and landed on the floor suffering injuries.

15. As found, despite Claimant's account, his testimony lacks credibility. The record reflects that Claimant was irritated and dissatisfied after being terminated on May

10, 2022. On May 11, 2022 Claimant was expecting to go over the work files he had passed on to AK[Redacted], the OSHA situation with LC[Redacted], and have his exit interview with KH[Redacted]. HG[Redacted] also had an approximately 45-minute conversation with Claimant that was somewhat of a tirade because he had been terminated and felt wronged. Claimant's actions subsequent to the termination demonstrate that he sought an exit interview and more information about the details of his termination. Claimant also repeatedly persisted in wanting to provide information and files to Employer. His account of returning to his office to do work after being terminated is simply not plausible. Claimant had already submitted his laptop and keycard, and been repeatedly told that no further information was necessary. Claimant's actions reflect a clear violation of KH's[Redacted] request to simply return the keycard and laptop. Finally, the actual occurrence of the accident was questionable because it was unwitnessed, Claimant called two co-employees over to him by name, and he merely recounted the alleged incident.

16. As found, Claimant's actions in returning to his cubicle to perform work after retuning his laptop and keycard were also not incidental to employment. Claimant explained that he went to his cubicle to write notes for AK[Redacted] and prepare a USB stick containing his files. Claimant was not engaging in activities preparatory for employment or incidental to his job duties. Instead, he was performing work after termination in contravention of the clear instructions of KH[Redacted]. Claimant's injuries thus did not arise out of a risk that was reasonably incidental to the conditions and circumstances of his specific employment.

17. As found, an employer's direction to an employee may potentially limit the sphere of the employment relationship. The direction must be specific and show a clear intent to limit the sphere of the employment relationship. Here, KH[Redacted] specifically directed Claimant to return to Employer's office on May 11, 2022 to simply return the keycard and laptop. Because Claimant had been terminated on May 10, 2022, KH's[Redacted] directive constituted an intent to limit Claimant's sphere of employment to simply return items and not engage in any work. Notably, KH's[Redacted] instructions were not an effort to control Claimant's method of completing his job duties. The directive negated the requisite causal relationship between Claimant's employment and resulting injury. Claimant's violation of Employer's instructions governing the sphere of employment thus severed the causal relationship between his employment and any injuries. Accordingly, Claimant did not suffer compensable injuries on May 11, 2022. His claim is therefore denied and dismissed. *See Escobedo v. Midwest Drywall Company*, W.C. No. 4-700-127 (ICAO, July 13. 2007) (where ALJ determined that the sphere of employment was limited by the employer's direction to either go home or wait for scaffolding to be repaired and claimant was told not to perform his duties, the claimant's subsequent injuries were not compensable). *Compare In re Eelorriaga*, W.C. No. 5-047-389-001 (ICAO, June 19, 2018) (because the employer's attempt to regulate driving by prohibiting phone calls while driving constituted an effort to control the claimant's methods of carrying out her duties and not a regulation concerning the sphere of employment, her injuries were compensable).

ORDER

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

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

2. Claimant earned an AWW of $2290.24.

3. Respondents are entitled to an offset for unemployment benefits under §8-42-103(f), C.R.S.

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

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

DATED: March 23, 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 5-196-616-001

ISSUES

1. Whether Respondents have demonstrated by a preponderance of the evidence that Pre-Hearing Administrative Law Judge (PALJ) Susan D. Phillips was incorrect in determining in a March 24, 2022 Order that claim notes are part of the claim file and subject to initial disclosure under §8-43-203(4), C.R.S.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' violation of §8-43-203(4), C.R.S. by failing to timely disclose the claim file and claim notes.

3. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recover penalties from Claimant for violating WCRP 9-1 by failing to timely produce requested discovery.

4. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to a general award of medical maintenance benefits pursuant to *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988).

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage of $559.85.

FINDINGS OF FACT

1. Claimant is a 31-year-old delivery driver for Employer. On December 23, 2021 he was involved in a motor vehicle accident (MVA) during the course and scope of his employment.

2. On December 24, 2019 Claimant was involved in a prior MVA. He suffered injuries to similar body parts as he claims in the current December 23, 2021 matter.

3. On January 19, 2022 counsel for Claimant sent a written request to Respondents for the claim file in the present matter pursuant to §8-43-203(4), C.R.S. Counsel precisely requested the following:

> Please send us a copy of all of your file materials, including the E-l, any admissions or denials of liability, any other employment records, wage records, and an indemnity log reflecting all payments made to our client to date. Please treat this as a specific request for the claims file under §8-43-203(4). This is a specific request for the entire claims file under the Act and includes a specific request for production of any and all claims' or adjusters'

notes and/or compliance with the privilege log requirements of the Act.
Please, of course, copy us on all of the medical records in your file as well.

4. On February 10, 2022 Claimant sent a follow-up letter to Insurer's adjuster stating that the claim file was late because it was due by February 3, 2022 under §8-43-203(4), C.R.S. and Respondents were now in a penalty situation.

5. Insurer's Claims adjuster [Redacted, hereinafter TM] testified that the claim was initially treated as medical benefits only. There was no information available to Insurer that Claimant had lost any time from work. The claim was thus assigned to adjuster [Redacted, hereinafter TW] to handle authorization of medical benefits only.

6. TM[Redacted]explained that, upon determination that the claim involved lost work time and Claimant had hired an attorney, the claim file was transferred to him. He became the adjuster for the claim on February 11, 2022. TM[Redacted] thus began collecting information from Employer in order to comply with the 20-day notice provision of §8-43-203(1), C.R.S.

7. The claim was reported to the Division of Workers' Compensation (DOWC) on February 11, 2022.

8. On February 15, 2022 TM[Redacted] filed a General Admission of Liability (GAL) for the December 23, 2021 claim. In the GAL TM[Redacted] calculated Claimant's Average Weekly Wage (AWW) at $559.85. TM[Redacted] explained that he used the most recent 12 weeks of wages prior to Claimant's December 23, 2021 MVA in his calculation. He further remarked that he used the gross wages as listed on the Claimant's payroll records. TM[Redacted] commented that he did not include amounts noted on payroll records as "Driver Maint Reimb – Payable" because the amount was not part of "gross wages."

9. On February 28, 2022 counsel for Claimant sent TM[Redacted] a letter again demanding the claim file and providing a different calculation of Claimant's AWW. He asked TM[Redacted] to file an amended GAL incorporating his AWW calculations. In reaching his AWW calculation, Claimant's counsel added to the gross wages the "Driver Maint Reimb – Payable" fee. As of February 28, 2022 TM[Redacted] was aware of a demand for the claim file on a "lost time" from work claim that would trigger the provisions of §8-43-203, C.R.S. TM[Redacted] remarked that he then proceeded to obtain legal counsel on the case to represent Respondents and respond to outstanding requests.

10. TM[Redacted] testified that he did not understand claim notes to be a part of the claim file. He commented that claim notes and any notes by adjusters or other insurance company personnel are not kept with the claim file. They are maintained in a separate program that is separately accessed. TM[Redacted] detailed that, when he sends the initial claim file to an attorney for Respondents in a Workers' Compensation claim, he does not include claim notes because they are not maintained as part of the

claim file. He only accesses the program where the claim notes are kept and prepares a log of the claim notes if specifically requested.

11. On March 8, 2022 legal counsel [Redacted, hereinafter BP] entered an appearance on behalf of Respondents.

12. On March 9, 2022 Respondents sent a copy of the claim file including all medical records, pleadings, correspondence, wage records and investigation in the file to Claimant's counsel. Counsel for Claimant acknowledged receipt of the claim file, but stated that it did not include any of the requested claim and adjuster notes. He also asserted that failure to produce the adjuster's notes as soon as possible would result in Respondents' claim of privilege being waived. On March 9, 2022 Claimant also requested a pre-hearing conference that was scheduled for March 24, 2022.

13. On March 11, 2022 Respondents submitted Interrogatories and Requests for Production to Claimant requesting information about prior MVAs, insurance benefits received, and information about prior injuries. Claimant never responded to the discovery requests. Respondents also never filed a motion to compel requesting Claimant to produce the information.

14. On March 21, 2022 Respondents submitted a written objection to Claimant's Motion for Respondents to produce adjuster notes. Respondents asserted that the claim notes are not enumerated within the disclosure provision of 8-43-203(4), C.R.S. and not a part of the claim file.

15. On March 24, 2022 Pre-Hearing Administrative Law Judge (PALJ) Susan D. Phillips entered an order granting Claimant's motion to compel production of the adjuster's claim notes and ordering Respondents to provide the claim notes subject to an accompanying privilege log within 10 days of the order. PALJ Phillips remarked that §8-42-203(4), C.R.S. does not specifically state the words "adjuster notes" in the text of the statute. However, in accordance with *Lyman v. Town of Bowmar*, 533 P.2d 1129 (Colo. 1975), the General Assembly intended the word "includes" in the statute to create an expansion of the types of items that an insurer is required to provide as part of the claim file. She therefore concluded that the adjuster's notes were part and parcel of the claim file and Respondents had ten days to provide them to Claimant subject to an accompanying privilege log.

16. On March 25, 2022 Respondents produced the adjuster's claim notes and redacted only the notes about reserves. They asserted the claim of privilege for the reserve notes.

17. Claimant received medical treatment from Authorized Treating Physician (ATP) Caroline Gellrick, M.D. for his December 23, 2021 injuries. She determined that Claimant reached Maximum Medical Improvement (MMI) on June 30, 2022. On July 13, 2022 Dr. Gellrick concluded that Claimant warranted a 5% whole person impairment rating as a result of his December 23, 2021 MVA. She advised Claimant that, in terms of

maintenance care, he could continue to use over-the-counter topical medication for his lumbar spine.

18. On July 26, 2022 Respondents filed a Final Admission of Liability (FAL) acknowledging that Claimant reached MMI on June 30, 2022 with a 5% whole person impairment rating. The FAL also reflected that Claimant earned an AWW of $559.85. The FAL acknowledged that Claimant was entitled to medical maintenance benefits, but specified that if no "pursuant to Dr. Caroline Gellrick 's medical report dated 07/13/2022." The FAL specifically provided:

"Admit to Maintenance Care after MMI? ☒ Yes ☐ No

If no, pursuant to Dr. Caroline Gellrick 's medical report dated 07/13/2022."

19. TM[Redacted] explained that he was the adjuster who filed the FAL. He testified that it was his understanding that he should attach the medical report of Dr. Gellrick to the FAL. TM[Redacted] specified that he attached Dr. Gellrick's report because he was relying on it for the admission of permanent partial disability and maintenance care after MMI. Under the "remarks and basis" for permanent disability award, the FAL simply noted that maintenance care was admitted without any improper limitation. TM[Redacted] testified that Insurer has not denied authorization of any of Claimant's medical treatment. He further commented that, as of the date of the hearing, there were no outstanding requests for medical treatment from Claimant.

20. On October 26, 2022 Claimant filed an Application for Hearing (AFH) endorsing, AWW, TTD, TPD, medical benefits, and asserting a penalty claim against Respondents for failure to provide "the complete claims file, including claims and/or adjuster's notes." Claimant further asserted that Respondents waived its claimed privilege by failing to provide a timely privilege log for adjuster's notes. Notably, as of the date of filing the AFH, Respondents had provided claim notes more than seven months earlier.

21. On October 26, 2022 Respondents submitted a second set of Interrogatories and Requests for Production to Claimant. They again sought information about prior MVAs, insurance benefits received by Claimant as a result of earlier MVAs, and any prior injuries.

22. On November 23, 2022 Respondents authored an email to Claimant stating they had not received discovery responses. Claimant's counsel responded on December 1, 2022 that he hoped to have the responses returned by the next day, but requested an extension until the following Monday or December 5, 2022. Counsel explained that he was missing one attorney for medical leave and one paralegal for a family emergency.

23. On December 5, 2022 Claimant provided partial answers to the interrogatories and followed-up with the notarized signature of Claimant on December 17, 2022. Medical records related to the prior December 24, 2019 MVA were not provided at

that time. Respondents never filed a motion to compel discovery responses with respect to the October 26, 2022 Interrogatories and Requests for Production.

24. On December 8, 2022 Dr. Gellrick advised Claimant's counsel that her office was closing due to retirement. She noted that, if Claimant needed further maintenance treatment, he would need to visit another physician.

25. In January, 2023 Respondents received additional discovery from Claimant's counsel including medical records from Littleton Chiropractic. The documents revealed that Claimant had been involved in a prior MVA on December 24, 2019. He injured his thoracic and lumbar spine as well as his sacroiliac. The preceding areas involve the same body parts Claimant contends were injured in the December 23, 2021 MVA.

26. Upon learning of the prior MVA through Claimant's discovery responses, Respondents again sought discovery regarding the prior claim including a release for the insurance file from carrier USAA that paid damages. Rather than providing a release to Respondents for USAA, Claimant requested permission to obtain the claim file from USAA and review it for privilege prior to producing it.

27. On January 24, 2023 PALJ John H. Sandberg granted Claimant's motion to request and obtain insurance records from USAA. PALJ Sandberg specified that "claimant shall request the complete insurance file at respondents' expense and produce the records obtained promptly upon receipt, with an accompanying privilege log." Claimant requested the file from USAA on February 14, 2023.

28. Respondents have failed to demonstrate it is more probably true than not that PALJ Phillips was incorrect in determining in a March 24, 2022 Order that claim notes are part of the claim file and subject to initial disclosure under §8-43-203(4), C.R.S. Initially, on January 24, 2023 PALJ Phillips granted Claimant's motion to compel production of the adjuster's claim notes and ordered Respondents to provide them to Claimant subject to an accompanying privilege log within 10 days of the order. PALJ Phillips remarked that §8-42-203(4), C.R.S. does not specifically state the words "adjuster notes" in the text of the statute. However, in accordance with *Lyman v. Town of Bowmar*, 533 P.2d 1129 (Colo. 1975), the General Assembly intended the word "includes" in the statute to create an expansion of the types of items that an insurer is required to provide as part of the claim file. She therefore concluded that the adjuster's notes were part and parcel of the claim file and Respondents had ten days to provide them to Claimant subject to an accompanying privilege log.

29. Notably, §8-42-203(4), C.R.S. provides in relevant part that the insurer shall provide to the claimant "a complete copy of the claim file that includes all medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information for the twelve months leading up to the date of the injury and thereafter." The word "includes" reveals that what is to follow is only part of a greater

whole. Rather than creating an exhaustive list, the statute identifies the general class of "a complete copy of the claim file," and then specifics particular examples or subclasses.

30. The specifically delineated parts of a "complete copy of the claim file" in §8-42-203(4), C.R.S. include "correspondence," "investigation files" and "investigation reports." Although "claim notes" are not specifically enumerated in §8-42-203(4), C.R.S., they are in the same class of documents as the preceding examples. The enumeration of the types of materials that constitute a "complete copy of the claim file" is merely illustrative, not exclusive. The list of materials to be disclosed is thus only illustrative and partial. The use of the word "includes" enlarges, rather than limits what constitutes a "complete copy of the claim file." The inclusion of "claim notes" as items in the claim file is a reasonable construction of the plain language of §8-42-203(4), C.R.S. Had the General Assembly sought to limit materials to be disclosed to specifically enumerated items, it could have used the word "means" instead of the general or enlarging term "includes."

31. The preceding construction gives the words in the statute their plain and ordinary meanings. The adjuster's notes, although not specifically enumerated by the statute, are part and parcel of the general term "claim file" and therefore fall within the requirements of §8-43-203(4). Accordingly, claim notes are properly included as part of "a complete copy of the claim file" under §8-42-203(4), C.R.S. They are thus subject to the initial disclosure provisions pursuant to §8-43-203(4), C.R.S. PALJ Phillips therefore properly granted Claimant's motion to compel production of the adjuster's claim notes and ordered Respondents to provide the claim notes subject to an accompanying privilege log within 10 days of the March 24, 2022 Order.

32. Claimant has failed to establish it is more probably true than not that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' violation of §8-43-203(4), C.R.S. in failing to timely disclose the claim file and claim notes. Initially, Claimant seeks penalties on two separate grounds. First, Claimant seeks penalties for Respondents failure to provide the claim file within 15 days of a request made on January 19, 2022. Claimant also seeks penalties for the time period after Respondents provided the claim file but not the claim notes. However, Claimant has failed to satisfy his burden of establishing that Insurer's actions were objectively unreasonable with respect to the two reasons for seeking penalties.

33. Claimant first seeks penalties for Respondents failure to provide the claim file within 15 days of January 19, 2022. This request was made less than one month after Claimant's injury on December 23, 2021. TM[Redacted] credibly testified that the claim was initially assigned to a medical-benefits-only adjuster because it was not clear that the case involved a lost time claim at that point. The First Report of Injury (FROI) was not filed until February 11, 2022. The claim was also not reassigned to TM[Redacted] until February 11, 2022 and his initial priority was to obtain information from Employer regarding the claim in order to file a GAL. He then filed the GAL on February 15, 2022. Claimant has not proven that TM[Redacted] was aware of the January 19, 2022 demand for the claim file and the demand letter was premature. Therefore, Claimant has not

established that there was knowledge of any violation of the statute for failing to provide the claim file within 15 days.

34. On February 28, 2022 counsel for Claimant sent a second demand for the claim file and provided incorrect AWW calculations. He asked TM[Redacted] to file an amended GAL using the incorrect calculations. Because TM[Redacted] was aware of a demand for the claim file, he engaged legal counsel within one week of receiving the letter. Respondents' counsel entered an appearance with the DOWC on March 8, 2022 and sent a copy of the claim file to Claimant's counsel on the next day March 9, 2022. The production of the claim file thus occurred within 15 days of Claimant's February 28, 2022 demand. There is a lack of reprehensibility with respect to Insurer's conduct. Further, Claimant has not demonstrated harm by not having the claim file at the early stage of the claim or less than two months after the Claimant's injury, where Respondents also quickly filed a GAL accepting liability for payment of medical benefits and temporary disability benefits. The record thus reflects that Respondents' have offered a reasonable factual and legal explanation for its actions. They were thus not objectively unreasonable.

35. Moreover, because the claim file was produced more than seven months before Claimant filed an AFH endorsing the penalty as an issue, the penalty had been cured pursuant to §8-43-304(4), C.R.S. Thus, the imposition of penalties in this case requires Claimant to prove by clear and convincing evidence that Insurer knew or reasonably should have known it was in violation. While Claimant sent a notice to TM[Redacted] on February 28, 2022 alleging that Insurer was in violation, the notice also contained improper calculations for AWW and demanded that TM[Redacted] amend his GAL with the incorrect AWW calculations. Counsel for Claimant was adverse to Insurer and TM[Redacted] had no obligation to rely on the legal advice provided by Claimant's counsel. At this point, TM[Redacted] acted swiftly to engage legal counsel for Respondents to resolve a legitimate legal dispute. By March 9, 2022 Insurer's counsel had provided the claim file to Claimant within 15 days of February 28, 2022. Accordingly, Claimant's request for penalties for Respondents' failure to timely produce the claim file under §8-43-203(4), C.R.S. is denied and dismissed.

36. On March 9, 2022 legal counsel for Insurer did not include claim notes with the claim file. Claimant also seeks penalties for the time period after Respondents provided the claim file but not the claim notes. Claimant again bears the burden of establishing that Insurer's actions were objectively unreasonable with respect to this basis for seeking a penalty. However, Claimant's argument fails because the record demonstrates that Respondents had a good faith basis in law or fact for failing to produce the claim notes.

37. The preceding section of this opinion details that claim notes are properly included as part of "a complete copy of the claim file" under §8-42-203(4), C.R.S. They are thus subject to the initial disclosure provisions pursuant to §8-43-203(4), C.R.S. Nevertheless, Respondents have made a good faith argument that claim notes are not, in fact, part of the "claim file" pursuant to §8-43-203(4), C.R.S. TM[Redacted] explained that he did not understand the adjuster's notes to be a part of the claim file because they

are not even maintained with the rest of the claim file. Respondents reasonably asserted that claim notes could not be reasonably construed to be part of a "claim file." Claims adjusters rarely provide such notes to their own counsel when transmitting the entire claim file for a litigation referral. Here, TM[Redacted] commented that this was his practice and adjuster's notes were not initially sent to counsel with the claim file.

38. On March 24, 2022 PALJ Phillips entered an order granting Claimant's motion to compel production of the adjuster's claim notes and ordering Respondents to provide the claim notes subject to an accompanying privilege log within 10 days of the order. On the following day March 25, 2022 Respondents produced the adjuster's claim notes and redacted only the notes about reserves. The actions of Insurer up to this point were not objectively unreasonable. Respondents' actions were based on a rational argument in law or fact. Importantly, "claim notes" are not specifically enumerated in §8-42-203(4), C.R.S. Claimant has thus not met his burden of establishing Insurer's actions were objectively unreasonable under the circumstances. Accordingly, Claimant's request for penalties based on Respondents failure to produce claim notes is denied and dismissed.

39. Respondents have failed to prove it is more probably true than not that they are entitled to recover penalties from Claimant for violation of WCRP 9-1 for failing to timely produce requested discovery. Specifically, the record reveals that Claimant's failure to timely respond to requested discovery did not constitute a willful violation justifying an award of penalties.

40. Initially, on March 11, 2022 Respondents submitted Interrogatories and Requests for Production to Claimant requesting information about prior MVAs, insurance benefits received, and prior injuries. Claimant did not respond to the discovery requests. Respondents also never filed a motion to compel requesting Claimant to produce the information. On October 26, 2022 Respondents submitted a second set of Interrogatories and Requests for Production to Claimant. They again sought information about prior MVAs, insurance benefits received by Claimant as a result of earlier MVAs, and any prior injuries. On November 23, 2022 Respondents authored an email to Claimant stating they had not received discovery responses. Claimant's counsel responded on December 1, 2022 that he hoped to have the responses returned by the next day, but requested an extension until the following Monday or December 5, 2022. Counsel explained that he was missing one attorney for medical leave and one paralegal for a family emergency. On December 5, 2022 Claimant provided partial answers to the interrogatories and followed-up with the notarized signature of Claimant on December 17, 2022. Respondents never filed a motion to compel discovery responses with respect to the October 26, 2022 Interrogatories and Requests for Production.

41. In January, 2023 Respondents received additional late discovery from Claimant's counsel including medical records from Littleton Chiropractic. The documents revealed that Claimant had been involved in a prior MVA on December 24, 2019. Upon learning of the prior MVA, Respondents again sought discovery regarding the prior claim including a release for the insurance file from carrier USAA that paid damages. Rather

than providing a release to Respondents for USAA, Claimant requested permission to obtain the claim file from USAA and review it for privilege prior to producing it. On January 24, 2023 PALJ Sandberg granted Claimant's motion to request and obtain insurance records from USAA. PALJ Sandberg specified that "claimant shall request the complete insurance file at respondents' expense and produce the records obtained promptly upon receipt, with an accompanying privilege log." On February 14, 2023 Claimant requested the file from USAA.

42. The record reveals that Claimant violated WRCP 9-1 on an ongoing basis by failing to provide disclosures and then discovery related to a prior MVA and the insurance claim file related to the prior MVA. Respondents repeatedly propounded discovery, but Claimant failed to respond. Although Claimant violated WCRP 9-1 by failing to respond, the record reflects that his conduct did not constitute a willful violation. There is no presumption of willfulness because Respondents never filed a motion to compel requesting Claimant to produce the information.

43. Claimant did not provide discovery responses to Respondents' initial the March 11, 2022 Interrogatories. However, Claimant did not file an AFH until October 26, 2022 and Respondents never filed a motion to compel requesting Claimant to produce the information. Instead, Respondents propounded discovery requests again on October 26, 2022 upon receipt of the AFH. Because Claimant did not respond to this discovery request, Respondents authored an email to Claimant on November 23, 2022 stating they had not received discovery responses. Claimant's counsel responded on December 1, 2022 and reasonably explained that he hoped to have the responses returned by the next day, but requested an extension until the following Monday or December 5, 2022. Counsel detailed that he was missing one attorney for medical leave and one paralegal for a family emergency. On December 5, 2022 Claimant provided partial answers to the interrogatories and followed-up with the notarized signature of Claimant on December 17, 2022. Respondents never filed a motion to compel the discovery responses.

44. Upon learning of Claimant's prior MVA, Respondents again sought discovery including a release for the insurance file from carrier USAA that paid damages. Claimant requested permission to obtain the claim file from USAA and review it for privilege prior to producing it. On January 24, 2023 PALJ Sandberg granted Claimant's motion to request and obtain insurance records from USAA. PALJ Sandberg specified that "claimant shall request the complete insurance file at respondents' expense and produce the records obtained promptly upon receipt, with an accompanying privilege log." Respondents again did not seek a motion to compel and PALJ Sandberg granted Claimant's request to review the claim file from USAA for privilege prior to production. PALJ Sandberg's decision reflects that Claimant's request to review the information before disclosure was reasonable.

45. The record is devoid of any evidence showing that Respondents filed a motion to compel discovery responses from Claimant. Claimant's actions cannot therefore be presumed to be willful. Notably, Claimant's conduct was not deliberate and did not exhibit either a flagrant disregard of discovery obligations or constitutes a

substantial deviation from reasonable care in complying with discovery obligations. Accordingly, Respondents' request for penalties for Claimant's violation of WCRCP 9-1 is denied and dismissed.

46. On July 26, 2022 Respondents filed an FAL acknowledging that Claimant reached MMI on June 30, 2022 with a 5% whole person impairment rating. The FAL remarked that Claimant was entitled to medical maintenance benefits, but specified that if no "pursuant to Dr. Caroline Gellrick's medical report dated 07/13/2022." TM[Redacted] testified that it was his understanding that he should attach the medical report of Dr. Gellrick to the FAL. He credibly commented that he attached Dr. Gellrick's report because he was relying on it for the admission of permanent partial disability and maintenance care after MMI. Under the "remarks and basis" for permanent disability award, it is simply noted that maintenance care is admitted without any improper limitation of continuing care. TM[Redacted] also noted that Insurer did not deny authorization of any medical treatment for Claimant. He further commented that, as of the date of the hearing, there were no outstanding requests for medical treatment from Claimant. The record thus reveals that Respondents' July 26, 2022 FAL constitutes a general award of medical maintenance benefits. Accordingly, Claimant's request for amendment of the FAL 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).

Propriety of PALJ Phillips' March 24, 2022 Order

4. Section 8-43-207.5(2), C.R.S. grants a PALJ authority to issue "interlocutory orders." A PALJ may also order a party to participate in a prehearing conference and make evidentiary rulings. An order of a PALJ is "an order of the director and binding on the parties," and "such an order shall be interlocutory." §8-43-207.5(3); *see Kennedy v. Indus. Claim Appeals Off.*, 100 P.3d 949 (Colo. App. 2004); *Martinez v. Vertical Electric Inc.*, WC 5-049-469 (ICAO, Oct. 20, 2017) (orders relating to prehearing conferences are generally interlocutory because a prehearing conference is followed by a full hearing before the director or an ALJ). ALJ's have the authority to review the pre- hearing orders of PALJ's. *See Dee Enterprises v. Indus. Claim Appeals Off.*, 89 P.3d 430, 441 (Colo. App. 2003); *Villegas v. Denver Water*, WC 4-889-298-005 (ICAO Apr. 14, 2021).

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

> Within fifteen days after the mailing of a written request for a copy of the claim file, the employer, or if insured, the employer's insurance carrier or third-part administrator shall provide to the claimant or his or her representative a complete copy of the claim file that includes all medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information for the twelve months leading up to the date of the injury and thereafter, regardless of the format. If a privilege or other protection is claimed for any materials, the materials must be detailed in an accompanying privilege log.

6. Under the general principles of statutory construction statutes must be construed to give effect to their legislative purpose. *Grogan v. Lutheran Medical Center, Inc.*, 950 P.2d 690 (Colo. App. 1997). If the statutory language is unambiguous, there is no need to resort to interpretative rules of statutory construction because it must be presumed the General Assembly meant what it clearly said. *Davison v. Indus. Claim Appeals Off.*, 72 P.3d 389 (Colo. App. 2003). To discern the legislative intent, we must first give the words in the statute their plain and ordinary meanings. A forced, subtle, or strained construction of the statute should be avoided if the language is simple and the meaning is clear. *Snyder Oil Co. v. Embree*, 862 P.2d 259 (Colo. 1993). Furthermore, where the statute is part of a comprehensive legislative scheme, it must be considered in relation to the other provisions to effect the legislative intent of both statutes. *Gonzales v. Advanced Components*, 949 P.2d 569 (Colo. 1997); *DeJiacomo v. Indus. Claim Appeals Off.*, 817 P.2d 552 (Colo. App. 1991).

7. When a statute uses a general word followed by the word "include" and then an enumerated list, the plain and ordinary meaning of "include" is used as "an extension or enlargement." *Lyman v. Town of Bow Mar*, 533 P.2d 1129, 1133 (1975). To conclude otherwise "would transmogrify the word 'include' into the word 'mean.'..." *Id.*; *see People v. Patton*, 425 P.3d 1152, 1156 (Colo. App. 2016) (concluding that statute did not require

notice only in person or in writing, because the word "includes" is a word that is meant to extend rather than limit)*; Dillabaugh v. Ellerton*, 259 P.3d 550, 553 (Colo. App. 2011) (relying on *Lyman* for the proposition that “include” is ordinarily used as a word of extension or enlargement and warning against transmogrifying “include” into the word “mean”); *Arnold v. Colo. Dep't of Corr.*, 978 P.2d 149, 151 (Colo. App. 1999) ("the word ‘include’ is ordinarily used as a word of extension or enlargement and is not definitionally equivalent to the word ‘mean.’ ").

8. As found, Respondents have failed to demonstrate by a preponderance of the evidence that PALJ Phillips was incorrect in determining in a March 24, 2022 Order that claim notes are part of the claim file and subject to initial disclosure under §8-43-203(4), C.R.S. Initially, on January 24, 2023 PALJ Phillips granted Claimant’s motion to compel production of the adjuster’s claim notes and ordered Respondents to provide them to Claimant subject to an accompanying privilege log within 10 days of the order. PALJ Phillips remarked that §8-42-203(4), C.R.S. does not specifically state the words “adjuster notes” in the text of the statute. However, in accordance with *Lyman v. Town of Bowmar*, 533 P.2d 1129 (Colo. 1975), the General Assembly intended the word “includes” in the statute to create an expansion of the types of items that an insurer is required to provide as part of the claim file. She therefore concluded that the adjuster’s notes were part and parcel of the claim file and Respondents had ten days to provide them to Claimant subject to an accompanying privilege log.

9. As found, notably, §8-42-203(4), C.R.S. provides in relevant part that the insurer shall provide to the claimant “a complete copy of the claim file that includes all medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information for the twelve months leading up to the date of the injury and thereafter.” The word ”includes” reveals that what is to followis only part of a greater whole. Rather than creating an exhaustive list, the statute identifies the general class of “a complete copy of the claim file,” and then specifics particular examples or subclasses.

10. As found, the specifically delineated parts of a “complete copy of the claim file” in §8-42-203(4), C.R.S. include “correspondence,” “investigation files” and “investigation reports.” Although “claim notes” are not specifically enumerated in §8-42-203(4), C.R.S., they are in the same class of documents as the preceding examples. The enumeration of the types of materials that constitute a “complete copy of the claim file” is merely illustrative, not exclusive. The list of materials to be disclosed is thus only illustrative and partial. The use of the word ”includes” enlarges, rather than limits what constitutes a “complete copy of the claim file.” The inclusion of “claim notes” as items in the claim file is a reasonable construction of the plain language of §8-42-203(4), C.R.S. Had the General Assembly sought to limit materials to be disclosed to specifically enumerated items, it could have used the word “means” instead of the general or enlarging term “includes.”

11. As found, the preceding construction gives the words in the statute their plain and ordinary meanings. The adjuster’s notes, although not specifically enumerated

by the statute, are part and parcel of the general term “claim file” and therefore fall within the requirements of §8-43-203(4). Accordingly, claim notes are properly included as part of “a complete copy of the claim file” under §8-42-203(4), C.R.S. They are thus subject to the initial disclosure provisions pursuant to §8-43-203(4), C.R.S. PALJ Phillips therefore properly granted Claimant’s motion to compel production of the adjuster’s claim notes and ordered Respondents to provide the claim notes subject to an accompanying privilege log within 10 days of the March 24, 2022 Order.

Penalties

12. Section 8-43-304(1), C.R.S. authorizes the imposition of penalties not to exceed $1000 per day if an employee or person “fails, neglects, or refuses to obey any lawful order made by the director or panel.” This provision applies to orders entered by a PALJ. *See* §8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Indus. Claim Appeals Off.,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), C.R.S. even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001).

13. The cure provision of §8-43-304(4), C.R.S., provides that,

> After the date of mailing of [any application for hearing for any penalty pursuant to subsection (1)], an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking the penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed….

14. Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must ascertain whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of an action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Indus. Claim Appeals Off.,* 107 P.3d 965 (Colo. App. 2003) ("reasonableness of conduct in defense of penalty claim is predicated on rational argument based in law or fact.”) *In Re Claim of Murray*, W.C. No. 4-997-086-02 (ICAO, Aug. 16, 2017). The question of whether a party’s conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Indus. Claim Appeals Off.,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Indus. Claim Appeals Off.*, 240 P.3d 429 (Colo. App. 2010). Where the violator fails to offer a reasonable factual or legal explanation for its actions, the ALJ may infer the opposing party sustained its burden to prove the violation was objectively unreasonable. *Human Resource Co. v. Indus. Claim Appeals Off.*, 984 P.2d 1194, 1197 (Colo. App. 1999).

15. An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* W.C. no. 4-619-954 (ICAO. May 5, 2006). However, any penalty assessed should not be excessive or grossly disproportionate to the conduct in question. When determining the penalty, the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the other party and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products v. Indus. Claim Appeals Off.,* 126 P.3d 323 (Colo. App. 2005).

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

16. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' violation of §8-43-203(4), C.R.S. in failing to timely disclose the claim file and claim notes. Initially, Claimant seeks penalties on two separate grounds. First, Claimant seeks penalties for Respondents failure to provide the claim file within 15 days of a request made on January 19, 2022. Claimant also seeks penalties for the time period after Respondents provided the claim file but not the claim notes. However, Claimant has failed to satisfy his burden of establishing that Insurer's actions were objectively unreasonable with respect to the two reasons for seeking penalties.

17. As found, Claimant first seeks penalties for Respondents failure to provide the claim file within 15 days of January 19, 2022. This request was made less than one month after Claimant's injury on December 23, 2021. TM[Redacted] credibly testified that the claim was initially assigned to a medical-benefits-only adjuster because it was not clear that the case involved a lost time claim at that point. The First Report of Injury (FROI) was not filed until February 11, 2022. The claim was also not reassigned to TM[Redacted] until February 11, 2022 and his initial priority was to obtain information from Employer regarding the claim in order to file a GAL. He then filed the GAL on February 15, 2022. Claimant has not proven that TM[Redacted] was aware of the January 19, 2022 demand for the claim file and the demand letter was premature. Therefore, Claimant has not established that there was knowledge of any violation of the statute for failing to provide the claim file within 15 days.

18. As found, on February 28, 2022 counsel for Claimant sent a second demand for the claim file and provided incorrect AWW calculations. He asked TM[Redacted] to file an amended GAL using the incorrect calculations. Because TM[Redacted] was aware of a demand for the claim file, he engaged legal counsel within one week of receiving the letter. Respondents' counsel entered an appearance with the DOWC on March 8, 2022 and sent a copy of the claim file to Claimant's counsel on the next day March 9, 2022. The production of the claim file thus occurred within 15 days of Claimant's February 28, 2022 demand. There is a lack of reprehensibility with respect to Insurer's conduct. Further, Claimant has not demonstrated harm by not having the claim file at the early stage of the claim or less than two months after the Claimant's injury, where Respondents also quickly filed a GAL accepting liability for payment of medical benefits and temporary disability benefits. The record thus reflects that Respondents'

have offered a reasonable factual and legal explanation for its actions. They were thus not objectively unreasonable.

19. As found, moreover, because the claim file was produced more than seven months before Claimant filed an AFH endorsing the penalty as an issue, the penalty had been cured pursuant to §8-43-304(4), C.R.S. Thus, the imposition of penalties in this case requires Claimant to prove by clear and convincing evidence that Insurer knew or reasonably should have known it was in violation. While Claimant sent a notice to TM[Redacted] on February 28, 2022 alleging that Insurer was in violation, the notice also contained improper calculations for AWW and demanded that TM[Redacted] amend his GAL with the incorrect AWW calculations. Counsel for Claimant was adverse to Insurer and TM[Redacted] had no obligation to rely on the legal advice provided by Claimant's counsel. At this point, TM[Redacted] acted swiftly to engage legal counsel for Respondents to resolve a legitimate legal dispute. By March 9, 2022 Insurer's counsel had provided the claim file to Claimant within 15 days of February 28, 2022. Accordingly, Claimant's request for penalties for Respondents' failure to timely produce the claim file under §8-43-203(4), C.R.S. is denied and dismissed.

20. As found, on March 9, 2022 legal counsel for Insurer did not include claim notes with the claim file. Claimant also seeks penalties for the time period after Respondents provided the claim file but not the claim notes. Claimant again bears the burden of establishing that Insurer's actions were objectively unreasonable with respect to this basis for seeking a penalty. However, Claimant's argument fails because the record demonstrates that Respondents had a good faith basis in law or fact for failing to produce the claim notes.

21. As found, the preceding section of this opinion details that claim notes are properly included as part of "a complete copy of the claim file" under §8-42-203(4), C.R.S. They are thus subject to the initial disclosure provisions pursuant to §8-43-203(4), C.R.S. Nevertheless, Respondents have made a good faith argument that claim notes are not, in fact, part of the "claim file" pursuant to §8-43-203(4), C.R.S. TM[Redacted] explained that he did not understand the adjuster's notes to be a part of the claim file because they are not even maintained with the rest of the claim file. Respondents reasonably asserted that claim notes could not be reasonably construed to be part of a "claim file." Claims adjusters rarely provide such notes to their own counsel when transmitting the entire claim file for a litigation referral. Here, TM[Redacted] commented that this was his practice and adjuster's notes were not initially sent to counsel with the claim file.

22. As found, on March 24, 2022 PALJ Phillips entered an order granting Claimant's motion to compel production of the adjuster's claim notes and ordering Respondents to provide the claim notes subject to an accompanying privilege log within 10 days of the order. On the following day March 25, 2022 Respondents produced the adjuster's claim notes and redacted only the notes about reserves. The actions of Insurer up to this point were not objectively unreasonable. Respondents' actions were based on a rational argument in law or fact. Importantly, "claim notes" are not specifically enumerated in §8-42-203(4), C.R.S. Claimant has thus not met his burden of establishing

Insurer's actions were objectively unreasonable under the circumstances. Accordingly, Claimant's request for penalties based on Respondents failure to produce claim notes is denied and dismissed.

Penalty Related to Claimant's Violation of WCRP 9-1 for Failure to Timely Provide Discovery Responses

23. Workers' Compensation Rules of Procedure WCRP 9-1(B) permits discovery in the form of written interrogatories. Under WCRP 9-1(D), the parties have a "continuing duty to timely supplement or amend responses to discovery up to the date of the hearing." Rule 9-1(F) provides that "[i]f any party fails to comply with the provisions of this rule and any action governed by, an administrative law judge may impose sanctions upon such party pursuant to statute and rule." Rule 9-1(G) specifies that once an order to compel has been issued, failure to comply with the order to compel shall be presumed willful.

24. The purposes of discovery and pretrial procedural rules include the production of relevant evidence, the simplification of issues, the elimination of surprise and the encouragement of fair and just settlements. *Shafer Com. Seating, Inc. v. Indus. Claim Appeals Off.*, 85 P.3d 619, 621 (Colo. App. 2003). To uphold these purposes in Workers' Compensation matters, §8-43-207(1)(e), C.R.S. provides that ALJs "may rule on discovery matters and impose the sanctions provided in the rules of civil procedure in the district courts for willful failure to comply with permitted discovery." In order for a discovery violation to be considered "willful," the ALJ must determine that the conduct was deliberate or exhibited "either a flagrant disregard of discovery obligations or constitutes a substantial deviation from reasonable care in complying with discovery obligations." *Reed v. Indus. Claim Appeals Off.*, 13 P.3d 810, 813 (Colo. App. 2000); *see Henrichs v. Department of Human Services*, WC 5-030-150-010 (ICAO, Feb. 8, 2022); *In re Claim of Zvolanek*, WC 4-859-506-02 (ICAO, July 13, 2016).

25. Whether to impose sanctions and the nature of the sanctions to be imposed are matters within the fact finder's discretion. *Shafer Com. Seating, Inc. v. Indus. Claim Appeals Off.*, 85 P.3d 619 (Colo. App. 2003). The fact finder is given flexibility in choosing the appropriate sanction and should exercise informed discretion in imposing a sanction that is commensurate with the seriousness of the disobedient party's conduct. *Id*. The Colorado Supreme Court has determined that, although the rule provides little guidance in the selection of a sanction, it should be applied "in a manner that effectuates proportionality between the sanction imposed and the culpability of the disobedient party." *Kwik Way Stores, Inc. v. Caldwell*, 745 P.2d 672 (Colo. 1987); *see Pinkstaff v. Black & Decker (U.S.) Inc.*, 211 P.3d 698, 702 (Colo. 2009) ("When discovery abuses are alleged, courts should carefully examine whether there is any basis for the allegation and, if sanctions are warranted, impose the least severe sanction that will ensure there is full compliance with a court's discovery orders and is commensurate with the prejudice caused to the opposing party."). The sanction should therefore be commensurate with the seriousness of the sanctioned conduct. *See In re Claim of Nozik*, W.C. No. 4-874-669 (ICAO, Mar. 13, 2013). An ALJ's exercise of discretion in determining an appropriate discovery sanction is broad and binding in the absence of a clear abuse of discretion.

Pizza Hut v. Indus. Claim Appeals Off., 18 P.3d 867 (Colo. App. 2001); *Hall v. Home Furniture Co*., 724 P.2d 94 (Colo. App. 1986) (ALJ's authority to impose a sanction is discretionary and may not be disturbed in "absence of clear abuse of discretion").

26. As found, Respondents have failed to prove by a preponderance of the evidence that they are entitled to recover penalties from Claimant for violation of WCRP 9-1 for failing to timely produce requested discovery. Specifically, the record reveals that Claimant's failure to timely respond to requested discovery did not constitute a willful violation justifying an award of penalties.

27. As found, initially, on March 11, 2022 Respondents submitted Interrogatories and Requests for Production to Claimant requesting information about prior MVAs, insurance benefits received, and prior injuries. Claimant did not respond to the discovery requests. Respondents also never filed a motion to compel requesting Claimant to produce the information. On October 26, 2022 Respondents submitted a second set of Interrogatories and Requests for Production to Claimant. They again sought information about prior MVAs, insurance benefits received by Claimant as a result of earlier MVAs, and any prior injuries. On November 23, 2022 Respondents authored an email to Claimant stating they had not received discovery responses. Claimant's counsel responded on December 1, 2022 that he hoped to have the responses returned by the next day, but requested an extension until the following Monday or December 5, 2022. Counsel explained that he was missing one attorney for medical leave and one paralegal for a family emergency. On December 5, 2022 Claimant provided partial answers to the interrogatories and followed-up with the notarized signature of Claimant on December 17, 2022. Respondents never filed a motion to compel discovery responses with respect to the October 26, 2022 Interrogatories and Requests for Production.

28. As found, in January, 2023 Respondents received additional late discovery from Claimant's counsel including medical records from Littleton Chiropractic. The documents revealed that Claimant had been involved in a prior MVA on December 24, 2019. Upon learning of the prior MVA, Respondents again sought discovery regarding the prior claim including a release for the insurance file from carrier USAA that paid damages. Rather than providing a release to Respondents for USAA, Claimant requested permission to obtain the claim file from USAA and review it for privilege prior to producing it. On January 24, 2023 PALJ Sandberg granted Claimant's motion to request and obtain insurance records from USAA. PALJ Sandberg specified that "claimant shall request the complete insurance file at respondents' expense and produce the records obtained promptly upon receipt, with an accompanying privilege log." On February 14, 2023 Claimant requested the file from USAA.

29. As found, the record reveals that Claimant violated WRCP 9-1 on an ongoing basis by failing to provide disclosures and then discovery related to a prior MVA and the insurance claim file related to the prior MVA. Respondents repeatedly propounded discovery, but Claimant failed to respond. Although Claimant violated WCRP 9-1 by failing to respond, the record reflects that his conduct did not constitute a willful violation. There is no presumption of willfulness because Respondents never filed a motion to compel requesting Claimant to produce the information.

30. As found, Claimant did not provide discovery responses to Respondents' initial the March 11, 2022 Interrogatories. However, Claimant did not file an AFH until October 26, 2022 and Respondents never filed a motion to compel requesting Claimant to produce the information. Instead, Respondents propounded discovery requests again on October 26, 2022 upon receipt of the AFH. Because Claimant did not respond to this discovery request, Respondents authored an email to Claimant on November 23, 2022 stating they had not received discovery responses. Claimant's counsel responded on December 1, 2022 and reasonably explained that he hoped to have the responses returned by the next day, but requested an extension until the following Monday or December 5, 2022. Counsel detailed that he was missing one attorney for medical leave and one paralegal for a family emergency. On December 5, 2022 Claimant provided partial answers to the interrogatories and followed-up with the notarized signature of Claimant on December 17, 2022. Respondents never filed a motion to compel the discovery responses.

31. As found, upon learning of Claimant's prior MVA, Respondents again sought discovery including a release for the insurance file from carrier USAA that paid damages. Claimant requested permission to obtain the claim file from USAA and review it for privilege prior to producing it. On January 24, 2023 PALJ Sandberg granted Claimant's motion to request and obtain insurance records from USAA. PALJ Sandberg specified that "claimant shall request the complete insurance file at respondents' expense and produce the records obtained promptly upon receipt, with an accompanying privilege log." Respondents again did not seek a motion to compel and PALJ Sandberg granted Claimant's request to review the claim file from USAA for privilege prior to production. PALJ Sandberg's decision reflects that Claimant's request to review the information before disclosure was reasonable.

32. As found, the record is devoid of any evidence showing that Respondents filed a motion to compel discovery responses from Claimant. Claimant's actions cannot therefore be presumed to be willful. Notably, Claimant's conduct was not deliberate and did not exhibit either a flagrant disregard of discovery obligations or constitutes a substantial deviation from reasonable care in complying with discovery obligations. Accordingly, Respondents' request for penalties for Claimant's violation of WCRCP 9-1 is denied and dismissed. *See O'Reilly v. Physicians Mutual Insurance Co.*, 992 P.2d 644 (Colo. App. 1999) (absence of a prior order compelling discovery precluded C.R.C.P. 37(b) sanctions for any alleged violation); *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (March 25, 2013) (ALJ erred in drawing adverse inference as a discovery sanction when no order compelling discovery previously had been entered).

Medical Maintenance Benefits

33. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). An award for *Grover*-type medical benefits is neither contingent

upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Indus. Claim Appeals Off.,* 992 P.2d 701,704 (Colo. App. 1999); *Stollmeyer v. Indus. Claim Appeals Off.,* 916 P.2d 609 (Colo. App. 1995). Nonetheless, the claimant must show medical record evidence demonstrating the "reasonable necessity for future medical treatment." *Milco Constr. v. Cowan,* 860 P.2d 539, 542 (Cob. App. 1992). The care becomes reasonably necessary where the evidence establishes that, but for a particular course of medical treatment, the claimant's condition can reasonably be expected to deteriorate so that he or she will suffer a greater disability. *Id.;* see *Hanna v, Print Expediters Inc.,* 77 P.3d 863, 865 (Colo. App. 2003). Once a claimant has established the probable need for future treatment, he or she "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna,* 77 P.3d at 866. Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center,* 992 P.2d at 704.

34. As found, on July 26, 2022 Respondents filed an FAL acknowledging that Claimant reached MMI on June 30, 2022 with a 5% whole person impairment rating. The FAL remarked that Claimant was entitled to medical maintenance benefits, but specified that if no “pursuant to Dr. Caroline Gellrick's medical report dated 07/13/2022.” TM[Redacted] testified that it was his understanding that he should attach the medical report of Dr. Gellrick to the FAL. He credibly commented that he attached Dr. Gellrick’s report because he was relying on it for the admission of permanent partial disability and maintenance care after MMI. Under the “remarks and basis” for permanent disability award, it is simply noted that maintenance care is admitted without any improper limitation of continuing care. TM[Redacted] also noted that Insurer did not deny authorization of any medical treatment for Claimant. He further commented that, as of the date of the hearing, there were no outstanding requests for medical treatment from Claimant. The record thus reveals that Respondents’ July 26, 2022 FAL constitutes a general award of medical maintenance benefits. Accordingly, Claimant’s request for amendment of the FAL is denied and dismissed.

ORDER

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

1. Claim notes are properly included as part of “a complete copy of the claim file.” They are thus subject to the initial disclosure provisions under §8-43-203(4), C.R.S. PALJ Phillips therefore properly granted Claimant’s motion to compel production of the adjuster’s claim notes.

2. Claimant’s request for penalties for Respondents’ failure to timely produce the claim file and claim notes under §8-43-203(4), C.R.S. is denied and dismissed.

3. Respondents’ request for penalties for Claimant’s violation of WCRCP 9-1 is denied and dismissed.

4. Claimant's request for the amendment of the July 26, 2022 FAL regarding medical maintenance benefits is denied and dismissed.

5. Claimant earned an AWW of $559.85.

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

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

DATED: March 29, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she is entitled to maintenance treatment in the form of cognitive behavioral therapy ("CBT").

FINDINGS OF FACT

1. Claimant is a 42-year old woman who works for Employer as a warehouse associate.

2. Claimant sustained an admitted industrial injury on June 20, 2014. Claimant underwent arthroscopies of her left and right hips on January 11, 2016 and August 1, 2016, respectively.

3. Claimant was placed at maximum medical improvement ("MMI") in October 2017. Respondents admitted for maintenance medical care.

4. On June 29, 2022, Claimant's authorized treating physician ("ATP") Robert Moghim, M.D. noted complaints of axial back pain with extension into the left hip. Claimant reported her condition had worsened. He documented, "She has issues with anxiety and 'getting out of the house.' She her (*sic*) anxiety is due to pain. She may benefit for (*sic*) CBT but this has been denied by WC." (Cl. Ex. J).

5. On July 20, 2022, Dr. Moghim noted, "My recommendation is pelvic floor PT, GTB injections w/ steroids, CBT and follow up PT for core muscle stabilization. Multimodal pain management has been shown to be the most effective in managing complex chronic pain symptoms. In the past, she has had excellent results when these modalities were deployed." (*Id*.)

6. On October 4, 2022, Amanda Osborne, DPT, authored a letter recommending that Claimant undergo CBT therapy. She noted that scientific literature has demonstrated the efficacy of interventions such as CBT in reducing pain, and opined Claimant should receive skilled mental health intervention like CBT to facilitate her pain management and to increase her participation in recreation and community engagement.

7. At the request of Respondents, Kathleen D'Angelo, M.D. performed Independent Medical Examinations ("IMEs") of Claimant on June 22, 2020, May 3, 2021 and October 31, 2022. Dr. D'Angelo has interviewed Claimant on multiple occasions, performed physical examinations, and did a comprehensive review of Claimant's medical records dating back to 2013. Dr. D'Angelo opined that Claimant 's need for CBT is not work-related. Dr. D'Angelo noted that in her evaluations of Claimant, Claimant admitted that she is able to leave her home for work and for doctor appointments without difficulty,

anxiety or psychic trauma. Dr. D'Angelo further noted Claimant can enjoy herself upon meeting friends, and that she has no concerns once she leaves her home. Dr. D'Angelo opined that providing CBT for a condition that is truly not present is not medically indicated.

8. Claimant testified at hearing to her belief that Dr. D'Angelo is biased. She referenced multiple parts of Dr. D'Angelo's prior IME reports and testimony from prior depositions, noting perceived inaccuracies or areas of disagreement with Dr. D'Angelo. Claimant testified that she did not request CBT until a couple years after her surgeries when she realized her issue with getting out of the house. She further testified to her belief that she needs CBT therapy to help get out of the house. Claimant testified that her issue with getting out of the house is a learned experience after undergoing her surgeries, noting that for two years she only left her house to go to doctors' appointments and that she does not have a strong support system. Claimant testified that she drives herself to medical appointments and goes to work and to the grocery store when out for work. She stated that she does not participate in other activities outside of her home. Claimant testified that she seldomly goes out of her home for an activity other than work or appointments. She acknowledged that she has a problem leaving the house, but once she leaves the house she is fine. Claimant testified that, prior to the work injury, she was active and did not experience similar issues.

9. On January 27, 2023 Dr. D'Angelo testified by post-hearing deposition as a Level II accredited expert in internal medicine. Dr. D'Angelo testified that Dr. Carbaugh's psychometric testing demonstrated depression at the time and that his February 24, 2016 report diagnosed Claimant with somatic symptom disorder, probable persistent depressive disorder, and avoidant personality traits with a rule out for avoidant personality disorder. She testified that Dr. Carbaugh recommended 8 sessions of CBT for Claimant. Claimant underwent multiple session of CBT with Dr. Carbaugh. Per her review of the medical records, Claimant reported to Drs. Walker and Fillmore that the CBT with Dr. Carbaugh was not helpful. Dr. D'Angelo opined that CBT therapy would not be helpful to Claimant at this time if it was not helpful in the past. Dr. D'Angelo testified that Claimant does not have symptoms of agoraphobia because she can get out of the house, go to work, go to doctor's appointments and, once she is out with friends, she is okay. She further testified that Claimant has no difficulties interacting with others, is able to go to work routinely and has no phobia of driving. Dr. D'Angelo testified that such presentation is inconsistent and not medically probable. Dr. D'Angelo concluded that CBT not reasonably necessary and causally related treatment for Claimant's June 20, 2014 work injury, stating, "You cannot treat something that doesn't have a diagnosis." Dr. D'Angelo explained that she could not relate Claimant's purported anxiety issues to a work injury sustained 8 years prior, and surgeries that occurred 6 years prior.

10. On cross examination, Dr. D'Angelo confirmed that she is not a psychologist and is not "certified" in CBT. She testified that Claimant's situation of attending nothing but therapy and doctors' appointments for two years between 2016 and 2018 is not learned behavior, explaining that Claimant's selective issue with going out for social interaction

but then being fine during such interaction is not consistent with any specific pattern. She opined it is not medically probable Claimant's issue is casually related to her work injury or surgeries. She further stated that there is no evidence Dr. Moghim reviewed Dr. Carbaugh's or Dr. Johnsrud's notes regarding prior CBT therapy.

11. In response to Dr. D'Angelo's January 27, 2023 deposition testimony, Claimant offered additional testimony by post-hearing deposition on February 6, 2023. She testified that has not had a life since 2016, reiterating her belief that her anxiety regarding going out socially is learned behavior resulting from not going out socially due to her pain, and limitations in walking and driving for almost a year after her surgeries. Claimant testified that she did not request CBT until two years after her surgeries when she realized that her issue with not getting out of the house was psychological. She further testified that she has told Dr. D'Angelo more than once that she has anxiety.

12. The ALJ finds the testimony of Dr. D'Angelo, as supported by the medical records, more credible and persuasive than the opinions of Drs. Moghim and Osborne.

13. Claimant failed to prove it is more probably true than not CBT is reasonably necessary and causally related maintenance medical treatment.

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).

Medical Treatment

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that medical maintenance 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. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). 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 District No.11*, WC No. 3-979-487, (ICAO, Jan. 11, 2012).

Claimant argues she experiences anxiety in going out of the house for anything other than work or appointments, and that such condition is a learned psychological state resulting from her work injury and subsequent surgeries. Dr. D'Angelo credibly and persuasively opined that any need for CBT therapy is not reasonably necessary or causally related to Claimant's June 2014 work injury and 2016 surgeries. Dr. D'Angelo has performed multiple IMEs of Claimant and comprehensively reviewed Claimant's medical records. Dr. D'Angelo credibly and persuasively opined that it is not medically probable Claimant's need for CBT therapy is related to the work injury, particularly considering the dichotomy between Claimant being able to go out to work and for appointments versus going out for other social issues and being fine once out. As noted by Dr. D'Angelo, there is no indication Drs. Moghim reviewed Claimant's medical records regarding prior CBT treatment. While Claimant is credible in her reports regarding her perceived condition, the preponderant evidence does not demonstrate that any need for CBT therapy is causally related to her 2014 work injury and resultant surgeries.

ORDER

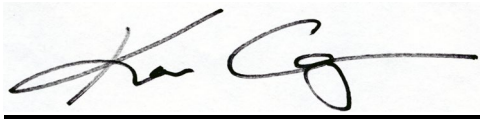
1. Claimant failed to prove by a preponderance of the evidence the CBT is reasonably necessary maintenance treatment causally related to her work injury.

2. Claimant's request for CBT is denied and dismissed.

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

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

DATED: March 15, 2023



Kara R. Cayce
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 5-192-744-002

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she is entitled to temporary total disability ("TTD") benefits from December 31, 2021, ongoing.

II. Whether Respondents proved by a preponderance of the evidence Claimant was responsible for her termination from employment and thus not entitled to TTD.

STIPULATION

The parties stipulated at hearing to an average weekly wage ("AWW") of $500.00.

FINDINGS OF FACT

1. Claimant is a 53-year-old woman who was employed by Employer as a deli clerk from approximately October 2021 to January 2022.

2. A written job description for Claimant's position indicates the position required, *inter alia*, the ability to lift/carry up to 70 lbs. and the ability to stand up to 4 hours continuously for a total of 8 hours per shift.

3. Claimant sustained an admitted industrial injury on Friday, December 31, 2021 when she slipped and fell at work. Claimant immediately reported the injury to the manager on duty. Employer then provided Claimant a list of four designated providers, including Lutheran Medical Center, Peak to Peak Family Practice Inc., CareNow Urgent Care, and Family Physicians.

4. Claimant sought treatment at the emergency department of Lutheran Medical Center later that same day. Claimant presented with complaints of pain in her coccyx, left ribs, abdomen, head and neck after slipping and falling at work. Claimant underwent a CT scan of the lumbar spine. The provider's final impression was coccyx pain, lumbar herniated disc, fall from standing, and left-sided rib pain. The provider placed Claimant on 48-hour restrictions of lifting no more than 10 lbs. and discharged Claimant with instructions to follow up with a primary care provider. Claimant did not provide any work restrictions to Employer.

5. Claimant Exhibit 15 contains a call log of calls to between Claimant and the main telephone number of Employer's store. Claimant testified that the call log reflects all the calls she made to Employer's store around that time period. She testified she did not know if Employer called from any other numbers other than the main store number and that, if Employer did she would not have recognized the numbers.

6. Employee work schedules are posted electronically on an online portal for employees, as well as in the employee breakroom. Work schedules are posted two weeks in advance. The schedule for the week of January 2, 2022 was published on December 24, 2022. The schedule for the week of January 9, 2022 was published on December 31, 2022.

7. Claimant was next scheduled to work on 4:30 p.m. on Saturday, January 1, 2022. Claimant called Employer at 9:00 a.m. on January 1, 2022 and informed Employer that she was unable to appear for her scheduled shift to the work injury. Employer considered the January 1, 2022 an excused absence.

8. Claimant was next scheduled to work on January 4, 2022 at 6:30 p.m. Claimant called Employer at 6:51 a.m. on January 4, 2022 and notified Employer she was again unable to appear for her scheduled shift due to the work injury. Employer considered the January 4, 2022 an excused absence.

9. Claimant's next scheduled shift was on January 6, 2022 at 4:30 p.m. Claimant did not appear for her scheduled shift due to the work injury. She did not notify Employer of her absence prior to the start of her scheduled shift. Claimant's call log indicates Claimant received a missed call from Employer at 1:45 p.m. on January 6, 2022. Claimant testified she did not recall receiving any voicemail from Employer. Claimant returned Employer's call at 5:33 p.m. that day, one hour after her scheduled shift began. Employer considered this a no-call, no-show.

10. Claimant was next scheduled to work on January 8, 2022 at 4:30 p.m. Claimant did not appear for her scheduled shift due to the work injury, nor did she contact Employer at any time to notify Employer of her absence.

11. Claimant testified she does not recall anything about January 8, 2022.

12. Claimant testified that, a few days after the date of injury, she attempted to log into the online portal to access her employee discounts and she was unable to log into the system. Claimant testified she called [Redacted, hereinafter MP], who was not in, and then called the corporate office, who sent her another PIN number that did not work.

13. Claimant testified on direct examination:

> Q: So, at that point, how would you - - if it is possible, how would you know about your shift?
>
> A: I didn't.

(Hrg. Tr. 42:8-10).

14. Claimant further testified on direct examination:

> Q: All right. And so it looked like you disagreed with [[Redacted, hereinafter MH]] about calling in?
>
> A: Yes.
>
> Q: Well, which shift - - just sitting here, which shift did you not call in on?
>
> A: I don't recall because I wasn't able to see the portal. I mean, I was calling in just to let them know what was going on and trying to update them.

(Hrg. Tr. 49:6-13).

15. On cross examination, when asked if her work schedule for the week of January 1, 2022, including January 4, January 6 and January 8, was posted in the online portal prior to December 31, 2022, she testified, "I guess. I assume. I don't know." (Hrg Tr. 64:22). Claimant testified she could have called the store or a co-worker to inquire about her schedule.

16. MH[Redacted] testified Claimant would not have been locked out of the online portal until a separation was final. He testified that Claimant never informed him she had an issue accessing the online portal.

17. Employer policy provides that employees may be terminated for two consecutive no-call, no-shows. Employees are required to notify Employer of an absence at least two hours prior to their scheduled start time. Per the policy, failure to notify Employer of an absence more than two hours in advance of a shift will be considered a no-call, no-show.

18. At hearing, when asked if she knew how many no-call/no-shows Employer permitted before termination, she testified, "I believe it is two or three." (Hrg. Tr. 53:24).

19. MH[Redacted] testified at hearing on behalf of Respondents. MH[Redacted] was the Store Manager of Claimant's store at the time of Claimant's work injury. MH[Redacted] testified that, after January 4, 2022, he did not speak to Claimant again until January 11 2022, despite Employer placing multiple telephone calls to Claimant in that time period to no avail. MH[Redacted] explained that the store has four telephone lines and that the calls placed to Claimant could have come from the store's main telephone number, or the other lines. He testified it is common practice to not use the main line as it is often busy. MH[Redacted] testified he tried to contact Claimant at least once for every shift for which she was scheduled to work and missed between January 5, 2022 and January 10, 2022.

20. On January 10, 2022, Claimant sought treatment at CareNow Urgent Care Center. Claimant testified she sought treatment at the urgent care center because she had a migraine and did not have any other doctor to go to. Claimant testified she had contacted another provider on Employer's designated provider list and understood that the provider was not accepting new clients at that time. She had scheduled an

appointment with another designated provider, Dr. Yamamoto, who was unable to see Claimant until February 3 2022. Claimant testified she planned to get a document from the urgent care center to provide to Employer regarding any work restrictions. While Claimant was completing documentation at the urgent care center, the urgent care center contacted Claimant's store, who informed the urgent care center that treatment was denied. Accordingly, Claimant was not evaluated at the urgent care center.

21. On January 10, 2022 at 8:24 a.m., MP[Redacted], Administrative Coordinator, emailed [Redacted, hereinafter AO], Human Resource Business Officer. She stated,

> We have a [team member] who has NCNS'd her past two shifts, the last time the Core talked to her was Tuesday when she called in for that shift, she had a shift on Thursday and Saturday and Core was not able to reach her. [Claimant] had hurt herself the week before here at the store and has a workman's comp claim open. Is there anything that needs to happen before submitting an ER ticket?

(R. Ex. C, p. 014).

22. MH[Redacted] testified that an ER ticket is a recommendation for termination, which is submitted to corporate, who makes the ultimate determination if the employee will be terminated.

23. AO[Redacted] replied to MP[Redacted] at 8:55 a.m. instructing AO[Redacted] to proceed with submitting a ticket.

24. At 11:10 a.m. on January 10 2022, MP[Redacted] emailed AO[Redacted]and ME[Redacted], Employer's Workers' Compensation Supervisor. She wrote,

> [Claimant] fell in the deli a couple of weeks ago. Since then she has called in for a couple of shifts but most recently she has NCNS'd her last two consecutive of shifts. Today, an urgent care center called for authorizations for a workman's comp. visit for [Claimant]. The center wasn't one of the ones that was listed and we denied the authorization. I had already opened an ER for job abandonment before the center called and just wanted to make sure that we were proceeding correctly.

(Id. at 015).

25. [Redacted, hereinafter ME] replied to MP[Redacted] on at 11:14 a.m. on January 10, 2022 notifying her that no one at the store was authorized to deny treatment and that authorizations for medical treatment needed to be reviewed by the claims department.

26. Employer's Timesheet Exceptions Report (R. Ex. D) is an internal document of Employer used by management that reflects employee attendance. The document reflects that MP[Redacted] marked Claimant's absences on January 1 and January 4, 2022 as excused, and her absence on January 6, 2022 as an unexcused no-call/no-

show. The document reflects that Claimant's January 8, 2022 absence was marked as excused and approved by MH[Redacted] at 6:33 a.m. on January 10, 2022.

27. MH[Redacted] addressed the discrepancy in his testimony. He testified that, early on Monday mornings, he quickly clears all exceptions for all employees to make sure each employee's time can be submitted to payroll. He does not investigate each entry. He testified he marked the exceptions report as excused at 6:33 a.m. on Monday January 10, 2022 before he had talked to his management team about Claimant's failure to call off for her shift.

28. Employer terminated Claimant due to no-call/no-shows for her scheduled shifts on January 6 and January 8, 2022. MP[Redacted] completed a Team Member Separation Form dated January 11, 2022 citing the reason for termination as no-call/no-shows on January 6 and January 8, 2022. She noted that attempts to contact Claimant were made by MH[Redacted] and MP[Redacted] on January 6, and January 8, 2022. MH[Redacted] signed the document on January 11, 2022.

29. Claimant, unaware of her termination, called MH[Redacted] on January 11, 2022. Claimant testified she called MH[Redacted] to obtain her correct claim number, as she had previously been provided an incorrect claim number. Claimant initially testified that she spoke to MH[Redacted] in two telephone calls on January 11, 2022. She later testified that it was one call.

30. Claimant's daughter recorded portions of Claimant's telephone conversation with MH[Redacted] on January 11, 2022. Three subparts of the telephone call were admitted into evidence as Claimant's Exhibit 16 and Respondents' Exhibits S-U. Claimant testified she recorded the call because she felt MH[Redacted] was speaking to her inappropriately and unprofessionally in what she described as a rude and sarcastic tone.

31. Claimant's call log reflects a call to MH[Redacted] at the store at 3:49 p.m. on January 11, 2022 for a duration of five minutes and nine seconds. The three recordings of the audio call submitted as exhibits total approximately two minutes and 25 seconds in duration.

32. The ALJ listened to each audio clip in its entirety. The clips start and stop suddenly throughout a larger conversation. During one audio clip (Cl. Ex. 16, video 3 and R. Ex. S), Claimant and MH[Redacted] state, in relevant part:

> MH[Redacted]: I've been straight up with you about everything.
>
> Claimant: Okay.
>
> MH[Redacted]: You're the one giving me the runaround by not calling us for your scheduled shift to keep us in the loop and see what's going on.
>
> Claimant: I called you Tuesday and told you I still wasn't feeling well, and I had Wednesday off.

MH[Redacted]: And then what about the rest of the week?

Claimant: I'm still down.

MH[Redacted]: Yeah, but you could've called me - -

Claimant: I mean - -

MH[Redacted]: and let me know. And then you go to an urgent care?

Claimant: Yeah, it's one of the four places listed on this print out.

MH[Redacted]: Right, but you gotta - - you need to call me to say 'Hey, I'm gonna go to the store - - I'm gonna go get this looked at - - and can you give me the information. You just take it on your own accord to go? You don't think the store should know that? I mean, you work in the medical field, you should know right? If that's the proper procedure.

33. In a second audio clip (Cl. Ex. 16, video 2, R. Ex. T), MH[Redacted] and Claimant state:

MH[Redacted]: - - inform the store?

Claimant: Inform the store of what? Me going into be seen?

MH[Redacted]: Yeah. And you're not showing up for your shift, right?

Claimant: Well I'm not going to be able to show up until I get a release.

MH[Redacted]: Right. But you still gotta let us know. You'll scheduled for a shift, right?

Claimant: So, am I gonna a get a claim, or?

MH[Redacted]: Yeah I'm looking. I'm pulling it up.

34. In the third audio clip (Cl 1, Resp. 3), MH[Redacted] provides Claimant a claim number. MH[Redacted] and Claimant then state:

MH[Redacted]: Keep us in the loop - - it is not fair for us at the store for you to not communicate with us. Alright?

Claimant: Okay.

MH[Redacted]: Let's all be adults about this and have those great conversations. (*Inaudible*) Not be afraid not return calls and do other things on the backend without informing your employer of these things. Alright?

CL: Okay.

(Telephone hangs up).

35. MH[Redacted] testified that he was unaware the telephone call between himself and Claimant on January 11, 2022 was being recorded. He testified he did not say anything to Claimant during the call about being terminated as they had just submitted the paperwork to corporate and a decision was still pending at the time. He testified that, during his conversation with Claimant, he was emphasizing to Claimant the necessity of communicating with the store about what was going on and about her condition if she could not come in for scheduled shifts.

36. Claimant testified that during their January 11, 2022 telephone MH[Redacted] did not make any mention of her being terminated. She testified that, when MH[Redacted] made multiple references to her failing to communicate with the store, she did not disagree with him because he was "screaming" at her on the call and she did not know what to say.

37. MH[Redacted]was not screaming at Claimant on the audio clips of the telephone call.

38. Claimant testified she did not become aware of her termination until receiving a COBRA letter at some unspecified time. The letter is dated January 10, 2022. She further testified she did not otherwise receive any written or verbal notification from Employer of her termination, nor did she speak to Employer after January 11, 2022.

39. Claimant's call log confirms Claimant placed a 2:29 long call to the main telephone number of Employer's store at 1:51 p.m. on January 15, 2022.

40. Respondents filed a General Admission of Liability on January 20, 2022 admitting for medical benefits only.

41. On January 13, 2022, Claimant sought treatment with a non-designated provider, Matthew Gray, M.D., at Mountain View Pain Specialists. She reported slipping and falling at work and experiencing severe headaches, worsening memory, cervical axial pain radiating into the left shoulder and left fingers, thoracic left-sided pain, and lumbar axial pain radiating into her left leg and foot. She further reported that ability to work and perform household activities were significantly affected by her symptoms. Dr. Gray referred Claimant for chiropractic treatment and physical therapy and ordered MRIs of the spine. He recommended that Claimant avoid lifting greater than 10 lbs. and that she take frequent breaks throughout the day.

42. On February 3, 2022 Claimant presented to designated provider David W. Yamamoto, M.D. at Peak to Peak Family Medicine, P.C. He assessed Claimant with cervical and lumbar strains, left leg pain and numbness, left arm pain and numbness, and a closed head injury with concussion. He restricted Claimant from all work.

43. Dr. Yamamoto continued Claimant's no-work restrictions through June 23, 2022.

44. Upon the referral of Dr. Yamamoto, Claimant saw Roberta Anderson-Oeser, M.D. at Premier Spine & Pain Institute, who referred Claimant for physical therapy, chiropractic care, neuromuscular massage and a neuropsychological consultation with William Boyd, Ph.D.

45. On June 24, 2022, Dr. Yamamoto released Claimant to work with restrictions of lifting, carrying, pushing, pulling no more than 5 lbs., walking no more than 1-2 hours per day, and changing positions every 15 minutes as needed.

46. On August 26, 2022 Dr. Yamamoto released Claimant to work up to four hours per day with restrictions of lifting, carrying, pushing, pulling no more than 8 lbs., walking and standing no more than 1 hour per day, and sitting 3-4 hours per day.

47. Dr. Anderson-Oeser drafted an undated letter responding to several questions from Respondents' counsel regarding Claimant's condition and status. She noted that prior medical records reflected that Claimant had a prior history of several conditions, including headaches, dizziness, neck pain, low back pain, stiffness in joints, tingling in feet, memory problems, and depressed mood, with prior diagnoses of and treatment for osteoarthritis of the knees, degenerative disc disease, fibromyalgia, migraine and depression. She noted prior records referenced Claimant informing her physicians of applying for disability. Dr. Anderson-Oeser opined that Claimant suffered a cervical strain, lumbar strain and left leg pain and muscle spasms as a result of the work injury. She opined that Claimant was not at MMI for her work-related injuries. She concluded that Claimant's any head injury was not work-related. She opined that Claimant needed 8 additional sessions of physical therapy, chiropractic treatment and neuromuscular massage treatments to reach MMI. Dr. Oeser opined that Claimant could perform seated work.

48. On October 13, 2022 Dr. Yamamoto restricted Claimant to working a maximum of 5 hours per day, 30 hours per week, with restrictions of lifting, pushing and pulling no more than 10 lbs., no more than 8 lbs. of repetitive lifting and carrying, no more than 1-2 walking hours of walking per day, standing sitting of 3-4 hours per day.

49. On November 3, 2022 Dr. Yamamoto noted that Clamant had sustained a non-work-related right fibular fracture when a box fell onto her leg in a private storage unit. Dr. Yamamoto continued Claimant's work restrictions.

50. On December 1, 2022, Allison M. Fall, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Fall's assessment was: status post fall leading to left hip and upper thigh contusion, right forearm contusion and adjustment disorder with increased anxiety. Dr. Fall opined that Claimant's symptoms were out of proportion to the mechanism of injury and that Claimant's subjective complaints were without correlating objective findings. She opined that Claimant reached MMI as of May 9, 2022 without the need for permanent impairment or further treatment for the work injury.

51. Claimant testified she has been unable to work since December 31, 2021 because of her injuries, symptoms and appointments. She testified that she has been under work restrictions since seeing Dr. Yamamoto. Claimant testified to numbness in her left side, pain, and an inability to stand for more than 3 hours in an 8-hour shift. Claimant testified she is unsure if she is capable of working 25-30 hour weeks. She confirmed she was not been offered work by Employer.

52. MH[Redacted] testified that, had Claimant showed up at any of her scheduled shifts following her injury date, he would not have had or allowed her to work as she did not have a work release, which she would be required to produce. He further testified that Employer did not offer Claimant because Employer had not received documentation stating Claimant's restrictions. He explained that, even if Claimant did not have a document allowing her to return back to work, she remained responsible for her contacting Employer regarding her scheduled shifts.

53. The ALJ finds MH's[Redacted] testimony, as supported by the employment records, more credible and persuasive than Claimant's testimony.

54. Claimant proved it is more probably true than not the December 31, 2021 work injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss.

55. Respondents proved it is more probably true than not Claimant is responsible for termination of her employment and thus Claimant is not entitled to TTD as of January 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).

TTD

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

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

recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

As found, Claimant proved she is entitled to TTD benefits from December 31, 2021 through January 10, 2022. Claimant suffered an admitted work injury on December 31, 2021 which rendered her unable to resume her work as a deli clerk. Claimant's position required lifting and carrying up to 70 lbs. and continuously standing for up to 4 hours in an 8-hour shift. The provider at Lutheran Medical Center placed Claimant on 48-hour restrictions of lifting no more than 10 lbs. Claimant credibly testified she was unable to perform her job duties at such time due to the symptoms from the work injury. Claimant missed more than three work shifts as a result of the work injury. Accordingly, to the extent Claimant sustained wage loss from December 31, 2021 through January 10, 2022, she is entitled to TTD.

Responsibility for Termination

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

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

termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As found, Claimant is not entitled to TTD as of January 11, 2022 as the preponderant evidence demonstrates Claimant was responsible for termination from her regular employment. Claimant's testimony and actions establish awareness and understanding of Employer's policy requiring employees to call Employer within two hours of a scheduled shift to notify Employer of an absence. On both January 1 and January 4, 2022, Claimant followed Employer's policy by calling out more than two hours in advance of her scheduled shifts. Claimant was aware that no-call/no-shows could lead to termination. She further specifically acknowledged a general understanding of the need to communicate her status with Employer when she testified that she was calling in to let Employer know what was going on and to update Employer.

Claimant's contention that she did not properly call out on January 6 and January 8, 2022 because she did not have access to the online portal and was unaware of her scheduled shifts is incredible and unpersuasive. Claimant had access to her work schedule for the week of January 2, 2022 on December 24, 2022 and for the week of January 9, 2022 on December 31, 2022, prior to her alleged inability to access the online portal. Claimant was aware of, and properly called off for, scheduled shifts just two and four days prior to her scheduled shifts later that week on January 6 and January 8, 2022. Furthermore, Claimant acknowledged that she could have contacted the store or a co-worker to inquire about her schedule if she was having an issue accessing her schedule.

The audio recordings of the January 11, 2022 telephone call between Claimant and MH[Redacted] further support the finding Claimant was aware she missed scheduled shifts and failed to properly notify employer of her absences. MH[Redacted] repeatedly references Claimant's failure to call out for scheduled shifts. At one point, Claimant responds that she did call off on Tuesday, January 4, 2022. When MH[Redacted] specifically asks her about the rest of the week, Claimant merely replies "I'm still down." Claimant did not ask what MH[Redacted] was referring to, nor in any way indicate she was unaware she was scheduled for other shifts and failed to call out for them as required. A reasonable person who was actually unaware of the scheduled shifts and need to call out would make some indication to her supervisor of that at the time. Claimant's stated reason for failing to address this in the recorded telephone call - that she did not know what to say because MH[Redacted] was screaming at her - is unpersuasive, as the ALJ listened to the audio in its entirety, and it did not evidence MH[Redacted] yelling at Claimant.

Based on Claimant's responses to MH[Redacted] during the January 11, 2022 telephone conversation, Claimant, of her own volition, chose not to contact Employer regarding absences for scheduled shifts on January 6 and January 8, 2022 because she because she felt she could not work and had not received documentation releasing her to work. Claimant's presumption that she did not need to contact Employer per Employer policy was unreasonable. Claimant does not argue, nor was any evidence

offered to demonstrate, that she reasonably relieved on some information or indication from Employer that, due to her circumstances, she was not required to follow policy regarding absences for scheduled shifts. Even if Employer would not have allowed Claimant to work a previously scheduled shift prior to providing a release, Claimant remained required to notify Employer of her absences under these circumstances, particularly when Employer had not received any documentation of a release or restrictions at that time.

To the extent Employer's Timesheet Exception Report indicates MH[Redacted] initially marked Claimant's January 8, 2022 absence as excused, MH[Redacted] provided a credible explanation, and other records support the timeline and reason for termination proffered by Respondents and found by the ALJ. Based on the totality of the credible and persuasive evidence, it is more probably true than not Claimant was at fault for her separation from employment and thus not entitled to TTD benefits as of January 11, 2022.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $500.00.

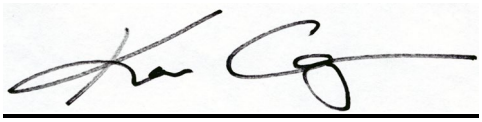
2. Respondents shall pay Claimant TTD from December 31, 2021 through January 10, 2022.

3. Claimant was responsible for her termination from employment, and thus not entitled to TTD benefits as of January 11, 2022.

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: March 20, 2023



Kara R. Cayce
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 5-180-032-001

ISSUES

I. Whether Respondent proved by a preponderance of the evidence Claimant did not sustain a compensable industrial injury, entitling Respondent to withdraw its admissions of liability.

II. In the alternative, whether Claimant proved by a preponderance of the evidence the lumbar surgery recommended by Robert Blatt, M.D. is reasonable, necessary and related.

FINDINGS OF FACT

1. Claimant is a 59-year-old who has been employed with Employer for approximately six years.

2. Claimant has a prior history of left hip pain noted in personal medical records dated December 2016 and January 2017, as well as low back pain radiating into his left lower extremity in January 2021.

3. Claimant alleges he sustained a compensable work injury on August 4, 2021 that was exacerbated while at work on August 10, 2021.

4. Claimant testified at hearing that in the days leading up to his work injury he had been working with the hand asphalt patching crew, which included removing old asphalt, pushing the road base, raking, pushing and shoveling. Claimant testified that his symptoms began on August 4, 2021 when he felt a pinch in his back and pain in his groin area while raking. He testified he went to work on August 10, 2021 feeling completely normal. Claimant participated in stretching exercises with his crew as part of their normal occupational activity to prepare for the day. Claimant testified that, while engaged in a hip flexor stretch, he felt a sharp stinging and burning pain in his lower back. Claimant stated he stopped the stretch and attempted to walk around to relieve his symptoms. He testified that his symptoms worsened and he began experiencing numbness and radiating pain down his left leg. Claimant found himself unable to climb stairs to use the restroom, and ultimately fell when stepping off of a sidewalk due to the lack of feeling in his left leg.

5. [Redacted, hereinafter TJ] testified at hearing on behalf of Respondent. TJ[Redacted] works for Employer as the road and bridge director. TJ[Redacted] testified that, per Employer records documenting the day, location and type of work performed by each worker, on Claimant was performing mowing on August 4, 2021 and asphalt patching on August 5, 2021. As it was typical for employees in the summer to not work weekends, Claimant did not work August 6-8, 2021. Claimant performed mowing duties

on August 9, 2021. TJ[Redacted] explained that raking asphalt involves pushing and the asphalt, which he estimated weighs around 150 pounds per cubic foot.

6. Claimant presented to the emergency department at UC Health on Tuesday, August 10, 2021 with complaints of low back pain. Regarding the onset of symptoms, the provider noted Claimant "developed back pain last Thursday. He believes this began while at work. He does manual labor. Starting Sunday noted worsening back pain and then yesterday numbness to left extremity. Either last night or today started noting weakness." (R. Ex. F, p. 31). Claimant reported he fell earlier in the day due to weakness. A lumbar spine MRI of revealed degenerative changes of the lower lumbar spine, greatest at L4-5, with mild spinal canal and mild/moderate bilateral foraminal narrowing. There was no effacement of the nerve. The provider's clinical impression was acute left-sided low back pain with left-sided sciatica and numbness and tingling of the left leg. Claimant was provided a walker and prescribed prednisone, hydrocodone, and flexeril. The provider referred Claimant for physical therapy and instructed him to follow-up with a worker's compensation physician.

7. On August 11, 2021 Claimant saw Amber R. Payne, PA-C at authorized provider Workwell Occupational Medicine ("Workwell"). Regarding the mechanism of injury, PA-C Payne noted,

> [Claimant was] Doing hot asphalt patching shoveling and raking on 8/4/21 and was really sore for a couple days. He was doing his preventative stretching at work yesterday and he was getting more and more sore and all of the sudden lost feeling in the left leg. He almost fell when he tried to get up on a prota (*sic*) potty trailor (*sic*). He reports that when he went to step down out of the office his leg went out and he went right down on his buttocks.

(R. Ex. G, p. 37).

8. Claimant reported to PA Payne that most of his pain was in his groin. He denied experiencing prior problems of the same type. On physical examination, PA Payne noted Claimant was unable to lift his left leg in the flexed position, absent sensory at the anterior thigh, and unable to extend knee actively with full passive extension. She diagnosed Claimant with an injury of the left femoral nerve at the hip and thigh level and referred him for an EMG and physiatry consultation with Dr. van den Hoven. PA Payne removed Claimant from all work and referred Claimant for a pelvic MRI. Regarding her review of the 8/10/2021 lumbar spine MRI, PA Payne remarked that the MRI results did not correlate with findings of the left lower leg, but that Claimant's numbness and loss of strength did correlate with the femoral nerve innervation.

9. Claimant returned to Workwell on August 12, 2021 and saw his primary authorized treating provider ("ATP") Robert Dupper, M.D. Regarding the mechanism of injury Dr. Dupper noted,

> On 8/4/2021 [Claimant] states he was working on an asphalt crew. Part of his job was to rake the asphalt. When he pushes the rake, he is pushing from 50 - 100 lbs. of asphalt. To get enough force to push it he places the end of the rake handle against the left groin area, and pushes with his groin/hip. He did this intermittently throughout the day on 8/4/2021. The next few days he was quite sore in the groin/hip area, but was able to continue working.
>
> Two days ago immediately after doing the morning stretching exercises he had an increase of pain in the left groin. He then noticed at the front of the left thigh fairly suddenly became numb. He could feel the numbness start from the groin and extend down the front of the thigh, knee, and proximal lower leg. He states there is also numbness in the 4th and 5th toes of the left foot.

(R. Ex. H, p. 43).

10. On examination, Dr. Dupper noted tenderness in the left groin, decreased sensation over the left anterior thigh extending distally to the proximal third of the anterior lower leg, decreased sensation to light touch and pinprick, and significant weakness in the quadriceps. Dr. Dupper continued the diagnosis of a femoral nerve injury and continued Claimant's work restrictions.

11. Claimant underwent pelvic MRIs on August 12, 2021 which revealed no acute abnormalities. The radiologist specifically noted that the left femoral nerve appeared normal.

12. On August 17, 2021 Dr. Dupper responded to a letter from Insurer requesting his opinion on the work relatedness of Claimant's condition. Dr. Dupper reiterated his understanding of the mechanism of injury as documented in his August 12, 2021 medical report. He noted Claimant had an onset of pain on 8/4/2021 while raking asphalt and then, on 8/11/2021 while at work stretching, the left groin pain increased significantly. Dr. Dupper opined the events surrounding Claimant's onset of left thigh numbness and weakness were all associated with his work activities and thus causally related to his work.

13. Respondent subsequently filed General Admissions of Liability ("GALs").

14. Dr. Dupper reexamined Claimant on August 19, 2021, noting Claimant now had a little more movement of his left leg. Claimant was using a cane. Claimant reported that his left leg continued to give out, causing him to fall on several occasions. Claimant further reported that he was now experiencing severe pain in the left gluteal area radiating to his left knee when laying down. Dr. Dupper noted, "[Claimant] states it feels like sciatica, which he has had in the past, but it hurts when his leg is extended, not when he is sitting." (R. Ex. L, p. 59). Claimant complained of mild pain in the lower back. Dr. Dupper noted Claimant's MRI did not demonstrate significant nerve impingement in

the lumbar spine and it did not appear Claimant's gluteal pain is radicular. Dr. Dupper continued Claimant's physical therapy and restrictions.

15. Upon referral from Dr. Dupper, Claimant presented to Raymond P. van den Hoven, M.D. for EMG testing on August 24, 2021. Regarding the mechanism of injury, Dr. van den Hoven noted,

> Apparently, he was involved in raking asphalt on 08/04/2021. This involved pushing a fairly wide rake and pushing fairly heavy asphalt. He has done this for a number of years, but that evening is when he noticed pain in his left groin pain (*sic*). The pain was aggravated the next day on the 5th and than (*sic*) on the 10th became significantly to the point that he went to the emergency room.

(R. Ex. M, p. 65).

16. On examination, Dr. van den Hoven noted obvious weakness in Claimant's left lower extremity, moderate tenderness in the lower thoracic spine, and reproducible discomfort in the left groin region with palpation and percussion. Dr. van den Hoven further noted Claimant had left lower extremity numbness, burning discomfort, and fairly global weakness with sensory changes all the way up to approximately T9 or T10 dermatomes. He opined Claimant likely had a disc injury in the lower thoracic spine around T9-10, just above where the MRI had visualized. Dr. van den Hoven recommended Claimant undergo a thoracic MRI. He suggested Claimant wait to undergo the recommended EMG, noting it takes 21-24 days for the optimal degree of findings to manifest after a nerve root injury.

17. Claimant underwent a thoracic spine MRI on August 27, 2021 which revealed some facet arthropathy in the mid to lower thoracic spine worst at T8-9, but no evidence of trauma or significant canal or foraminal narrowing at any level.

18. On September 8, 2021 Claimant returned to Dr. van den Hoven for an EMG. Dr. van den Hoven noted Claimant's thoracic MRI did not demonstrate any results that would affect Claimant's thoracic cord and produce his left leg symptoms. Dr. van den Hoven opined the results of the EMG were consistent with left L4 radiculopathy, moderate to severe, with abnormalities in the lumbar paraspinals, without clear evidence for L5 or S1 root findings. He stated, "With lumbar paraspinal abnormalities, this is not likely due to lumbar plexus injury. There is a possibility of acute idiopathic lumbar radiculoplexus neuropathy, but disease course is not consistent with such." (R. Ex. O, p. 74). Dr. van den Hoven recommended Claimant undergo a left L4 nerve block for diagnostic and therapeutic purposes, as well as a repeat lumbar MRI.

19. Claimant underwent a second lumbar MRI on September 20, 2021 that was compared to the August 10, 2021 lumbar MRI. The radiologist noted a broad based disc bulge at L4-5 and a superimposed central disc protrusion measuring 5 mm in AP diameter, partially effacing the ventral thecal sac, moderate degenerative facet

arthropathy and a small right facet joint effusion. There was overall a relatively similar mild stenosis of the bilateral neural foramen, right greater than left, and mild spinal canal stenosis. The radiologist's impression was: "Slight increase in size of a central disc protrusion at L4-5 and development of mild spinal canal stenosis at this level. Otherwise relatively similar appearance of the mild to moderate severity multilevel degenerative disease in the remainder of the lumbar spine, otherwise as detailed in the above report." (R. Ex. Q, p. 82).

20. Claimant returned to Dr. Dupper on October 13, 2021 with complaints of increased pain in his left buttocks radiating to the left distal anterior thigh and to the medial aspect of the knee and calf. Dr. Dupper noted profound weakness in the left knee extensors of the thigh and the hip flexors. He noted Claimant's EMG showed L4 radiculopathy but that the lumbar MRI did not indicate L4 impingement. He referred Claimant for a neurosurgical evaluation.

21. On October 20, 2021 Claimant underwent a left L4 selective nerve root block with Timo Quickert, M.D.

22. Claimant testified that he only experienced a few minutes of relief from the injection before his symptoms returned.

23. Dr. Quickert's office conducted a follow-up telephone call with Claimant on October 27, 2021, at which time Claimant reported that he experienced 60% relief for three hours immediately following the injection, but no relief thereafter.

24. At a follow-up examination with Dr. Dupper on October 27, 2021, Dr. Dupper noted that the injection did not seem to have changed anything very much. Claimant continued to report pain in the low back and left leg weakness.

25. On November 5, 2021 Claimant presented to neurosurgeon David Robert Blatt, M.D. at UC Health Brain and Spine Clinic. On examination, Dr. Blatt noted atrophy of the left thigh and leg, decreased sensation, back pain with hip manipulation and tenderness of the left lateral hip and across the lumbosacral region. He reviewed Claimant's 8/10/2021 lumbar MRI and remarked, "To level degenerative changes not unusual for age. Muscle atrophy. Normal conus. Diffuse disc protrusion at L4-L5. There is mild foraminal narrowing. I do not appreciate any neural impingement. No significant canal narrowing." (R. Ex. T, p. 97). He noted that 9/20/2021 lumbar MRI showed similar findings. He wrote, "In reviewing the 2 lumbar MRIs cannot rule out the possibility of L4 nerve compression within the foramen." (Id.) Dr. Blatt also reviewed the 8/27/2021 thoracic MRI, 8/12/2021 pelvic MRI, and EMG results. Dr. Blatt opined,

> Symptoms and clinical findings are most consistent with a lumbar plexopathy. Multiple nerve distributions are involved. EMG was performed 9/4 which was less than 1 month after weakness developed. That study was most consistent with L4 root involvement of plexopathy could not be ruled out. EMG changes can take 6 weeks or more to develop. At this time I recommend repeat electrodiagnostic studies of the left lower extremity. If

> plexopathy is not demonstrated then he would need MRI of the brain and cervical spine. Lumbar MRI findings do not explain his clinical presentation.

(Id. at p. 94).

26. Dr. van den Hoven performed a repeat EMG on December 7, 2021. He remarked,

> It should be noted that previous testing done in September did show moderate to severe left L4 lumbar radiculopathy. Unfortunately, the imaging is not conclusive for such.
>
> ELECTRODIAGNOSTIC TESTING: Today his EMG studies are essentially unchanged from before. There continue to be abnormalities in the paraspinal muscles as well as the muscles supposed by L4 nerve root in common. There is involvement of the femoral obturator and sciatic nerves (sciatic nerve component with L4). The iliopsoas is also involved. No clear evidence for L5 or S1 involvement.
>
> The only changes I see on today's study is that there is some increase in polyphasia in the L4 myotome, which would be consistent with early terminal sprouting and attempt to reinnervate denervated muscle fibers, which is anticipated at this stage.

(R. Ex. U, p. 99).

27. Dr. van den Hoven remarked,

> Lumbar paraspinals are clear (*sic*) abnormal, and findings are in multiple peripheral nerve territories (femoral, obturator, and sciatic (via superior gluteal nerve and fibular nerve)). Continues to demonstrate significant mechanical component of symptoms, with triggering of symptoms readily with palpation at L4-5 interspinous region, and positive femoral nerve stretch test. This suggests significant irritability of L4 root, and given degree of symptoms, involvement of the dorsal root ganglion is suggested. Typically, this type of presentation is most likely related to lumbar radiculopathy, though acute idiopathic radiculoplexus neuropathy could possibly present this way. However, since is (*sic*) now 4 months into clinical course, I have never seen an acute idiopathic radiculoplexus neuropathy show such continued mechanical irritability, and furthermore, onset presentation is much more consistent with an acute, rapid onset of symptoms, faster than typically observed with radiculopathy neuropathy (whereas lumbar radiculopathy due to root impingement from disk herniation or small hematoma could present this way). Given overall findings, left L4 root involvement at or just lateral to foramen appears to be

> implicated as the cause. Did have 2 hours of essentially complete pain relief after a left L4 nerve root block, also suggesting mechanical involvement of that root. This is clearly not an isolate femoral neuropathy given the findings in other peripheral nerve distributions. No clinical evidence to suggest shingles. This is clearly lower motor neuron injury, not due to CNS involvement.

(*Id*. at 101).

28. Claimant underwent an x-ray of the lumbar spine on December 20, 2021 which revealed mild degenerative disease throughout the lumbar spine and mild facet arthropathy at L3-4 through L5-S1.

29. On January 14, 2022 Dr. Blatt followed up with Claimant via telephone, noting extension x-rays did not show any instability. Dr. Blatt again reviewed Claimant's lumbar MRI. He noted the MRI results showed a disc protrusion at L4-5 with mild foraminal narrowing bilaterally but no clear neural impingement. Dr. Blatt opined, "The patient's symptoms and clinical findings are consistent with L4 involvement. The electrodiagnostic findings would be consistent with impingement of the L4 root in her far lateral and that is consistent with MRI showing some elevation superiorly of the L4 nerve root and foramen." (R. Ex. W, p. 105). He discussed the possibility of Claimant undergoing a left L4-5 far lateral extraforaminal microdiscectomy, noting that the procedure "in some ways be 'exploratory' as we do not see definitive nerve compression although his clinical and other diagnostic testing does lead to the site as being the source of his symptoms." (*Id*.)

30. At the request of Respondent, Carlos Cebrian, M.D. performed an Independent Medical Examination ("IME") on March 16, 2022. Dr. Cebrian issued an IME report dated April 4, 2022. Claimant reported he first developed symptoms on 8/4/2021 when he finished raking asphalt. He further reported his symptoms increased over the weekend and on 8/10/2021 he felt a pinch while stretching. Dr. Cebrian noted, at the time of his IME, clinical diagnosis was not clear. He concluded he could not state whether it was medically probable Claimant's complaints are causally related to his claim based on the available information. He remarked although there was evidence of L4 radiculopathy, there were not objective findings on the lumbar MRI correlating with that level, nor findings explaining the significant amount of atrophy and weakness, which developed quickly. Dr. Cebrian explained that, if there were a disc lesion, there would be more significant findings on the lumbar MRI. He noted that, if there is pathology in the lumbar plexus, it is not explained by any of the diagnostic testing. Dr. Cebrian remarked that Claimant's "clinical picture is confusing" and did not add up to a lumbar spine work-related injury with nerve root compression. He opined Claimant's presentation is more consistent with a systemic neuromuscular condition resulting in focal muscular atrophy. He explained that there are multiple different possible causes of such condition. Due to Claimant's age and profound and significant atrophy with minimal MRI findings, Dr. Cebrian recommended additional neurological work-up outside of the workers' compensation system. He ultimately opined Dr. Blatt's request

for left L4-5 far lateral extra foraminal microdiscectomy should be denied as not medically reasonable, necessary or related, noting there were no specific objective findings correlating with Claimant's pathology.

31. On April 14, 2022 Dr. Dupper documented,

> [Claimant] continues to have profound weakness of the left anterior thigh. He had an IME ordered by the insurer. The examiner concluded the condition is not work related, and the surgery recommended by Dr. Blatt is not medically necessary or indicated. He suggested there is a neuromuscular condition causing the weakness, but failed to give a differential diagnosis of what those conditions might be. It seems unlikely for a neuromuscular condition to affect the left suddenly and completely without any gradual onset. [Claimant's] condition does not have a clear and definite diagnosis. Because we are unable to say absolutely that the condition is or is not caused by his employment a neurology consult is indicated in my medical opinion to define what neuromuscular disease, if any, is affecting him.

(R. Ex. Y, pp. 130-131).

32. On May 5, 2022 Dr. Dupper noted Insurer denied continued workup of the etiology of Claimant's leg weakness and that, without further workup, the etiology of the weakness could not be determined. He remarked Claimant would be scheduled for an impairment rating as no further workup was being authorized by Insurer. Dr. Dupper opined that it was more than 50% probable that the weakness Claimant is experiencing is related to his work, noting that the providers had not been able to show this condition was due to any other specific condition.

33. On May 26, 2022 Dr. Dupper recommended Claimant undergo a repeat MRI and a neurologic evaluation to clearly determine causation. He reasoned,

> The cause of [Claimant's] condition has not been diagnosed. Temporally [Claimant's] symptoms correlated with his work. Additionally the symptoms came on suddenly, and were not a slow progressive onset. Usually a neuromuscular disease would progress slowly and symptoms would be gradually progressive. [Claimant's] symptoms were essentially the same at onset as they are now. The changes seen since onset are likely the result of his continued weakness, and loss of function and probably not a progressive underlying disease. Neither Dr. Blatt, or Dr. van den Hoven mentioned the probability of a neuromuscular disease. Both of them concluded that the symptoms were most consistent with an L4 radiculopathy. However, as I have stated we have not made a diagnosis that shows the condition is definitely not caused by his work, or that it definitely was caused by his work. In my opinion this should be defined clearly before concluding it is not a work related condition.

(R. Ex. Z, p. 136).

34. On June 7, 2022 neurologist Alexander H. Zimmer, M.D. performed an IME at the request of Respondent. Dr. Zimmer issued an IME report dated June 14, 2022. Dr. Zimmer noted that Claimant's physical examinations revealed a very diffuse sensory loss pattern, as well as motor symptoms that extended beyond the usual myotome of the L4 nerve root. Regarding the September 8, 2021 EMG, he remarked that, while denervation changes were noted predominantly in the left L4 muscles, they also were noted in muscles beyond the usual L4 distribution, with other areas showing reduced motor unit recruitment and discrete interference patterns consistent with neuropathic change in three non-L4 muscles.

35. Dr. Zimmer concluded Claimant's "clinical presentation of diffuse motor weakness and diffuse sensory abnormalities in the left lower extremity, associated with pain at the onset and subsequent muscle atrophy primarily of the thigh muscles followed by modest improvement in strength over several months", along with the results of the EMG studies and negative MRI findings, was most consistent with a diagnosis of lumbosacral radiculoplexus neuropathy. He explained,

> Lumbosacral radiculoplexus neuropathy is typically an idiopathic inflammatory condition which involves a combination of pathology of the lumbosacral plexus and lumbosacral nerve roots. A similar picture can be seen in patients with diabetes or with a variety of inflammatory diseases. In [Claimant's] case, there does not appear to be any clear incident at work that would be associated with the production of pathology involving the lumbosacral plexus. Therefore, it is my opinion to a medical probability that [Claimant's] condition is not work related but is most consistent with an idiopathic medical condition [lumbosacral radiculoplexus neuropathy] that developed in a subacute fashion while [Claimant] was participating in routine work activities and routine exercise activities, which do not correlate etiologically with a lumbosacral plexus injury.

(R. Ex. AA, p. 157).

Dr. Zimmer noted Claimant had shown some degree of recovery of motor function and some reduction in his original pain symptoms, which he explained was typical over time in patients with lumbosacral radiculoplexus neuropathy. He recommended Claimant follow up with a neurologist to review bloodwork that may be associated with various inflammatory mechanisms.

36. On August 16, 2022 orthopedic surgeon Michael Janssen, D.O. performed an IME at the request of Claimant. Claimant reported that on August 4, 2021 while raking asphalt he felt a pull towards the left side in his low back near his lumbosacral plexus and began experiencing some pain in his thigh, which progressed over the next number of days. He further reported that within a week he was doing some stretching at work

associated with numbness and tingling. Dr. Janssen reviewed several MRIs and EMGs, noting that the most recent lumbar MRI on September 21, 2021 showed a disc herniation centrally at L4-5, but was not lateralized per se, and revealed no other obvious compressive pathology. Dr. Janssen assessed Claimant with a work-related injury, and possible plexopathy and possible radiculopathy. He stated,

> In my professional opinion, after reviewing all of this information, the patient is not clinically improving. He correlates this to a clear-cut occupational condition. He does have substantial motor weakness in more than one dermatomal distribution that is not explained on the MRI…I recommend the following: A repeat MRI scan of the lumbar spine and possibly now an EMG to correlate with this because none of this actually makes sense from a musculoskeletal standpoint. He has clear-cut objective pathology. This does not appear to be a case where subjective symptoms outweigh clinical findings."

(R. Ex. BB, p. 163).

37. Dr. Dupper reexamined Claimant on August 18, 2022, noting some improvement. He referred Claimant for another lumbar MRI and EMG of the left lower extremity.

38. Claimant underwent a third lumbar MRI on August 26, 2022. The radiologist noted an ongoing disc protrusion at the L4-L5 level indenting the right thecal sac with associated diffuse disc bulging encroaching on both neural foramina and central canal and bilateral foraminal stenosis. The radiologist's impression was: "1. No significant change compared to the September 20, 2021 MRI. 2. L4-L5 central/right paracentral disc protrusion. 3. Milder spondylotic changes at other levels." (R. Ex. DD, p. 170).

39. On August 30, 2022 Claimant was evaluated outside of the workers' compensation system at Kaiser by Dr. David Weiner. Dr. Weiner diagnosed Claimant with lower back pain with radiculopathy and recommended a referral to neurology.

40. Upon referral by Dr. Dupper, Claimant presented to neurologist Kenneth Morris, M.D. at UC Health Neurology Clinic on September 6, 2022. Regarding the mechanism of injury, Claimant reported that he felt a pop in his back while getting ready for work then subsequently lost feeling in his left leg. Dr. Morris remarked,

> I agree there is good evidence for possible L4 nerve root involvement, but symptoms also seem to extend to other nerve roots, especially sensory symptoms. MRI of the lumbar spine does not show any clear area of L4 nerve impingement. Although he does not have a history of diabetes, I think monophasic inflammatory radiculoplexopathy is still a possibility.

(R. Ex. EE, p. 173).

Dr. Morris recommended an MRI of the left lumbosacral plexus for evaluation of any structural compression and another EMG.

41. On September 26, 2022 Anjmun Sharma, M.D. performed an IME at the request of Claimant. Claimant reported that on August 4, 2021 he felt symptoms when he finished raking asphalt and then felt a pinch on August 10, 2021 when stretching. Dr. Sharma opined Claimant was not at maximum medical improvement ("MMI"), noting Claimant had ongoing pathology in his lumbar spine or in his left plexus in lower extremity evidenced by significant atrophy and weakness in the left lower extremity. Dr. Sharma wrote,

> I am very surprised that this patient has gone on for well over one year nearly 14 months since the date of injury and he is still unable to get a simple procedure to alleviate the disc herniation on the nerve root. The patient clearly has an injury. This is supported by the MRI at L4-L5. This is also supported by the EMG findings which has been completed three times now. We are reconfirming the same diagnosis over and over. At this point in time, it is highly unlikely that a new diagnosis is going to be elicited While it is true that the patient may have an injury to the plexus, this will not necessarily be able to be addressed until the primary lesion is addressed which is the lumbar spine. The patient has a significant amount of atrophy in the left lower extremity. It takes quite a bit of time for such atrophy to occur but this atrophy has occurred because the patient's nerve is not firing properly and that is because it is compressed. The patient has a compressed disc, compressing on the left L4 nerve root This is resulting in the symptoms that are all consistent in the myotomal and dermatomal pattern on physical exam…The patient does not have knee pathology. He does not have a thoracic nor does he have a cervical pathology. The patient does not have a systemic, chronic immune or inflammatory problem. In these cases where there is a chronic systemic problem, this occurs in multiple body parts and is usually bilateral and symmetrical. To even raise this as a point of issue or to deny medical care because of alternative theories or alternative realities that do not exist is simply ignoring the evidence and the data that is already available in this claim.

(Cl. Ex. 6, pp. 91-92).

He recommended a repeat MRI of the lumbar spine, a repeat EMG of the left lower extremity, a surgical consultation with a neurosurgeon, physical therapy, and an MRI of the lower plexus to completely understand whether or not there is a lesion that is also in concomitant with the injury at L4 nerve root.

42. Dr. van den Hoven conducted a third EMG on September 28, 2022, noting results showed improvement in innervation. Dr. van den Hoven concluded,

> This overall pattern while not classic for it early on and certainly not suggested on his physical examination does now suggest that his initial insult to the nerve supply of the left lower extremity was due to acute idiopathic radiculoplexus neuropathy. There clearly were abnormalities in the lumbar paraspinal muscles early on on (*sic*) needle study. While plexus concern in the pelvis is a possibility, I doubt ongoing compression as he is improving clinically as well as electrodiagnostic testing evidence is showing improvement as well. Prior lumbar imaging does not suggest a significant L4 nerve root entrapment and given his improvement now it is more consistent with noncompressive neuropathy.

(R. Ex. FF, p. 178).

Dr. van den Hoven opined Claimant would show significant additional improvement over the next 6-12 months.

43. An October 19, 2022 MRI of the sacrum and lumbar sacral plexus revealed no abnormalities.

44. Dr. Zimmer issued an addendum IME report on October 28, 2022 after reviewing additional medical records. Dr. Zimmer continued to opine that his original assessment and diagnosis of lumbosacral radiculoplexus neuropathy remained, and was reinforced by additional clinical and EMG findings. He explained that evidence of reinnervation of Claimant's proximal left lower extremity muscles is consistent with recovery of some of the nerve fibers affected by the lumbosacral radiculoplexus neuropathy. Dr. Zimmer again noted that this type of plexopathy is typically idiopathic and inflammatory and is not related to trauma. Regarding Dr. Sharma's IME report, he explained that Dr. Sharma included an assessment of the lumbar MRI scans that was at odds with MRI scan interpretations by the radiologists, as well as by the surgeons who have examined Claimant. He remarked other providers all noted the absence of a compressive lesion on the MRI.

45. Dr. Dupper attended a SAMMS conference with counsel of both parties and issued a note on November 9, 2022 changing his opinion on the causality of Claimant's condition. Dr. Dupper opined Claimant has an idiopathic lumbosacral plexopathy and that he was unable to state with more than 51% certainty the actual cause of the condition.

46. Dr. Sharma testified on behalf of Claimant by pre-hearing deposition on December 7, 2022. Dr. Sharma was admitted as a Level II accredited expert in occupational medicine. Dr. Sharma testified the diagnoses of lumbar radiculopathy and lumbar plexopathy are interchangeable and that, whether Claimant has radiculopathy or plexopathy, it is work-related. He stated,

> …So an acute injury indicated that it was something that occurred as a result of a particular incident, a particular time or perhaps a series of

events that occurred in a short period of time. He was working. He was not having any pain. You know, for the record, he has had pain in his back before, but the pain resolved quickly without any need for intervention. The pathology that we see now on the imaging studies and the EMG supports the fact that this is a work-related condition. This did occur at work. This occurred at a specific time, a specific place, and specific activity, and all of these things have contributed to what is a workers compensation injury.

Q: Okay is the controversy over radiculopathy versus plexopathy tied to the multiple dermatomes that are involved in this?

A: Yes.

Q: So could you explain that to us?

A: Sure. So let's just talk, you know, let's use some definitive terms so, you know, everybody can understand what we are saying.

When we are talking about a radiculopathy we are talking about a nerve…if you are having pain in the nerve all the way down from the back or near the root where the issue is occurring, for example a herniation, that is going to present as a radicular pain all the way down into the leg or just a small portion of it, okay, depending upon how much of an impingement is occurring in the spine.

You know, when we are talking about a plexopathy, you know, we are talking about a network of nerves, not just one nerve, which is a radicular pain, but a network of nerves.

(Dr. Sharma Dep. Tr., p. 6:14-25, p. 7:1-25, p. 8:1-7).

47. Dr. Sharma clarified that either or both of the Claimant's occupational activities of stretching and/or the motions needed for asphalt repair could cause lumbar plexopathy. He testified his conclusion regarding Claimant's condition is supported by Claimant's subjective complaints and objective findings. Dr. Sharma testified that objective clinical findings include weakness, pain, burning, tingling and atrophy, and that objective findings on MRI were an extruded fragment at L4-5. Dr. Sharma acknowledged he did not personally review the MRI film, but believed this was referenced in Dr. Blatt's report. He testified that such reference in Dr. Blatt's report indicated to him that Dr. Blatt felt the nerve was being impinged by extruded fragments that you may not be able to see on the MRI. Dr. Sharma further testified the EMGs indicated a nerve root impingement starting from the lumbar spine at the L4-5 nerve root, and that the nerve block was diagnostic because of Claimant's good initial response. Dr. Sharma acknowledged that he had not reviewed any EMGs conducted after December 9, 2021.

48. Claimant testified at hearing that, prior to the work incident he had some minor hip and lumbar issues in the past, but that the symptoms from the August 10, 2021 work incident were completely different than anything that he had previously experienced. Claimant testified that in December 2016 he experienced some pain and swelling in his hip, whereas the August 10, 2021 incident caused numbness and a burning sensation, which he had never before experienced. Claimant further testified he also experienced atrophy and weakness as a result of the work injury, which he did not have previously. Claimant testified that he has experienced some slight improvement in his condition over time, but continues to experience significant weakness.

49. Dr. Dupper testified at hearing on behalf of Respondent. Dr. Dupper is an occupational medicine physician who has been practicing since 1985. Dr. Dupper testified he initially believed Claimant's condition was work-related, but that he now agrees with the conclusions of Drs. Zimmer and van den Hoven that Claimant's condition is idiopathic. Dr. Dupper testified he also discussed the matter with Dr. Morris. Dr. Dupper further testified he was unfamiliar with the condition of lumbar radiculoplexus neuropathy prior to treating Claimant. He stated that he has since conducted some reading on the condition, but not extensively. He acknowledged that he was not qualified to answer certain questions regarding the condition. Dr. Dupper stated he has not personally reviewed any research suggesting Claimant's condition could be caused by trauma; however, he testified that the condition can be caused if there is some sort of impact on the lumbosacral spine like a major injury such as pelvic fracture with displacement. He testified that it might be possible stretching/traction could traumatize the plexus and that it could be possible to have both radiculopathy and plexopathy concurrently. Dr. Dupper did not offer an opinion on whether the recommendation for a microdiscectomy is reasonable, necessary and related, noting he is not a surgeon.

50. Dr. Zimmer testified at hearing on behalf of Respondent as an expert in neurology. Dr. Zimmer testified consistent with his IME reports and continued to opine Claimant suffers from non-work-related idiopathic lumbar radiculoplexus neuropathy. He explained lumbosacral radiculoplexus neuropathy is a disease that can affect multiple areas, including the nerve root, the plexus, and the peripheral nerve, and that each case is a little different. He stated,

> …it can be quite confusing if you're the first person to see the patient because when it starts, it could start with just one nerve root area being involved, or one plexus area being involved, or one nerve area being involved. But, you know, typically, it's on the average what we would call subacute, meaning that it starts off sort of relatively suddenly, but it can evolve over a period of days or weeks, and then it stabilizes. And then eventually, it starts to improve. So that's the typical course.

(Hrg. Tr. p. 59:21-25, p. 60:1-4).

51. Dr. Zimmer explained that Claimant's course is consistent with lumbar radiculoplexus neuropathy. He testified that the condition can look like an L4 nerve root issue at the beginning in the subacute phase, as was the case in Claimant's situation. He explained that Claimant's providers initially assessed a femoral nerve injury, then L4 radiculopathy, but that Claimant's very diffuse sensory symptoms and weakness of muscles affected multiple nerve and root areas beyond L4, encompassing the whole nerve supply from L2 to S2. Dr. Zimmer reiterated that the lumbar MRIs did not show a disc compressing the L4 nerve root or any others. He noted MRI evidence of bilateral foraminal narrowing, which he explained is typically degenerative, and was equal on both sides for Claimant. Accordingly, he stated that there was no explanation based on the lumbar MRI findings of why Claimant's symptoms were on one side. Dr. Zimmer testified there would have to be obvious disc compression on MRI to cause the significant weakness Claimant is experiencing, not simply nerve root irritation. He further explained that the pelvic MRI did not evidence any issues with the plexus.

52. Regarding the EMGs, Dr. Zimmer testified that the EMGs predominantly pointed to issues in the L4 area, but also L5-S1 and well as L5 and L3 muscles. He explained Claimant's condition results in small vessel inflammation that causes diffuse patchy problems in the lumbar area, as well as in the plexus and nerves. Accordingly, there was some confusion in the beginning of Claimant's treatment because the EMG revealed some changes indicating damage to the paraspinal muscles, which would indicate some involvement of the nerve root. He opined the last EMG performed by Dr. van den Hoven was supportive of his initial impression in that the results showed a recovery pattern in the muscles, which is typically occurs when the nerves are starting to reinnervate and typical with radiculoplexopathy neuropathy. Dr. Zimmer explained that such recovery would not occur in the event Claimant had a compression lesion in the plexus.

53. Dr. Zimmer reviewed Dr. Sharma's deposition testimony and testified that Dr. Sharma's description seems to confuse radiculopathy and plexopathy, which are different. He explained that radiculoplexopathy means that both the nerve root and the plexus are involved in an inflammatory way.

54. Dr. Zimmer further explained that lumbosacral plexopathy/lumboplexus disease is different from lumbosacral plexopathy neuropathy. He testified that the physiology of lumbosacral plexopathy/lumboplexus disease is different, that it may have multiple causes, and does not necessarily have the patchy pattern involving multiple nerve roots. Dr. Zimmer testified that, with lumbosacral plexopathy/lumboplexus disease, if you have trauma to that area it will not start in one little area and then progress to a bigger area and then a third patchy area. He explained that Claimant's condition is a distinct entity that can be differentiated from lumbosacral pathology by its course.

55. Dr. Zimmer testified that Claimant's condition - lumbar radiculoplexus neuropathy – cannot be caused by trauma and is idiopathic. He testified that plexopathy – a different diagnosis- can result from major trauma such as a pelvic fracture or severe traction such as a hip dislocation, but not low-impact activities like pushing a rake in the

hip area or stretching. Dr. Zimmer stated that Claimant's description of placing a rake near the groin area would not be near the plexus, which is located on an individual's backside. He explained that the only thing the rake would have been close to per Claimant's description was the femoral nerve, which he does not think Claimant hit because it is deep in the groin and protected by the muscle.

56. Dr. Zimmer explained that Claimant's condition involves inflammation of small blood vessels, resulting in diffuse patchy problems. He stated that such patchy distribution can also be seen in diabetics. On cross-examination, when asked if diabetes is a potential contributing factor to developing Claimant's condition, Dr. Zimmer testified,

> A: No, no I'm just saying that in some people - - it's just statistically, it's like a risk factor, that if you're - - if you're diabetic, you're statistically at a higher risk of getting a vasculitis, or a small - - small blood vessel changes like this…So - - so that's because - - like I say, anatomically, it's the same structures.
>
> In other words, with diabetes, you get small blood essel disease, which can affect different areas. And with this entity, with this inflammation, it's also the same small blood vessels that are affected, so you can get the same damage to the plexus and - - so forth from small blood vessel changes. So I'm just saying that diabetes is a common cause of small blood vessel disease. And so that's why it's - - it can look the same." (Hr. Tr. p. 81: 1-7).

(Hrg. Tr. p. 80:20-25, p. 81:1-7).

57. Dr. Zimmer acknowledged that Claimant does not have diabetes nor any other underlying disease they know of causing Claimant's condition. He testified that, because there is no evidence of other involvement and Claimant's condition is improving, there is no need to test for systemic ongoing inflammation, as there would be with an individual with a more progressive disease. Dr. Zimmer testified that most of Claimant's recovery will occur with the natural reinnervation at a rate of one millimeter per day.

58. The ALJ finds the opinions of Drs. Zimmer, van den Hoven and Dupper, as supported by the medical records, more credible and persuasive than the opinions of Drs. Blatt, Janssen and Sharma and the testimony of Claimant.

59. The ALJ finds Respondent proved it is more probable than not Claimant's disability and need for treatment is not causally related to his employment. Respondent proved by a preponderance of the evidence Claimant did not sustain a compensable work injury and Respondent is entitled permitted to withdraw its admissions of liability.

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).

Withdrawal of Admission

Withdrawal of an admission is granted prospectively, except in limited situations where the claimant is shown to have fraudulently supplied materially false information upon which the insurer relied in filing the admission. *Rocky Mountain Cardiology v. Indus. Claim Appeals Office*, 94 P.3d 1182 (Colo. App. 2004); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). *Compare HLJ Mgmt. Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990), with *Vargo v. Colo. Indus. Comm'n*, 626 P.2d

1164 (Colo. App. 1981)(retroactive relief granted where claimant made fraudulent misstatements regarding specific injury for which benefits were claimed).

When the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School District*, WC 4-702-144 (ICAO, June 5, 2012). Section 8-43-201(1), C.R.S. provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to §8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital*, WC 4-754-838-01 (ICAO, Oct. 1, 2013).

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

As found, Respondent proved it is more probable than not Claimant's disability and need for treatment is not causally related to his employment and thus not a compensable work injury.

That Claimant experienced an onset of symptoms while performing his work duties is not dispositive of the fact his work activities caused Claimant's disability or need for treatment. The mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). While Claimant initially testified he felt fine on the morning of August 10, 2021 prior to work, the records indicate Claimant reported experiencing worsening pain and numbness after August 4, 2021 and over the course of the next several days leading up to the morning of August 10, 2021. At Claimant's initial evaluations, he made no mention of feeling a pop or any other symptoms from stretching. Thus, Claimant's experience of symptoms while performing his work activities is one factor to consider among other evidence, particularly in light of Respondent's assertion of an idiopathic condition.

Throughout Claimant's course of treatment, multiple assessments have been provided including a femoral nerve injury, a lumbar plexus injury, lumbar radiculopathy, lumbar plexopathy, and lumbosacral radiculoplexus neuropathy. As elucidated in the medical records, Claimant presented with a confusing and challenging clinical picture - one in which he presented with significant objective findings on examination and on EMG, but no correlative findings on MRI. While Claimant's lumbar MRIs evidence a disc protrusion at L4-5 with mild foraminal narrowing bilaterally, each of the treating physicians - Drs. Dupper, van den Hoven, Blatt, and Morris - as well as the IME physicians retained by Respondent - Drs. Cebrian and Zimmer - and by Claimant, Dr. Janssen - all consistently opine the lumbar MRIs do not show effacement or clear neural impingement and do not correlate with Claimant's significant left lower extremity findings. Dr. Blatt noted he could not "rule out the possibility" of L4 nerve compression within the foramen and noted the MRI showed "some elevation superiorly of the L4 nerve root and foramen," but he again explicitly stated he did not see definitive nerve compression. Dr. Blatt's reference to the "possibility" of L4 nerve compression does not establish medical probability in light of the totality of the evidence in this case.

The only physician in this matter who opines there is significant nerve compression is Claimant's IME physician Dr. Sharma who, based on his interpretation of Dr. Blatt's reports, determined Claimant's condition results from a herniated disc with extruded fragments causing impingement. Such description and conclusion is not found in Dr. Blatt's reports, is not corroborated by any other medical records, and is at odds with the findings of multiple other physicians as discussed above. Moreover, as credibly testified to by Dr. Zimmer, if Claimant's condition was caused by compression or trauma, it would be seen on an MRI, particularly considering the significant weakness in Claimant's left lower extremity.

Claimant underwent extensive workup consisting of lumbar x-rays, three lumbar MRIs, a pelvic MRI, an MRI of the lumbar sacral plexus, a thoracic MRI, a left L4 selective nerve block, and three EMGs. It is undisputed the pelvic and lumbar sacral plexus MRIs revealed no abnormalities with the plexus or femoral nerve. Dr. Zimmer credibly, persuasively and thoroughly explained why it is medically probable Claimant suffers from idiopathic lumbar radiculoplexus neuropathy and not, the "possible" diagnosis (as identified by Drs. Blatt and Janssen) of lumbar radiculopathy and lumbar plexopathy. While Dr. Sharma testified that the terms lumbar radiculopathy and lumbar plexopathy are interchangeable, Dr. Zimmer credibly testified to the differences in those conditions, as well as their differences with respect to lumbar radiculoplexus neuropathy. Dr. Zimmer credibly explained that lumbar radiculoplexus neuropathy is a distinct entity that is differentiated from lumbosacral pathology by its course.

Dr. Zimmer provided a credible explanation for why Claimant's presentation and test results initially caused confusion for providers and why Claimant was initially assessed with a femoral nerve injury and L4 radiculopathy. He credibly testified that lumbar radiculoplexus neuropathy can initially appear as an issue with a specific nerve root or area, but subsequently affects multiple areas with a diffuse, patchy distribution of symptoms. As credibly explained by Dr. Zimmer, Claimant's presentation, EMG findings and negative MRI findings have been consistent with the course of lumbar

radiculoplexus neuropathy. Claimant's clinical improvement and evidence of improvement on EMGs further support the diagnosis of lumbar radiculoplexus neuropathy, as credibly opined by Drs. Zimmer and van den Hoven. Dr. Zimmer further credibly testified there is no evidence of further involvement as Claimant is clinically improving so there is no need to perform additional testing for systemic ongoing inflammation.

Dr. Zimmer's opinion is buttressed by the opinions of treating physicians and fellow neurologists Drs. van den Hoven and Morris. Dr. van den Hoven evaluated Claimant and performed each of Claimant's three EMGs and is familiar with the course of Claimant's presentation and condition. On September 8, 2021, prior to Dr. Zimmer performing any IME, Dr. van den Hoven specifically noted acute idiopathic lumbar radiculoplexus neuropathy as a possible cause of Claimant's symptoms based on his findings. Dr. van den Hoven ultimately opined Claimant's symptoms were the result of acute idiopathic radiculoplexus neuropathy based on Claimant's course. Dr. Morris also noted the possibility of an inflammatory condition as the cause of Claimant's symptoms when considering Claimant's presentation and testing. While Claimant's primary ATP Dr. Dupper initially attributed Claimant's low back and left lower extremity issues to a work-related femoral nerve injury, upon further testing, Dr. Dupper changed his opinion to conclude Claimant suffers from an idiopathic neuropathy condition, of which he was unfamiliar prior to dealing with Claimant's case.

In *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014) the Supreme Court addressed whether an unexplained fall while at work satisfies the "arising out of" employment requirement of the Workers' Compensation Act and is thus compensable. The Court identified the following three categories of risks that cause injuries to employees: (1) employment risks directly tied to the work; (2) personal risks; and (3) neutral risks that are neither employment related nor personal. The Court determined that the first category encompasses risks inherent to the work environment and are compensable while the second category is not compensable unless an exception applies. *Id.* at 502-03. The Court further defined the second category of personal risks to encompass those referred to as idiopathic injuries. These are "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, and similar conditions. *Id.* at 503. The third category of neutral risks would be compensable if the application of a but-for test revealed that the simple fact of being at work would have caused any employee to be injured. *Id.* at 504-05.

Here, the preponderant evidence demonstrates Claimant's injury and condition is idiopathic and not compensable. Drs. Zimmer and van den Hoven credibly opined Claimant's condition is idiopathic and was not caused by Claimant's work activities. Although Claimant was in the scope of his employment and performing his normal work activities when he experienced an onset of symptoms, the totality of the circumstances do not establish a sufficient causal nexus between Claimant's employment and his injury/condition. Based on the totality of the evidence, Respondent proved it is more probable than not Claimant did not sustain a compensable work injury.

Respondent does not allege Claimant provided materially false information upon which Respondent relied in filing its admission(s). As Claimant did not suffer a compensable work injury, and Respondent does not allege fraud, Respondent shall be permitted to prospectively withdraw its admission(s) of liability.

ORDER

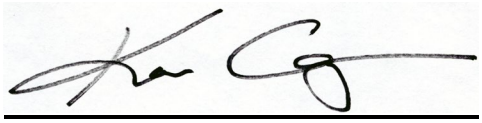
1. Respondent proved by a preponderance of the evidence Claimant did not sustain a compensable injury.

2. Respondent's request to withdraw its admission(s) of liability is granted.

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: March 29, 2023



Kara R. Cayce
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 4-899-087-007

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the L4-L5 foraminotomy requested by authorized treating provider ("ATP") Michael Rauzzino, M.D. is reasonable, necessary and related medical care.

II. If Claimant did not establish entitlement to the L4-L5 foraminotomy, whether the lidocaine patch requested by Dr. Rauzzino is reasonable, necessary and related maintenance medical care.

III. If Claimant did not establish entitlement to the L4-L5 foraminotomy, whether the methocarbamol requested by Dr. Sacha is reasonable, necessary and related maintenance medical care.

FINDINGS OF FACT

1. Claimant is a 60-year-old male who works for Employer as a package handler.

2. Claimant sustained an admitted industrial injury on September 12, 2012 when he picked up a box and felt a pop in his low back.

3. Claimant underwent medical treatment for the work injury with ATP John Sacha, M.D.

4. On December 17, 2012, Claimant underwent an EMG of the left lower extremity that was negative for left lower extremity radiculopathy.

5. Claimant was placed at maximum medical improvement ("MMI") on January 30, 2014.

6. Upon the referral of Dr. Sacha, Claimant presented to Andrew Castro, M.D. for a surgical evaluation on February 10, 2014. Claimant complained of low back pain as well as numbness and tingling in his left thigh. Dr. Castro opined surgical intervention would not benefit Claimant as Claimant's predominant complaint was low back pain with minimal involvement of nerve roots in the area. Dr. Castro recommended Claimant treat with non-operative conservative measures including physical therapy, anti-inflammatories, and other conservative modalities.

7. Respondent filed a Final Admission of Liability ("FAL") on July 17, 2014 admitting for reasonable and necessary related care from an authorized treating doctor.

8. Claimant continued to experience low back pain with radiating pain and numbness and tingling in his left leg.

9. Claimant continued to see Dr. Sacha as maintenance care, undergoing chiropractic treatment, acupuncture and taking medications. Claimant also underwent multiple left L5 and S1 lumbar transforaminal epidural steroid injections and trigger point injections performed by Dr. Sacha.

10. On December 30, 2014, Claimant presented to Dr. Sacha with increasing low back and left leg pain. Dr. Sacha recommended Claimant undergo a lumbar transforaminal epidural steroid injection.

11. On January 7, 2016, Dr. Sacha performed an L5 transforaminal epidural steroid injection/spinal nerve block as well as a left S1 transforaminal steroid injection for a diagnosis of lumbosacral radiculopathy. The injections provided Claimant relief.

12. On January 28, 2016, Claimant underwent a left greater trochanteric bursa corticosteroid injection with ultrasound guidance, which provided Claimant relief.

13. On September 15, 2016, Claimant underwent an L5 transforaminal steroid injection and left S1 transforaminal steroid injection with Dr. Sacha. Dr. Sacha noted Claimant had a diagnostic response to the injection, which provided Claimant some lasting relief.

14. Claimant returned to Dr. Sacha on December 1, 2016 reporting ongoing low back and left leg pain. Claimant reported that, if not for the chiropractic care and acupuncture, his symptoms would be intolerable.

15. On April 14, 2017, Dr. Sacha noted that since he last saw Claimant, Claimant had experienced a flare in severe pain in the low back with radiation to the left leg with increased numbness and tingling.

16. On April 26, 2017, Claimant returned to Dr. Sacha who performed an L5-S1 transforaminal epidural steroid injection/spinal block as part of his maintenance follow-up.

17. On May 3, 2018, Dr. Sacha noted that Claimant was returning under maintenance medical care for the “same distribution as his current pain” and performed an L5 transforaminal epidural steroid injection/nerve block as well as an S1 transforaminal epidural steroid injection/nerve block.

18. On October 4, 2018, Claimant returned to Dr. Sacha who indicated that Claimant had a diagnostic response at the L5 level, consistent with L5 radiculopathy, and placed a request for another repeat Left L5 transforaminal injection.

19. On February 7, 2019, Claimant underwent a left L5 transforaminal epidural steroid injection performed by Dr. Sacha which provided relief.

20. Claimant returned to Dr. Castro on May 24, 2019 for an evaluation of low back pain into the buttock and legs. Dr. Castro again remarked that Claimant’s back pain was his predominant complaint. He noted circumferential left lower extremity pain, but that

the low back pain was still greater than the leg pain. Dr. Castro further noted that a recent EMG revealed chronic S1-L5 radiculopathy. He reviewed x-rays and MRIs, noting that a disc bulge at L4-L5 could be extending into the foramen causing radiculopathy. Dr. Castro stated, "Certainly, there is not severe nerve encroachment at any of the levels. The foraminal stenosis seems to be more on the left side at L4-L5 than any other levels." (R. Ex. B., p. 34). He recommended that Claimant undergo a new lumbar MRI to better evaluate neural encroachment.

21. On August 28, 2019, Claimant again underwent a left L5 transforaminal epidural steroid injection/spinal block performed by Dr. Sacha which provided relief.

22. On July 16, 2020, Claimant returned to Dr. Sacha who noted that Claimant was there for maintenance care under a September 12, 2012 work-related injury. Dr. Sacha performed a trigger point injection.

23. Claimant returned to Dr. Sacha on August 6, 2020 for his repeat trigger point injection.

24. Dr. Sacha continued to recommend trigger point injections, which were denied by Respondent.

25. The parties went to hearing on January 7, 2021 after which the Court entered an Order on April 2, 2021 authorizing the trigger point injection recommended by Dr. Sacha. The findings of that Order (Cl. Ex. 7) are incorporated herein by reference.

26. On April 19, 2021, Claimant returned to Dr. Sacha who noted Claimant continued to experience ongoing low back pain, left buttock pain, and left posterior thigh pain. Dr. Sacha administered trigger point injections to Claimant on May 10, 2021.

27. On August 31, 2021, Dr. Sacha noted that although the injections were providing temporary relief, it may be time for Claimant to consider surgery, stating:

> I did do a maintenance followup visit today with [Claimant]. Since last being seen, he is still having ongoing low back and left leg pain. He is getting some relief either with the lumbar epidurals or the trigger point injections for about 2 weeks, then the pain returns. He is getting increased leg pain and cramping. At this point, this gentleman has been under maintenance care for a prolonged period, and I discussed with him that it might behoove him to start considering lumbar spine surgery, which we put off on this gentleman. He now does want to consider it. We will get a repeat MRI of the lumbar spine, compare to previous, and then assess to see whether this is reasonable.

(Cl. Ex. 8, p. 133).

28. On October 11, 2021, Claimant returned to Dr. Sacha who noted the following:

> [Claimant] did have a repeat MRI today that we did do as maintenance. It does show progression and worsening of his L4-5 spinal stenosis. It is not so much the canal that is narrow. The lateral recess on the left-greater-than-right side is worsening, and this is consistent with my findings on this gentleman's transforaminal injection of him having fairly severe foraminal stenosis of the left L5 spinal nerve. At this point, I recommend he get a surgical reevaluation with Dr. Castro. This is a gentleman who has been very good at maintaining his work status, working, and taking minimal medications. At this point, I do feel that surgical intervention is inevitable.

(Id. at p.135).

29. Dr. Castro reexamined Claimant on November 5, 2021. He reviewed Claimant's September 20, 2021 lumbar MRI report, noting a L4-5 left bulge with left foraminal annular tear results and mild to moderate left and mild right foraminal narrowing without spinal canal stenosis. He further noted the L5-S1 minimal disc bulge resulted in mild right neural foraminal narrowing. Dr. Castro recommended that he review the actual MRI images to make further evaluation and recommendations.

30. Claimant returned to Dr. Castro on December 6, 2021. Dr. Castro noted Claimant described ongoing back pain without radiating symptoms. He concluded surgical intervention was not necessary and referred Claimant back to Dr. Sacha to consider other physiatry interventions. He opined Claimant was at MMI from a spinal surgery standpoint.

31. On January 17, 2022, Claimant presented to ATP Michael Rauzzino, M.D. for a second opinion on whether he is a candidate for a microdiscectomy. Claimant reported continued severe pain in his back and radicular symptoms into his left lower extremity. Dr. Rauzzino noted,

> We reviewed his images at length. We used various models and diagrams in the clinic to discuss his pathology. [Claimant] has been dealing with his symptoms for several years. He has pain in his back radiating down his left leg. Most of his symptoms are in his left leg. His imaging studies show degenerative changes at L4-S1, particularly with left foraminal narrowing on the left at the L4-L5 level.
>
> We discussed various treatment options from doing nothing to more conservative modalities such as time, rest, medications, physical therapy, and additional injections. We discussed surgery as well. He is not interested in any injections or therapy. He is looking for a more definitive option including surgery

(Cl. Ex. 9, p. 158).

Dr. Rauzzino recommended proceeding with an EMG/NCS study and flexion/extension x-rays to better assess Claimant's pathology.

32. Dr. Sacha performed a repeat EMG/NCS on March 7, 2022. He remarked that the test results showed evidence of work-related chronic left L5 and S1 radiculopathy, as well as a sensory peripheral polyneuropathy that was not work-related.

33. On March 21, 2022, Claimant returned to Dr. Rauzzino with complaints of worsening back and left leg pain. Dr. Rauzzino noted that injections performed by Dr. Sacha at L4-5 provided diagnostic relief with subsequent return of symptoms. He further noted Dr. Castro preferred to manage Claimant non-operatively with injections, but Claimant preferred a more definitive fix. Dr. Rauzzino remarked that imaging obtained in September 2021 was of poor quality but suggested significant foraminal narrowing at L4-5 consistent with Claimant's symptomatology. He noted that an EMG performed by Dr. Castro on March 7, 2022 showed chronic left L5-S1 radiculopathy and chronic peripheral neuropathy consistent with Claimant's complaints of back and leg pain. Regarding treatment, Dr. Rauzzino noted,

> I told him I would not recommend a large surgery but instead a minimally invasive L4-L5 decompression in the hope of alleviating his leg symptoms. I explained that it would not take away all of his back pain but would help with the leg symptoms. I offered to have him return to Dr. Castro to perform the surgery as Dr. Castro knows him best; we would be happy to do the surgery if this was the patient's preference. We will arrange to get an MRI of better quality and he would need a note from his cardiologist to clear him for surgery.

(Id. at pp. 159-160).

34. Dr. Rauzzino submitted a request for authorization for an L4-L5 foraminotomy on March 21, 2022.

35. Respondent denied Dr. Rauzzino's surgery request and scheduled an independent medical examination ("IME") with Neil Brown, M.D.

36. Claimant returned to Dr. Sacha on March 29, 2022. Dr. Sacha agreed with Dr. Rauzzino's recommendation for surgery, stating that "probably [the surgery] should have been done some time ago for this patient with a fairly severe L5 radiculopathy, but because of multiple medical issues and the patient's own request to try and avoid it, we have not done that." (Cl. Ex. 8, p. 143). He noted Claimant was now healthy enough to undergo the surgery.

37. On May 2, 2022 Dr. Sacha noted Claimant was awaiting authorization for surgery. He again noted Claimant was now healthy enough for the surgery, and has ongoing objective findings of lumbar radiculopathy.

38. On May 5, 2022 N. Neil Brown, M.D. performed an Independent Medical Examination ("IME"). Dr. Brown noted Claimant initially had low back symptoms but developed left-sided radicular symptoms a few weeks later, which he stated was not unusual. He also noted Claimant's radicular symptoms have persisted through the most recent evaluation by Dr. Rauzzino on March 21, 2022.

39. Dr. Brown reviewed an October 31, 2012 lumbar MRI, noting a broad-based posterior disc bulge at L4-L5 with foraminal narrowing which could abut the L4 nerve root; however, he opined that the findings were incidental since there was no evidence of a L4 radiculopathy. There was also a minimal central disc bulge at L5-S1. Dr. Brown noted the December 17, 2012 EMG showed no evidence of any acute or chronic radiculopathy, but that an April 11, 2019 EMG confirmed chronic L5 and a possible S1 radiculopathy. Regarding the September 20, 2021 lumbar MRI, Dr. Brown noted findings indicating mild bulging to the left at L4-5 with a left foraminal annular tear and minimal disc bulging at L5-S1. He opined that the findings are non-operative, stating there is no documentation of objective findings which could account for the EMG findings on April 11, 2019. Dr. Brown further noted that Dr. Sacha opined there had been interval progression of spinal stenosis, which he stated is contrary to the radiological report.

40. Regarding the March 30, 2022 MRI Dr. Brown noted,

> There was moderate bilateral foraminal stenosis at L4-5 and moderate right-sided foraminal stenosis at L5-S1. Comment is made about disc material at L3-4 abutting the L4 nerves, at L4-5 abutting the L5 nerves bilaterally slight compression of the left L5 nerve…There is no evidence of significant central canal spinal stenosis reported.

(R. Ex. A, p. 22).

Dr. Brown again remarked that Claimant has no evidence of L4 radiculopathy and this was the first radiological documentation of a possible cause of the patient's L5 radiculopathy.

41. Dr. Brown opined that the surgery recommended by Dr. Rauzzino is reasonable and necessary, but not causally related to Claimant's work injury, stating,

> His clinical course since his remote occupational Injury on September 12, 2020 is manifested by pain behaviors which would signify an exaggerated psychological response to his physiological disorder. Surprisingly, no psychological counseling has been recommended. Lack of treatment of co-existing psychological disorder is associated with poor treatment outcomes so any surgical intervention should be deferred until his psychological condition had been adequately treated. Consequently, it is my opinion that his current subjective complaints are causally related to his occupational injury on September 12, 2012 but there is no objective evidence of any compromise of the L5 nerve roots until several years after his accident. The subjective symptoms may be psychological manifestations of his physiological injury. One does not operate on patients with subjective symptoms but no objective evidence of neural compression of the appropriate nerve roots. The findings on the March 30, 2022 MRI are simply age-related progression of lumbar degenerative disc disease. Consequently, any indication for surgery would not be related to

> his occupational injury but rather simply age related degenerative changes.

(Id. at p. 23).

42. Dr. Rauzzino subsequently submitted a request for authorization of lidocaine, which was denied by Respondent.

43. The parties subsequently attended a SAMMS Conference with Dr. Castro, who outlined his opinion in a letter dated September 22, 2022. Dr. Castro noted he had seen Claimant on several occasions and Claimant primarily complained of low back pain without lumbar radiculopathy. He noted the MRI findings of mild to moderate degenerative changes. He stated, "Specifically, I do not believe that a lumbar decompression is indicated in relation to his initial symptoms from an accident which occurred several years ago where he did not have radicular or claudicatory-type symptoms initially." (R. Ex. B, p. 26).

44. Dr. Castro reviewed the IME report of Dr. Brown, noting he agreed with the opinion of Dr. Brown but differed in that he did not believe surgery was indicated "irrespective of causality or degenerative changes." (Id.). Dr. Castro noted Claimant primarily has low back pain with mild findings without substantial neurological impingement. He further noted that he reviewed Dr. Rauzzino's March 21, 2022 medical note, and opined that his imaging did not support substantial neurological impingement. Dr. Castro reiterated his opinion that surgical intervention is not reasonable in this matter and is not related to Claimant's occupational injury of September 12, 2012.

45. Dr. Sacha reviewed the reports of Drs. Castro and Brown and issued a report dated October 4, 2022. Dr. Sacha continued to opine that Claimant is a surgical candidate for an L4-5 and possibly L5-S1 laminectomy and discectomy. He explained,

> In reviewing this patient's case, I do believe Dr. Castro is an excellent surgeon; however, he does not have all the information correct on this patient. Here's what we know based on the records. This patient (*sic*) MRI, which I am reviewing as we look at (*sic*), does have evidence of moderate foraminal narrowing at the L4-5 level. He also has mild-to-moderate foraminal narrowing in the L5-S1 level. This gentleman did not have a normal EMG, in fact, his EMG showed evidence of a chronic left L5 and S1 radiculopathy, and finally, I do not believe either Dr. Brown or Dr. Castro reviewed my procedure notes for the spinal nerve blocks for this gentleman. Every time this gentleman has had a transforaminal epidural injection/spinal nerve block, not only has he had a diagnostic response, but he has been noted during the procedure to have reproduction of symptoms when injected to the L5 neural foramen and moderate to severe compression of the L5 spinal nerve, especially on the left side. These are all very specific objective evidence of neural impingement. The notations by both Dr. Brown and Dr. Castro above are completely incorrect with respect to this, and the data is very specific and all of the diagnostic and

> therapeutic studies as outlined above. This gentleman meets all the medical treatment guidelines for lumbar spine surgery. He has all the objective findings on physical exam and although there are times when he has more back pain and leg pain, his pain has been consistent and the complaint is consistent dating all the way back to this gentleman's original date of injury of September 2012 and his practitioner has been the physician treating him over the entirety of this course and performing both his electrodiagnostic studies as well as transforaminal injections. This patient needs all the medical treatment guidelines appropriateness for the surgery.

(Cl. Ex 3, p. 34).

46. Dr. Brown reviewed Dr. Castro's September 22, 2022 letter and Dr. Sacha's October 4, 2022 report and issued an addendum to his IME report on November 21, 2022. Dr. Brown continued to opine surgical intervention is not indicated for Claimant.

47. Claimant returned to Dr. Sacha on November 29, 2022 who noted, "At this point, he does have L5 radiculopathy that is longstanding with foraminal compromise and does want to move forward with surgery. He has likely been a surgical candidate for a long period, but this patient was against any type of surgical intervention." (Cl. Ex. 8, p. 149).

48. Pending authorization for surgery, Dr. Sacha submitted a request for methocarbamol, which was denied by Respondent.

49. Claimant credibly testified at hearing. He testified the injections performed by Dr. Sacha have helped him be able to continue to perform his work duties, but that the relief from the injections is not sustained. Claimant testified he continues to experience symptoms of low back pain and radiating pain into his left leg and toes, and that the symptoms have worsened. Claimant has not sustained any new injuries to his low back. He stated he cannot perform more than two to three hours of work activities without pain. Claimant testified he understands the risks of the recommended surgery and wants to undergo the surgery to relieve his excruciating pain. Claimant stated that, if he is unable to undergo the recommended surgery, he wants the lidocaine and methocarbamol authorized to provide temporary pain relief.

50. The ALJ finds the opinions of Drs. Sacha and Rauzzino, as supported by the medical records and Claimant's testimony, more credible and persuasive than the opinions of Drs. Castro and Brown.

51. Claimant proved it is more probably true than not the L4-L5 foraminotomy requested by Dr. Rauzzino is reasonable, necessary and related medical care.

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).

Medical Treatment

Respondents are liable for medical treatment that is reasonable and necessary relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S.; *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). 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). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As found, Claimant proved it is more probable than not the surgery recommended by Dr. Rauzzino is reasonably necessary and causally related medical treatment. Respondents rely on the opinions of Dr. Castro and Respondent IME

physician Dr. Brown. While Dr. Brown concluded that the surgery is reasonable and necessary, he opined that objective findings of L5 radiculopathy were not evidenced until several years after Claimant's injury and are due to degenerative changes. Dr. Castro also believes Claimant's MRI findings are degenerative, but further found no objective evidence of substantial neurologic impingement. Dr. Castro opined that the surgery is not causally related or otherwise indicated, repeatedly stating Claimant's primary complaint is low back pain without lumbar radiculopathy and that he did not have radicular symptoms initially.

Both Dr. Rauzzino and Dr. Sacha address the purported lack of and delay in objective findings. Dr. Rauzzino credibly noted Claimant has been experiencing low back and left leg symptoms for several years. He reviewed the MRIs and EMGs and credibly and persuasively opined the imaging shows objective evidence of significant left foraminal narrowing at L4-5 and chronic L5-S1 radiculopathy consistent with Claimant's symptomatology. Dr. Rauzzino recommended surgery to help alleviate Claimant's left leg symptoms caused by the work injury.

Dr. Rauzzino's opinion is supported by Dr. Sacha, who has served as Claimant's primary ATP for over 10 years and is well-familiarized with Claimant's presentation and clinical course. Contrary to Dr. Castro's opinion that Claimant's primary concern is back pain, Dr. Sacha credibly explained that, while there are occasions Claimant has more back than leg pain, Claimant's back and leg pain have been consistent and dates back to his date of injury. Dr. Sacha's opinion is supported by Claimant's credible testimony regarding his symptoms as well as the medical records documenting complaints of, and treatment for, both back and leg pain over the course of several years. Dr. Sacha further credibly and persuasively opined that, in addition to the findings on MRI and EMG, Claimant's physical exam findings and his diagnostic responses to several injections are objective evidence of significant neural impingement warranting surgery. Dr. Sacha has reviewed the opinions of Drs. Brown and Castro and continues to opine that the recommended surgery is related to Claimant's work injury and reasonably necessary to relieve its effects. Based on the totality of the evidence, Claimant has met his burden to prove the L4-5 foraminotomy recommended by Dr. Rauzzino is reasonable, necessary and causally related medical treatment.

ORDER

It is therefore ordered that:

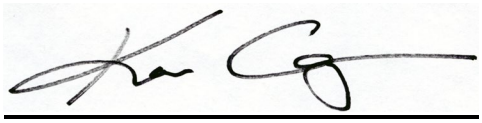
1. Respondents shall authorize and pay for the L4-L5 foraminotomy requested by Dr. Rauzzino.

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: March 31, 2023



Kara R. Cayce
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 5-198-596-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that the following medical treatment is reasonably necessary to cure or relieve the effects of his work-related injury:

    a. Treatment at Centura/Lakewood Emergency and Urgent Care;

    b. Chiropractic care;

    c. Gabapentin;

    d. Lidoderm patches; and

    e. Left L4-5 and L5-S1 transforaminal epidural steroid injection.

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury to his lower back on January 3, 3022.

2. Claimant is the owner of Employer, and on the date of injury, contacted Insurer regarding his injury. Insurer instructed Claimant to seek medical treatment at Centura/Lakewood Emergency and Urgent Care center ("Centura").

3. On January 3, 2022, Claimant went to Centura and was examined by Case Kerr Newsom, D.O. Claimant reported pain in his low back with radiation down his left leg after lifting a heavy box at work that day. X-rays performed that day showed minimal degenerative changes and were negative for fractures. Claimant was diagnosed with a lumbar strain with possible radiculitis, and prescribed Lidoderm patches and naprosym. (Ex. 6).

4. On January 7, 2022, Claimant saw Gary Zuehlsdorff, D.O., at On the Mend Occupational medicine on January 7, 2022. Thereafter, Dr. Zuehlsdorff served as Claimant's authorized treating physician (ATP). Claimant reported low back pain and left leg symptoms. Dr. Zuehlsdorff diagnosed Claimant with a lumbar sprain/strain, back spasms, and left leg dysesthesias, ordered a lumbar MRI, and prescribed medications and physical therapy. (Ex. 3).

5. On January 11, 2022, Dr. Zuehlsdorff prescribed Claimant Lidoderm patches, and referred Claimant for chiropractic care. Claimant received six chiropractic visits, and reported to Dr. Zuehlsdorff he received relief from the chiropractic treatments. (Ex. 3).

6. On March 14, 2022, Dr. Zuehlsdorff referred Claimant for an evaluation with a physiatrist. Insurer denied authorization for the Lidoderm patches and the physiatry referral. (Ex. 3).

7. On April 19, 2022, Claimant underwent a lumbar MRI. On April 26, 2022, Claimant saw Dr. Zuehlsdorff, who interpreted the MRI as showing a disc extrusion at the left paracentral region at L4-5. Dr. Zuehlsdorff opined that the disc extrusion was indicative of an acute injury, not chronic and was consistent with Claimant's acute injury pattern. As of April 19, 2022, Insurer had not approved Claimant's prescription for Lidoderm patches. Claimant testified he obtained the patches using his health insurance, and the patches provided him with relief. Dr. Zuehlsdorff reiterated his request for a referral to physiatrist Dr. Trainor, and prescribed 30 Lidoderm patches. (Ex. 3).

8. On July 11, 2022, Claimant saw Dr. Trainor for evaluation. After examination, he diagnosed Claimant with lumbar spinal stenosis, and prescribed Gabapentin. Dr. Trainor also recommended an L4-5 L5-S1 transforaminal epidural steroid injection. Claimant initially chose to delay the procedure but ultimately decided to go forward with the injection. On August 3, 2022, Dr. Trainor requested authorization for left L4-5 and L5-S1 transforaminal epidural steroid injection (TESI) from Insurer. (Ex. 5). Insurer denied authorization for the procedure.

9. On November 1, 2022, Claimant saw Dr. Zuehlsdorff. Dr. Zuehlsdorff noted that Insurer continued to deny authorization of the TESI, and had denied further chiropractic care. Dr. Zuehlsdorff continued to prescribe gabapentin, and Lidoderm patches, but noted Claimant was obtaining Lidoderm through his primary care physician because of the denial. (Ex. 3)

10. As of November 30, 2022, Insurer had not authorized the requested TESI. Dr. Trainor's office indicated they would again submit the request for approval to Insurer. (Ex. 5).

11. On January 3, 2023, Claimant saw Dr. Zuehlsdorff again. He noted the TESI had not been approved, and Claimant was continuing to obtain Lidoderm patches through his primary care physician. Claimant reported receiving relief with the Lidoderm patches. (Ex. 3).

12. On January 23, 2023, Dr. Zuehlsdorff responded to a letter from Claimant's counsel regarding Claimant's need for treatment. In the letter, he indicated the TESI recommended by Dr. Trainor, and chiropractic treatment was reasonable and necessary to cure and relieve the effects of, and causally related to Claimant's work injury. He further indicated if the treatment failed, Claimant may need a surgical consult. (Ex. 3).

13. Dr. Zuehlsdorff testified at hearing and was admitted as an expert in occupational medicine. Dr. Zuehlsdorff testified the treatment Claimant received at Centura,

chiropractic care, Lidoderm patches, Gabapentin, and the TESI injection were reasonable and necessary to cure or relieve the effects of Claimant's work injury, and the treatment was causally related to Claimant's January 3, 2022 injury. Respondents submitted surveillance footage of Claimant driving a vehicle and photographs of Claimant using a hand-held leaf blower. (Ex. F & G). Dr. Zuehlsdorff credibly testified the surveillance videos did not demonstrate Claimant performing activities inconsistent with his presentation to Dr. Zuehlsdorff or any recommended work restrictions. Dr. Zuehlsdorff further testified Claimant's use of a leaf blower was not inconsistent with his injuries, presentation, or restrictions. Dr. Zuehlsdorff's testimony was unrebutted, credible, and persuasive.

14. Claimant testified at hearing that he had undergone one course of chiropractic treatment, which improved his function and gave him relief. He also indicated he received pain relief and increased function from use of Lidoderm patches, and he continued to use them, but obtained them through is private health insurance, because Insurer had not authorized them. Claimant also testified that Insurer had denied authorization for Gabapentin, and that it also provided relief. Claimant further testified he wished to undergo the TESI injection prescribed by Dr. Trainor. Claimant's testimony was unrebutted and credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find a fact 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).

Specific Medical Benefits At Issue

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. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Diagnostic testing which is reasonable and necessary for treatment of a work-related injury is compensable. *Beede v. Allen Mitchek Feed and Grain*, W.C. No. 4-317-785 (ICAO Apr. 20, 2000). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the medical treatment he received at Centura, the Lidoderm patches, Gabapentin and chiropractic care prescribed and recommended by Dr. Zuehlsdorff, and injections recommended by Dr. Trainor, are reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. The evidence establishes Claimant went to Centura on the date of his injury for evaluation and treatment directly related to is work injury. Claimant credibly testified he was instructed to go to Centura by Insurer. Dr. Zuehlsdorff' testified such treatment was reasonable, necessary, and causally related to Claimant's injury. With respect to Lidoderm, Gabapentin, and chiropractic care, Claimant's medical records demonstrate he contemporaneously reported relief with these treatments when he saw Dr. Zuehlsdorff. Dr. Zuehlsdorff testified these treatments were reasonable, necessary, and causally related to his work injury. Finally, Dr. Zuehlsdorff and Dr. Trainor have both recommended lumbar TESI injections. Dr. Zuehlsdorff testified this course of treatment is reasonable and necessary to cure or relieve the effects of Claimant's work injury. The ALJ finds Dr. Zuehlsdorff's unrebutted testimony credibly and persuasively establishes it is more likely than not that the treatment for which Claimant seeks authorization and

payment was reasonable and necessary to cure or relieve the effects of Claimant's January 3, 2022 back injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay the cost of Claimant's treatment at Centura/Lakewood Emergency and Urgent Care Center, according to the Worker's Compensation Medical Fee Schedule.

2. Claimant's request for authorization of the left L4-5 and L5-S1 transforaminal epidural steroid injections recommended by Dr. Trainor and Dr. Zuehlsdorff is granted.

3. Claimant's request for authorization of chiropractic treatment, Lidoderm patches, and Gabapentin is granted.

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

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

DATED: March 7, 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 5-148-539-004

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of employment with [Redacted, hereinafter TO] and/or [Redacted, hereinafter AA].

2. If Claimant established the existence of a compensable injury, whether Claimant is entitled to medical benefits.

3. If Claimant established the existence of a compensable injury, whether Claimant is entitled to temporary disability benefits.

FINDINGS OF FACT

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

Parties

1. Claimant is a 64-year-old man who contends he was employed by both TO[Redacted] and AA[Redacted]. Claimant contends he sustained an injury arising out of the course of employment with TO[Redacted] and AA[Redacted] on December 3, 2019.

2. AA[Redacted] is an adult day care facility located in Aurora, Colorado that provides services to older and disabled adults. These services include planned activities, meals, and transportation to various locations, such medical appointments, pharmacies, immigration offices, and others. As part of its services, AA[Redacted] transports clients to and from their homes to AA's[Redacted] facility. [Redacted, hereinafter AB] owns and operates AA[Redacted]. AB[Redacted] testified that all individuals who perform services for AA[Redacted] are independent contractors, consequently, AA[Redacted] does not maintain workers' compensation insurance.

3. TO[Redacted] is a home health care agency that provides in-home health care, personal care, and other services to its clients, including assistance with activities of daily living, such as laundry and trash removal. TO[Redacted] employs approximately 110 individuals. AB[Redacted] also owns TO[Redacted], and credibly testified that TO[Redacted] is a distinctly different business entity than AA[Redacted], and maintains a different tax ID, different payroll, and provides different services. TO[Redacted] maintains workers' compensation insurance through Insurer.

Background and Claimant's Relationship with Respondents

4. Beginning in 2013, Claimant was a client of Aurora Mental Health Center (AuMHC), receiving assistance dealing with issues that developed after Claimant served as an

interpreter for the United States Army in the Iraq war. Sometime in 2013, Claimant was working to obtain a certificate in family support through AuMHC, which required Claimant to perform volunteer work. Claimant began volunteering at AA[Redacted] in 2013 or 2014. (Ex. N). Claimant testified he provided transportation, served as a translator, helped serve meals, and provided other services, and that he dealt entirely with AB's[Redacted] husband, [Redacted, hereinafter SA], and had no communications with AB[Redacted].

5. Claimant testified that after completing his certificate in 2014, he worked for and was paid by AuMHC until 2019. He testified he worked for AuMHC on the weekends, and worked for AA[Redacted] during the week. Claimant testified he continued to provide the services to AA[Redacted] clients, such as translating, serving meals, and providing transportation from 2014 through 2019. Claimant was not paid for any of the services he alleges he provided during this time period. AB[Redacted] testified that Claimant was a volunteer at AA[Redacted], and occasionally came to AA[Redacted] to eat meals, but was not a staff member and was not employed by AA[Redacted]. No documentary evidence was presented establishing Claimant was employed by AA[Redacted] at any time from 2014 through summer 2019.

6. AB[Redacted] testified that Claimant never applied for a job and did not fill out an application for employment or to be an independent contractor. However, in the summer or fall of 2019, Claimant asked AA[Redacted] for a job. (Ex. N). AA[Redacted] agreed to train Claimant as a driver/client assistant for two months with pay. (Ex. N and R). Claimant began transporting AA[Redacted] clients from their homes to AA[Redacted], sometime in the summer or fall of 2019. Claimant testified he initially used his own vehicle, and later used a van owned by AA[Redacted] to transport clients.

7. Although AB[Redacted]testified Claimant was not paid for his services, AA[Redacted] did issue Claimant at least two checks in the amount of $1,500.00 from its payroll account on November 1, 2019 and December 2, 2019. (Ex. A). Claimant testified he was also paid $1,500 per month in September and October 2019, although no credible evidence of such payments was admitted.

8. Claimant testified that at various times, SA[Redacted] promised to pay Claimant, make Claimant a partner in the business, make him a manager, and buy him a home. No credible evidence of the alleged promises was presented at hearing.

<u>December 3, 2019 Incident</u>

9. In December 2019, AB[Redacted] and SA[Redacted] were out of the country, and their son, [Redacted, hereinafter NB], served in a supervisory role at AA[Redacted] during their absence. On December 3, 2019, an incident occurred between Claimant and NB[Redacted], during which Claimant asserts he sustained injuries to both knees. Claimant testified NB[Redacted] confronted him while Claimant was getting in one of AA's[Redacted] vans, pushed Claimant against the van, hit Claimant's legs with the van door two times, and hit claimant in the face. Claimant did not work again for

AA[Redacted] after December 3, 2019. For the reasons described below, Claimant's testimony regarding the incident with NB[Redacted] was not credible.

10. Claimant testified after the incident, he left the scene, went home, and slept, and that he went to a doctor a week later. No documentary evidence was presented admitted indicating Claimant sought medical care the week after December 3, 2019.

11. In January 2020, Claimant contacted AA[Redacted] and demanded $150,000 for back wages he asserted he was owed from 2014 to 2019. When AA[Redacted] refused to pay Claimant $150,000, Claimant began filing a series of claims against AA[Redacted]. Claimant testified he decided to file "everything" against AA[Redacted] as a way of obtaining the money he believed he was owed for alleged back wages.

12. On February 3, 2020, Claimant filed a Workers' Claim for Compensation against AA[Redacted] claiming to have suffered an injury to his large toe on December 12, 2017. (Ex. B).

13. Claimant filed a claim for unemployment benefits against AA[Redacted], which was denied on February 10, 2020. (Ex. CC).

14. On February 13, 2020, Claimant contacted the Aurora Police Department (APD) and reported that he had been assaulted by NB[Redacted]on December 3, 2019. The APD investigated and prepared a police report on February 13, 2020. (Ex. D). Claimant reported to APD that on December 3, 2019, as he "was getting out of the van, NB[Redacted] approached him from behind and shoved him up against the van a couple of times while yelling at him to turn over the van keys." Claimant also alleged he attempted to run into the building "but NB[Redacted] grabbed him by the back of his coat and yanked him back before he could reach the front door." Claimant reported he "decided to run off and left the premise." When questioned about injuries, Claimant "stated he had a few scratches on his legs from being shoved up against the van." Claimant indicated he had not photographed the injuries which had healed. The APD report indicates a witness – [Redacted, hereinafter MB] -- was interviewed and did not corroborate Claimant's report
that NB[Redacted] physically assaulted Claimant. (Ex. D).

15. Claimant later filed a complaint with the Colorado Civil Rights Division (CCRD) against AA[Redacted], alleging he was harassed and subject to unequal terms and conditions based on his national origin, disability, and/or retaliation for engaging in protected activity. (Ex. N). After investigation, the CCRD issued an order dismissing Claimant's complaint on January 13, 2021. (Ex. N).

16. Claimant also filed a claim against AA[Redacted] with the Equal Employment Opportunity Commission (EEOC). The EEOC adopted the CCRD's findings and issued a Dismissal and Notice of Rights on April 5, 2021. (Ex. P). AB[Redacted] testified that Claimant also filed complaints or grievances against AA[Redacted] with OSHA and the IRS.

17. On July 1, 2021, Claimant filed a civil lawsuit in which he asserted employment related claims against AA[Redacted], and SA[Redacted] and AB[Redacted] individually. Claimant did not assert he was employed by TO[Redacted] in the civil lawsuit. Ultimately, the parties reached a settlement and resolved the civil suit. (Ex. S, T, and BB).

18. No evidence was admitted indicating Claimant filed any claim or complaint against TO[Redacted], or that Claimant asserted he was employed by TO[Redacted] in any of the claims filed.

19. On September 24, 2020, Claimant filed a Workers' Claim for Compensation against AA[Redacted] related to the December 3, 2019 incident. Claimant asserted he sustained "fracture, strain" injuries to both knees on December 3, 2019. Claimant described the injury as occurring when "[NB[Redacted]] aggressively pushed the car door into my left knee, causing me to twist my right leg/knee." Claimant did not assert he was employed by TO[Redacted] in the September 24, 2020 Workers' Claim for Compensation. (Ex. H).

CLAIMANTS' MEDICAL TREATMENT

20. Claimant's first documented visit with any healthcare provider after the alleged December 3, 2019 work injury was a visit at AuMHC on February 5, 2020. Although the record references an altercation at work, it does not reference any physical injuries from the alleged altercation. (Ex. C).

21. Claimant's first documented medical evaluation for any physical injuries after December 3, 2019, was on June 3, 2020, when Claimant saw Khatera Jahan, FNP-C, at Colorado Alliance for Health Equity and Progress (CAHEP). At that visit, Claimant reported his knee pain began in December 2019 when someone opened a car door that hit his knee. Claimant reported his knee was initially painful with bruising and pain had continued to increase since. On examination, Claimant was noted to have inflammation present on the left lateral knee, tenderness with palpation, mild pain with flexion and extension and a negative McMurray's test. Claimant was referred for x-rays of the left knee. (Ex. E).

22. An x-ray of Claimant's left knee was performed on June 22, 2020, which was interpreted as showing normal soft tissues, narrowed joint spaces in 3 compartments, with prominent osteophytes and sclerosis. It was also noted that Claimant had a large loose osteochondral joint bodies in the suprapatellar bursa. (Ex. F).

23. On June 22, 2020, Claimant was evaluated at Colorado Joint Replacement by Todd Miner, M.D. Claimant reported that his left knee pain began on December 5, 2019 as the result of "another … employee purposefully hit him in the leg while opening the car door. The car door struck him on the outside of the knee." Claimant reported the pain and swelling initially improved but began to worsen more recently. (Ex. G). Dr. Miner noted Claimant had a remote history of ACL reconstruction on the left knee. Dr. Miner indicated "At this time I believe his symptoms are primarily related to the heterotopic ossification that is superior lateral of his kneecap as well as to the advanced osteoarthritis

of the left knee. … I feel both his arthritic condition and the fairly large loose osseous bodies in the suprapatellar region are likely aggravating his knee and contributing to his knee symptoms. He does have very severe tricompartmental arthritis of his left knee which is most likely attributing to the pain he is experiencing as well." Dr. Miner performed a left knee corticosteroid injection and recommended physical therapy. Although Dr. Miner
referenced a workers' compensation claim, he did not offer any credible opinion indicating Claimant's alleged work injury either caused or contributed to Claimant's need for treatment or his then-existing condition. (Ex. G).

24. On September 16, 2020, Claimant returned to Dr. Miner. Dr. Miner noted that Claimant's imaging studies demonstrated "severe varus osteoarthritis of both knees with bone-on-bone collapse of the medial compartments and advanced patellofemoral involvement." Due to his severe osteoarthritis, Dr. Miner felt that knee replacement was his best option to alleviate symptoms and restore mobility. He also indicated that bilateral knee replacement, as opposed to unilateral staged knee replacement was a reasonable treatment option. While Dr. Miner referenced Claimant's alleged workplace injury, he did not credibly opine that the need for bilateral knee replacement was causally related to Claimant's alleged work injury. (Ex. G).

25. On October 22, 2020, Claimant underwent a right total knee arthroplasty performed by Dr. Miner. (Ex. K). No credible evidence was admitted indicating Claimant's right total knee arthroplasty was causally related to Claimant's employment with AA[Redacted] or causally related to the December 3, 2019 incident involving NB[Redacted].

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. 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 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.*, 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 Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The 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); *Marjorie Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO, Apr. 9, 2014).

Medical Treatment

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. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Temporary Total Disability

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove her industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *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).

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 regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) TTD benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), C.R.S. The existence of disability is a question of fact for the ALJ. No requirement exists that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Claimant's Claims Against TO[Redacted]

Claimant has failed to establish that he sustained a compensable injury arising out of the course of employment with TO[Redacted]. Specifically, Claimant has failed to establish he was an "employee" of TO[Redacted] on December 3, 2019, or any other time. As relevant to Claimant's alleged relationship with TO[Redacted], the Act defines employee as "any individual who performs services for pay for another …" § 8-43-202 (2)(a), C.R.S. No credible evidence was presented indicating Claimant was

performing any service for TO[Redacted] on December 3, 2019, or that he was employed by TO[Redacted] in any capacity. No credible evidence was presented in support of Claimant's contention that TO[Redacted]and AA[Redacted] were the same entity. Claimant's Workers' Claim for Compensation related to the December 3, 2019 incident did not identify TO[Redacted] as his employer. Moreover, in the multiple claims Claimant filed against AA[Redacted], he did not allege he was employed by TO[Redacted]. Because no credible evidence exists establishing any employment relationship between Claimant and TO[Redacted], Claimant has failed to establish that he sustained any injury arising out of the course of employment with TO[Redacted]. Because Claimant has failed to establish that he sustained a compensable injury, Claimant has failed to establish an entitlement to medical or temporary disability benefits.

Claimant's Claims Against AA[Redacted]

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of the course of employment with AA[Redacted]. Unlike TO[Redacted], the evidence does establish it is more likely than not Claimant was providing services for AA[Redacted] on December 3, 2019 for pay.

AA[Redacted] offered Claimant two-months of paid training to determine whether Claimant could work as a driver for AA[Redacted]. AA[Redacted] paid Claimant $1,500 on November 1, 2019 and December 2, 2019. That Claimant did not formally apply for a position with AA[Redacted], and had not completed paperwork A AA[Redacted] deemed necessary does not lead to a different conclusion. The evidence was undisputed that Claimant was using or preparing to use one of AA's[Redacted] vans on December 3, 2019 when an incident with NB[Redacted]occurred. The ALJ makes no conclusions about the nature of Claimant's relationship except as relevant to the December 3, 2019 incident.

Claimant has failed to establish he sustained an injury arising out of his employment with AA[Redacted]. Claimant's testimony regarding the alleged incident with NB[Redacted]on December 3, 2019 was not credible, and no credible evidence was admitted establishing that Claimant sustained an injury on December 3, 2019. Claimant's first documented report of the alleged incident is the February 13, 2019 APD report, in which Claimant did not report being struck with a car door, or sustaining injuries to either knee. Instead, Claimant reported only scratches on his legs that had healed. Claimant's statements to APD that NB[Redacted]physically assaulted him were not corroborated by the other witness interviewed. Although the evidence establishes that Claimant and NB[Redacted] had an interaction on December 3, 2019, no credible evidence exists that NB[Redacted] assaulted Claimant, struck him in the knee with a van door, or otherwise injured Claimant.

Claimant's testimony that he chose to file numerous claims against AA[Redacted] in an attempt to obtain $150,000 also undermines Claimant's credibility. Although Claimant filed several different claims against AA[Redacted] in the months after December 2019, he did not file a workers' claim for compensation related to the

December 3, 2019 incident until September 2020, more than nine months after the alleged events. Claimant also did not seek medical treatment for his alleged knee injuries until June 3, 2020, six months after the alleged incident.

When Claimant did seek medical attention, his physician, Dr. Miner attributed Claimant's symptoms to ongoing severe arthritic conditions of the knee. Although Dr. Miner mentioned a workers' compensation claim, he offered no credible explanation as to how the alleged incident caused an injury to Claimant's knees, aggravated his pre existing condition, or caused the need for surgery. The ALJ finds, more likely than not that Claimant's knee condition and the need for surgery is the result of his preexisting knee condition, and is unrelated to any employment with AA[Redacted] or the December 3, 2019 incident involving NB[Redacted].

The ALJ finds Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of the course of employment with AA[Redacted]. Because Claimant has failed to establish a compensable injury, Claimant has failed to establish an entitlement to medical treatment or temporary disability benefits.

ORDER

It is therefore ordered that:

1. Claimant's claims for workers' compensation benefits against TO[Redacted] and Insurer are denied and dismissed.

2. Claimant's claims for workers' compensation benefits against AA[Redacted] are denied and dismissed.

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

DATED: March 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 5-204-404-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer on April 1, 2022.

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

3. Whether Claimant established by a preponderance of the evidence that left knee surgery recommended by Dr. Schnell is reasonable and necessary to cure or relieve the effects of a work-related injury.

4. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a 24-year-old man who worked for Employer as a concrete finisher.

2. On April 19, 2022, Claimant was working with a crew laying and finishing a raised concrete pad at the Larimer County Jail. Because the pad was inside a building, a concrete pumping truck was used to move concrete to the pad location through an 80-foot-long hose measuring 3.5 inches in diameter. (Ex. D). The project required placement of 18.5 cubic yards of concrete into an area approximately 25 to 30 feet in length and 15-20 feet in width. Due to the relatively small size of the project, the crew working on the pad was in close proximity to one another. (Ex. D). The concrete pumping truck arrived at the Larimer County Jail project at 5:30 a.m., on April 19, 2022 and remained on site until 9:45 a.m. (Ex. D).

3. Claimant testified his job assignment on April 19, 2022 was to place concrete into the pad form by holding the open end of the concrete hose. April 19, 2022 was the first time Claimant had performed this role. Claimant testified that sometime between 12:00 and 1:00 p.m., he was pulling the hose and had his left foot hooked beneath a piece of metal rebar or reinforcement mesh, when the pump "caught air"[1] and "blasted [him} in the opposite direction" (*i.e.*, backward). Claimant testified he fell to the ground after the hose "kicked," causing him to twist and injure his left knee. Claimant testified another worker helped him up. Claimant testified he verbally reported the incident to his foreman, [Redacted, hereinafter JH], and returned to work finishing concrete after the pour was completed.

[1] The phrase "catching air" refers to a situation where air interrupts the flow of concrete from the pump truck through the hose, causing the hose to expel air, rather than concrete.

4. [Redacted, hereinafter JS], one of Employer's foremen who was working at the project on April 19, 2022, testified at hearing. JS[Redacted] testified the crew working on the pad was close to each other at all times, and he did not recall Claimant's role in the work that day. JS[Redacted] testified when a concrete pump "catches air" it makes a loud, distinct noise that would have been audible to everyone present. When this occurs the pump operator will stop the pump to assess the problem. He did not recall the pump catching air on April 19, 2022, and did not recall Claimant being injured.

5. JH[Redacted] testified at hearing. JH[Redacted] was the foreman supervising Claimant on April 19, 2022, and was present while the concrete was being poured. JH[Redacted] testified when a concrete pump catches air it makes a distinct sound, and he did not recall the hose catching air or any other problems with the concrete pour on April 19, 2022. He testified it would be difficult for a person to hook a foot under the reinforcement mesh used on the pour because of the small distance between the mesh and the ground. JH[Redacted] did not see Claimant fall that day, but Claimant did report pain in his leg as the crew was finishing pouring concrete. He indicated Claimant wanted to keep working that day after reporting an injury.

6. Claimant first sought medical treatment for his left knee on April 21, 2022, when he saw Jeffrey Baker, M.D., at Concentra in Fort Collins, Colorado. Claimant reported to Dr. Baker that the injury occurred on April 19, 2022 at 11:00 a.m., while Claimant "was moving the concrete pump line laterally and he felt a 'pop' in his left knee." Dr. Baker characterized the incident as "the result of [a misstep] while carrying a cement hose." (Ex. 5). Dr. Baker's examination revealed no swelling of Claimant's knee. Claimant reported tenderness over the lateral and medial joint lines, and lateral collateral ligament, crepitus, and limited range of motion in all planes. Dr. Baker found positive Lachman's, laxity on varus stress, and lateral McMurray tests.[2] He diagnosed Claimant with a knee strain, and referred him for physical therapy. (Ex. 5). Claimant underwent six sessions of physical therapy at Concentra for his left knee. (Ex. 9).

7. On April 22, 2022, Employer prepared First Report of Injury or Illness (FROI), which described Claimant's injury occurring as he "was pulling a concrete hose and stepped backwards wrong and hurt his knee." (Ex. M).

8. On April 25, 2022, Claimant saw Linda Young, M.D., at Concentra. On examination, Dr. Young noted trace effusion and found tenderness over the lateral joint line and lateral collateral ligament, limited range of motion in all planes, and positive Lachman's and lateral McMurray tests. Dr. Young diagnosed claimant with internal derangement of the left knee, and ordered an MRI. (Ex. 6)

9. On May 3, 2022, Claimant underwent an MRI on his left knee. The MRI showed irregular tearing of the posterior horn of the lateral meniscus, and a complete or near complete tear of the anterior cruciate ligament (ACL) at the femoral attachment. The MRI

[2] Lachman's test is an anterior collateral ligament test. McMurray test is a meniscus test. (See WCRP Rule 17, Exhibit 6).

noted no effusion within the joint. The remainder of Claimant's knee ligaments and tendons were intact. (Ex. B).

10. Claimant returned to Dr. Baker on May 5, 2022. Dr. Baker indicated Claimant was returning for "left knee and lower back injuries as a result of a fall from the bottom step of his truck breaking."[3] He reviewed Claimant's MRI, diagnosed a left knee strain, ACL tear, and tear of the meniscus, and referred Claimant for an orthopedic consultation. Claimant saw Dr. Baker five additional times through August 22, 2022. At these visits, Dr. Baker's exam findings remained substantially unchanged. (Ex. 5).

11. On May 17, 2022, Respondents filed a Notice of Contest, indicating Claimant's claim was contested due to the need for further investigation. (Ex. L).

12. On May 23, 2022, Claimant saw Lucas Schnell, D.O., for an orthopedic consultation on referral from Dr. Baker. Dr. Schnell described Claimant's injury as occurring while "holding onto the concrete pump when it jerked violently. He had a pivot-shift type injury and felt an immediate pop in his knee. He notices swelling within an hour as well. " Dr. Schnell reviewed Claimant's May 3, 2022 MRI report and images and noted that Claimant had a lateral discoid meniscus with a posterior horn tear, and near-complete ACL rupture. On examination, Dr. Schnell found mild left knee effusion, a positive Lachman's test, positive anterior drawer test, and pain apprehension with lateral McMurray's testing. Based on his examination and the MRI film, Dr. Schnell diagnosed Claimant with a left ACL rupture, left posterior horn lateral meniscus tear, and left discoid meniscus. He recommended arthroscopic left knee ACL reconstruction surgery, lateral meniscus saucerization, and meniscectomy. Dr. Schnell opined that Claimant's described "twisting mechanism with his work Injury does correlate with an ACL rupture and lateral meniscal tear." (Ex. C). Dr. Schnell requested authorization of Claimant's surgery, which was denied by Insurer.

13. Dr. Baker and Dr. Schnell are authorized treating physicians.

14. On October 27, 2021, Mark Failinger, M.D., performed an independent medical examination (IME) of Claimant at Respondents' request. Dr. Failinger was admitted as an expert in orthopedic surgery and sports medicine and testified at hearing. Dr. Failinger documented Claimant's report of the mechanism of injury as: "[Claimant] was pulling the hose while pouring concrete, as he was pulling backwards, he states all the pressure was on his left knee when the pump 'caught air.' There was an air blast, and the hose kicked back. He states the hose pulled away from him, and it yanked him forward. He states he twisted and fell and felt a pop with some numbness to the left knee." (Ex. A). Dr. Failinger credibly testified that had Claimant sustained an acute ACL or meniscal tear on April 19, 2022, it would be unlikely Claimant could have returned to work that day, and that most patients would terminate weightbearing after such an injury.

15. Dr. Failinger reviewed Claimant's MRI films from May 3, 2022 and opined that there was "no medical possibility that the anterior ligament tear present on the MRI scan

[3] Dr. Baker continued to use this description of Claimant's mechanism of injury in each of his later records. No evidence was presented explaining the discrepancy in mechanism of injury in Dr. Baker's records.

occurred at the time of the alleged work incident of 04-19-2022." Dr. Failinger indicated the MRI did not show any acute changes to the Claimant's ACL, such as edema. He opined that an MRI of a recent ACL tear would tear would show significant edema (inflammation) within the ligament fibers and effusion in the joint even two and one-half weeks after the injury. He further opined Claimant's meniscus tears were also likely pre-existing and that a recent meniscal tear or worsening of a preexisting tear would also show significant joint effusion and more than minimal tibial bone bruising. Dr. Failinger opined that Claimant's ACL tear was preexisting, but placed Claimant at a greater risk of instability due the instability. Dr. Failinger opined that the need for ACL reconstruction and meniscal surgery was not due to any pathology caused by Claimant's April 19, 2022 work incident. Dr. Failinger agreed that ACL reconstruction may be reasonable and necessary, but does not believe the need for the surgery is work-related.

16. As of the date of hearing, Claimant had not undergone the surgery recommended by Dr. Schnell.

17. Claimant testified that he sustained a injury to his left knee in November 2021, while operating a motorized bicycle, that resulted in swelling and abrasions on his knee. Claimant testified he did not receive medical treatment for the injury, although he did limp, and his knee was bandaged. Claimant testified he had no prior injuries to his left knee. A photograph of Claimant's knee from November 8, 2021 was admitted into evidence as Exhibit D, and shows significant swelling and abrasions on Claimant's left knee. JH[Redacted] testified that Claimant was placed on light duty for approximately one month following the November 2021 knee injury. During that time, JH[Redacted] testified he observed Claimant limping, but he did not notice Claimant having difficulty with his assigned job tasks. Claimant was not on light duty from January 1, 1022 to April 18, 2022, and was able to work without limitations finishing concrete.

18. From December 26, 2021 through April 16, 2022, Claimant averaged 31.5 hours per week, including overtime. At the time of his injury, Claimant earned $24.00 per hour. The ALJ finds that Claimant's average weekly wage at the time of his injury was $756.00 per week.

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. 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 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).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dept. Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the requisite causal connection exists is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675 (*ICAO Sept. 1, 2006*).*

Claimant has failed established by a preponderance of the evidence that he sustained a compensable injury to his left knee arising out of the course of his employment with Employer on April 19, 2022. While Claimant did report knee pain to JH[Redacted] on April 19, 2022, the evidence does not credibly establish that Claimant incurred an injury to his left knee on April 19, 2022.

Claimant has offered inconsistent explanations of the mechanism of injury. Claimant testified he injured his knee while operating the concrete pump hose with his left foot placed beneath the rebar mesh when the hose "caught air" blasting him backward, causing him to fall. Claimant's testimony regarding the mechanism of injury was inconsistent with his initial report to Dr. Baker, the First Report of Injury, and includes elements not previously reported to his health care providers. For example, both Dr. Baker's initial report and the First Report of Injury indicate Claimant's injury occurred as the result of a misstep. Claimant did not report the concrete hose "catching air," being "blasted" back, twisting his knee, or falling, or positioning his foot beneath the rebar mesh until weeks or months later. Claimant did not report to either Dr. Schnell or Dr. Failinger that his foot was placed beneath the concrete rebar. Moreover, Claimant testimony that he was "blasted" in the opposite direction is inconsistent with his report to Dr. Failinger that he was pulled forward. Finally, neither JH[Redacted] nor JS[Redacted], who were present at the job site, recall the concrete hose "catching air," or recall Claimant falling. The inconsistencies in Claimant's descriptions of the mechanism of injury render Claimant's testimony unreliable and not credible. Dr. Schnell's opinion that Claimant's injury is causally related to his employment is not persuasive because it is based on the Claimant's unreliable description of the mechanism of injury.

While it is undisputed that Claimant has a ruptured ACL and meniscal pathology in his left knee, the ALJ finds persuasive Dr. Failinger's opinion that Claimant's left knee pathology was preexisting. Dr. Failinger credibly opined that an ACL tear or a meniscus tear sustained on April 19, 2022, would be accompanied by significant inflammation which would remain present for weeks after the injury. However, Claimant's April 21, 2022 examination by Dr. Baker's revealed "no swelling." Similarly, while Dr. Young and Dr. Schnell noted "trace" and "mild" effusion, neither noted significant swelling. Claimant's MRI also notes no joint effusion. The lack of significant swelling is inconsistent with an acute ACL or meniscal tear. Claimant's positive Lachman's and McMurray tests are

explained by his preexisting pathology, and are not necessarily indicative of an acute injury.

The ALJ finds credible Dr. Failinger's testimony that had Claimant sustained a torn ACL and/or meniscal tear on April 19, 2022, it is unlikely he would have been able to return to work that day. The ALJ concludes Claimant's ability to return to work the remainder of April 19, 2022, is inconsistent with an acute injury to the left knee.

Based on the totality of the evidence, Claimant has failed to establish it is more likely than not he sustained a compensable injury to his left knee arising out of the course of his employment with Employer on April 19, 2022.

Medical Benefits & Surgical Authorization

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

Because Claimant has failed to establish a compensable injury, Claimant's has also failed to establish an entitlement to medical benefits, or authorization of the surgery recommended by Dr. Schnell.

Average Weekly Wage

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

As found, Claimant's average weekly wage as of April 19, 2022 $756.00 per week. Neither of the AWW calculations proffered by the parties are supported by the evidence and do not accurately reflect Claimant's AWW.

ORDER

It is therefore ordered that:

1. Claimant's claim for worker's compensation benefits related to an alleged April 19, 2022 injury is denied and dismissed.

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

DATED: March 23, 2023

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

ISSUES PRESENTED

- Whether Claimant established, by a preponderance of the evidence, that [Redacted, hereinafter VG] suffered a compensable Coronavirus (Covid-19) infection arising out of his work duties for Employer on or about June 2, 2020.

- If Claimant established that VG[Redacted] suffered a compensable Covid-19 infection, whether she also established, by a preponderance of the evidence, that the care he received after his Covid-19 diagnosis was reasonable and necessary treatment to cure and relieve him of the effects of said infection.

- If Claimant established that VG[Redacted] suffered a compensable Covid-19 infection, whether she also established that his death was causally related to that infection.

- If Claimant established that VG[Redacted] suffered a compensable Covid-19 infection, whether she also demonstrated, by a preponderance of the evidence, that VG[Redacted] was temporarily totally disabled from June 2, 2020, until the date of his death on July 1, 2020.

- If Claimant established that VG[Redacted] suffered a compensable Covid-19 infection and that he succumbed to that infection, whether Claimant also demonstrated, by a preponderance of the evidence, that she and VG[Redacted] were in a common law marriage at the time of his passing.

- If Claimant established that she is the surviving spouse of VG[Redacted], whether she also demonstrated that she is entitled to wholly dependent death benefits pursuant to the provisions of C.R.S. § 8-41-501, § 8-42-114 and § 8-42-115 and if so, at what rate of compensation.

STIPULATION

Although Claimant indicates in her post-hearing position statement that the parties were unable to arrive at a stipulation concerning VG[Redacted] average weekly wage (AWW), Respondents, in their position statement, reference their willingness to stipulate that VG's[Redacted] AWW is $583.90. While no formal agreement appears to have been reached, since Respondents' AWW calculation is noted to be 10 cents more than what Claimant calculated for VG's[Redacted], the ALJ has reviewed Claimant's Exhibit 16 and ALJ agrees that, at the time of his death, VG's[Redacted] AWW is $583.80. This figure is based upon VG's[Redacted] gross wages for 2020 from a W2 form provided from Employer. Based upon the evidence presented, the ALJ is persuaded that this calculation represents the fairest approximation of VG's[Redacted] wage loss and diminished earning capacity based upon the 153 days of employment

from January 1, 2020 through June 1, 2020 after which VG[Redacted] was hospitalized and unable to work due to his alleged occupational disease. Accordingly, the ALJ finds VG's[Redacted] AWW to equal $583.80.

FINDINGS OF FACT

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

Generally

1. Employer in this action operates a long term/skilled nursing facility, i.e. a nursing home known as [Redacted, hereinafter UC]. VG[Redacted] was employed by the facility as a member of the housekeeping department, specifically in the capacity of a floor technician or "floor tech".

2. As a floor tech for the facility, VG's[Redacted] duties included cleaning/maintaining the main areas of the building, such as the dining room, the hallways, the common areas and the lobby. He would also collect and dispose of the building's trash. As is relevant to the issues presented, VG[Redacted] was continuously employed by facility from March 2020 through June 1, 2020.

3. VG[Redacted] became sick with Covid-19 on or about May 26, 2020. His health deteriorated rapidly and he was admitted to the hospital on June 2, 2020 with acute respiratory failure with hypoxia due to pneumonia. (Ex. 11, p. 57). The evidence presented supports a finding that Claimant was hospitalized in the ICU unit and unable to work in any capacity between June 2, 2020 and July 1, 2020. Accordingly, the ALJ finds that VG[Redacted] was temporarily and totally disabled from June 2, 2020, through July 1, 2020.

4. Despite advanced in-patient hospital care, VG's[Redacted] condition did not improve. He was subsequently intubated and ventilator dependent for a period of time while in the hospital's ICU. After developing multisystem organ failure, the difficult decision was made to withdraw further life support. (Ex. 11, p. 88). VG[Redacted] passed away on July 1, 2020.

The Testimony of [Redacted, hereinafter DM]

5. DM[Redacted] testified as Employer's current infection prevention (IP) nurse. She has worked for Employer for the past 9 years. DM[Redacted] testified that she took over the IP nursing position in October 2020. When she assumed the position, DM[Redacted] "inherited" a list of every person, both staff and resident that had tested positive or whom had developed symptoms consistent with Covid-19 prior to October 2020. (Hrg. Trans., p. 19, ll. 18-24). DM[Redacted] testified that the chart documenting when a resident or staff member developed Covid-19 was originally put together by the previous IP nurse, [Redacted, hereinafter LN]. *Id* at p. 19, ll. 2-8. According to DM[Redacted], she continued to document those residents and staff members who

developed Covid-19 after she took over as the IP nurse. *Id*. at. p. 19, ll. 9-14. The aforementioned chart is contained at Exhibit 18.

6. DM[Redacted] testified that as soon as a positive Covid-19 test result was received or as soon as a resident presented with symptoms consistent with a Covid-19 infection, they were placed in quarantine. (Hrg. Trans., p. 20, ll. 1-5). Staff members testing positive or exhibiting symptoms were "automatically placed out of work". *Id*. at p. 21, ll. 1-12.

7. DM[Redacted] testified that approximately 110 residents resided in Employer's facility between April 1 and June 30, 2020. Based upon the charting done during this period, DM[Redacted] testified that 20 residents tested positive for Covid-19 and 8 out of this 20 died from Covid-19 related disease. (Hrg. Trans., p. 21, ll. 16-25; pp. 22-23, ll. 1-8; Ex. 18). DM[Redacted] testified that during this same period, 20 staff members tested positive for and/or developed Covid-19 and one died, that being VG[Redacted]. *Id*. at p. 23, ll. 9-15. DM[Redacted] indicated that VG[Redacted] was the third staff member to come back with a positive Covid-19 test. *Id.* at p. 23, ll. 22-23.

8. According to DM[Redacted], the National Guard came to the facility on May 2, 2020, and tested both residents and staff members who consented to testing. (Hrg. Trans., p. 24, ll. 7-14). Claimant's Ex. 18 reflects that VG[Redacted] was tested on this date and that he had a negative test result. (Ex. 18, p. 137).

9. DM[Redacted] testified that the first positive test for Covid-19 in a resident was returned on May 24, 2020. (Hrg. Trans. p. 32, ll. 12-13). According to DM[Redacted], the facility declared a Covid-19 outbreak shortly thereafter on May 29, 2020. (Hrg. Trans. p. 25, ll. 12-17). As a result of the outbreak, DM[Redacted] testified that the staff stepped up their use of personal protective equipment (PPE)[1] and increased cleaning measures. The facility also set up an isolation unit for infected residents at the direction of the public health department. *Id*. at p. 26, ll. 2-3; p. 27, ll. 3-18. Despite these measures, the evidence supports a finding that residents and staff continued to contract Covid-19. *Id*. at p. 26, ll. 4-8.

10. DM[Redacted] described the isolation unit, also known as the "red unit", as a completely closed off section of the facility that housed known positive Covid-19 residents. (Hrg. Trans., p. 27, ll. 8-11). According to DM[Redacted], only "designated" staff members were allowed to work in the red unit and those persons used a completely separate entrance to the building and that unit so they did not walk through the main parts of the facility. *Id*. at p. 27, ll. 12-15. Per DM[Redacted], VG[Redacted] was not tasked with moving any residents to the isolation unit. (Hrg. Trans., p. 31, ll. 20-23).

11. DM[Redacted] stated that the two employees who tested positive before VG[Redacted] were restorative certified nursing assistants (CNAs) who worked "very

[1] Any contact with a resident exhibiting symptoms or any time testing was initiated would require the use of full PPE, including a gown, gloves, an N95 mask and a face shield. (Hrg. Trans., p. 28, ll. 4-11).

closely" with the residents during range of motion exercise sessions. (Hrg. Trans., p. 30, ll. 5-8). The ALJ infers from DM's[Redacted] testimony that these CNAs had direct hands on contact with the residents. These CNAs did not work directly with VG[Redacted]. *Id*. at p. 30, ll. 11-12.

The Testimony of [Redacted, hereinafter MN]

12. MN[Redacted] testified as the Director of Environmental Services for Employer. (Hrg. Trans., p. 87, ll. 23-25). She has worked for Employer for 27 years and for the past six years has managed the laundry, housekeeping and directed the floor techs at Employer's facility. *Id*. at p. 88, ll. 1-14. She was VG[Redacted] immediate supervisor. *Id*. at p. 99, ll. 6-7.

13. MN[Redacted] described VG's[Redacted] job duties as a floor tech to include vacuuming the common areas, throwing out the trash from dirty utility rooms, sweeping, stripping wax and doing room changes, although MN[Redacted] testified that she did the "majority" of the room changes. (Hrg. Trans., p. 92, ll. 12-25).

14. MN[Redacted] testified that none of her staff ever worked inside the red unit. (Hrg. Trans., p. 93, ll. 11-20). According to MN[Redacted], the laundry and trash from the red unit would be gathered by the unit's staff, placed in trash or "red bags" and set outside the door to the unit. *Id.* at p. 93, ll. 21-25, p. 94, line 1. Once outside the red unit door, the floor techs under MN's[Redacted] direction would proceed to the isolation unit to pick up the trash and transport it and any soiled linens, et cetera out of the back door and disposed of or taken to the buildings laundry. *Id*. at p. 94, ll. 2-7. Despite being bagged and outside of the red unit, MN[Redacted] testified the collection of materials, including the trash and dirty laundry from inside the red unit required the use of full PPE, including a gown, gloves, a face shield and a N95 mask. *Id*.

15. While MN[Redacted] testified that VG[Redacted] did not work with or have any direct contact with anyone who was known to have tested positive for Covid-19, she noted that the facility is very large and the staff is comprised of dietary workers, therapists, nurses, CNAs and admissions people and that there was quite a few people in the building on a daily basis. (Hrg. Trans., p. 15-20). She also testified that her housekeepers would go into resident rooms to clean and that the housekeepers and floor techs could interact with each other. *Id*. at p. 2-14.

16. Although she did not know who completed the First Report of Injury form or where that person got the information concerning VG's[Redacted] contraction of Covid-19, MN[Redacted] testified that the First Report was incorrect in as much as VG[Redacted] did not transfer sick residents to the red unit. (Hrg. Trans., p. 99, ll. 8-18). Rather, MN[Redacted] testified she personally transported sick residents to the red unit because she was a supervisor and had taken on additional "education" with what to do with infectious people. Id. at p. 93, ll. 5-10. Nonetheless, she acknowledged that after she transported a sick resident to the red unit she would return to her regular

duties which included having contact with her housekeepers and the floor techs, including VG[Redacted].

17. The ALJ has reviewed the employer's first report of injury that was filed with the Division of Workers' Compensation. The First Report states that VG[Redacted] "may have been exposed to Covid-19 while moving Covid-19 positive residents to isolation rooms". The First Report indicates that it was completed on June 24, 2020; however, it does not show who completed it nor is it signed. (Cl. Ex 13).

The Testimony of [Redacted, hereinafter SJ]

18. Claimant, SJ[Redacted], the personal representative of the Estate of VG[Redacted] and his alleged widow, testified that VG[Redacted] was her husband at the time of his death on July 1, 2020. (Hrg. Trans., p. 37, ll. 4-6).

19. Claimant testified that she and the decedent got married in a "very little, private ceremony in March of 2016" shortly after they started dating. (Hrg. Trans., p. 37, ll. 7-10). Claimant testified that she and VG[Redacted] lived together continuously between March 2016 and his death on July 1, 2020 and that during this time, they held themselves out as husband and wife. *Id.* at p. 37, ll. 11-17, p. 42, ll. 9-12.

20. Per Claimant's testimony, she and VG[Redacted] exchanged wedding rings, shared debts and obligations, purchased a home in joint tenancy and she was named as his surviving spouse on his life insurance policy. (Hrg. Trans., p. 37, ll. 18-25, p. 38, ll. 1-3, p. 42. ll. 6-24. Further, Claimant testified that when VG[Redacted] was taken to Penrose Hospital on June 2, 2020, she did not go with him and while he was "winded", he was alert and able to talk. (Hrg. Trans., p. 45, ll. 23-25). Consequently, the information that was given to the hospital staff upon his admission came directly from VG[Redacted] . *Id*. at p. 46, ll. 2-4. The Admission Facesheet from Penrose Hospital lists Claimant as VG[Redacted]' "Spouse" and emergency contact. (Ex. 11, p. 56). Moreover, the medical records from Penrose Hospital reference Claimant as VG's[Redacted] wife. (See generally, Ex. 11).

21. Claimant's Exhibit 15(a) verifies that there was a probate action wherein Claimant requested to be named as the decedent's personal representative and his common law wife. This action was initially contested by one of VG's[Redacted] daughters; however, this daughter stopped cooperating with her attorney who was subsequently permitted to withdraw from the case on December 1, 2021. (Ex. 15(a)). There was a hearing in the Pueblo County District Court on January 11, 2022, during which the Court found that Claimant and VG[Redacted] "agreed to enter into marriage on March 17, 2016 and a ceremony was held near Mt. Princeton". After this ceremony, Claimant and VG[Redacted] "exchanged rings symbolizing their marriage to each other". (Ex. 15(a) at ¶ 13). Moreover, the Court determined from the testimony of Claimant that she and VG[Redacted] "intended to be married and shared a relationship of mutual support and obligation" based upon the fact that they signed a lease and cohabitated together in an apartment until they purchased a residence in joint tenancy

in April 2020; the mortgage agreement obligating both to be financially responsible for the mortgage and the property. *Id*. at ¶¶ 14-15. In addition to the medical records being "replete" with references to Claimant as VG's[Redacted] spouse, the Court noted that VG[Redacted] designated Claimant as his beneficiary on a life insurance policy, "clearly" identifying her as his spouse. *Id*. at ¶¶ 16-17. Finally the Court noted that Claimant filed a joint tax return identifying VG[Redacted] as her spouse. Based upon Claimant's testimony and the records submitted, the Court determined that there was "clear and convincing" evidence that Claimant was VG's[Redacted]spouse at the time of his death. *Id*. at ¶ 19. In concluding that Claimant was VG's[Redacted] surviving spouse, the Court noted: "The determination of [Claimant] as a common law spouse was necessary to complete administration of the estate, but also to establish her entitlement to workers' compensation benefits that will not be paid into or become assets of the estate". *Id*. at ¶ 27.

22. The ALJ has reviewed the certified copy of the Order from the District Court dated February 2, 2022 at Exhibit 15(a) and finds the testimony of the Claimant in the present proceeding consistent with that found by the District Court Judge in the Order of Intestacy. Based on the totality of the evidence presented, the ALJ is convinced that Claimant is the surviving common-law spouse of VG[Redacted]. Indeed, Respondents confess that Claimant established that she is the surviving widow and statutory dependent of VG[Redacted]. (Resp. Position Statement, Finding of Fact, ¶ 13, p. 4).

23. Claimant testified that in the months before VG[Redacted] fell ill in the latter part of May of 2020, she worked as a care plan coordinator for [Redacted, hereinafter IE] which is a program for all-inclusive care for the elderly. Claimant testified that commencing March 18, 2020, and continuing until the decedent was taken to Penrose on June 2, 2020, she worked from home. (Hrg. Trans., p. 38, ll. 4-24).

24. Claimant testified that during the month preceding VG's[Redacted] hospitalization there were four people living in her and VG's[Redacted] house, to wit: herself, VG[Redacted], his half-brother, [Redacted, hereinafter RR], and her son, [Redacted, hereinafter CR]. She testified that in order to prevent/minimize the Covid-19 virus from entering that home, she used Instacart to order the household groceries for delivery to the home. (Hrg. Trans., p. 39, ll. 6). Once delivered, everyone would participate in wiping the food down. *Id*. at p. 39, ll.10-11. Claimant also testified that when CR[Redacted], RR[Redacted], and VG[Redacted] came home from work at UC[Redacted][2], she would have them strip off their clothes, leave their shoes at the door, have them put their clothes in the washing machine, wash their hands with sanitizer, and take a shower. Id. at p. 39, ll. 11-19. No guests or visitors were permitted in the house. *Id.*

[2] VG[Redacted], RR[Redacted] and CR[Redacted] all worked at Employer's facility. RR[Redacted] and CR[Redacted] worked in the kitchen as dietary aids and would try to secure the same schedule so they could all car pool to/from work. (Hrg. Trans., p. 40, ll. 2-19).

25. Claimant testified that VG[Redacted] would travel straight home from work and that none of the other residents of the house were ill nor had they tested positive for Covid-19 before VG[Redacted] exhibited fell ill. (Hrg. Trans., p. 42, l. 25, p. 43, ll. 1-17). Indeed, Claimant testified that while she had gastritis and gastrointestinal issues in the period between April 1 through June 1, 2020, no one in the house was sick before VG[Redacted] became ill toward the end of May 2020. *Id.* at p. 48, ll. 13-18. Regarding trips into the community as a potential source of VG's[Redacted] Covid-19 infection, Claimant testified that she was pretty strict and nagged VG[Redacted] about the "whole thing". *Id*. at p. 46, ll. 11-25. She added that as a nurse, she was concerned about the virus and therefore suggested that the only place that RR[Redacted], CR[Redacted], or VG[Redacted] were going during that period of time was to work and back home. *Id.*

26. Claimant also suggested that VG's[Redacted] duties were not limited to maintaining the floors and collecting the building's trash. Indeed, Claimant testified that VG[Redacted] was cross-trained to feed residents and that he would go into the dining room and help feed people. (Hrg. Trans., p. 43, ll. 20-24). Claimant described VG[Redacted] as a "jack-of-all trades" who would facilitate room changes, move furniture from room to room, and assist with maintenance from time to time. *Id*. at p. 44, ll. 1-6.

27. Claimant testified that VG[Redacted] expressed concerns about Covid-19 exposure at Employer's facility and mentioned that he had to move residents to the isolation unit a few times and that he didn't feel safe. (Hrg. Trans., p. 44, ll. 7-12). Claimant testified further that she was aware, from speaking with VG[Redacted], that the employer had made PPE available to the employees. Nonetheless, she did not know if he wore it correctly. Id. at p. 44, ll. 13-16.

The Testimony of Dr. Marcus Oginsky

28. Dr. Marcus Oginsky testified as a board certified expert in the fields of internal medicine and healthcare quality management, which is a field of medicine that pertains to the analysis of data that describes the quality standards of medicine. (Hrg. Trans., p. 60, ll. 8-19). The Board Certification in health care quality management entails having at least five years of previous experience in health care quality management, 24 hours of continuous classes and lecture materials and once passing a test every two years, an additional eight hours of continuous education in the field of health care quality management. *Id*. at p. 64, ll. 2-14.

29. Dr. Oginsky is the chief quality officer at Midtown Inpatient Medicine. His job is to analyze data that is generated in the course of the clinical practice and using that data to both describe the quality and efficiencies of the practice. Dr. Oginsky has direct training in the analysis of probability and statistics, has personally treated over a thousand hospitalized Covid-19 patients in all levels and spectrums of the disease process caused thereby and has developed Covid-19 protocols for his hospital quality program. He has done additional work developing Covid-19 protocols privately which

have been published by the Centers for Disease Control (CDC). (Hrg. Trans., pp. 62-63, ll. 1-11).

30. Dr. Oginsky was asked by Claimant to review VG's[Redacted] treatment history and available records and opine as to where he most likely contracted his Covid-19 infection that lead to his hospitalization. Dr. Oginsky authored a report dated October 6, 2022, in which he noted the following medical history and course of treatment:

> VG[Redacted] was a 67-year-old male with reported history of diabetes mellitus, hypertension, and obstructive sleep apnea. He first developed a fever of 100.7 on 5/26/20. He was afebrile when he presented to work at UC[Redacted] on 5/27 and 5/28 despite a reported fever at home. On 5/29 he called off sick as he felt too ill to work. On 6/2/20 he fell more significantly ill, and his wife recorded low oxygen saturations at home. She took him to the Parkview Hospital emergency room, and he was emergently transferred to Penrose Hospital in Colorado Springs. On arrival to the hospital, Covid-19 was confirmed by RT-PCR testing, and he reported to the admitting critical care physician that he had contact with Covid-19 sick patients. Of note, the admitting physicians reported about one month of antecedent fatigue symptoms. However, the onset of his fever and the timing of acute respiratory failure are consistent with acute Covid-19 beginning with the fever onset on 5/26/2020. This timing is consistent with standard public health definitions of case onset. On arrival he was requiring maximum flow oxygen at 15 liters. He was treated with Remdesivir, steroids, and convalescent plasma. He required heated high flow oxygen and non-invasive ventilator support with BIPAP until 6/23/2020 when he required intubation and mechanical ventilation for progressive respiratory failure. He failed to improve on the mechanical ventilator and passed away on 7/1/2020 with the cause of death listed as Covid-19 pneumonia.

(Ex. 12, p. 94).

31. VG's[Redacted] death certificate documents that he died of Acute Respiratory Failure/ARDS and Covid-19 Pneumonia. (Ex.14). The ALJ credits the content of the medical records and the death certificate to find that VG's[Redacted] death was, more probably than not, precipitated by a Covid-19 infection that progressed to pneumonia and sepsis leading to multisystem organ failure and ultimately respiratory failure.

32. In his October 6, 2022 report, Dr. Oginsky noted that the State and County public health authorities registered a Covid-19 outbreak for Employer's facility on May 29, 2020, with the first weekly report after the "outbreak" designation referencing 6

Covid-19 cases in residents and 2 cases in staff.[3] The numbers did not improve over time. Indeed, subsequent weekly reports documented 10 cases in residents and 6 cases in staff on June 10, 2020 and 34 cases in residents, 12 cases in staff with 9 additional "probable" cases in staff by June 24, 2020. (Ex. 12, p. 94). At the close of the outbreak[4] on July 29, 2020, a total of 35 cases, with 2 additional probable cases and 9 deaths had been reported in/for residents of Employer's facility. Staff cases included 13 known cases, 9 probable cases and 1 death, that being VG[Redacted]. Dr. Oginsky was careful to point out that the outbreak designation on May 29, 2020, did not imply that this was the "start of illness in that [facility]". Rather, May 29, 2020 reflected the date "when it was clear that the disease was present (in the facility) and the authorities were made aware of cases. *Id.* at p. 94. The ALJ infers from Dr. Oginsky's report that Covid-19 was probably circulating about Employer's facility before May 29, 2020. Indeed, per DM[Redacted] a positive test result was reported for a resident on May 24, 2020. Accordingly, the ALJ is convinced that infections among residents and staff were occurring before May 24, 2020.

33. Dr. Oginsky discussed the unique characteristics of the Covid-19 virus in his October 6, 2022 report, noting that the virus is spread by inhaling aerosolized virus particles that are "buoyant in the air and can travel in the air directly into a person's airways and lungs". (Ex. 12, p. 95). He noted further that the infectivity of a virus is based upon its "attack rate", which is defined as the "percentage of individuals who become infected after an exposure". According to Dr. Oginsky, the attack rates for the original circulating Alpha variant of Covid-19 at the time VG[Redacted] was infected was different for different environments. Indeed, in a home environment, where there is typically no mask use but prolonged close family contact, the attack rate ranges from 60-80%. (Ex. 12, p. 95). In congregate care environments, such as jails/prisons, reported attack rates can reach up to 72% and in work environments, where workers are not as closely confined, the attack rate can reach 20-30%. *Id.*

34. In determining the medical probability as to where VG's[Redacted] Covid-19 exposure/infection occurred, Dr. Oginsky testified that you do not apply a system of direct transmission to the analysis of how an individual was infected with Covid-19. Rather, Dr. Oginsky explained that in the case of respiratory illnesses, including Covid-19, the illness is often not traceable to a single event and it is indeed rare to be able to document a direct contact to contact exposure. Thus, Dr. Oginsky testified that to determine the source of likely transmission, he analyzed the three environments wherein VG[Redacted] spent his time, i.e. the community at large, his workplace and his home. Dr. Oginsky undertook an analysis of the probability of Covid-19 transmission in each environment, accounting for the attack rates and the contagious nature of the disease and then applied the probability that VG[Redacted] was exposed to and infected by the contagion in those environments. Dr. Oginsky testified that the

[3] Per Colorado Department of Public Health & Environment (CDPHE) reporting guidelines an "outbreak" was present, at the time, if two cases were present in the facility. (Ex. 12, p. 94).
[4] An outbreak is considered closed after the passage of 30 days from the last associated case in the facility. (Ex. 12, p. 94).

environment that yields the highest probability for transmission is deemed to be the most medically probable source of the exposure/infection.

35. Using publically available community databases, Dr. Oginsky noted that for the week of May 22, 2020, the daily case rate for Pueblo County was no greater than 4 cases per 100,000 people. (Hrg. Trans., p. 68, ll. 6-11). However, because Covid-19 is plus or minus prevalent and contagious for a seven-day time period, that averages to about 28 contagious persons at any simultaneous time period for that week. So there would be approximately 28 people per 100,000 who would be contagious with Covid-19 in Pueblo which represents a prevalence rate of .03%. *Id*. at p. 68, ll. 12-19. Nonetheless, Dr. Oginsky noted that during the time period of VG[Redacted] infection access limitations to testing probably lead to the number of infections being underestimated by 4-10 fold. Dr. Oginsky opined that accounting for a worst case scenario, i.e. a 10 fold error, there would be a bump in the chances of coming into contact contagious person in the community to around 0.3% (.03% × 10 = 0.3%). Simply put, Dr. Oginsky noted that "[i]f VG[Redacted] were . . . moving around in the community going to stores, grocery stores, and restaurants, the chances of an encounter with a contagious stranger was only 0.3%". Moreover, Dr. Oginsky noted that any such encounter would have to involve a long enough exposure to transmit the virus to VG[Redacted], which Dr. Oginsky concluded, mathematically speaking, was an "extremely low probability event". (Ex. 12, p. 96).

36. In contrast, Dr. Oginsky opined that the chances of VG[Redacted] being exposed/infected at home or in the workplace were substantially higher than in the community at large. Concerning the home environment, Dr. Oginsky testified that the attack rate, i.e. the infectivity percentage in the home environment is the highest it can be because there is often a "lower degree of air circulation" in the home than in other environments combined with a failure to employ environmental controls such as masking and social distancing. (Hrg. Trans., p. 71, ll. 11-25, p. 72, ll. 1-4). Thus, Dr. Oginsky testified that if Covid-19 is present in the home environment, it simply becomes the "highest probably site of contagion" transmission because of that attack rate. *Id.* at p. 72, ll. 5-8. Because there was no one in living in the home that had either tested positive for Covid-19 or shown symptoms of Covid-19 exposure prior to VG[Redacted] falling ill towards the end of May of 2020, Dr. Oginsky excluded the household as the site of VG's[Redacted] exposure/infection in this case. (Ex. 12, p. 96; Hrg. Trans., p. 72, ll. 13-19).

37. Concerning the likelihood that VG's[Redacted] contracted Covid-19 from his work environment, Dr. Oginsky testified that the public reporting databases, including the data reported by Colorado Department of Public Health and Environment (CDPHE), confirmed there was an outbreak at the employer's facility. (Hrg. Trans. p. 65, ll. 5-15). According to Dr. Oginsky, it was important to note that at the time the outbreak was declared, there were two Covid-19 cases that could be connected to the same physical location and that the timing of VG's[Redacted] acute illness, hospitalization and respiratory failure were consistent with an exposure around May 20, 2020 or after. (Hrg. Trans., p. 65, ll. 10-12; Ex. 12, p. 96). As noted by Dr. Oginsky, the outbreak

designation on May 29, 2020, does not imply that this was the start of infections/illness in Employer's facility, signifying instead that Covid-19 was present and circulating in the facility before the May 29, 2020 outbreak designation. Indeed, the evidence presented supports a finding that at least three residents and one staff member exhibited symptoms of Covid-19 prior to the outbreak designation prompting those residents to undergo PCR testing.[5] (Ex. 18, pp. 130-133). Every test for these three residents came back positive for the presence of Covid-19 and one resident was subsequently hospitalized and succumbed to his illness. *Id*. at p. 133.

38. Dr. Oginsky testified that the Covid-19 attack rate for VG[Redacted] work environment was approximately 30%, which was consistent with other healthcare environments as well as the "attack rate in a lot of common workplaces". (Hrg. Trans., pp. 68-69). Dr. Oginsky noted that while risk reduction strategies were implemented at the facility in an effort to limit the spread of the Covid virus, it would be false to "claim that [these] control measures [were] 100% effective". (Hrg. Trans., p. 66, ll. 2-21). Rather, Dr. Oginsky indicated that these risk reduction strategies may have been partially effective since such measures may have helped limit the spread of the disease to 35 cases in residents and 12 cases among staff members. Concerning the transmission of Covid-19 among staff members, including those adhering to safety protocols, wearing PPE and avoiding exposure to Covid-19 positive individuals, Dr. Oginsky testified that he was not really able to analyze whether these risk reductions strategies were effective. Id. at p. 67, ll. 4-14. Rather, all that could be discerned definitively was that there were "12 cases present in staff . . ., which was a much higher proportion that (sic) would have been present in the community at large". *Id*. Accordingly, Dr. Oginsky testified, "So regardless of [the] efficacy of controls and appropriateness of controls, there was spread of Covid-19 to staff members at [Employer's] facility". *Id*. at ll. 15-17. Indeed, Dr. Oginsky testified that the presence of Covid-19 in 30% of the residents and in 12-15 staff members supported a conclusion that there was "person-to-person" transmission within VG's[Redacted] workplace environment. *Id*. at p. 85, ll. 2-12.

39. Based upon his review of the available records/data, Dr. Oginsky concluded that VG's[Redacted] "acute (illness) presentation and time-course of his illness [was] consistent with an exposure window around the time that the outbreak was occurring at the facility. (Ex. 12, p. 97). Because the likelihood of coming in contact with a contagious person in the community was improbable at the time VG[Redacted] would have been exposed and because he had no household contacts who were ill with Covid-19 around the time he would have been exposed, Dr. Oginsky opined that the "highest probability environment for VG[Redacted] to acquire Covid-19 was the nursing facility where he worked". (Ex. 12, p. 97; Hrg. Trans. p. 72, ll. 13-25, p. 73, ll. 1-3). The testimony of Dr. Oginsky is unrebutted.

40. The ALJ credits the content of the medical records and the opinions of Dr. Oginsky, including his testimony that contagious individuals aren't recognized

[5] The evidence presented does not indicate whether the staff member exhibiting symptoms was tested for Covid-19.

immediately because symptoms may not manifest for up to 24 hours, to find that VG[Redacted] was probably exposed to and infected with Covid-19, either from a well appearing, but contagious resident or staff member in the workplace shortly before the outbreak designation at Employer's facility was announced. Moreover, the evidence presented persuades the ALJ that VG's[Redacted] subsequent illness and death was proximately caused by this workplace exposure and ensuing infection.

41. Based upon the evidence presented, the ALJ is convinced that the treatment VG[Redacted] received following his positive Covid-19 test result/diagnosis, including his in-patient hospital care, was causally related to his work-related Covid-19 infection. Moreover, the evidence presented persuades the ALJ that this care was reasonably necessary as an attempt to cure and relieve VG[Redacted] of the effects of this work-related occupational disease and otherwise preserve his life.

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), §§ 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. C.R.S. § 8-40-102(1). In general, the claimant has 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. C.R.S. § 8-43-201.

B. 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. 2002). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002).

C. The weight and credibility to be assigned expert testimony is also a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo.App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968). In this case, the undersigned ALJ concludes that the unrebutted expert medical opinions of Dr. Oginsky are supported by the medical record, the available medical literature and public databases. Dr. Oginsky has extensive prior experience treating Covid-19 patients, establishing Covid-19 safety protocols and had the opportunity to draw conclusions after reviewing the entire medical record and available databases concerning the facility involved in this case. Accordingly, the ALJ concludes that Dr. Oginsky's opinions are credible and more convincing than the suppositions raised by Respondents based upon the testimony of DM[Redacted] and MN[Redacted]. While the ALJ is convinced that the testimony of DM[Redacted] and MN[Redacted] is sincere, the medical evidence concerning the transmission of Covid-19 coupled with the remaining opinions of Dr. Oginsky persuades the ALJ that VG[Redacted] probably contracted Covid-19 while working in Employer's facility and that his need for treatment and ultimately his death were related to that exposure.

D. 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 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).

Compensability

E. To sustain her burden of proof concerning the compensable nature of VG's[Redacted] death, Claimant must establish, by a preponderance of the evidence, all the elements necessary to find a work related injury compensable, specifically that the death arose out of and in the course of employment. See generally*, Matter of Death of McLaughlin,* 728 P.2d 337 (Colo.App. 1986); *Gates Rubber Co. v. Industrial Commission,* 705 P.2d 6 (Colo.App. 1986); see also*, Deane Buick Co. v. Kendall, 160 Colo. 265, 417 P.2d 11 (1966).*

F. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for an injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions.

In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co., 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, the evidenced presented persuades the ALJ that VG's[Redacted] alleged Covid-19 exposure and subsequent infection occurred within the Employer's facility during his working hours as he discharged his floor tech duties. Nonetheless, the question of whether VG's[Redacted] Covid-19 infection, subsequent illness and death arose out of his employment must be answered before his illness/death can be considered compensable.

G. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001); *Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term "arising out of" calls for an examination of the causal connection or nexus between the conditions and obligations of employment and the alleged injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo.App. 1996). As referenced above, proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo.App. 1997). Here, Claimant alleges that VG[Redacted] was exposed to and infected with the Covid-19 virus while discharging his duties as a floor-tech for Respondent-Employer. According to Claimant, this exposure lead to a positive Covid-19 test result, subsequent systemic illness, including the development of Covid-19 pneumonia, hospitalization to treat his resultant condition(s) and ultimately his untimely death.

H. Based upon the evidence presented, the ALJ concludes that Claimant's claims are rooted in the legal principals surrounding the manifestation of an occupational disease rather than an accidental injury. An accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo.App. 1993). In contrast, an occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo.App. 1997). The criteria for proving an occupational disease is set forth in C.R.S. § 8-40-201(14). An occupational disease is defined 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.

I. Thus, in practice an occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of that work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo.App. 1993). Evidence in a workers compensation claim regarding an occupational disease must establish a reasonable causal connection between the work and an occupational disease but need not establish it with "medical certainty." *Beaudoin Construction, Co. v. Industrial Commission*, 626 P.2d 711 (Colo. App. 1980). Expert opinion is neither necessary nor conclusive in proving causation of an occupational disease claim. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo.App. 1990); *In re the of Death of Talbert*, 694 P2d 864 (Colo.App. 1984); *Meza v. ICAO*, 2013 COA 71, 303 P.3d 158 (Colo.App. 2013). In this case, Respondents contend that because VG's[Redacted] job functions were janitorial in nature and did not require him to work directly with or transfer Covid positive residents to the isolation unit, Claimant failed to prove that his illness/death can be seen to have followed as a natural incident of his work. Simply put, because there were no documented incidents of exposure between VG[Redacted] and a Covid positive person at work, Respondents assert that Claimant failed to establish a causal connection between VG's[Redacted] employment and his Covid-19 infection. In order for VG's[Redacted] Covid-19 infection and subsequent death to be compensable, Respondents argue that Claimant "should have to establish that there was contact with the residents or know (sic) positive employees just before he tested positive . . ." (Resp. Position Statement, p. 10).

J. Concerning Respondents' contention that there must be direct contact with an infected person, Dr. Oginsky convincingly testified that because of its aerosolized nature, Covid-19 transmission spreads more effectively and efficiently than other viruses, including influenza and rhinovirus, which spread by infectious droplets. Because it is buoyant, Covid-19 contagion can travel via the air directly into a person's airways and lungs from a distance. Hence the Centers for Disease Control (CDC) established a six foot per fifteen minute exposure rule as their time line for when a person may receive a large enough amount of contagion to be infected with Covid-19. (Hrg. Trans., p. 70, ll. 8-13, p. 74, ll. 17-24). For this reason, Dr. Oginsky testified that it is usually 'fruitless" and inappropriate to apply a system of direct transmission to analyzing a case of Covid-19 infection, because the spread of respiratory illnesses, including Covid-19 is often not traceable to a single event. (Hrg. Trans., p. 66, ll. 2-13). Indeed, Dr. Oginsky testified that "[i]t is rare in the case of respiratory illnesses to ever document a direct contact to contact to contact exposure chain. *Id.* at p. 66, ll. 19-21. Accordingly, the ALJ is not convinced that there must be direct contact with an infected person for a sufficient dose of Covid-19 virus to be transmitted to another person.

K. Contrary to the assertions of Respondents' Counsel, the evidence in this case supports a conclusion that VG's[Redacted] Covid-19 infection, more probably than not, arose out of his work in Employer' facility. Indeed, the evidence presented

establishes that the chances of VG[Redacted] having a community encounter with a contagious stranger was only 0.3% as compared to the 30% attack rate for VG[Redacted]work environment. Moreover, Dr. Oginsky noted that any such community encounter would have to involve a long enough exposure to transmit the virus to VG[Redacted], which Dr. Oginsky concluded was an “extremely low probability event” in the community environment. In contrast, the statistical data regarding the number of residents and staff testing positive for or exhibiting symptoms of a Covid-19 infection supports a reasonable conclusion that VG[Redacted] was working in a facility besieged with a “person-to-person” spread of Covid-19. Indeed, the evidence presented persuades the ALJ that despite enhanced cleaning protocols, universal precautions, stringent use of PPE and a complete lock down of residents and limited contact between staff members, transmission of the virus within Employer’s facility continued. So much so, that an outbreak designation was imposed on the facility by the health department of May 29, 2020.

L. Based upon the airborne transmission vector and the statistical opinions expressed by Dr. Oginsky, the ALJ is convinced that VG’s[Redacted] Covid-19 infection is, more probably than not, directly related to his presence in Employer’s facility to discharge his work duties. In other words, the ALJ is persuaded that VG’s[Redacted] Covid infection followed as a natural incident of his work in Employers facility and as a result of the exposure occasioned by the nature of his employment, he fell ill and died. Thus, his employment exposure is the proximate cause his illness and death, whether or not he had close direct contact with infected residents or staff members. Indeed, close personal contact does not appear necessary for transmission of the virus given its aerosolized nature, which is why the CDC was prompted to recommend distancing rules. The testimony of MN[Redacted] that VG[Redacted] did not have any contact with known Covid-19 positive persons provides Respondents no safe harbor to escape liability given the fact that contagious persons may be asymptomatic for up to 24 hours before the onset of symptoms, which simply means that contagious individuals are often not recognized before they infect someone else. Based upon the totality of the evidence, including the opinions of Dr. Oginsky and the testimony of MN’s[Redacted] that the facility houses a large number of people on a daily basis, the ALJ is convinced that VG[Redacted], probably came into contact with a well appearing, but contagious person (resident or staff) in the building for a sufficiently long enough period to be infected with Covid-19. He subsequently fell ill and ultimately died as a consequence of this infection. Accordingly, the ALJ is convinced that Claimant has proven that there is a sufficient "nexus" or causal relationship between VG’s[Redacted] employment and the Covid-19 infection leading to his illness and death.

M. In concluding that Claimant has established that VG[Redacted] suffered a compensable occupational disease causally related to his work for employer, the ALJ rejects any suggestion that VG[Redacted] was equally exposed to a Covid-19 hazard outside of his employment and that he may have contracted Covid from Claimant or someone living in his household. While the evidence presented supports a finding that Claimant was sick with gastritis and gastrointestinal issues, there is no persuasive evidence to support a find/conclusion that any member of VG’s[Redacted] household

was sick with Covid before, during or after he became ill and tested positive for Covid-19. Indeed, the suggestion advanced by Respondents that VG's[Redacted] may have contracted Covid from Claimant comes from testimony of MN[Redacted]. However, MN[Redacted] testified that VG[Redacted] informed her that Claimant was sick approximately two weeks before VG[Redacted] developed symptoms. Moreover, VG[Redacted] informed MN[Redacted] he was not sure what was making Claimant sick. (Hrg. Trans., p. 94, ll. 12-25, p. 95, ll. 1). Based upon this evidence, the ALJ finds Respondents' suggestion/conclusion that Claimant was ill with Covid and did not want to get tested is speculative and unconvincing.

Medical Benefits

N. Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *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, a claimant is only entitled to such medical benefits if the industrial injury is the proximate cause of his/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. 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 that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

O. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, the 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). The question of whether the need for treatment is causally related to an industrial injury is also one of fact. *Walmart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 521 (Colo.App. 1999). Here, the evidence presented persuades the ALJ that Claimant's hospitalization and subsequent intensive treatment was directly related to the ravages that his Covid-19 infection leveled on his body. Indeed, the evidence presented supports a finding that VG's[Redacted] Covid-19 infection caused him to develop pneumonia, hypoxia, sepsis and multiple organ failure. Moreover, the totality of the evidence presented establishes that Claimant's admission to the intensive care unit represented the last best resort to cure and relieve VG's[Redacted] of the ongoing effects of his infection. Consequently, the ALJ concludes VG's[Redacted] hospitalization and subsequent in-patient treatment was reasonable and necessary. Accordingly, Respondents shall, pursuant to C.R.S. § 8-42-101 (6)(a) and (b), reimburse such estate, widow, insurer or governmental program for the reasonable and necessary medical expenses incurred as a consequence of VG's[Redacted] hospitalization and in-patient Covid-19 treatment.

Claimant's Entitlement to Temporary Total Disability Benefits

P. Respondents concede that Temporary Total Disability (TTD) would be owed if Claimant established the compensable nature of VG's[Redacted] Covid infection, subsequent illness and death. In light of this concession and because the evidence presented otherwise supports a conclusion that VG[Redacted] suffered a compensable occupational disease leading to his hospitalization and inability to work between June 2, 2020 and his death on July 1, 2020, Claimant is entitled to TTD benefits for this time period.

Common Law Marriage

Q. As noted, Respondents confess that Claimant established that she is the surviving widow and statutory dependent of VG[Redacted]. (Resp. Position Statement, Finding of Fact, ¶ 13, p. 4). Even without such concession, the evidence presented supports a conclusion that Claimant and VG[Redacted] were common law married. Colorado has long recognized common law marriages. See *Taylor v. Taylor*, 50 P. 1049 (Colo.App. 1897). Since 1987, the pivotal case in Colorado outlining the requirements for establishing a common law marriage has been *People v. Lucero*, 747 P.2d 660 (Colo.1987). In *Lucero*, the Colorado Supreme Court stated that a common law marriage is established by mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship. In doing so, it focused on cohabitation of the parties and their reputation in the community as the two primary factors to evaluate an intention to be married, although any evidence manifesting such an intention to establish a marriage could fulfill the burden of proof. *See Id.* at p. 665.

R. Recently the Colorado Supreme Court revisited the standard and refined the test to emphasize the parties' mutual agreement to enter into a marital relationship in the context of a trio of opinions issued on January 11, 2021. The primary case setting forth the Court's new standard was *Hogsett v. Neale*, 478 P.3d 713 (Colo. 2021). It elaborated on the new standard and need to review the totality of the circumstances in the case of *In re Estate of Yudkin*, 478 P.3d 732 (Colo. 2021).[6] In *Hogsett*, the Court modified the applicable test to acknowledge modern norms, which rendered the more traditional indicia of marriage no longer exclusive to marital relationships, i.e. those recognized by *Lucero* as typically indicative of a marital relationship because that indicia is often present in non-marital relationships currently. The new test established by *Hogsett*, while retaining elements from *Lucero*, is essentially that a common law marriage is "established by the mutual consent or agreement of the couple to enter the legal and social institution of marriage, manifested by conduct reflecting that agreement." *Hogsett*, 478 P.3d at 715. The *Hogsett* court elaborated that marriage represents "a deeply personal commitment to another human being . . . and the

[6] The third case, *In re Marriage of LaFleur and Pyfer*, 479 P.3d 869 (Colo. 2021), largely focused on the issue of whether same sex couples could prove the existence of a common law entered into prior to same sex marriages before Colorado legally recognized same sex marriages.

decision whether and whom to marry is among life's momentous acts of self-definition." *Id.* at p. 719, citing *Goodrige v. Dep't of Pub. Health*, 798 N.E.2d at 954-55 (2003). The core inquiry under this standard is whether the parties intended to enter into a truly marital relationship involving a committed, intimate relationship of mutual support and obligation. *Id.* at p. 715. The necessity to show an agreement to marry is absolute in this standard, although the Court retained the elements of *Lucero* that such an agreement could be inferred from the parties' conduct assessed within the context of the overall relationship. *Id.*

S. The *Hogsett* Court further elucidated factors which a Court should examine when necessary to infer an agreement to marry, including instances of shared financial responsibility such as leases, joint bills, filing joint tax returns, evidence of estate planning including wills, symbols of commitment (rings), the couples references to each other, and also the more traditional factors such as cohabitation, having children together, and use of surnames. *Id.* at pp. 722-725. However, it also noted the more important factors emphasized by *Lucero*, namely cohabitation, using each other's surnames, and having children together, were less decisive in modern times given the frequency with which those factors may be present in couples who both considered themselves married and not. *Id.* at pp. 722-723. The Supreme Court emphasized these points further in the *Yudkin* case, noting the purpose of a court's examination is to discover the intent of the parties to be married, not "test the couple's agreement to marry against an outdated marital ideal." *Yudkin*, 478 P.3d at 718.

T. In this case, the evidence establishes that Claimant and VG[Redacted] were in a long term personal relationship with a level of commitment mirrored the "momentous act of self-definition" the Colorado Supreme Court contemplated when deciding to refine the doctrine of common law marriage. The core query of *Hogsett* is to identify the existence of an intent to be married. Here, the evidence demonstrates that the relationship between Claimant and VG[Redacted] carried the attributes of a legally binding relationship. Indeed, they proceeded through a ceremony in the presence of their friends, wherein they expressed their desire to be considered husband and wife. They exchanged rings, purchased a home in joint tenancy and as the medical records demonstrate VG[Redacted] referred to Claimant as his spouse. Moreover, VG[Redacted] identified Claimant as the beneficiary on his life insurance policy, listing her as his wife. Finally, Claimant filed a joint tax return identifying VG[Redacted] as her husband following his death. From every aspect in which Claimant and VG[Redacted] had set up their lives, there were signs of an intent to enter into the legal institution of marriage. See *Sara Ortega v. Blue Star Holding Company*, W.C. No. 4-661-263-02 (ICAO, April 17, 2018). As noted in *Hogsett,* a common law marriage is "established by the *mutual* consent or *agreement* of the couple to enter the legal and social institution of marriage." Based upon the principles announced in *Hogsett* and *Yudkin*, the ALJ finds/concludes, as did the District Court Judge in the probate action, that there is sufficient evidence to prove the existence of a common law marriage in this case.

Death Benefits

U. The Workers' Compensation Act provides that spouses and the minor children (under the age of 18) of an injured worker who succumbs to his/her injuries are presumed to be wholly dependent and entitled to death benefits. C.R.S. § 8-41-501(1)(a) and (b). Section 8-41-503(1), C.R.S., provides: "Dependents and the extent of their dependency shall be determined as of the date of the injury to the injured employee, and the right to death benefits shall become fixed as of said date irrespective of any subsequent change in conditions except as provided in section 8-41-501(1)(c). Death benefits shall be directly payable to the dependents entitled thereto or to such person legally entitled thereto as the director may designate."

V. Section 8-42-115(1)(b), C.R.S., states: "(1) In case death proximately results from the injury, the benefits shall be in the amount and to the persons following: . . . (b) If there are wholly dependent persons at the time of death, the payment shall be in accordance with the provisions of § 8-42-114." If there are both persons wholly dependent and partially dependent, only those wholly dependent shall be entitled to compensation. § 8-42-119, C.R.S. In this case, Respondents acknowledge that Claimant is a dependent. (Resp. Position Statement, FOF ¶ 13, p. 4). The evidence presented fails to establish that there are other wholly or partially dependent persons. Accordingly, death benefits payments shall be made to Claimant, as VG[Redacted] surviving widow, pursuant to C.R.S. § 8-42-114 in the amount of "sixty-six and two-thirds percent of the deceased employee's average weekly wage . . . per week. (See, C.R.S. §§ 8-41-501, 8-42-114).

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that VG[Redacted] contracted a compensable Covid-19 infection arising out of and in the course and scope of his employment with the employer on June 2, 2020.

2. Claimant has established, by a preponderance of the evidence, that VG's[Redacted] need for hospitalization, treatment and subsequent death were causally related to his compensable Covid-19 infection.

3. Claimant has established, by a preponderance of the evidence, that the care VG[Redacted] received after his Covid-19 diagnosis was reasonable and necessary to cure and relieve him of the effects of said infection and that his need for care was related to this infection. Accordingly, Respondents shall reimburse Claimant, individually as Personal Representative of VG's[Redacted] estate, and/or any insurance carrier or governmental program that has paid for the reasonably necessary and related medical care received by VG[Redacted] at Penrose Hospital between June 2, 2020, and his death on July 1, 2020.

4. Claimant has established, by a preponderance of the evidence, that VG[Redacted] was temporarily totally disabled from June 2, 2020, until the date of his death on July 1, 2020. Accordingly, Respondents shall pay TTD benefits in the amount

of sixty-six and two-thirds percent of VG[Redacted] average weekly wage of $583.80 commencing June 2, 2020 and running through June 30, 2020.

5. Claimant has established, by a preponderance of the evidence, that she is the surviving widow and a dependent of VG[Redacted]. Accordingly, Respondents shall pay death benefits to Claimant pursuant to the provisions of C.R.S. §§ 8-41-501, 8-42-114 and 8-42-115, commencing July 1, 2020, and continuing thereafter until terminated pursuant to the provisions of C.R.S. § 8-42-120.

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

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

DATED: March 1, 2023

/s/ Richard M. Lamphere

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-160-157-001

STIPULATIONS

- Prior to hearing Respondents agreed that Claimant was entitled temporary total disability (TTD) benefits from the date of injury through his return to modified duty on January 29, 2021. Simply put, because the period of disability lasted longer than two weeks from the day Claimant left work as a consequence of the injury, Respondents conceded that Claimant was entitled to TTD pursuant C.R.S. § 8-42-103(1) (b) commencing December 25, 2020. According to Respondents' Counsel payment for the previously unpaid waiting period of time has been issued.

- The parties also stipulated and agreed that Claimant missed work on August 11, 2022 to attend the Division IME in Denver.

These stipulations were approved and accepted by the ALJ.

REMAINING ISSUES

I. Whether Claimant proved entitlement to temporary partial disability benefits the dates for which are outlined in Exhibit 12.

II. Whether Claimant proved that Respondents failed to timely pay medical benefits in violation of WCRP 16 and are liable for penalties pursuant to C.R.S. §§ 8-42-304(1) and 305 or under § 8-43-401(2)(a)

FINDINGS OF FACT

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

1. Claimant is a 48 year old (DOB: 10/10/74) trash truck driver for Employer. He injured his low back on or about December 24, 2020. Claimant's job duties require driving a commercial trash truck and collecting and loading trash, grass clippings and "anything sitting outside". (Hrg. Trans., p. 22, ll. 3-8). Claimant would occasionally lift 50 pounds or more. *Id*. at p. 22, ll. 9-12. Approximately 2-3 weeks prior to the date of injury, Claimant was assigned to a truck that required him to repetitively ascend and descend three steps on the left side of the truck to complete his route. Previously, Claimant had to negotiate one step to enter and exit the cab of his truck. Claimant developed left lower back pain while running his route on December 24, 2020. Nonetheless, he was able to complete his work shift.

2. Liability for Claimant's injury was admitted and he proceeded to treat conservatively. Claimant was initially treated at UC Health but eventually came under

the care of Dr. Castrejon who has overseen Claimant's care. Chiropractic treatment provided no lasting relief. Diagnostic testing revealed a left S1 radiculopathy prompting administration of an S1-2 transforaminal epidural steroid injection that provided next to no relief. After a surgical evaluation that concluded with a recommendation for continued non-operative management, Claimant was offered a facet injection, which he declined. Claimant was ultimately placed at maximum medical improvement (MMI) and discharged from care by Dr. Miguel Castrejon with an 11% whole person impairment rating.

3. Claimant was initially evaluated by Dr. Castrejon on May 10, 2021 during which Dr. Castrejon imposed physical restrictions to include, sedentary work, allowance to sit, stand and walk as tolerated, no commercial driving, no lifting and limited bending/stooping. (Ex. 3, bates 018; Ex. 2, bates 011). Claimant was seen by Dr. Castrejon approximately once per month for several months before being placed at MMI on January 6, 2022, with a permanent lifting restriction of 50 pounds. (Ex. 3, bates 018-019; Ex. 2, bates 012). At the request of respondents, Claimant underwent a Division IME (DIME) with Dr. Bryan Alvarez on August 11, 2022 who opined claimant was not at MMI. (Ex. 3, bates 014, 022).

4. Claimant was off of work immediately following the injury and returned to work on modified duty on January 29, 2021. A December 13, 2022 General Admission of Liability (GAL) reflecting that TTD was paid from December 30, 2021 (sic) through January 28, 2021 is contained at Exhibit 5, bates 029. As noted, Respondents stipulated that Claimant was due TTD beginning December 25, 2020 and running through December 29, 2020, and payment for this period has been issued.

5. Claimant continues to work for [Redacted, hereinafter GL]. He testified that since his return to work he has missed several shifts to either attend medical appointments or because he was in too much pain from the work injury to report to work. Claimant compiled a list of missed time from work he asserts is due to his admitted industrial injury. The list is contained at Exhibit 12, bates 067 and allegedly contains those days Claimant missed work due to a medical appointment or because he was physically unable to work secondary to pain caused by his low back injury.

6. As noted, Respondents have paid for all missed time prior to claimant's return to work on January 29, 2021. Thus, the question of whether Claimant is entitled to temporary disability benefits for the dates listed on Exhibit 12 commences with the entry for February 26, 2021 and ends on September 5, 2022, the last entry on Exhibit 12. Concerning the dates between February 26, 2021 and September 5, 2022, Respondents confess that Claimant had medical appointments on February 26, 2021, March 1, 2021, May 3, 2021, August 3, 2021, March 3, 2022, and August 11, 2022. These six dates are highlighted in yellow on Exhibit 12. The appointments from these dates are corroborated by other evidence, specifically the DIME report of Dr. Alvarez and the billing records presented by Respondents at Exhibits 6-11. Except on two occasions, Claimant testified that his supervisors did not require him to return to work following his medical appointments. (Hrg. Trans., p. 25, ll. 4-10). During cross-

examination, Claimant reiterated that he would miss a full day of work to attend his doctor's appointments and denied any suggestion that he was taking time off of work to care for his girlfriend. (Hrg. Trans., p. 32, ll. 9-25, p. 33, ll1-2).

7. In addition to the six dates referenced above, Exhibit 12 contains 30 other days between February 26, 2021 and September 5, 2022, which Claimant asserts he missed from work to attend other medical appointments or because he was in too much pain from his injury to report for his shift. Indeed, Claimant testified that there were days he "couldn't even get up" because of his pain and for this reason, he called off work. (Hrg. Trans., p. 26, ll. 16-21). In contrast to the verified six dates mentioned above, there is no persuasive corroborating evidence tending to establish that any of the additional 30 days Claimant missed from work between February 26, 2021 and September 5, 2021, were related to his attendance at a medical appointment to cure and relieve him from the effects of his admitted industrial injury.

8. Claimant testified that if he was going to miss time from work to attend a medical appointment he would contact his supervisor, [Redacted, hereinafter DE], by phone and alert him of the appointment or show him the appointment card from the doctor's office. (Hrg. Trans., p. 24, ll. 11-20). Concerning those days where Claimant was purportedly in too much pain to report to work, he testified that he would call off work for the day, on the day, by reporting to DE[Redacted] that he could not work. (Hrg. Trans., p. 29, ll. 7-13). For scheduled days off, Claimant testified that he would call into in work the day before he wanted to take off and ask for the day off. *Id*. at p. 29, ll. 11-16.

9. [Redacted, hereinafter DW] testified as Employer's operations manager. DW[Redacted] explained Employer's paid time off (PTO) policy. According to DW[Redacted] PTO referred to time off that had been previously scheduled and approved. (Hrg. Trans., p. 65, ll. 22-25, p. 66, l. 1). Typically, scheduled PTO is requested two weeks prior to the requested day off. *Id*. at p. 66, ll. 2-4. Time off described as "Unscheduled – PTO" referred to PTO that was not requested prior to the day but rather was a call-off the day of. *Id.* at p. 65, ll. 22-25, p. 66, l. 1. DW[Redacted] testified that Respondents' Exhibit C constituted a time chart for Claimant that contained a "print out of [Claimant's] days off", including both his PTO and unscheduled time off. (Hrg. Trans., p. 67, ll. 10-14). According to DW[Redacted], the time chart at Respondents' Exhibit C also documented several dates coded as "Holiday Ineligible – Unpaid". According to DW[Redacted], when seen on Exhibit C (Claimant's Exhibit 12), Holiday Ineligible "means the employee called off either the day before the holiday, the day after the holiday, the day of the holiday or the make-up day". *Id*. at p. 67, ll. 15-20. In order to be paid for a holiday, DW[Redacted] explained that employees must "work the day before the holiday, the day after the holiday, and either the holiday or the make-up day for the holiday". *Id*. at p. 68, ll. 2-4. Respondents Exhibit C/Exhibit 12 demonstrates that Claimant was ineligible for holiday pay on Labor Day (9/5/22), Christmas Eve (12/24/21), Thanksgiving (11/25/21), and Monday July 5, 2021 (Independence Day Observed). Based upon the testimony of DW[Redacted], the ALJ

finds that Claimant's "ineligibility" was probably due to Claimant's not working the day before, the day after, the day of or the make-up day for the aforementioned dates.

10. Respondents' Exhibit C confirms that Claimant did not work the day before, the day after, the day of or a make-up day for any of these documented holidays. Indeed, Exhibit C documents that Claimant made use of unscheduled PTO either before or after the observed holidays in question. (See Ex. C, bates 012-013). While Claimant's Exhibit 12 seeks compensation for each of the holidays, it does not consistently seek compensation for each of the days before the scheduled holiday. Specifically, Exhibit 12 does not include a request for temporary disability benefits for September 4, 2022 or November 24, 2021. The ALJ infers from Claimant's Exhibit 12 and his withdrawal of his request for benefits related to June 18, 2022 that any dates Claimant missed which are not contained on Exhibit 12 are days which Claimant probably missed work for personal reasons. Because Claimant missed both September 4, 2022 and November 24, 2021, then it is more probably true than not that Claimant was not paid for Labor Day (9/5/22) and Thanksgiving Day (11/25/21) because he was ineligible for holiday pay on those dates.

11. There is also a code designated "Unscheduled – unpaid SE" which DW[Redacted] testified meant that Claimant was out of PTO time, i.e. PTO allowance. (Hrg. Trans., p. 68, ll. 5-8). Crediting DW's[Redacted] testimony, the ALJ finds that Claimant was probably out of PTO on September 20, 2021, August 31, 2021 and April 6, 2021 as listed in Exhibit 12. Accordingly, his time off work for these dates was probably unpaid. (Ex. 12, bates 067).

12. Exhibit 12 and Exhibit C contain scheduled PTO dates for August 11, 2022, August 10, 2022, March 3, 2022, March 2, 2022 and September 14, 2021. The ALJ finds these dates noteworthy because, per the testimony of DW[Redacted] and Claimant himself, they reflect days that Claimant requested off prior to missing the day itself, possibly as much as two weeks prior to each date for which PTO was taken. However, outside of August 11, 2022, there is no corroborating evidence establishing that the remaining dates reflect days on which Claimant had scheduled medical appointments. The explanation Claimant offered for the missed time from work on these dates was that he was in too much pain to report to for his shift on these days. Thus, the court must infer that claimant requested these days prior to taking the days off because claimant believed he *would be* in too much pain to report to work on those days. It strains credulity to believe that Claimant could be so prophetic to predict, perhaps days in advance, when his pain would reach levels that would preclude him from reporting to work. Based on a totality of the evidence presented, the ALJ finds Claimant's testimony that he took PTO on the days listed in Exhibit 12 because his was in too much pain to work incredible and unpersuasive.

13. Claimant testified that the time of day of his medical appointments varied. Some appointments occurred in the morning while others occurred in the afternoon. When asked why he was not able to report to work before or after his appointments, Claimant simply suggested that he was not required to return to work after his

appointment. Similarly, Claimant offered no evidence or any explanation for why he did not miss time from work for any of the other numerous appointments he had between December 24, 2020 and the January 6, 2022 MMI appointment. Per the Division IME report, Claimant had at least 30 other scheduled medical appointments for which no accountable time appears on either Exhibit C or Exhibit 12. Accordingly, the ALJ finds that Claimant either did not miss time from work while attending these other medical appointments or was not held accountable for the time that was missed to attend these appointments. Based upon the evidence presented, the ALJ is convinced that Claimant was probably not held accountable for minimal lost time related to attending scheduled medical appointments on days that he reported to work either before or after his appointments. Indeed, the evidence presented supports a finding that Claimant was only held accountable for those days on which he did not report for work at all. Because the evidenced presented supports a finding that Claimant was probably not required to return to work after his medical appointments and the parties stipulated that Claimant attended medical appointments related to his industrial injury on 2/26/21, 3/1/21, 5/3/21, 8/3/21, 3/3/22, and 8/11/22, the ALJ is persuaded that the lost time on each of these dates is related to the work injury.

14. Concerning the remaining dates from Exhibit C/Exhibit 12 for which Claimant requests payment of temporary disability benefits, the evidence presented supports a finding that Claimant was not eligible for holiday pay on Labor Day (9/5/22), Christmas Eve (12/24/21), Thanksgiving (11/25/21), and Monday July 5, 2021 (Independence Day Observed) probably because he did not work the day before, the day after, the day of or the make-up day for the aforementioned dates. The ALJ is not convinced that Claimant missed the aforementioned dates of work because he needed to attend a medical appointment or was simply in too much pain from his industrial injury to work. Rather, the ALJ is convinced that Claimant probably missed time on these dates and for the remaining dates identified in Claimant's Exhibit 12 for reasons unrelated to his work injury which is strikingly consistent with his attendance and missed time from work pre-dating the work injury.[1] (See Exhibit C, bates 012-015). Accordingly, the ALJ finds that Claimant has failed to prove that he missed work on 9/5/22, 8/31/22, 8/10/22, 3/18/22, 3/2/22, 2/3/22, 1/12/22, 1/11/22, 1/10,22, 1/5/22, 1/4/22, 1/3/22, 12,24,21, 12/23/21, 11/27/21, 11/25/21, 11/1/21, 9/20/21, 9/14/21, 8/31/21, 8/30/21 8/16/21, 8/13/21, 8/12/21, 8/11/21, 7/5/21, 7/4/21, 6/24/21, 4/6/21, or 3/22/21 because

[1] The Employer's policy regarding absenteeism is that an employee would receive a verbal warning after three occurrences within six months; one occurrence is an absence and tardy is a half occurrence. (Hrg. Trans., p. 68, ll. 10-14). If the action occurs two more times, the employee receives a written warning. *Id.* at p. 68, ll. 16-17. This can then progress to a second written warning, a final written warning, and then separation from employment. *Id.* at p. 68, ll. 17-20. DW[Redacted] acknowledged that [Redacted, hereinafter MG] had received warnings prior to his work-related injury for his attendance. (Hrg. Trans., p. 74, ll. 13-75:16; Ex. D at bates 017-019). Since the date of his injury, December 24, 2020, however, he has only received one written warning for an absence (February 10, 2021). Hrg. Trans., p. 76, ll. 6-9; Ex. D at bates 020, 021 (duplicates)). MG[Redacted] was written up three times beginning in early 2018 and up to August of 2019. He had no write ups for the rest of 2019 or at all in 2020. He had one additional write up after the work injury. The first written warning was January 12, 2018 for not using proper call off procedures. (Ex. D at bates 017). The second write-up was February 4, 2019 and was incorrectly noted as a first written warning. *Id.* at 018. The final write up prior to the work injury was August 20, 2019 for failure to report to work.

of the work injury either to attend medical appointments or because of symptoms related to his admitted injury.

15. As noted above, Claimant attended a DIME with Dr. Bryan Alvarez on August 11, 2022. Dr. Alvarez determined that MG[Redacted] was not at MMI. (Ex. 3, bates 014).

16. Claimant then returned to the office of Dr. Castrejon to see what other treatment options were available to him. (Hrg. Trans., p. 27, ll. 7-12). However, Dr. Castrejon declined to see Claimant due to what he considered overdue medical bills totaling $773.41 related to five dates of service—May 20, 2021, July 22, 2021, September 16, 2021, March 3, 2022, and April 26, 2022. (Hrg. Trans., p. 27, ll. 3-20). Claimant has been unable to make an appointment with Dr. Castrejon since. *Id.* at p. 27, ll. 15-20. Respondents had issued payments for each of the bills and provided explanations of benefits (EOBs) for the denied portions of the bills. (Exhibits E through J). Dr. Castrejon resubmitted each bill for payment in full on multiple occasions and declined to let Claimant schedule a follow up appointment until each bill was paid in full. The only difference between the resubmitted bills and the original bills were handwritten notes on the Health Insurance Claim (HCFA) forms asking respondents to pay the balance.

17. [Redacted, hereinafter RA] testified as a claims supervisor employed by Gallagher Bassett Services, the third-party administrator adjusting the instant claim on behalf of GL[Redacted] and Ace American Insurance. RA[Redacted] testified regarding the bill paying process and the handling of the outstanding bills received from Dr. Castrejon. RA[Redacted] explained that the billing process involved the providers sending bills to a specific address and that the billing department handles bills for claims from all over the country. The bill is then sent to the handling adjuster who reviews it to ensure that the necessary medical records are attached and that the billing is related to the claim. The adjuster then chooses an internal pay code for processing the bill which is then sent back to the billing department for payment pursuant to the fee schedule. The billing department determines the fee scheduled amount and then sends out payment along with an explanation of benefits (EOB). If a provider believes the billing department has erred and would like reconsideration, then the provider is given specific instructions on the EOB to submit additional documentation and a letter outlining the basis for appeal/reconsideration. In this case, RA[Redacted] did not receive any documents from Dr. Castrejon's office that specifically complied with how it stated reconsideration requests should be documented, but it is clear that Dr. Castrejon's office did provide handwritten statements regarding missing payments on the HIPAA forms submitted. Hrg. Trans., p. 57, ll. 13-18; Ex. 6). RA[Redacted] admitted that although the handwritten notes did not look like what he would expect to see in a reconsideration request, he did not have any problem understanding that Dr. Castrejon's office was claiming that additional unpaid balances were due and owing from the bills his office resubmitted. (Hrg. Trans., p. 61, ll. 3-9).

18. RA[Redacted] testified that he had worked as the adjuster on the subject claim off and on prior to March of 2022 due to staffing issues with the company. He acknowledged that Gallagher Basset had received multiple billings from Dr. Castrejon's office. Indeed, RA[Redacted] acknowledged that Dr. Castrejon's office sent a billing for date of service of May 20, 2021 to Respondents on June 9, 2021, with subsequent submissions on October 22, 2021 and November 17, 2021. Tr. at 36:1-7; (Ex. 7 at bates 040-044). There continues to be an outstanding balance of $117.84 on that billing (Ex. 6 at bates 038). Respondents originally paid only $39.01 for that appointment. *Id*.; Hrg. Trans., p. 36, ll. 17-24). RA[Redacted] also acknowledged that Respondents received a bill from Dr. Castrejon's office for a date of service of July 22, 2021 on at least September 22, 2021 and again on October 25, 2021. Tr. at 37:1-14; (Cl's Ex. 8 at 46-49). There remains an unpaid balance concerning this invoice according to Dr. Castrejon's office. (Hrg. Trans., p. 37 ll. 5-24, 40, ll. 2-5; Ex. 6 at bates 037).

19. RA[Redacted] acknowledged that Dr. Castrejon's office sent a bill for a date of service of September 16, 2021, which was received by Respondents on October 11, 2021. Hrg. Trans., p. 40, ll. 6-11; Ex. 9 at bates 051). The payment for that same date of service was not made for tizanidine until June 10, 2022. (Ex. G at bates 085). The final payment for the tramadol prescription was not paid until December 9, 2022. (Hrg. Trans. p. 42, ll. 17-25, p. 43, ll. 1-2).

20. RA[Redacted] acknowledged that Respondents received a billing for a date of service of March 3, 2022. (Hrg. Trans., p. 43, ll. 17-19). Of the total bill of $278.97, Respondents paid $168.44 in April of 2022, but did not pay the subsequent payment of $110.53 until October 18, 2022. (Hrg. Trans., p. 43, ll. 17-25, p. 44, ll. 1-5; Ex. 6 at bates 035). Finally, RA[Redacted] acknowledged that Respondents paid Dr. Castrejon's bill for the office visit of April 26, 2022, but failed to pay for the meloxicam prescription until November 18, 2022. (Hrg. Trans., p. 45, ll. 5-15; Ex. 6 at bates 034).

21. RA[Redacted] admitted that each late payment that was issued used the same codes that Dr. Castrejon's office had listed on their bills. (Hrg. Trans. p. 46, ll. 18-25, p. 47, l. 1). Regardless, RA[Redacted] suggested that the bills submitted had only been partially paid due to the fee schedule and the CPT code the provider used. RA[Redacted] explained that he was not a billing expert and did not know the fee scheduled amounts or the correct CPT codes for billing services. Nonetheless, it was his understanding that Dr. Castrejon's office was asking to be paid for the full amount of charges billed regardless of the fee schedule. RA[Redacted] also explained that as a supervisor, he had the ability to escalate payment issues and waive deadlines and errors with the codes if after discussion with the provider, he was able to determine that a particular bill should be paid. He explained that no one from Dr. Castrejon's office ever called him or the other adjusters to discuss the issue but rather continued to resubmit the same previously denied bills without the additional documentation requested on the EOBs. Consequently, the billing department continued to deny the bills as duplicates. RA[Redacted] testified that he eventually escalated the resubmitted bills for payment in October and November of 2022. He explained that he typically escalates bills once someone reaches out to him directly.

22. Claimant has withdrawn his request for penalties based on the date of service May 20, 2021. The remaining dates of service, however, only involve two different service codes for office visits (99214) and for various medications (99070), including meloxicam, tizanidine, tramadol, and gabapentin. The amount billed changes depending on whether the DOS was in 2021 or 2022, but the codes remain the same. Respondents' denials and payments of the submitted invoices are inconsistent and random. For example, the office visit for April 26, 2022 was paid in full on June 3, 2022 ($203.42) (Ex. I at bates 109), but the office visit for March 3, 2022 is only partially paid at $168.44. (Ex. H at bates 093). The office visit for September 16, 2021 was paid in full on November 2, 2021, but the office visit for July 22, 2021 has still not been paid. (Ex. 6 at bates 037).

23. The July 22, 2021 date of service was submitted for payment on July 29, 2021. (Ex. 8 at bates 046). The September 16, 2021 date of service was submitted for payment on October 5, 2021. (Ex. 9 at bates 051). The March 3, 2022 date service was submitted on March 17, 2022. (Ex. 6 at bates 035). The April 26, 2022 data service was submitted on the same date service was rendered. *Id.* All of the dates of service have been submitted again on numerous occasions, including specifically on October 19, 2022. *Id.* at bates 033.

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 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.* Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo.App. 2001).

B. It is the ALJ's sole prerogative to assess the credibility of witnesses and the probative value of the evidence to determine whether a party has met its burden of proof. In addition to determining the sufficiency of the evidence presented, the ALJ evaluates the credibility and probative value of conflicting evidence, including competing experts and inconsistencies in a particular witness' testimony. *Johnson v. ICAO*, 973 P.2d 624, 626 (Colo.App. 1997). When determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the

testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

C. 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).

Claimant's Entitlement to Temporary Disability Benefits

D. To establish entitlement to temporary disability benefits, the claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss which, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S.; *S*ee *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872, 873 (Colo.App. 2001). A "disability," occurs when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Baldwin Constr. Inc., V. Indus. Claim Appeals Office,* 937 P.2d 895, 897 (Colo.App. 1997). Claimant must prove both disability and wage loss or a loss in earning capacity to be entitled to temporary disability benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

E. Whether the claimant has proved a disability, including proof that the injury has impaired the ability to perform the pre-injury employment, is a factual question for the ALJ. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo.App. 1997). The ALJ has broad discretion in assessing the weight and sufficiency of the evidence to determine whether this burden has been satisfied. (*See Sena v. World of Sleep*, 173 Colo. 348, 478 P.2d 671 (1970); *Eisnach v. Industrial Commission*, 633 P.2d 502 (Colo.App. 1981).

F. As found here, Claimant's testimony regarding the reasons he lost time from work outside of those dates corroborated by the medical records is not credible. Indeed, Claimant's testimony was vague, non-specific, and in some cases contradicted by the documents. For example, Claimant testified that he had medical appointments on dates that were not corroborated by the medical records. In fact, Claimant testified that he requested time off on August 10, 2022 to attend a medical appointment with Dr. Castrejon despite indicating that he had not been able to return to Dr. Castrejon because of the claimed outstanding balances outlined above. Simply put, Claimant presented no persuasive evidence of a medical appointment on August 10, 2022 and the record submitted does not support the existence of such appointment. Similarly, Claimant initially testified that he missed work on June 18, 2022 due to his industrial injury. However, after evidence was presented establishing that he requested that day off for personal reasons, Claimant withdrew his request for temporary disability benefits for this date.

G. It is apparent from the evidence presented that outside those dates on which Claimant had a corroborated medical appointment, Claimant has no genuine recollection about why he missed any of the remaining specific dates listed on Exhibit 12. This is evidenced by foregoing as well as the fact that several holidays appear on this list. DW[Redacted] credibly testified that holiday pay was dependent on working the day before, the day of, the day after and a make-up day. Respondents' Exhibit C conclusively establishes that Claimant did not work the day before Labor Day in 2022 or the day before Thanksgiving in 2021. Claimant is not seeking benefits for the day before Labor Day or the day before Thanksgiving. Nevertheless, he contends that he did not work on Labor Day or Thanksgiving Day because of symptoms related to the work injury, when in fact he probably did not work those days because they were holidays.

H. Based upon the evidence presented, the ALJ agrees with Respondents that Claimant is simply asserting that any date for which he did not get paid after his work injury is related to the work injury unless there is proof to the contrary. This is not sufficient to prove his claim. Claimant has the burden of proving the lost time is related to the work injury. Respondents do not have the burden to prove the contrary. In this case, Respondents have presented evidence establishing that Claimant had a history of absenteeism prior to the work injury that closely resembles his absenteeism following the work injury. The evidence presented persuades the ALJ that outside of the six corroborated medical appointment dates listed on Exhibit 12, the remaining uncompensated lost time documented in Exhibit 12 probably represents time Claimant missed for personal reasons rather than time lost because of his work injury, which, as found above is consistent with extensive attendance issues that pre-date the work injury.

Claimant's Penalty Claim

I. The general penalty provision in § 8-43-304(1), C.R.S. sets forth four categories of conduct and authorizes the imposition of penalties when an employer or insurer: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) 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; or (4) fails, neglects, or refuses to obey any lawful order of the director or the Panel. *See Holliday v. Bestop, Inc*., 23 P.3d 700 (Colo. 2001); *Giddings v. Industrial Claim Appeals Office*, 39 P.3d 1211 (Colo.App. 2001). The limiting phrase contained in § 8-43-304(1), C.R.S., "for which no penalty has been specifically provided" modifies the first three categories, but does not modify the fourth category, which is disobeying a lawful order. *Holliday v. Bestop, Inc., supra; Pena v. Industrial Claim Appeals Office,* 111 P.3d 84 (Colo.App. 2004).

J. The term "order" as used in § 8-43-304(1), C.R.S. includes a rule or regulation. (*See* § 8-40-201(15), C.R.S.; *Holliday v. Bestop, Inc., supra; Paint Connection Plus v. Industrial Claim Appeals Office,* 240 P.3d 429 (Colo.App.

2010)(failure to comply with a procedural rule is a failure to obey an "order" within the meaning of § 8-43-304(1), C.R.S); *Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176 (Colo.App. 2002); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo.App. 2005). Accordingly, the ALJ has authority to assess penalties under the general penalty provision contained at § 8-43-304(1), C.R.S. for a violation of WCRP 16-10 rather than the specific penalty enumerated at C.R.S. § 8-43-401(2)(a). (*Holliday v. Bestop, Inc*. *supra* at 706-707; *See also*, *Jill Goss v. The Kroger Company*, W.C. No. 4-855-895-02 (ICAO, January 14, 2013). Under Rule 16-10(A), "All bills submitted by a provider are due and payable in accordance with the Medical Fee Schedule within 30 days after receipt by the payer, unless the payer provides timely and proper reasons (for denial) as set forth by section 16-102 or 3". In this case, the question presented is not whether the ALJ has the authority to impose penalties for a violation of WCRP 16-10(A) under the general penalty statute at C.R.S. § 8-43-304(1) but whether the evidence presented supports that a violation occurred.

K. The imposition of penalties under § 8-43-304(1) requires a two-step analysis. First, 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).

L. The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *See Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). In this case, Claimant contends that Respondents unreasonably denied payment of portions of Dr. Castrejon's invoices within 30 days of submission. Hence, Claimant asserts that Respondents violated WCRP 16-10(A) and are subject to penalties for the following time periods and amounts:

1. Respondents claim to have received the billing for the July 22, 2021 date of service on September 22, 2021. Payment was due under the Rule by October 22, 2021. The late payments on that bill run from October 23, 2021 until the date of hearing. The balance had still not been paid in full as of the hearing date. That represents 445 days of late payment for a requested penalty of $4,450.

   Concerning this claim, the evidence submitted establishes that Dr. Castrejon's office submitted a billing invoice to Insurer for services rendered on July 22, 2021 in the amount of $442.33. (Ex. F, at bates 050). This bill was fee scheduled and a check was issued to Dr. Castrejon's office in his business name CPRMC (Colorado Pain and Rehabilitation

Medical Center), Inc. on October 29, 2021 for $270.42. *Id.* at bates 055-056. Although Respondents assert that the billing was received September 22, 2021, information attached to the check sent to Dr. Castrejon reflects that the billing date was September 15, 2021. (Ex. F at bates 055). Crediting Respondents indication that the billing date was September 15, 2021, the initial payment and EBO denying payment for $123.87 on October 29, 2021 was fifteen (15) days past the 30 days allowed for under WCRP 16-10(A). As noted, the initial fee scheduled payment did not include an additional $123.87 for 90 units of "supplies and materials" on the grounds that the billed service had "NO ALLOWANCE IN FEE SCHEDULER/URC" and because the "BILLED PROCEDURE CODE HAS AN RBRVS STATUS INDICATOR B IDENTIFYING A BUNDLED CODE. SEPARATE PAYMENT IS NOT ALLOWED. *Id*. at bates 056. Based upon the evidence presented, the ALJ finds that this $123.87 charge probably represented provision of medication prescribed by Dr. Castrejon. Although initially denied, the $123.87 charge was subsequently paid on August 11, 2022, 293 days after the initial denial and 30 day payment period under WCRP 16-10(A) expired. *Id*. at bates 057-058. Resubmission of the billing for consideration of additional charges from this date of service generated additional EOBs without further payment based upon an explanation for the continued denial of payment. *Id*. at bates 060-071; See also, Ex. 6 at bates 037.

2. Respondents claim to have received the billing for September 16, 2021 on October 11, 2021. For the late payment on the tizanidine prescription, the penalty runs from November 11, 2021 to June 10, 2022 (212 days) for a penalty of $2,120.The payment for the tramadol from this date of service was not made until December 9, 2022, so the penalty for that late payment runs from November 11, 2021 until that day (394 days) for a requested penalty of $3,940.

   Concerning these claims, the record evidence establishes that Dr. Castrejon submitted a total of $396.96 in charges for the September 16, 2021 date of service. (Ex. G at bates 073). With a billing date of October 5, 2021, Respondents fee scheduled the invoice and issued an EOB and a check to Dr. Castrejon for $171.36 on November 2, 2021. *Id*. at bates 073, 083-084. Accordingly, initial payment was made within the time period provided for by WCRP 16-10(A). While neither of the charges for Claimant's medications of $149.35 and $75.65 were included in payment to Dr. Castrejon for the same reasons as noted on the October 29, 2021 EOB, the November 2, 2021 EOB clearly denied payment for the additional charges and explained why those charges were denied. (See Ex. G at bates 84). Similar to the billing from July 22, 2021, the cost of one of Claimant's work-related medications from September 16, 2021 was eventually paid on June 10, 2022, 212 days after the initial denial and the 30 day payment period under WCRP 16-10(A) expired. (Ex. G at bates

085-086).[2] However, the $75.65 charge for Claimant's other medication was consistently denied in subsequent EOBs issued after resubmission of the billing. *Id.*; See also, Ex. 6, at bates 036. Following both the initial and subsequent denials, the $75.65 charge for this medication was ultimately processed and paid on December 9, 2022, 394 days after the 30 day payment period under WCRP 16-10(A) expired. (Hrg. Trans. p. 42, ll. 17-25). RA[Redacted] explained that the cost of this medication was only paid recently because the bill was either "sent back to Gallagher Bassett for review and reconsideration or [he] escalated [it] into [his] billing office". *Id.* at p. 43, ll. 3-8. Nonetheless, the evidence presented supports a finding that the initial billing for the $149.35 and $75.65 was initially denied by EOB on November 2, 20921 within the 30 day period allowed for by WCRP 16-10(A) given that the billing was received on October 5, 2021. (Ex. G at bates 083).

3. Claimant contends that the record supports that the March 3, 2022 date of service was received on March 17, 2022. Because payment for the $112.11 charges associated with this date of service were not paid until October 18, 2022, Claimant contends that penalties must be imposed from April 17, 2022 until October 18, 2022 (185 days) for a requested penalty of $1,850.

   Concerning this claim, the evidence presented establishes that Dr. Castrejon submitted two E-billing invoices for a March 3, 2022 date of service. (Ex. H at bates 088). The charges associated with this E-billing totaled $280.55 and $112.11 respectively. *Id*. The billing for $280.55 was received on March 17, 2022. (Ex. H at bates 093). This bill was fee scheduled and a check was issued to CPRMC, Inc. (Dr. Castrejon) in the fee scheduled amount of $168.44 on April 4, 2022. Thus, initial payment for this billing was made and an EOB issued within the window of time provided for under WCRP 16-10(A). Despite the indication that the charges for $112.11 were also received March 17, 2022, this billing was not paid and the initial EOB from April 4, 2022 makes no reference to a denial of the $112.11 charge. (Ex. H at bates 094). Dr. Castrejon's office requested additional payment indicating that the office did not have a "PPO with any insurance". (Ex. 6, at bates 035). Dr. Castrejon's resubmission of the $112.11 billing invoice generated multiple EOBs dated 8/26/2022, 10/7/2022, 11/1/2022 and 11/22/2022 indicating that a denial had already been recommended for the reasons outlined in the explanation codes included on the EBO. As noted, the initial EOB issued in connection with the March 3, 2022 date of service does not include a denial for the $112.11 charges. Despite the EOBs surrounding the March 3, 2022 charges for $112.11, RA[Redacted] testified that a fee scheduled payment in the amount of $110.53 was ultimately paid in connection with

[2] The total charge of $149.35 was reduced (fee scheduled) by $101.39 lowering the payment to Dr. Castrejon to $47.96. (Ex. G at bates 086).

this billing. (Hrg. Trans., p. 44, ll. 1-5). Payment was made on the October 18, 2022. *Id.* According to RA[Redacted], he did not know why the billing wasn't paid or if he was the one who escalated the billing to get it paid. *Id*. at p. 44, ll. 15-25. Nevertheless, this billing was fee scheduled and paid. Id. at p. 44, l. 25, p. 45, ll. 1-4. Payment of the fee scheduled $112.11 billing invoice occurred 185 days after the 30 day payment period under WCRP 16-10(A) expired.

4. Claimant contends that the record supports that the April 26, 2022 day of service was sent to Respondents on that same date. Because the charges for this date of service were not paid until October 8, 2022, Claimant asserts a penalty from May 27, 2022 until October 8, 2022 (166 days) for a penalty of $1,660.

Concerning this claim, the ALJ is persuaded that Dr. Castrejon submitted a billing invoice to Gallagher Bassett totaling $352.77, which billing included a charge of $149.35 for Meloxicam, one of Claimant's work-related medications. (Ex. I at bates 104, 110). This bill was received on May 16, 2022, and a check was issued to Dr. Castrejon in the fee scheduled amount of $203.42 on June 3, 2022. (Ex. I at bates 109). The EOB attached to Dr. Castrejon's June 3, 2022 check denied payment for the $149.35 for Claimant's Meloxicam. *Id*. at bates 110. Accordingly, the evidence presented supports a finding that the initial payment and the denial of the charges for the Meloxicam was timely based on the time period provided by WCRP 16-10(A). Following the initial billing, Dr. Castrejon's office resubmitted the billing with the indication that they had received payment for the office visit but not the Meloxicam. (Ex. 6 at bates 034). Subsequent EOBs issued 8/17/2022, 11/7/2022 and 11/25/2022 provided an explanation for the continued denial of payment. (Ex. I at bates 112-116, 118). Nonetheless, RA[Redacted] testified that the prescription for Meloxicam was paid on November 18, 2022. (Hrg. Trans., p. 45, ll. 5-15). RA[Redacted] testified that non-payment of the prescription was compounded by Dr. Castrejon's failure to write a reconsideration letter explaining why the billing for the Meloxicam should be paid. (Hrg. Trans., p. 45, ll. 16-26, p. 46, ll. 1-22).

M. Respondents contend that the facts presented do not support a violation of WCRP 16-10(A). With exception of the fifteen (15) day late payment of the July 22, 2021 billing invoice and the late payment of the $112.11 invoice from March 3, 2022, the ALJ agrees. WCRP 16-10-2 identifies grounds for denying medical bills for non-medical reasons including missing medical documentation and unrecognized or improper CPT codes. As noted above, with the exception of the July 22, 2021 and March 3, 2022 invoices, each of the bills at issue was timely processed and fee scheduled after receipt. Moreover, Respondents issued an EOB for each billing explaining the reductions in the bills based on fee scheduled limitations and problems

with the CPT codes. Each of the EOBs issued contained code 5721 as a basis and the following statement in all caps:

> TO AVOID DUPLICATE BILL DENIAL FOR ALL RECONSIDERATIONS/ADJUSTEMENTS/ADDITIONAL PAYMENT REQUESTS SUBMIT A COPY OF THIS EOR OR CLEAR NOTATION"

Each EOB also contained a State Specific EOB Message which read as follows:

> Do not resubmit bills for the same dates of services, as listed on this EOR, or they will be considered as duplicates. If any portion of this explanation/payment is being contested or corrected, pursuant to Rule 16(11)(D)(1), within 60 days the following items must be submitted for reconsideration; a copy of the original or corrected bill, a copy of this EOR, a letter that clearly identifies that this is a request for reconsideration with the specific item(s) being contested and with clear persuasive reasons for contesting each item, as well as any additional information as requested in this notice.

N. In this case, RA[Redacted] testified that Dr. Castrejon's office repeatedly submitted bills for the same dates of service without providing the additional information requested by the original EOBs or subsequent EOBs. As stated in each of the original EOBs, the subsequent billings were repeatedly denied as duplicates by the billing department. Per RA[Redacted], additional payments were not processed until he began communicating directly with the billing department advising that these resubmissions were in fact attempts to appeal the earlier denials. There is no allegation that Respondents did not timely deny each of the resubmitted bills. Rather, Claimant's allegation is that the billing department erred in its fee scheduled calculations to the fee schedule and should have paid the bills in full at the request of Dr. Castrejon. Claimant did not present any convincing evidence to support this allegation. In asserting that Respondents had not paid the bills in full pursuant to the fee schedule, Claimant relied entirely on the fact that Dr. Castrejon's office continued to resubmit the bills for payment. However, a review of the resubmitted bills from Dr. Castrejon's office does not prove that the billing department had indeed erred in their application of the fee schedule to Dr. Castrejon's bills. (See Ex. 6). None of the notes from Dr. Castrejon's office referred to the fee schedule or any of the CPT codes. Instead, Dr. Castrejon's office repeatedly asked for payment of the unpaid balance with no reference to or any discussion about the fee schedule or the explanation of benefits that had been provided.

O. The fact that Dr. Castrejon's office continued to resubmit the same bills asking for additional payment does not prove that the office was entitled to payment in full or to any additional payment pursuant to the fee schedule. It merely proves that Dr. Castrejon's office was asking for additional payment. It was Claimant's burden to prove that additional payment was in fact due pursuant to the fee schedule concerning the billing in question. Here, Claimant failed to carry that burden, with exception of the July 22, 2021 and March 3, 2022 late payments as noted above, by failing to present

persuasive evidence regarding the proper fee scheduled amounts for the services billed by Dr. Castrejon. In this case, RA[Redacted] testified that he was not a billing expert and did not know the fee scheduled amounts for the services billed by Dr. Castrejon. No one from Dr. Castrejon's office testified or offered any opinions regarding the proper fee scheduled amounts for the services billed. Claimant did not testify regarding the fee schedule nor did he present any billing experts, a representative of the Division of Workers Compensation, or any other testimony to prove that the third party (Gallagher Bassett) billing department had not properly applied the fee schedule to each of its denials. Because Respondents timely provided payment and EOBs outlining what was being paid and why concerning the invoices from September 16, 2021, March 3, 2022 (with exception of the $112.11 charges) and April 26, 2022, Claimant has failed to prove that Respondents violated WCRP 16-10(A) for the medical charges associated with these dates of service. The fact that additional bills were resubmitted does not negate the initial denial. The fact that RA[Redacted] escalated bills for payment at later dates does not change the analysis. Indeed, the ALJ agrees with Respondents that RA's[Redacted] decision to escalate the bills for additional payments in October and November of 2022 after the application for penalties was filed proves only that he was attempting to resolve the issue. Nonetheless, the ALJ finds that the totality of the evidence presented supports a conclusion that Respondents did not timely pay the billing invoice associated with the medical billing from July 22, 2021 nor did they timely deny or pay the billing associated with the $112.11 charge for Claimant's Meloxicam within the time prescribed by WCRP 16-10(A).

P. Based upon the evidence presented, the reasons RA[Redacted] cited for the failure to timely deny or pay the aforementioned bills fails to convince the ALJ that that failure was objectively reasonable. Indeed, RA[Redacted] simply testified he was not a billing expert, that he did not know the fee scheduled amount of the services billed and did not know why some of the bills were not paid. Any suggestion that RA's[Redacted] testimony supports a conclusion that failure to timely pay the above referenced medical bills was objectively reasonable is unpersuasive. To the contrary, the evidence presented persuades the ALJ that the failures to pay or denials are based on inconsistent and often contradictory reasons. Respondents contended at times that an amount requested was in excess of the fee schedule, but later turned around and paid that exact amount for that same bill or a later bill with the same code. As important here, the ALJ concludes that no reasonable insurer would ignore resubmitted bills, claiming that they were not submitted in the proper format. This is particularly true where, as here, the adjuster had no problem understanding what was still outstanding and unpaid from Dr. Castrejon's March 3, 2022 billing invoice. The fact that the unpaid medical bills have prevented the Claimant from seeing Dr. Castrejon for treatment following a DIME examination concluding that he was not at MMI persuades the ALJ that Claimant has suffered specific and serious harm from Respondents' actions and inactions. Accordingly, the ALJ concludes that Respondents violated WCRP 16-10(A) by failing to pay the July 22, 2021 billing timely and by failing to deny or pay the March 3, 2022 billing from Dr. Castrejon's office in the amount of $122.11. Because Respondents' actions in failing to pay or deny the billing invoices for July 22, 2021 and March 3, 2022 has, in part, resulted in Claimant's inability to secure additional timely

treatment from Dr. Castrejon, the ALJ is convinced that the effect of Respondents' conduct/violation amounts to a delay or denial of medical treatment for Claimant. Indeed, Claimant convincingly testified that he cannot access care based upon Respondents failure to timely pay Dr. Castrejon's bills. Accordingly, the ALJ is convinced that the imposition of penalties in this case is appropriate under the general penalty statute enumerated at C.R.S. § 8-43-304(1) rather than under C.R.S. § 8-43-401(2)(a). (*See*, *Jill Goss v. The Kroger Company*, W.C. No. 4-855-895-02 (ICAO, January 14, 2013; *Pamela Ringler v. King Soopers, Inc.,* W.C. No. 4-121-888-11 (ICAO, March 13, 2013)(Claimant's failure to seek penalties on any conduct outside of the penalty available under C.R.S. § 8-43-401(2)(a) limited the available penalty to eight percent of the withheld medical benefit).

Q. "The imposition of penalties under § 8-43-304(1) is mandatory if there has been a violation and the violation was not reasonable under an objective standard." *Castro v. FBG Service Corporation*, W.C No. 4-739-748(ICAO Dec. 31, 2008). *See also, Armbruster v. Rocky Mountain Cardiology,* W.C. No. 4-447-502 (ICAO Feb. 24 2003). *aff'd by Rocky Mountain Cardiology v. ICAO,* 94 P.3d 1182 (Colo. App. 2004). When, as here, the evidence supports a conclusion that Respondents knew the rule and did not present any convincing arguments that their actions did not violate the rule, the record compels the conclusion that Respondents knew or should have known that their failure to timely pay or deny the July 22, 2021 and March 3, 2022 billing violated the WCRP 16-10(A). As a result, the ALJ would err as a matter of law if he refused to impose a penalty. *Varga v. A1 Sewer Master Mountain Water,* W.C. No. 4-508-548 (ICAO July 1, 2004). "Negligence, as opposed to recklessness and other standards of conduct, connotes an objective standard measured by the reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *CCIA v. ICAO,* 907 P.2d 676, 678 (Colo. App. 1995). As noted, RA's[Redacted]justifications for the late payment are not objectively reasonable. An adjuster's "mistaken beliefs" and "poor handling procedures" are not predicated on a rational argument based on law or fact, and thus are not reasonable. *Diversified Veterans Corporate Center v. Hewuse,* 942 P.2d 1312, 1314 (Colo. App. 1997). As such, penalties must be assessed in this case.

R. The Colorado Supreme Court has adopted the "gross disproportionality" test for determining whether a regulatory fine violates the Excessive Fines Clause. *Colorado Dept. of Labor & Empl. v. Dami Hospitality, LLC*, *supra* (hereinafter *Dami Hospitality*). In Concluding that corporations were protected from the imposition of excessive fines pursuant to the Eighth Amendment, the Court provided:

> In sum, we hold that the Eighth Amendment does protect corporations from punitive fines that are excessive. The appropriate test to apply in assessing whether a regulatory fine violates the Excessive Fines Clause is the "gross disproportionality" test. In assessing proportionality, a court 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.

Dami Hospitality, *Id.* at 103.

S. Concerning the penalties (fine) imposed in this case, the ALJ is mindful that C.R.S. § 8-43-304(4) provides that, "Any employer or insurer… [that] fails, neglects, or refuses to obey any lawful order (including a rule or regulation) made by the director or panel or any judgment or decree made by any court as provided by the articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each offense….". The statute specifically authorizes an ALJ to assess up to $1,000 per day in penalties against any party that fails to adhere to a regulation or rule of procedure. Asserting that Respondents established no legitimate justification for failing to timely pay Claimant's medical bills, which is precluding Claimant's ability to obtain medical treatment through Dr. Castrejon's office, Claimant contends that he has been forced to endure additional hardship as he needs further treatment to attain MMI. The ALJ is not convinced that Claimant's cited hardship arises to the level for imposition of the maximum penalty allowed for by statute. Indeed, the evidence presented persuades the ALJ that the limited violations in this case support the imposition of a $10.00/day penalty as suggested by Claimant.

T. The purpose of penalties is to address ongoing conduct. The ALJ finds and concludes that the delay in payment or denial of the medical billing involved in this case results from isolated, albeit unreasonable conduct, which billing was ultimately paid through the involvement of RA[Redacted]. Nonetheless, it is actionable to deter future like violations. In this case, a penalty of $10.00 per day is not grossly disproportionate to the harm or risk of harm caused by each day of Respondents failure to pay or deny the charges associated with Dr. Castrejon's July 22, 2021 and March 3, 2022, i.e. the $121.11 billing invoices. Simply put, the fine is proportional to the offending conduct and appropriate under the circumstances presented.

ORDER

It is therefore ordered that:

1. Claimant's request for payment of temporary disability benefits is GRANTED in part as follows:

a. Respondents shall pay temporary total disability (TTD) benefits from 12/25/20 through 12/29/20, pursuant to the stipulation of the parties;

b. Respondents shall pay temporary partial disability (TPD) benefits for Claimant's lost work time to attend medical appointments on 2/26/2021, March 1, 2021, May 3, 2021 August 3, 2021 March 3, 2022 and August 11, 2022;

c. Claimant's request for payment of temporary disability benefits associated with the remaining dates listed in Exhibit 12 is denied and dismissed.

2. Claimant established by a preponderance of the evidence that Respondents violated WCRP 16-10(A) by failing to timely pay Dr. Castrejon's July 22, 2021 billing invoice and by failing to deny or pay Dr. Castrejon's March 3, 2022 billing invoice in the amount of $112.11. Accordingly, Respondents shall pay penalties at a rate of $10.00 per day for these violations, pursuant to §§ 8-43-304(1) and 8-43-305, C.R.S. in the following amounts:

a. 7/22/2021: For the fifteen (15) days between October 15, 2021, when payment was due and October 29, 2021, when payment was made - $150.00 (15 days × $10.00/day = $150.00).

b. 3/3/2022: For the 185 days between April 17, 2022, when payment and or denial of the billing was due and October 18, 2022, when payment was made - $1,850.00 (185 days × $10.00/day = $1,850.00).

c. Claimant's remaining penalty claims are denied and dismissed.

3. Pursuant to § 8-43-304(1) the penalty assessed is apportioned between Claimant and the Colorado uninsured employer fund created in § 8-67-105. Fifty percent (50%) of the penalty assessed shall be paid to Claimant and the remaining fifty percent of the penalty assessed shall be paid to the Colorado uninsured employers fund.

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

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

DATED: March 20, 2023

/s/ Richard M. Lamphere

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

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-092-107-003

ISSUE

1. Whether Respondent established by a preponderance of the evidence that Claimant received an overpayment of permanent partial disability (PPD) benefits for which Respondent is entitled to repayment.

2. If Respondent is entitled to repayment, what are the terms of repayment?

FINDINGS OF FACT

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

1. Claimant suffered a compensable injury on November 8, 2018.

2. Claimant reached maximum medical improvement (MMI) on September 28, 2020, and was given a 17% whole person impairment rating. Claimant's whole person impairment rating corresponds to an award of PPD benefits of $57,249.54. Due to the cap on indemnity benefits, Claimant is only entitled to $39,806.82 in PPD benefits. (Ex. A).

3. Following the date of injury, and until March 13, 2021, Respondent paid Claimant temporary total disability (TTD) benefits and temporary partial disability (TPD) benefits totaling $64,141.88. (Ex. A and Ex. C).

4. On June 9, 2021, Respondent filed a Final Admission of Liability (FAL). The FAL states, "[t]here has been an overpayment in indemnity benefits in the amount of $12,821.86. Overpayment will be taken as a credit against any applicable future benefits." (Ex. A). Claimant filed an Application for Hearing on June 18, 2021, endorsing, among other things, the issue of "alleged overpayment," but the parties canceled the August 25, 2021 hearing.[1]

5. The ALJ finds that Respondent knew of the $12,821.86 overpayment of TTD benefits on June 9, 2021.

6. Two days later, on June 11, 2021, Respondent paid Claimant $20,315.48 in PPD benefits for the period of September 26, 2020 to June 14, 2021. (Ex. C). There is no

[1] Although not included in the evidentiary record submitted by the parties, the ALJ takes judicial notice of the Office of Administrative Courts' files related to this claim. *See Habteghrigis v. Denver Marriott Hotel*, W.C. No. 4-528-385 (ICAO March 31, 2006) ("A court can take judicial notice of its own records and files."). Respondent's contention that the Court may not take administrative notice of these facts is without merit.

evidence in the record that Respondent attempted to recover the known $12,821.86 TTD overpayment, by offsetting it against the PPD payment as provided in the June 9, 2021 FAL.

7. Between June 15, 2021 and July 26, 2021, Respondent paid Claimant an additional $13,183.98 in PPD benefits. Respondent paid Claimant $9,927.30 on June 25, 2021, $1,085.56 on June 25, 2021, $1,085.56 on July 9, 2021 and $1,085.56 on July 23, 2021. (Ex. C). There is no evidence in the record that Respondent attempted to recover the known $12,821.86 TTD overpayment, by offsetting it against any of these PPD payments as provided in the June 9, 2021 FAL. In total, Respondent paid Claimant $33,499.46 in PPD benefits between June 11, 2021 and July 26, 2021.

8. On August 3, 2021, Respondent filed an Amended FAL. The Amended FAL stated, "[t]here has been an overpayment in indemnity benefits in the amount of $12,821.86. Overpayment will be taken as a credit against any applicable future benefits."[2] (Ex. A).

9. Claimant did not object to the Amended FAL, nor did he file an Application for Hearing.

10. [Redacted, hereinafter LV] is a claims adjuster for [Redacted, hereinafter SC]. She credibly testified that the $12,821.86 overpayment noted in the FAL and Amended FAL reflected TTD payments made to Claimant after he returned to work.

11. After issuance of the Amended FAL, Respondent paid Claimant an additional $14,112.28 in PPD benefits. Respondent issued thirteen separate payments of $1,085.56 to Claimant between August 9, 2021 and January 6, 2022. There is no evidence in the record that Claimant ever attempted to recover the $12,821.86 TTD overpayment by offsetting it against any of these payments.

12. In total, Respondent paid Claimant $47,611.74 in PPD benefits between June 11, 2021 and January 26, 2022, when Claimant was only entitled to $39,806.82 in PPD benefits per the statutory cap.

13. The ALJ finds that Respondent overpaid Claimant $7,804.92 in PPD benefits.

14. Respondent filed an Application for Hearing on August 16, 2022, seeking "recovery of ***overpaid PPD benefits***." (emphasis added). In Claimant's Response to the Application for Hearing, Claimant asserted that the issues to be heard at hearing were "alleged overpayment by Respondents to Claimant of ***Permanent Partial Benefits***; effect of agreement of resolution." (emphasis added).

15. Claimant testified that he never had any conversations with LV[Redacted] or Respondent regarding any alleged overpayments. Claimant further testified that when

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[2] Respondent paid Claimant $64,141.88 in indemnity benefits, but Claimant was only supposed to be paid $51,320.02. This resulted in a $12,821.26 overpayment ($64,141.88 - $51,320.02).

he returned to work, he did not realize he was still being paid TTD benefits. The ALJ finds Claimant's testimony to be credible.

16. Claimant credibly testified that he currently works for Employer, and his average weekly wage is $1,000.00 per week. He testified that if required to make payments, he could afford payments of $100.00 to $200.00 per month at the most.

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 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).

Overpayment

Pursuant to § 8–43–303(1) C.R.S., upon a prima facie showing that the claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. *Id*. Prior to January 1, 2022, the Act, defined "overpayment" as "money received by a claimant that

exceeds the amount that should have been paid, or which the claimant was not entitled to receive." § 8-40-201 (15.5), C.R.S. (2021). The General Assembly amended the statute (effective January 1, 2022) and removed this language. The statute now includes "money paid in error or inadvertently in excess of an admission or order that exists at the time that the benefits are paid to a claimant," as an overpayment. *Id.*

Respondent bears the burden of proving, by a preponderance of the evidence, that Claimant received an overpayment, and that Respondent is entitled to recovery of that overpayment. *Denver v. Indus. Claim Appeals Office*, 58 P.3d 1162, 1164-1165 (Colo. App. 2002). As found, Respondent proved by a preponderance of the evidence that Claimant received an overpayment of $7,804.92 in PPD benefits. (Findings of Fact ¶ 13).

Respondent is seeking to recover a total overpayment of $20,626.78 (PPD benefits of $7,804.92 and TTD benefits of $12,821.86). Respondent's Application for Hearing, however, specifically states Respondent is seeking recovery of the overpayment of PPD benefits. Rule 12(A) of the OACRP states, "[i]ssues for hearing shall be listed in the Application for Hearing, the Response to the Application for Hearing, or may be added before the hearing date is confirmed by written notice to the OAC and the opposing party. After the hearing date is confirmed, issues may only be added by written agreement of the parties or order of a judge or designee clerk for good cause shown." Here, the Application for Hearing and the Response both note that the issue for hearing involved the alleged overpayment of PPD benefits. No other issues, particularly as related to TTD benefits, were added before the hearing.

Even if the overpayment of TTD benefits had been at issue, which it was not, Respondent would have been barred from seeking such recovery by the statute of limitations. Section 8-42-113.5(b.5)(I) of the Colorado Revised Statutes states "[a]fter the filing of a final admission of liability, except in cases of fraud, any attempt to recover an overpayment shall be asserted within one year after the time the requester knew of the existence of the overpayment." As the Court of Appeals held, "the term 'attempt' in section 8-42-113.5(1)(b.5)(I) cannot be a mere assertion of an overpayment; it must include some effort to regain the overpayment." *Peoples v. Indus. Claim Appeals Office*, 457 P.3d 143, 148 (Colo. App. 2019). An assertion in the FAL simply provides notice to the claimant of the overpayment. *Id.*

Here, Respondent filed an FAL on June 9, 2021, and provided notice to Claimant of the $12,821.86 overpayment of TTD benefits. As found, Respondent knew of the overpayment of TTD benefits on June 9, 2021. (Findings of Fact ¶ 5). Respondent filed an amended FAL on August 6, 2021, and again provided notice of the $12,821.86 overpayment of TTD benefits. Respondent acknowledged in the FAL and the Amended FAL that the overpayment of TTD benefits would be taken as a credit against any future benefits. Despite multiple opportunities, Respondent did not attempt to recover the overpayment. Respondent issued eighteen separate PPD payments between June 11, 2021 and January 26, 2022, but never offset the TTD overpayment that Respondent knew of on June 9, 2021. (Findings of Fact ¶¶ 6, 7, and 11). Thus, even if the recovery of the TTD overpayment had been endorsed in the August 16, 2022, Application for Hearing, the one-year statute of limitations to recover the overpayment would have run.

Claimant's contention that recovery of an overpayment is barred because the Amended FAL closed the issue of overpayment and Respondent did not file a petition to reopen, is without merit. As addressed in *Cooper v. Safeway, Inc*., W.C. 4-539-747 (ICAO Nov. 19, 2003), "[n]othing in § 8-43-303 mandates the filing of a formal petition to reopen in order to confer jurisdiction on an ALJ to determine whether there has been an overpayment. Rather, the filing of a petition to reopen is a procedural mechanism designed to facilitate the process of adjudicating requests to reopen. While courts have held the procedural rules governing the filing of petitions to reopen may be enforced, they have not held such rules erect jurisdictional barriers to adjudicating reopenings where the rules have not been complied with." (Citing *Lewis v. Scientific Supply Co.*, 897 P.2d 905 (Colo. App. 1995)). The failure to file a petition to reopen does not deprive the ALJ of jurisdiction to hear this matter.

Denver v. Indus. Claim Appeals Office 21CA0275 (Colo. App. 2021) does not require a different result. After an admission becomes final, a party may not seek increased or decreased benefits without reopening the proceedings. Respondent, however, is not seeking to either increase or decrease Claimant's benefits. Claimant's benefits, as admitted in the Amended FAL, remain unchanged. The evidence demonstrates Claimant, by no fault of his own, received money in excess of the benefits to which he is entitled. The excess payments are by definition, overpayments, and not "benefits." Thus, the alleged overpayment does not become "final."

As found, Respondent is entitled recover from Claimant the overpayment of PPD benefits in the amount of, $7,804.92.

Repayment

Under § 8-43-303(1), C.R.S., upon a finding of an overpayment, an order of repayment is mandatory. When the parties are unable to agree upon a repayment schedule, the ALJ is empowered, pursuant to § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." The Colorado Court of Appeals held the ALJ has discretion to fashion a remedy with regard to overpayments. *See Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010). Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo. App. 1994).

Claimant credibly testified at hearing that the most he can afford to pay toward an overpayment is $100.00 - $200.00 per month. The ALJ finds that requiring Claimant to make substantial payments would impose a financial hardship. The ALJ concludes Claimant is able to make payments of $100.00 per month without sustaining significant financial hardship.

ORDER

It is therefore ordered that:

1. Claimant received an overpayment of PPD benefits in the amount of, $7,804.92 and Respondent is entitled to repayment of that amount.

2. Claimant shall repay the overpayment at the rate of $100.00 per month, until satisfied.

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: March 2, 2023

Victoria E. Lovato
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 3-707-077-003

ISSUES

1. Did Respondents prove by a preponderance of the evidence that they can terminate the general maintenance medical admission in the Final Admission of Liability (FAL)?

2. Is Claimant entitled to change her authorized treating physician (ATP) to Sander Orent, M.D.?

3. Did Claimant prove by a preponderance of the evidence that numerous, specific medical benefits are reasonable, necessary and related to her July 14, 1983 work injury as maintenance treatment? The specific benefits include:

   a. Pain management and treatment;
   b. Authorization for walk-in tub;
   c. Authorization for the following prescribed medications: folic acid, folate, D#-1000, Movantik, Cynaocobalamin injections, Alprazolam, Toradol, Magnesium oxide, Narcan, Lyriaca, Tizanidine, and Tolterodine;
   d. Authorization for membership at recreational center for water-based exercises;
   e. Evaluation and treatment at National Jewish Health for sleep apnea;
   f. Payment to Dr. Schaeffer for additional EMG testing;
   g. Ongoing botox injections;
   h. Physical therapy;
   i. Payment for treatment at Valley View Hospital October 2021, Sterling Regional Medical Center for December 2021, Pioneer Medical Center October 2021, and Banner Health May 2021; and
   j. Completion of proposed dental implant procedures.

4. Did Claimant prove by a preponderance of the evidence that Respondents have violated § 8-43-404(10)(b), C.R.S.? If so, what penalty, if any, should be ordered?

FINDINGS OF FACT

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

1. Claimant is a 71 year-old female who suffered an admitted injury on July 14, 1983. The admitted workers' compensation claim is currently on an FAL, dated February 6, 2018, admitting for permanent total disability and maintenance medical benefits. (Ex. OO).

2. Claimant's mechanism of injury, which occurred nearly 40 years ago, involved leaning over to pick up a bottle, and feeling a pain in her lower back when she stood up. Over the last 40 years, Claimant has received extensive medical care that has been approved by Insurer.

3. Claimant was placed at MMI on March 26, 1985, by James Reese, M.D. Dr. Reese diagnosed Claimant with chronic lumbar muscle strain. He provided a two percent partial disability for lumbar spine. (Ex. X).

4. On April 14, 1985, Claimant had a CT scan of her back that reflected a new, moderate, and central left-sided disc bulge at L5-S1. (Ex. X). The claim was reopened, and Claimant was later placed at MMI on September 10, 1991. After failure of vocational rehabilitation, Claimant asserted she was permanently and totally disabled, and this was admitted. (Ex. QQ).

5. Claimant has had numerous surgeries including a L4-5 decompression and fusion in 1988, and a L3-S1 fusion anteriorly and posteriorly in 1993 with a bone growth stimulator. She underwent physical therapy for years. Claimant subsequently began a course of pain management with providers at Denver Pain Management.

6. Claimant had an intrathecal morphine pump from 1994 to 2010. In addition to the intrathecal pump, Claimant received numerous injections, and was prescribed opiates. When the pump was removed, her providers prescribed her Fentanyl and Actiq.

7. In 2013, Shay Bess, M.D. performed a removal of Claimant's posterior segmentation of instrumentation, exploration of fusion mass with confirmed fusion L3-S1, T3 through the sacrum, pelvis posterior spinal fusion, T3-sacrum pelvis posterior segmental instrumentation, posterior pelvic fixation other than sacrum, transforaminal lumbar inner body fusion L2-3 and insertion of inner body implant L2-3. (Ex. A).

8. Kristin Mason, M.D. began treating Claimant on January 25, 2016 and served as her ATP. Dr. Mason specializes in physical medicine and rehabilitation. (Dep. Tr. 4:23-24). She conducted a new patient evaluation, and noted Claimant was initially injured on July 14, 1983, and developed low back pain and decreased capacity to lift. She further noted Claimant's complex medical history including a laminotomy in 1988, cervical and lumbar fusion in 1993, multiple pain pumps, and a long fusion from T3 to sacrum for scoliosis. Claimant's previous physician who managed her chronic pain, lost his medical license. Dr. Mason described Claimant as a "complex long term chronic pain patient." At the first appointment, Dr. Mason discussed her desire to reduce Claimant's medications, and stagger her benzodiazepines and pain medications. (Ex. M)

9. Dr. Mason completed a comprehensive record review on February 18, 2016. She concluded Claimant presented with an exceedingly complex situation with significant chronic multifactorial pain and an extensive procedural history. (Ex. M).

10. Dr. Mason evaluated Claimant on June 27, 2016. She noted Claimant's three falls within a week, and her general increased pain. Dr. Mason opined that Claimant's

"function is a problem but . . . she would not function at all if she did not have pain medications available to her." (Ex. M.).

11. Over the next several years, Dr. Mason regularly evaluated Claimant, and she gradually decreased Claimant's pain medications. Dr. Mason routinely checked the Prescription Drug Monitoring Program (PDMP) to ensure Claimant was not getting medications from other physicians, and Claimant complied with random urine drug screens.

12. In May 2017, Dr. Mason ordered a sleep study for Claimant, and formally referred her to neurosurgeon, Bernard Guiot, M.D., for an evaluation. (Ex. M). Dr. Guiot recommended C4-T4 fusion to treat junctional kyphosis at T4 and a pseudarthrosis at C5-6. Dr. Mason assessed Claimant as having psychologic and physical dependence to opiates for chronic pain, anxiety and sleep apnea. (Ex. M).

13. In November 2017, Claimant and Dr. Mason discussed whether Dr. Mason trusted Claimant. Dr. Mason explained that she did not trust anyone completely with respect to opiates. Dr. Mason told Claimant she did not feel Claimant was addicted, but definitely had ongoing psychologic and physical dependence on the opiates. (Ex. M.).

14. In April 2018, Dr. Mason and Claimant discussed Claimant's planned oral surgery, and subsequent pain management. They discussed the complexity of pain management post-op. (Ex. M). In the summer of 2018, Claimant received her lower implant, and a temporary upper denture. (Ex. M).

15. In February 2019, Claimant was hospitalized for a pulmonary embolus. Dr. Mason saw Claimant on March 25, 2019. She was concerned about the amount of opiates Claimant was taking, particularly given her pulmonary situation. Claimant and Dr. Mason discussed going through an inpatient detoxification program to get her off of her current medication and potentially on something like Suboxone. Claimant was open to the idea. (Ex. M).

16. Kathy McCranie, M.D., is a physician advisor for Insurer. She has worked in this position since 1996. (Vol. I Tr. 126:8-14). On March 26, 2019, Dr. McCranie conducted an Independent Medical Examination (IME) at the request of Insurer. Dr. McCranie is board certified in physical medicine and rehabilitation. (Vol. I. Tr. 40:14-16). Claimant provided Dr. McCranie a summary of her injury and treatment. Dr. McCranie conducted a physical examination of Claimant. She opined that Claimant's mechanism of injury did not cause her cervical issues, so any treatment for Claimant's cervical issues, was not work-related. Dr. McCranie recommended that Claimant transition from physical therapy to an independent exercise program, and continue tapering her opioid medications. (Ex. A).

17. Insurer asked Dr. Mason to review Dr. McCranie's IME. Dr. Mason reviewed the IME, and noted she had been weaning Claimant's medication. With respect to Claimant, Dr. Mason felt that with "a patient with this sort of chronicity, the best means to treat this level of psychologic dependence is likely a structured inpatient program. . . . [Claimant] is

frail enough physically that she would need to do tapering of opioid medications and more specifically the benzodiazepines in an inpatient setting." (Ex. M).

18. At Claimant's April 22, 2019 appointment with Dr. Mason, Claimant expressed her displeasure with the IME report. They discussed Dr. McCranie's recommendation of inpatient detoxification. Claimant was very resistant to this because she felt she had "too many painful procedures coming up to even think about lower amounts of medication." Dr. Mason continued to reduce Claimant's medications. She noted in Claimant's medical record, "I feel fairly strongly that it won't be possible to fully wean her off of the medication as an outpatient, and I have been encouraging a medical detox program for appropriate monitoring, given her medical frailty." (Ex. M)

19. Dr. Mason examined Claimant on May 20, 2019. She noted Claimant was quite angry still about Dr. McCranie's IME, and perseverated on the IME. Dr. Mason discussed inpatient detoxification and transitioning to Suboxone. She told Claimant that her pain levels hovered at 8 or 9 regardless of what medications they tried. Claimant agreed to try weaning down the Oxycodone. (Ex. M).

20. Over the next couple of months, Dr. Mason continued to wean Claimants' medications. Claimant continued to refuse to go to an inpatient detoxification facility. Dr. Mason routinely told Claimant that they could not continue having the same heated discussions regarding tapering her medications. (Ex. M).

21. At Claimant's February 11, 2020 appointment, Dr. Mason suggested Claimant consult with Dr. Gellrick because she may be able to do an outpatient Suboxone transition. Claimant had an appointment scheduled with Dr. Gellrick for some time in March. Claimant, however, ended up hospitalized with bacterial pneumonia, from March 15-19, 2020, so she had to cancel her appointment with Dr. Gellrick. Dr. Mason advised Claimant to reschedule the appointment. (Ex. M).

22. Dr. Mason began having telehealth visits with Claimant due to Covid. At her May 22, 2020 visit, Dr. Mason noted Claimant had not yet rescheduled her appointment with Dr. Gellrick. Claimant looked into inpatient treatment programs, but did not wish to go in that direction. (Ex. M).

23. Throughout 2020 and early 2021, Dr. Mason conducted telehealth visits with Claimant. After being fully vaccinated, Claimant saw Dr. Mason for an in-person appointment on May 3, 2021. Her subsequent appointments, however, were virtual visits.

24. In October 2021, Claimant and her husband went to Meeker, Colorado to go camping with family. Claimant testified they had been camping for a day when she began getting ill. Claimant thought she was developing a urinary tract infection. She was rushed to Pioneer Medical Center (Pioneer), and subsequently airlifted to Valley View Medical Center (Valley View). Claimant testified that she became quite ill, and had no memory for almost two weeks. (Vol. II Tr. 32:3-33:2).

25. Dr. Fauchet contacted Dr. Mason on October 8, 2021, to alert her that Claimant had been airlifted to Valley View with pulmonary emboli, confusion and hypoxemia. Dr.

Fauchet was concerned about the opioids Claimant was taking, so he transitioned her to Suboxone. He gave Claimant a 28-day prescription of Suboxone.

26. Claimant credibly testified she tried to fill the prescription for Suboxone, but Insurer did not authorize the prescription, and she could not afford it. (*Id.* at 33:4-7). She returned to her relatives' house in Meeker. Claimant testified she became sick and went into withdrawals. (*Id*. at 33:4-17). She was transported by ambulance back to Pioneer, and while there, Claimant was given opioids.

27. After Claimant was discharged from Pioneer, she filled prescriptions for Oxycontin and Oxymorphone that Dr. Mason had written previously. (Vol. II Tr. 33:21-34:1).

28. Claimant had a telehealth visit with Dr. Mason on November 1, 2021. Prior to the appointment, Dr. Mason reviewed the PDMP and saw that Claimant filled her previously written prescriptions for Oxymorphone and Oxycontin on October 13, 2021 and October 14, 2021, respectfully. There was no record of Claimant filling her Suboxone prescription, and Claimant never contacted Dr. Mason or Insurer to alert them to the fact she could not fill her Suboxone prescription. Claimant told Dr. Mason that when she was re-hospitalized at Pioneer, they put her back on her usual pain medications. Claimant also told Dr. Mason she did not remember much from either of the hospital stays. Dr. Mason told Claimant she needed to review the medical records from Valley View and Pioneer, but she was seriously considering discharging her as a patient for her failure to communicate. Dr. Mason was unwilling to write any other prescriptions for pain medications until she was able to review the medical records. Dr. Mason offered to facilitate an immediate admission to a medical detoxification facility, but Claimant was not interested. (Ex. M).

29. After reviewing the medical records from Valley View and Pioneer, and after speaking with Claimant, Dr. Mason decided to discharge Claimant from her care. Dr. Mason did not feel Claimant had been honest with her regarding the events in October. Dr. Mason noted Claimant "has been a difficult patient to manage under previous circumstances and I feel at this point that it is dangerous for her to continue on her medications, which is what she would like to do, and I no longer feel comfortable being her treating physician. I did go ahead and write a referral to inpatient detox which is the only care I am willing to offer her further for her safety." This record was copied to Claimant's counsel. (Ex. M).

30. On November 4, 2021, Dr. Mason wrote the following to Claimant: "it is clear that they transitioned you to Suboxone and that is what you were supposed to be on. You instead chose to resume taking your medications and fill[ed] the previously written prescription from me against medical advice. I am therefore formally discharging you from my practice effective November 8, 2021. My only recommendation for you at this point is that you be admitted to an inpatient detoxification facility. Your cardiopulmonary and renal issues may get unsafe for you to continue on opiate pain medication. I have written that referral and we will send it to Pinnacol for authorization." (Ex. M). Dr. Mason did not recommend a specific detoxification facility.

31. The ALJ finds Dr. Mason discharged Claimant from her practice for nonmedical reasons effective November 8, 2021. The ALJ further finds Dr. Mason began recommending an inpatient detoxification program for Claimant as far back as March 2019.

32. [Redacted, hereinafter LJ] is a complex claims representative for Insurer. LJ[Redacted] took over Claimant's claim in February 2019. (Dep. Tr. 4:5-8). LJ[Redacted] received Dr. Mason's November 4, 2021 medical record discharging Claimant as a patient, the letter Dr. Mason sent to Claimant, and the prescription for inpatient detoxification, on November 8, 2021, via fax. None of these documents were sent via certified mail. (Vol. I 190:2-192:9).

33. The ALJ finds Insurer had notice, on November 8, 2021, that Dr. Mason discharged Claimant as a patient.

34. LJ[Redacted] credibly testified that when she received the materials from Dr. Mason, she spoke with the medical case manager assigned to the claim, [Redacted, hereinafter HW]. LJ[Redacted] and HW[Redacted] agreed that inpatient detoxification treatment should be authorized. According to the claim notes, the "clock [was] ticking" before Claimant ran out of her medications. LJ[Redacted] noted it was "going to be VERY VERY difficult" to find a new ATP for Claimant. (Ex. RR).

35. LJ[Redacted] called Claimant's counsel on November 8, 2021, and left a message confirming Insurer would authorize inpatient detoxification, but if Claimant refused to go, they could discuss possibly settling the claim. (Vol. I Tr. 192:5-193:8).

36. The ALJ finds that Insurer notified Claimant, through her counsel, on November 8, 2021, that inpatient detoxification was authorized.

37. Claimant's counsel and LJ[Redacted] exchanged voicemail messages on December 1 and 2, 2021. They finally spoke on December 16, 2021. Claimant's counsel asked if Insurer had found Claimant a new ATP and LJ[Redacted] answered that she had not even tried. When LJ[Redacted] asked whether Claimant was going to inpatient detoxification, Claimant's counsel said she did not want to go. LJ[Redacted] asked Claimant's counsel about Dr. Gellrick, who Dr. Mason noted might be an option to take over Claimant's care. Claimant's counsel told LJ[Redacted] that Dr. Gellrick was likely not an option because she was too far away. (Vol. I Tr. 200:2-23 and Ex. RR).

38. Claimant had previously agreed to see Dr. Gellrick. As found, she had an appointment with Dr. Gellrick in March 2019, but had to cancel because she was hospitalized. Claimant never rescheduled the appointment with Dr. Gellrick. There is no objective evidence in the record that Dr. Gellrick was too far away to serve as Claimant's ATP.

39. On December 28, 2021, Respondents' counsel wrote to Claimant's counsel confirming that Dr. Mason's referral for inpatient medication detoxification was pre-approved, and she provided the contact information for three facilities: Centennial Peaks

Hospital, Detox Center of Colorado, and Rocky Mountain Detox. The direction was to "contact one of the facilities and arrange for [Claimant's] admission." (Ex. 9).

40. LJ[Redacted] testified that she did not contact any of the three facilities listed in the December 28, 2021 letter until January 28, 2022, a month later. LJ[Redacted] testified that she tried contacting the facilities at this time because Claimant was unable to get into any of the facilities listed in the December 28, 2021 letter. (Vol. I Tr. 207:13-25).

41. According to Insurer's records, Rocky Mountain Detox was the only facility, as of December 27, 2021 that had a bed available and would be able to admit Claimant. (Dep. Tr. 18:23-21:5 and 30:3-31:6). LJ[Redacted] credibly testified that the referral to a detoxification facility was an urgent need. (*Id.* at 23:3-7)

42. The ALJ finds that Insurer did not contact any of the detoxification facilities until December 27, 2021, nearly two months ***after*** Dr. Mason discharged Claimant and referred her to inpatient detoxification, which was an urgent need. The ALJ finds that as of December 28, 2021, only one of the facilities listed in the December 28, 2021 letter had been contacted and had a bed for Claimant.

43. On January 6, 2022, Respondents filed a Petition to Terminate Claimant's medical benefits because Claimant refused to submit to inpatient detoxification treatment. (Ex. LL). LJ[Redacted] credibly testified that the intent of filing the Petition was "to get [Claimant] to complete the recommendations that Dr. Mason had – had given her." (Vol. I Tr. 209:1-5).

44. On February 2, 2022, LJ[Redacted] wrote to Claimant re: "**URGENT – Admission scheduled for February 4, 2022."** The letter explained that Insurer had coordinated Claimant's admission to Rocky Mountain Detox, an inpatient detoxification facility. (Ex. RR). LJ[Redacted] testified that Insurer considers Rocky Mountain Detox to be Claimant's ATP. (Dep. Tr. 33:2-6). LJ[Redacted] further testified that she has never spoken with a doctor at Rocky Mountain Detox. (Vol. I Tr. 209:22-25).

45. The ALJ finds that Rocky Mountain Detox is not an appropriate ATP, and Insurer has not provided Claimant with a new ATP since November 8, 2021, when Dr. Mason discharged Claimant from her practice for nonmedical reasons.

46. Claimant never went to Rocky Mountain Detox despite the referral from Dr. Mason and Insurer's authorization. Instead, Claimant eventually ran out of her medications.

47. Claimant testified the last time she had any pain medications was in November 2021. She further testified that her functioning level has decreased since that time, and she goes from her bed to couch and back. She testified she cannot sit for long periods of time because of the pain, and she can no longer cook or clean. (Vol. II. Tr. 30:8-17).

48. Claimant testified that in October 2021, when she was on pain medications, she was not functioning as well as when she had been on higher doses. Claimant testified she lost quite a bit of function when she was taken off of physical therapy, and when her

medication doses were decreased. Claimant could, however, do some cooking and cleaning in October 2021. (Vol. II Tr. 29:13-21).

49. On March 9, 2022, Sander Orent, M.D., virtually evaluated Claimant for purposes of a new patient consultation. Dr. Orent is an expert in occupational and environmental medicine and internal medicine. He testified that Claimant's attorney requested he become Claimant's ATP and take over her care. The virtual evaluation entailed Dr. Orent taking a detailed history from Claimant. He did not review the thousands of pages of medical records nor did he examine Claimant prior to issuing an opinion. (Vol. II, Tr. 55:25-56:18).

50. In rendering his opinion, Dr. Orent relied primarily on the history Claimant provided to him, regardless of its veracity. For example, in his report, Dr. Orent described Claimant's 1988 surgery as a "sham fusion where she was never actually fused. . . . it was discovered that even though [the surgeon] took a piece of her hip bone from her hip, he never actually fused her spine. Apparently, there were incisions made both anterior and posteriorly, but the fusion had never happened." (Ex. 15). There is no evidence in the record Claimant had a "sham fusion" in 1988.

51. Based on his interview of Claimant, Dr. Orent recommended referring her to Dr. Wakeshima, a pain management specialist, to consider the resumption of pain medications. He opined Claimant needed a repeat EMG nerve conduction study and imaging of her T3 area. Dr. Orent also concluded Claimant needed to see an orthopedist and a neurologist. (Ex. 15).

52. On March 30, 2022, Dr. McCranie received additional medical records, and Dr. Orent's report. Insurer asked her to address multiple issues, including, but not limited to, Dr. Orent's recommendations. (Vol. I Tr.126:8-14). Dr. McCranie opined that there was no need for a change in ATP. She reasoned that Dr. Mason recommended inpatient detoxification, but Claimant refused the treatment. Dr. McCranie said "[o]piod management was the only treatment that had been reasonably related to the work injury, however, opioid use is no longer indicated for [Redacted, hereinafter KL]. While an inpatient detoxification program would be work-related, if KL[Readacted] refuses this treatment, she does not require other ongoing work-related treatment." (Ex. A).

53. Dr. McCranie testified that none of the medical care and treatment Claimant received from 1986 to present is related to the admitted injury in 1983. (Vol. I. Tr. 182:14-19). Further, she testified that there is no causal connection between Claimant's use of opiates and her 1983 injury. (*Id.* at 101:8-17).

54. While Dr. McCranie has completed a comprehensive review of Claimant's voluminous medical records, she has only examined Claimant on one occasion, four years ago. The ALJ finds Dr. McCranie's opinion to be credible, but not persuasive.

55. Dr. Orent recommended several referrals and courses of treatment for Claimant. (Ex. 15). Dr. Orent, however, has never physically examined Claimant, and he has only

reviewed limited medical records. (Vol. II Tr. 80:11-13). Based on these facts, the ALJ does not find Dr. Orent's opinion persuasive.

56. The only physician who has extensive personal experience with Claimant is Dr. Mason. She was deposed, and credibly testified Claimant needs ongoing medical care for her July 14, 1983 injury. Dr. Mason further testified she discharged Claimant as a patient because she no longer felt comfortable prescribing medications to her, but felt after Claimant detoxed off of the opiates, she would need some form of medication management. (Dep. Tr. 9:20-10:12). The ALJ finds Dr. Mason's testimony to be credible and persuasive as she is the only physician who actively treated Claimant for a significant amount of time.

57. The ALJ finds that Rocky Mountain Detox is not an appropriate ATP, and Insurer never designated a physician to serve as Claimant's ATP following Dr. Mason's decision to discharge Claimant for nonmedical reasons, effective November 8, 2021.

58. Claimant has not had an ATP since November 8, 2021. The ALJ finds that Claimant needs maintenance medical care. The ALJ further finds that Claimant needs an ATP to examine her and determine what maintenance medical care is needed.

59. The ALJ does not find Dr. Orent's recommendations for Claimant's maintenance medical care to be persuasive as he has not physically examined Claimant, nor has he reviewed her extensive medical records. His opinion is primarily based upon what Claimant reported to him.

60. There is no objective evidence in the record that Claimant sent written notice to Respondents, via certified mail, pursuant to § 8-43-404(10)(b), C.R.S., notifying Respondents that Claimant needed a new ATP. Accordingly, the ALJ finds that Respondents did not violate § 8-43-404(10)(b).

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).

Petition to Terminate Benefits

Respondents seek to withdraw their admission for maintenance medical benefits. Section 8-43-201(1) of the Colorado Revised Statutes states: "the claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence;…and a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." Thus, Respondents must prove by a preponderance of evidence that maintenance medical benefits are not reasonable, necessary, or related to the original work injury in 1983.

As found, Dr. Mason treated Claimant, and served as her ATP from January 25, 2016 until November 8, 2021. When Dr. Mason discharged Claimant as a patient for nonmedical reasons, she recommended medical detoxification treatment, and Insurer authorized the treatment. Dr. Mason had been recommending detoxification treatment since March 2019. Dr. Mason credibly testified she discharged Claimant as a patient because she was not comfortable continuing to prescribe Claimant medications, particularly in light of Claimant's cardiopulmonary and renal issues. Dr. Mason also credibly testified that Claimant would need some form of medication management after she detoxed off of the opiates. As found, Claimant has not had any opiates since November 2021.

Dr. McCranie testified that no maintenance medical care is reasonable, necessary or related to Claimant's injury in 1983. As found, Dr. McCranie evaluated Claimant on one occasion, four years ago, and she completed an extensive record review. While Dr.

McCranie is credible, she does not have the personal experience of treating Claimant that Dr. Mason has. As found, Dr. McCranie's opinion is not persuasive.

The ALJ credits Dr. Mason's opinion and finds that even though Claimant has not had any opioid medications since November 2021, she still needs some form of medication management, and ongoing maintenance medical care. Based on the totality of the evidence, Respondents have not met their burden of proof to support the termination of benefits.

Designation of New ATP and Penalties

As found, Dr. Mason discharged Claimant as a patient, for nonmedical reasons effective November 8, 2021, and referred Claimant to inpatient detoxification treatment. As found, Claimant had notice on November 8, 2021 that Dr. Mason discharged her as a patient, and Insurer authorized inpatient detoxification treatment. LJ[Redacted] credibly testified that inpatient detoxification treatment was ***urgent***. Despite the urgent need for care, none of the parties acted urgently.

LJ[Redacted] credibly testified that as of December 16, 2021, she had not even tried to find a new ATP for Claimant. Insurer was aware that Claimant was going to run out of her medication, and LJ[Redacted] noted it would be difficult to find another ATP to treat Claimant. Dr. Mason suggested that Claimant treat with Dr. Gellrick. There is no evidence in the record, however, that Insurer ever attempted to contact Dr. Gellrick. Insurer takes the position that Rocky Mountain Detox is Claimant's ATP. Insurer had not spoken with a physician at Rocky Mountain Detox, they simply confirmed that a bed was available for Claimant, nearly two months after Dr. Mason discharged Claimant for nonmedical reasons. As found, Respondents did not designate a new ATP for Claimant despite her urgent need for care.

LJ[Redacted] credibly testified she left a voicemail message for Claimant's counsel on November 8, 2021. Claimant's counsel and LJ[Redacted] exchanged voicemail messages on December 1 and 2, 2021, but did not speak until December 16, 2021. There is no objective evidence in the record as to why Claimant's counsel and LJ[Redacted] did not speak until December 16, 2021 – over a month from the date Dr. Mason discharged Claimant from her practice.

As found, Insurer did not have a location, with an available bed, until December 27, 2021. Insurer, however, did not make arrangements for admission to Rocky Mountain Detox until February 4, 2022, nearly four months after Dr. Mason discharged Claimant as a patient. As found, Rocky Mountain Detox is not an appropriate ATP. The ALJ finds that Respondents did not designate a new ATP for Claimant after Dr. Mason discharged her as a patient, even though they knew that Claimant was in urgent need of medical care, and would run out of the medications she had been on for 30 years.

Claimant, however, exacerbated the situation by refusing to go to inpatient detoxification. Claimant knew Dr. Mason had been recommending inpatient detoxification

for years. She also had notice by November 8, 2021, that this treatment was authorized by Insurer.

It is undisputed that Dr. Mason notified Insurer on November 8, 2021, via facsimile, that she was discharging Claimant as a patient. Section 8-43-404(10)(a) of the Colorado Revised Statutes provides that when an ATP "discharges an injured employee from medical care for nonmedical reasons when the injured employee requires medical treatment to cure or relive the effects of the work injury, then the physician shall, within three business days from the refusal or discharge, provide written notice of the refusal or discharge by certified mail, return receipt requested, to the injured employee and the insurer or self-insured employer. The notice must explain the reason for the refusal or discharge and must offer to transfer the injured employee's medical records to any new authorized physician upon receipt of a signed authorization to do so from the injured employee." As found, Dr. Mason discharged Claimant for nonmedical reasons. Claimant provided notice of the discharge to Insurer via facsimile, not certified mail.

Respondents argue that § 8-43-404(10)(a), C.R.S., does not apply because Claimant has no more need for medical treatment that is reasonable, necessary, or related to the admitted work injury. Respondents assert that Claimant failed to follow the one recommendation made by Dr. Mason, her ATP, to go to inpatient detoxification. Respondents rely on the opinion of Dr. McCranie that none of Claimant's medical treatment since 1986 is related to Claimant's work injury. Dr. Mason testified, however, that Claimant would need medical management following the inpatient detoxification. As found, Dr. Mason's opinion with respect to Claimant's need for ongoing medical maintenance is credible and persuasive. Dr. Mason treated Claimant for nearly six years and has the most familiarity with her. The ALJ finds that Claimant continues to require medical maintenance.

It is undisputed that Dr. Mason sent her notice of discharge via facsimile, and not via certified mail. As found, Insurer had notice on November 8, 2021 that Dr. Mason discharged Claimant as a patient and recommended inpatient detoxification treatment. But Claimant's arguments about the application of § 8-43-404(10)(b), C.R.S., and designating Dr. Orent as Claimant's ATP are misplaced. The statute requires that before Claimant can select a new ATP, ***Claimant***, must first notify Respondents of the need for a new physician through written notice sent via certified mail. *See Greenberg v. Mtn. Capital Partners*, W.C. No. 5-095-740-009 (ICAO Sept. 8, 2021). The notice, ***from Claimant***, must include language that the ATP discharged claimant for nonmedical reasons when the claimant requires medical treatment, and that there is no other authorized physician willing to provide medical care. § 8-43-404(10)(b), C.R.S. Insurer, upon receiving such notice, has 15 days to designate a new ATP. If Insurer fails to do this, then the injured employee can select an ATP. Here, there is no objective evidence in the record that Claimant provided such a notice to Insurer to trigger this statute. Claimant has failed to prove by a preponderance of the evidence that Respondents violated § 8-43-404(10)(b), C.R.S. Claimant is not entitled to penalties.

To the extent Claimant wants to designate Dr. Orent as her ATP pursuant to § 8-43-404(5)(a)(VI)(A), C.R.S., there is no evidence in the record that Claimant ever

completed “a form prescribed by the Director” seeking such relief. While Dr. Orent’s March 9, 2022 report was forwarded to Respondents, this is not sufficient to comply with the requirements of § 8-43-404(5)(a)(VI)(A), C.R.S.

As found, Claimant requires maintenance medical treatment. Currently, Claimant does not have an ATP. As found, Dr. Orent’s recommendations regarding medical maintenance are not persuasive because Dr. Orent did not physically examine Claimant, nor did he comprehensively review her medical records. Claimant failed to prove by a preponderance of the evidence that Dr. Orent’s recommended medical treatment is reasonable, necessary and related to Claimant’s admitted work injury.

The Parties are to confer and decide upon a new ATP for Claimant. The designated ATP will personally examine Claimant and make recommendations regarding maintenance medical care.

ORDER

It is therefore ordered that:

1. Respondents are not allowed to withdraw the general admission for maintenance medical care under this claim.

2. Claimant’s request for a change of ATP to Dr. Orent is denied.

3. Claimant’s request for treatment, as set forth in Dr. Orent’s March 9, 2022 report, is denied,

4. The parties are to confer, and within 21 days, designate an ATP to treat Claimant.

5. Claimant’s new ATP will personally examine Claimant and make recommendations regarding medical maintenance treatment.

6. Claimant’s claim for penalties is denied and dismissed.

7. 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: March 22, 2023

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she was injured in the course and scope of her employment with Employer on April 20, 2022.

II. If the claim is found compensable, whether Claimant proved by a preponderance of the evidence she is entitled to medical benefits that are reasonably necessary and related to the injury for Concentra and their referral providers.

STIPULATIONS

The parties stipulated to holding the issues of average weekly wage and temporary disability benefits in abeyance.

The parties further stipulated that Claimant was not requesting payment for unauthorized medical care at Mountain View Pain Specialists.

FINDINGS OF FACT

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

1. Claimant was employed by Employer as a full time Child Welfare Social Worker and was 41 years old at the time of the hearing. Claimant's job required her to perform personal visits in the community to make assessments for child abuse and neglect. She had been working for Employer since April 2014. She also worked the "after hours" hotline, where a Social Worker would have to respond to emergencies. Her last day working for Employer was July 8, 2022, as she had put in her notice on June 20, 2022 due to the way she had been treated by Employer following the accident. She would generally spend three days a week in the field conducting visits in family homes, in schools or in the community, and two days in the office finalizing her findings in her reports.

2. Claimant had no prior history of neck, mid-back or low back conditions and had no medical treatment. She had not missed worked for any medical conditions prior to the work accident. Neither was she under any restrictions, was not taking any medications and had no problems performing the job duties assigned by Employer.

3. On April 20, 2022 Claimant was within the course and scope of her employment, driving from a home visit, responding to an emergency, when she was stopped at a stop light with her foot on the break, in the southbound lane on Broadway at the Evans intersection. Another motor vehicle rear-ended her vehicle at approximately

11:35 a.m. Claimant did not see the other vehicle before the accident happened. Claimant stated that she had been wearing her seatbelt at the time of the accident. She was also looking towards the right, outside her right drivers' window when the accident occurred. There was some damage to her rear bumper caused by the accident and had to have the damage repaired. Her air bag did not deploy at the time of the accident.

4. Claimant immediately reported her accident on the "ouch line" and requested medical attention as she felt immediate tension and pain following the accident. She injured her neck, mid-back and low back in the accident. She stated she felt immediate tightness in the middle of her neck and pain that started in her mid-back and into her low back. She was referred to Concentra Medical Center for medical care related to the incident. She did not continue onto her next client appointment and did not finish out her work day on the day of her accident. She stated she was seen the same day at Concentra, they provided Tylenol and a muscle relaxer that helped with the back pain. They also prescribed physical therapy, which worsened her condition, and they placed her on restrictions of four hours, desk duty only. She was not able to perform her regular job because that required her to be out in the community making visits.

5. Claimant was forced to use her personal time off because workers' compensation was not paying for the part time work lost wages. Further, after several weeks of treatment with the Concentra providers, she had to resort to seeing medical providers at Mountain View Pain Specialists for chiropractic treatment, dry needling and physical therapy. She also developed hip pain radiating from the low back, post concussive symptoms, memory loss, headaches and brain fog following the accident of April 20, 2022.

6. Claimant contacted Denver Health initially and a triage report was issued on April 20, 2022 at 12:30 p.m. Claimant reported she was sitting at a stop light when a car hit her from behind. She reported middle to lower back pain and neck pain when turning from side to side. She further reported mid-back pain into the bilateral hips and mid back pain with movement. Claimant was instructed to immediately be seen due to back and neck pain after motor vehicle accident (MVA). The report noted that Claimant chose to be seen at Concentra South.

7. Claimant was seen at Concentra by Stephen Danahey, M.D., on April 20, 2022. He documented Claimant's history of sitting at a red light and that the car behind her rear-ended her car with onset of middle to lower back pain with moderate neck pain when she would turn her head from side to side. He documented physical examination findings of muscular tenderness and did not note any cervical or lumbar radicular signs or symptoms. He noted tenderness present in the cervical spine at the right trapezius muscle and left trapezius muscles, tenderness in the level T1-T12 of the thoracic spine and at the L1-L5 levels of the lumbar spine. Dr. Danahey concluded that Claimant had sustained a bilateral trapezius muscular strain as well as a strain of the thoracic spine and lumbar spine regions. He recommended medication including acetaminophen and cyclobenzaprine. He also recommended initiation of physical therapy. Dr. Danahey noted that objective findings were consistent with the work related mechanism of injury.

8. Claimant started with physical therapy immediately at Concentra with Bethany Lubacz on April 20, 2022, including cold packs to the cervical spine and

therapeutic exercises. She recommended claimant be seen three times a week for two weeks.

9. Claimant returned to Dr. Danahey on April 25, 2022 who noted a similar focal exam as previously and assessed both cervical and lumbar strains, providing Claimant with limitations of sedentary work of no more than 4 hours a day. He noted that X-rays of the cervical spine were normal.

10. On May 2, 2022 Respondent file a Notice of Contest.

11. Claimant then transferred to physical therapy with Ron Reznichky. On May 4, 2022 Mr. Reznichky documented that Claimant stated she went to her private PCP to get help. She was instructed to continue physical therapy and was educated on expectations following a whiplash injury. Claimant reported she was becoming impatient with how long it was taking for her cervical pain to resolve. She also was experiencing increased frequency of headaches. He noted she was progressing slower than expected, though was demonstrating significantly improved ROM of cervical spine, with continued to complains of left sided pain. He noted she was educated on prognosis of whiplash injury following MVA and how it different recovery was from person to person. She was reassured that she was healing and heading in the right direction.

12. On May 12, 2022 Mr. Reznichky noted that Claimant was progressing slower than expected and was questioning the plan of care (POC) involving progressive loading of core musculature and progressing in functional activities. Mr. Reznichky noted that she was frustrated with delayed healing. He documented that most pain was with end range of motion and that Claimant had a hyper-lordotic posture with pain across the lumbosacral junction. He recommended Claimant continue with the therapy treatment plan.

13. Claimant was evaluated by Physician Assistant Felicia Turner on May 13, 2022. Ms. Turner documented Claimant's report of moderate discomfort to her neck, thoracic back and lower back. On examination of the cervical spine, there were findings of tenderness in the C7 region as well as in the right-sided trapezius and left-sided trapezius musculature of the cervical spine. In the lumbar spine, there were findings of tenderness in the L4 through S1 region with mild motion limitations in all planes of motion. Ms. Turner recommended further diagnostic evaluation to include MRI scans of Claimant's cervical and lumbar spine regions. She noted that objective findings were consistent with her work related mechanism of injury.

14. Claimant was seen at Stanley Lake Massage Therapy on May 19, 2022 with a history consistent with her testimony. She presented with moderate tenderness of the lumbar spine with moderate palpation, tender in the iliocostal muscles of the right greater than the left, tenderness in the bilateral piriformis and quadratus femoris.

15. A lumbar spine MRI was done on May 20, 2022, and was interpreted by Eduardo Seda, M.D. Dr. Seda described mild bilateral degenerative joint changes at the L5-S1 level. In particular, Dr. Seda noted that at L5-S1, there were mild bilateral findings of joint hypertrophy with small joint effusions.

16. Records from Mountain View Pain Center included records from Jonathan Edelman, FNP-C starting on May 17, 2022. Claimant reported a MVA on April 20, 2022,

and subsequently developed onset post-concussive symptoms of brain-fog and memory loss, headaches, cervical pain radiating into her left shoulder, thoracic pain, and lumbar pain radiating to her hips. Claimant reported her headaches occurred from prolonged sitting, and that her head felt heavy on her shoulders which triggered the headaches she was having up to 5 times a week. Her cervical pain extended down into her left shoulder, her thoracic pain was diffuse and sore, and her lumbar pain was her most bothersome complaint, a sharp pain that was felt with prolonged sitting and standing, and was disturbing her sleep. Nurse Edelman noted tenderness on palpation of the cervical spine, cervical paraspinals on the left and right, thoracic spine and lumbar spine. He also found on testing that Claimant had bilateral positive straight leg tests, and facet loading tests but negative FABERs on the left and positive on the right. He recommended a multi-modal treatment approach of chiropractic care, physical therapy and massage therapy.

17. Chiropractic records authored by Kimberlea Stonewerth, D.C. of Mountain View Pain Center showed treatment was initiated on May 20, 2022 and physical therapy was initiated as well and continued with Nicole Uncapher. When Claimant initiated this treatment, her pain levels in her spine was in the range of 8-9/10 as documented by Dr. Stonewerth.

18. PA Turner noted on June 2, 2022 that Claimant continued to have neck and back pain. She stated that Claimant had not had her cervical MRI due to anxiety so she prescribed a tablet of lorazepam to take when she went in for the MRI. On exam, she documented a normal exam except for tenderness in the C7 cervical spine level, and right trapezius muscle and left trapezius muscle, with mild limitation of motion to the right and left. She noted tenderness present at the L4-S1 of the lumbar spine with mild limitations of motion in all planes. She recommended restrictions of no driving, working only 4 hours per day and to change positions often. She referred Claimant for a physiatry evaluation.

19. The MRI of the cervical spine was completed on June 4, 2022 and read by Michael Kershen, M.D. He noted findings of mild multilevel degenerative changes with associated mild to moderate spinal stenosis and no more than mild neural foraminal stenosis.

20. On June 15, 2022 John Aschberger, M.D., a physical medicine and rehabilitation specialist (physiatrist) evaluated Claimant pursuant to Ms. Turner’s referral. He documented the history of the MVA, Claimant's course of care and persistence of both cervical and lumbar spine symptoms. On examination, he found Claimant's cervical spine was tight with right lateral flexion pulling at the left trapezius and that Spurling's maneuver was negative for any radiated symptoms. Dr. Aschberger documented muscular tightness involving the left trapezius musculature with a trigger point at the infraspinatus without radiation. He noted no tenderness in the midline thoracic spine. In the lumbar spine, Dr. Aschberger documented physical examination findings of mild increases in irritation at the right low back with facet loading but negative on the left side. Dr. Aschberger documented that there were no radicular signs or symptoms and he concluded that elements of the lumbar spine examination suggested potential irritation at the right sacral sulcus and involving the facet joints. Dr. Aschberger endorsed a continuing course of chiropractic care along with a core stability program. He noted that anti-inflammatory medications would be reasonable though would have to be monitored

due to her hypertension. He recommended that Claimant continue in this course of care and that if she did not make gains, "she is a candidate to consider corticosteroid injection at the lower lumbar facet and sacroiliac area."

21. On June 17, 2022 Claimant was evaluated by PA Turner of Concentra who continued to document that Claimant reported back and neck pain, though improving neck pain. Ms. Turner noted that massage therapy was helping and that the treatment of chiropractic care and physical therapy she had obtained on her own were helping. She noted that Dr. Aschberger had agreed chiropractic care and occupational therapy would be beneficial. PA Turner noted she would place the referrals that day.[1]

22. Under the review of systems, PA Turner listed Claimant's continuing joint pain, back pain, neck pain, joint swelling, joint stiffness and night pain. On exam she noted tenderness in the C7 level of the cervical spine, right and left trapezius muscles, and slow lateral rotation. Ms. Turner noted tenderness present in the lumbar spine but palpation was normal with mild limitations for ROM but otherwise an unremarkable exam. She continued to assess cervical strain, lumbar strain, thoracic spine strain, and bilateral trapezius strain.

23. PA Turner made a referral for chiropractic care and another for physical therapy, recommending the providers at Mountain View Pain. Lastly, she referred Claimant for further massage therapy and noted that objective findings were consistent with history and/or work-related mechanism of injury. She emphasized that Claimant was working modified duty but that she would advance from 4 hours to 8 hours a day but no work related driving and to change positions often, noting Claimant was not at maximum medical improvement (MMI).

24. Claimant was evaluated by Taylor Robertson, PA-C at Mountain View Pain Specialists on June 20, 2022. PA Robertson noted Claimant's cervical pain was primarily axial in nature and extended into the left and right shoulder, described as a dull intermittent ache. Claimant's thoracic pain was also axial in nature and intermittent. Claimant's lumbar pain was a constant dull ache, axial in nature and extended into her hips bilaterally. He diagnosed cervicalgia, lumbar degenerative disc disease, other low back pain, muscle spasms of neck, and thoracic back pain and muscle spasm. PA Robertson noted that Claimant had multilevel disc bulges in the cervical spine. PA Robertson recommended a trial of cervical trigger point injections (TPIs) and if she did not respond to continued conservative therapies would recommend reconsideration for cervical epidural steroid injections (ESI). She also recommended TPIs of the lumbar paraspinals and glutes.

25. Claimant was reassessed at Concentra by Nancy Strain, D.O. on July 8, 2022 through a telemedicine visit. Dr. Strain documented Claimant's report that she had improvement in neck and back pain in the course of her care at Mountain View Pain and that massage therapy was also helping. She provided updated work restrictions of up to an 8 hour day but still no work related driving and should change positions often. She recommended a continuing course of care and noted that she would make the appropriate referrals. She noted that diagnosis continued to be cervical, thoracic and lumbar strains

[1] The specific referrals were not in evidence.

as well as bilateral trapezius strains. She noted that objective findings were consistent with the history and work related mechanism of injury.

26. Dr. Danahey, Dr. Aschberger and Dr. Strain as well as PA Turner all concluded that Claimant's objective findings were consistent with her work related mechanism of injury of April 20, 2022.

27. At some point in time, an Accident Information form was completed with the Colorado Department of Revenue, Division of Motor Vehicles.

28. Multiple photos of Claimant's vehicle were taken at some point in time as well, showing slight damage to the rear bumper, which was repaired for $2,772.54.

29. Allison Fall, M.D. conducted an Independent Medical Examination (IME) of Claimant on September 8, 2022. Dr. Fall obtained a history of the mechanism of the accident consistent with Claimant's testimony and a history of the medical treatment, including that she was initially seen a Concentra and prescribed physical therapy, which she believed was worsening her symptoms, which was later stopped and changed to a medical massage treatment. Claimant later found another pain management practice were she was prescribed chiropractic care and dry needling, which helped improve her symptoms. Claimant listed low back, neck, left shoulder and mid back pain symptoms and denied that she had any prior conditions.

30. Dr. Fall described Claimant as a well-developed, well-nourished, obese female that was short in her answers and had a somewhat defensive manner and flat affect. Her examination of Claimant was within normal limits with diffuse tenderness along the entire spine from cervical to lumbar midline spine and a pulling sensation of the cervical spine with flexion. Dr. Fall opined that Claimant did not sustain an injury on April 20, 2022. She stated that if Claimant "did sustain an injury which at most would have been a mild muscular strain which would resolve without treatment with the passage of time, then she would be at maximum medical improvement with zero impairment."

31. On October 11, 2022 Appaji Panchangam, Ph.D. prepared a 58 page Vehicle Accident Reconstruction and Biomechanical Analysis at Respondent's request regarding the April 20, 2022 MVA. He noted that **"**Rimkus was retained to reconstruct the accident to determine the dynamics of the Lincoln and to evaluate the motions, forces, and mechanisms sustained by the driver of the Lincoln in relation to the injuries claimed by" Claimant. After analyzing all the data provided, including the photographs, the vehicle history, the CDR[2] report, the forces and speed of the impact as well the impact on the body, Dr. Panchangam concluded that Claimant's vehicle sustained a forward-directed speed change (delta-V) of less than 5 miles per hour (mph) due to the rear end impact, that transient cervical muscle strains, although unlikely, could not be ruled out but that lumbar muscle strains was unlikely from the mechanics of the accident. He noted that Claimant's bodily movements would have been well within physiological limits. Therefore, intervertebral disc herniations, spinal sprains, and upper-extremity sprains were not consistent with resulting dynamics of the accident. He opined that the loads that the cervical spinal tissues of the driver would have undergone would be within levels that

[2] CDR stands for Crash Data Retrieval and includes a program to retrieve the electronic crash information or non-impact information from a vehicle. It is a program provided by [Redacted, hereinafter BL].

these tissues would undergo during routine activities of daily living in which tissue damage was reasonably not expected. He noted that the mechanism for acute intervertebral disc herniations, in the absence of bony fractures or ligament tears, is combined hyperflexion and compression and that there were no mechanisms from accident that could account for structural injuries to Claimant's cervical spine or lumbar spine or to result in degenerative changes to those anatomic regions. He further concluded that Claimant's head accelerations in the subject accident were far below the accelerations associated with mild traumatic brain injury (mTBI) or concussion and the accident did not present a mechanism for asymmetric loading or meaningful internal motion that could cause a hip strain. He highlighted a study of multiple test subjects that were advised they had been in a MVA but were only subjected to a simulation with negligible force and reported subsequent symptoms, without a trigger, concluding that it was possible that Claimant fell within this category.

32. John Hughes, M.D. conducted an IME at Claimant's request on November 23, 2022. Dr. Hughes took a history and reviewed the medical records available. He noted that Claimant related she continued to be symptomatic. Her pain diagram outlined dorsal spinal pain across the back of her cervical spine and lumbar spine. She reported neck pain was "aching… it comes and goes" and had a magnitude of severity of 1/10. She noted that she was given a water pillow prescription by her clinicians that had been quite helpful for her neck pain. With respect to low back pain, Claimant noted she had an aching quality and made it difficult to get back into a normal routine as she sustained "setbacks." She noted a magnitude of pain of 4/10 for the lumbar spine.

33. On exam Dr. Hughes found hypertonicity in the bilateral posterior trapezius, a slight difference in lateral cervical spine range of motion. He noted bilateral erector spinae hypertonicity in the lumbar spine that releases well with walking in place and a negative straight leg test. Dr. Hughes assessed cervical spine sprain/strain, ("nearly resolved over a course of physical and chiropractic treatment"), with some residual left-sided posterior trapezius hypertonicity that measurably decreases right lateral flexion of the cervical spine, and lumbar spine sprain/strain with residual right-sided lumbar facet joint arthropathy, meriting additional treatment as recommended by Dr. Aschberger in his report of June 15, 2022. Following review of Dr. Panchangam's report, he noted from Claimant's physical examination that she had findings consistent with those noted by Dr. Aschberger on June 15, 2022. He concluded that when he performed his examination, he had not yet reviewed Dr. Aschberger's report, and it appeared they had concordant clinical findings supporting consistency of Claimant's injuries, which meant that these findings are more likely than not stemming from objective pathologies; and in his opinion that they stemmed from the motor vehicle collision of April 20, 2022.

34. Dr. Hughes went to on to state as follows:

> In the cervical spine, consistency is noted in reduced right lateral flexion of the cervical spine consistent with that noted by Dr. Aschberger on June 15, 2022 in conjunction with left-sided trapezius hypertonicity. Consistency is also noted in the lumbar spine with reduced right lateral flexion noted today at 14 degrees with positive right-sided facet loading findings also noted by Dr. Aschberger on June 15, 2022.

> [Claimant] underwent lumbar spine MRI scan evaluation on May 20, 2022. This was done one month after the motor vehicle collision. As noted by Dr. Seda; "at L5-S1, there were mild bilateral findings of joint hypertrophy with small joint effusions." These joint effusions are probably traumatic in etiology and consistent with [Claimant]'s current clinical findings of facet joint arthritis.
>
> It is my opinion that [Claimant] is not yet at maximum medical improvement (MMI). She should continue in treatment essentially as recommended by Dr. Aschberger in his report of June 15, 2022. [Claimant] may be a candidate for interventional spine care directed to her right-sided lumbar spine facet joint pathology. This treatment was also suggested by Dr. Aschberger in his report of June 15, 2022. Given the information currently available to me, it appears probable that [Claimant] will completely resolve her cervical spine injuries. She really has minimal objective pathology in the cervical spine and subjectively, she notes pain that "comes and goes" and has a magnitude today of 1/10.
>
> In contrast, [Claimant]'s lumbar spine has been more problematic. She notes decreases in pain levels from 8-9/10 down to 4/10; however, findings noted by Dr. Aschberger on June 15, 2022 have persisted. I believe her lumbar spine will require additional prescriptive medical care in accordance with the Colorado Division of Worker's Compensation Lumbar Spine Medical Treatment Guidelines.
>
> I do agree with Dr. Panchangam that [Claimant] was involved in a low energy motor vehicle collision. I disagree with him that [Claimant] could not have sustained injuries as a result of this collision. It seems clear to me and all of [Claimant]'s attending medical providers that she has sustained injuries meriting medical treatment. It is also clear that [Claimant] is responding positively to medical treatment rendered to date.

Ultimately, Dr. Hughes opined that Claimant sustained cervical and lumbar spine injuries on April 20, 2022, that the medical evaluations and treatment to date all appeared to be reasonable, necessary and related to this particular work-related motor vehicle collision, that she was not at MMI and should continue in treatment as had been recommended by Dr. Aschberger on June 15, 2022.

35. Dr. Panchangam testified at hearing as an expert in biomechanical and biomedical engineering and vehicle accident reconstruction. He reviewed information provided including the inspection of the vehicle and analyzed the information to extrapolate and determine the severity of the accident as it related to the parameters of the vehicle, how the conditions would have affected a typical driver in the Lincoln that Claimant was driving, and, finally, assessing whether the Claimant's diagnosed injuries were consistent with what would be expected with the typical driver in that particular setting.

36. Dr. Panchangam obtained information for similar accidents and damage to comparable vehicles from the National Highway Traffic Safety Administration and obtained the information from the Claimant's damaged vehicle control module or EDR[3], which recorded no events as it did not meet the threshold requirements of 5 miles per

[3] EDR stands for "event data recorder" and is also known as an ACM (Association for Computing Machinery), which measures the severity of a crash and determines whether or not to deploy airbags or safety devices or seat belt pretensioners.

hour. He concluded that Claimant's vehicle was not going faster than 5 miles per hour following the impact from being stationary. Dr. Panchangam also analyzed the structure of the bumper and the force that was absorbed by the bumper structures to calculate the Delta V, the velocity, to increase the accuracy of the final conclusion. He had little information regarding the damage to the vehicle that hit the Lincoln other than it was drivable following the accident.

37. Once Dr. Panchangam analyzed the severity of the accident, he turned to the bio-mechanics to deduce how the body of the driver in the Lincoln would move upon impact. He explained that upon impact the body, including the torso and the neck, would compress into the seat back and head rest for about 150 milliseconds, then rebound forward proportionally to the force impacting the vehicle. He stated that the force backwards and the subsequent force forward is minimized by activation of the neck muscles, which could cause whiplash and stretch the muscle tissue. In his opinion, this did not occur to Claimant. He further stated that the sheering force of the impact to the spine was not significant enough to cause the Claimant's cervical spine injuries. He further opined, based on the analysis of the data, that there would be a very remote possibility of a concussion or mild traumatic brain injury caused by the MVA. Lastly, he stated that the compression forces to the back is minimal both in backward motion into the contoured seat and forward at the speed the vehicle was moving upon impact.

38. Dr. Panchangam deferred to Claimant's providers with regard to the diagnosis of lumbar and cervical strains caused by the MVA. He stated that patients know when they have pain and know when to seek treatment and care. He also stated that he would defer to a physician to diagnose what the patient was suffering from, what the cause of the particular injury that was causing the symptoms as well as what treatment needed to be provided.

39. Allison Fall, M.D. testified on behalf of Respondent as an expert Level II accredited physician and expert in physical medicine and rehabilitation. She reviewed the available medical records, took a history from Claimant and from the intake Claimant completed. Claimant reported the accident consistent with her hearing testimony and the medical records from her initial visit at Concentra. She conducted a physical examination of the cervical spine and lumbar spine, including palpating the muscles, looking at range of motion, and asking about her symptoms. Claimant complained of pain along the midline of the cervical spine and pain right in the center of her low back. The side to side bending showed some restrictions but did not increase Claimant's symptoms. In general, Dr. Fall stated that all provocative maneuvers were negative and her neurological examination of the arms and legs were normal.

40. Dr. Fall stated that she looked at the facts when making her causation analysis, including mechanism of the injury, whether it was biologically plausible that the mechanism of injury led to the documented diagnosis, looking at the records, seeing what the other providers had found on their examinations, what the imaging had shown, how Claimant responded to treatments, looking at psycho-social factors that may be playing a role and then, history taking and examination in reaching her conclusion

41. Further, Dr. Fall stated that she reached the same conclusions as Dr. Panchangam without having the benefit of the calculation of forces or the lack of a

recorded event on the vehicle control module, that it was unlikely that there were any musculoskeletal injuries sustained as a result of the MVA but even if there had been, they would have been mild muscular strains. Dr. Fall stated that neck strains and trapezius strains were consistent with rear-end MVAs though lumbar spine strains were not typical. She noted that she was familiar with Dr. Danahey as she had previously practiced with him. She noted that Dr. Danahey had diagnosed multiple strains including the thoracic and lumbar spine strain, prescribed medications and physical therapy, which were reasonable treatments considering Claimant's reported symptoms and believed Dr. Danahey treated Claimant appropriately on April 20, 2022, following the MVA. She had also practiced with Dr. Aschberger for over 20 years in the same specialty. While she believed that the treatment provided and offered by Dr. Aschberger was controversial, it was appropriate given Claimant's ongoing complaints. Dr. Fall conceded that there were no facts or medical records indicating that Claimant had any preexisting conditions related to her neck and back.

42. As found, Claimant was within the course and scope of her employment when she was involved in a low impact motor vehicle accident on April 20, 2022 while returning from a home visit. As found, Claimant credibly testified that she was injured as a consequence of the accident, injuring her neck, bilateral trapezius areas and low back as a consequence of the work related accident. This is supported by the medical records of the authorized treating providers from Concentra, including Dr. Aschberger, Dr. Danahey, Dr. Stain, PA Ron Reznichky and PA Turner. It is further supported by the records of providers at Mountain View Pain Specialists. These listed providers were more credible and persuasive than the contrary opinion of Dr. Fall.

43. While Dr. Panchangam clearly explained his theory regarding the probability of injury during this type of MVA, it is also clear that Claimant was the exception to his scenario as she injured both her cervical spine and lumbar spine, despite the failure of the control module or EDR to record the accident. While this ALJ agrees that the accident was not a significantly violent accident, it was sufficient to injure Claimant, who was asymptomatic prior to the MVA and injury.

44. As found, Claimant reported the injuries to Employer immediately and was seen immediately at Concentra after she contacted Employer's "Ouch" line and was directed to Concentra. Dr. Hughes was also persuasive in his opinion that Claimant sustained cervical and lumbar spine injuries on April 20, 2022, that the medical evaluations and treatment to date were reasonable, necessary and related to this particular work-related motor vehicle collision, that Claimant was not at MMI and should continue in treatment essentially as had been recommended by Dr. Aschberger on June 15, 2022

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. (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 claimant must also prove by a preponderance of the evidence that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (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).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." § 8-41-301, C.R.S.

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).

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.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent

need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. 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 was within course of her employment as she was engaged in performing her duties as a Child Welfare Worker for Employer, returning from an assignment visiting a family on April 20, 2022 when the motor vehicle accident occurred. This job required Claimant to drive from location to location visiting family and community members regarding the families she was investigating. While in the course of performing those duties, Claimant was rear-ended by another vehicle. While the motor vehicle accident was not specifically violent, as found, it was sufficient to cause injuries to Claimant's cervical spine and low back as described by her treating providers at Concentra as well as Dr. Hughes. Claimant credibly testified that prior to the April 20, 2022 work related accident, she had no medical problems involving her cervical and lumbar spine. She reported her injuries immediately to her Employer, she was sent to Concentra and attended by Concentra, who diagnosed cervical, thoracic and lumbar spine injuries. Dr. Hughes was more credible than Dr. Fall. Dr. Hughes reviewed Dr. Fall and Dr. Panchangam reports and opined that the MVA of April 20, 2022 was the cause of Claimant's cervical and lumbar spine injuries. Claimant credibly testified that she had not preexisting symptoms prior to the April 20, 2022 work-related accident, despite the MRIs showing degenerative changes. As found, those asymptomatic degenerative changes were aggravated by the MVA of April 20, 2022. Claimant proved that she was within the course and scope of her employment with Employer on April 20, 2022 when she incurred injuries which were proximately caused by the MVA and for which she required medical attention, including treatment, specifically causing disability as Claimant was limited in her employment immediately following the work-related injuries. From the totality of the evidence, Claimant has shown by a preponderance of the evidence that the injuries to her lumbar spine, cervical spine and thoracic spine were more likely than not caused by her work related accident of April 20, 2022.

C. 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).

Claimant has proven by a preponderance of the evidence that she is entitled to all reasonable and necessary medical treatment related to the motor vehicle accident of April 20, 2022. This is supported by the Concentra records and Dr. Hughes' opinion that it was more likely than not that the treatment provided as well as the treatment recommended by Dr. Aschberger were reasonably necessary and related to the work related injury and accident of April 20, 2022.

It is clear that the Concentra providers and their referrals are authorized medical providers. The records in evidence are also clear that Claimant chose to go on her on to Mountain View Pain Center. It was not until June 17, 2022 that PA Turner made the first referral to Mountain View Pain Center for chiropractic care. It is presumed that Ms. Turner made an independent medical determination that the treatment she was referring Claimant to was appropriate under the circumstance. Therefore, any care at Mountain View Pain Center before June 17, 2022 was not authorized care and Respondents are not liable for that care.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained compensable work related injuries on April 20, 2022.

2. Respondents shall pay for reasonably necessary and related medical care as recommended by her Concentra providers as well as their referrals for physical therapy, chiropractic, medications and diagnostic testing, including Dr. Aschberger.

3. 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 13th day of March, 2023.

Digital Signature

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

ISSUES

I. Whether Claimant has shown by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning March 5, 2022 to the present and continuing until terminated by law.

II. Whether Respondents have shown by a preponderance of the evidence that Claimant is responsible for his termination from employment with the Employer of injury and his subsequent employer.

STIPULATIONS OF THE PARTIES

The parties stipulated that Claimant's average weekly wage was $1080.00 which is based on 40 hours per week and $27.00 per hour.

The parties further stipulated that, if Claimant is entitled to temporary disability benefits, those benefits would start form March 5, 2022 through the present and continuing until terminated by law.

FINDINGS OF FACT

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

1. Claimant worked as an iron worker and welder, including bent plate and installing all the detail work, for Employer beginning in May 2021. The bent plate and angles could weight up to 120 lbs. and Claimant would have to move them and put them in place. He was also installing stair rails that would weight approximately 30 to 40 lbs.

2. On October 11, 2021, while lifting one of the bent plate to put it on his shoulder, Claimant felt a pop in his low back and a felt a strain in his groin area and into his stomach. He thought it might be a hernia, and did not give the pop in his low back any thought. The following day, his back was in pain. He continued working despite the throbbing, needling pain in his low back, though he did have his coworkers help with putting the bent plate in place due to his back pain.

3. Claimant stated that he had seen Dr. Corson, who provided work restrictions of 15 lbs. maximum lifting. He stated that he provided his Employer the paperwork from his medical providers with the 15 lbs. restriction. Specifically he provided the paperwork to his supervisor and his foreman. Despite the restrictions, he testified continued to work, lifting the welder, which weighed approximately 100 lbs. and the bent plate or angles which were also heavy. He spoke to his employer about a modified duty job, but since the work needed to get done, he continued working his normal job though had some help.

4. The first time Claimant was placed on restrictions was on October 20, 2021 by Dr. Corson, approximately 9 days following his work injury, and included the 15 lbs. restriction. His restrictions continued through December 7, 2021 when Dr. Zimmerman evaluated Claimant.

5. Claimant testified that he left his employment with Employer because his back hurt and they kept having him do work outside of his restrictions. He let his foreman, [Redacted, hereinafter MM] know he was leaving as of December 22, 2021 in the afternoon. He testified that he left Employer both because of his back injury and because he was unable to receive his cortisone injection as recommended by Dr. Zimmerman. He stopped seeing the workers' compensation providers in December 2021 because he was under the impression that his workers' compensation benefits terminated when he left his position.

6. Claimant stated that he went to work for another company, [Redacted, hereinafter TI], performing work welding. Initially he was not doing any work lifting heavy things because they had carts that would hold the materials and the job was within his work restrictions. He testified that he left the job at TI[Redacted] because of back pain. When Claimant called in to work and told TI[Redacted] about his back, he stated his employer did not like the fact that he had back problems. He left this job on or about March 4, 2022.

7. Between December 2021 and October 2022, Claimant did not attend any medical appointments. He returned to see Dr. Rubio on October 17, 2022.

8. Claimant answered interrogatories on September 22, 2022 and represented that he answered them to the best of his ability. However, one of the questions asked was whether he had secured any employment since leaving Employer and Claimant answered that he had not, which was clearly incorrect since he was immediately employed by TI[Redacted] as a welder on December 23, 2021.

9. Claimant conceded that [Redacted, hereinafter LU] sent him for a pre-employment physical on December 22, 2021 at 8:21 a.m. to Concentra South, and that the same day in the afternoon he gave notice to Employer that he would not be returning to work for Employer.

10. Claimant was initially seen at Concentra by Ron Rasis, PA, on October 11, 2021 complaining of abdominal pain, groin pain and testicular pain. He documented that Claimant was lifting a 280 lb. piece of metal, straddling the metal, bent over to lift and as he was lifting he felt acute pain, pulling and tearing sensation into his right testicle and right lower abdomen. PA Rasis examined Claimant and failed to palpate any herniations, but noted that Claimant had abdominal tenderness in the suprapubic area and in the right lower quadrant. Mr. Rasis ordered an ultrasound and requested Claimant return following the evaluation. He diagnosed strain of the groin and persistent pain in the testicle. Claimant was returned to regular work.

11. On October 13, 2021 PA Rasis ordered an MRI of the lumbar spine and the pelvis. He diagnosed groin strain and lumbar strain.

12. Respondent Employer filed a First Report of Injury on October 13, 2021 noting that Claimant was lifting a metal plate and felt a shooting pain from his groin and down his leg.

13. PA Rasis reevaluated Claimant on October 20, 2021 for ongoing lower back aching pain, stiffness and radiation of pain down his right leg to his 3rd toe, burning pain in the right inguinal region into his right testicle. PA Rasis documented Claimant stated that he was being asked to lift heavy objects at work which were beyond his ability due to his back pain. He diagnosed lumbar strain and right groin strain. He discussed the new restrictions of 15 lbs., a trial of Lidoderm for his back pain, treatment for ROM, modalities, and myofascial release.

14. On November 8, 2021 PA Rasis documented that Claimant was working modified duty. However, he also stated that Claimant was not working due to fear of re-injury.[1] On exam he found an abnormal lordosis of the spine and tenderness of the lumbar spine. He continued the restrictions.

15. Claimant was again attended by PA Rasis on November 15, 2021, reporting ongoing midline lower back pain, soreness, limited tolerance to trunk flexion and intermittent groin pain. He was still awaiting an MRI. He had tenderness in the lumbar spine, bilateral paraspinals and had right sided muscle spasm. He continued with the restriction of 15 lbs. lifting. He returned to PA Rasis on November 29, 2021 with similar complaints, though continued with the tenderness of the lumbar spine, but no muscle spasms were detected. Restrictions remained the same.

16. Claimant was provided a Designated Provider List on November 16, 2021, which was signed by Claimant on November 17, 2021, marking Concentra Medical Centers. On the same day Claimant signed the acceptance of modified employment.

17. The MRI report was issued by Clinton Anderson, M.D. on November 18, 2021. He noted that Claimant has a transitional lumbar anatomy at L5, disc desiccation and mild disc space narrowing between L1-L5 and degenerative changes. There was a moderate disc bulge at L4-L5 with a small superimposed central disc protrusion, moderate right sided neuroforaminal narrowing without compression and mild left sided neural foraminal narrowing without compression.

18. Fredric Zimmerman, D.O. evaluated Claimant on December 7, 2021. He took a history consistent with Claimant's testimony. Claimant continued to complain of constant low back pain. Dr. Zimmerman noted that the abdominal and groin pain were slowly improving. The lumbar spine pain only had moderate improvement with treatment of physical therapy, though Claimant reported that the dry needling alleviated temporarily the muscle spasms. He reviewed the medical records, including the MRI. Dr. Zimmerman diagnosed lumbar displaced disk with evidence of annular tear/disc bulge on MRI and a combination of flexion and extension based back pain. He provided a Medrol Dosepak to treat the inflammation around the annulus, cyclobenzaprine and recommended scheduling an L5 transforaminal epidural steroid injection for both diagnostic and therapeutic purposes.

19. Physical therapy continued at Concentra through December 21, 2021. Scott Rendell, P.T. noted Claimant continued with symptoms, was awaiting authorization for injections, and was provided dry needling, exercises and manual therapy.

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[1] However, PA Rasis also noted that Claimant was not working due to fear of re-injury within the same report.

20. On December 22, 2021 a Craft Termination PAN was completed for [Redacted, hereinafter LR]. It noted Claimant Voluntarily Quit but the reason was for "Job Abandonment."

21. John Raschbacher, M.D. performed an independent medical examination (IME) of Claimant on September 20, 2022 at Respondents' request. Dr. Raschbacher took a history of the injury, his symptoms, medical treatment, and reviewed the medical records through December 7, 2021. On examination he found a normal deep tendon reflexes at the ankles and knees, a one inch and one quarter calf circumference difference with the left side atrophied compared to the right, no lumbar tenderness, normal lordosis, negative pseudorotation, slight positive Patrick's test right greater than left, negative straight leg test, and normal vascular, sensory and motor sensation of the lower extremities. He had a significant loss of range of motion but no inguinal findings.

22. Dr. Raschbacher noted Claimant reported stable symptoms and persistent discomfort at the low back. His MRI findings were fairly modest, with some changes at L4-5, but only a small disc protrusion. At that time, he may have had some neuroforaminal encroachment on the right, but there was no nerve root compression. He opined that the MRI did not explain, medically, the persistence of symptomatology he was reporting. He suggested potentially a repeat MRI to see if he had any new or different anatomy at the lumbar spine. He opined Claimant did not have any findings that clearly explained the persistence of his symptomatology or his reported inability to work. He stated that Claimant was not an appropriate candidate for injection or for surgery unless new evidence was found. He further stated that additional application of medical resources is unlikely to cause subjective resolution of his reported symptomatology. Dr. Raschbacher's final medical opinion was that Claimant was at MMI as of the date of the IME and did not have a clear ratable impairment or clear basis for restricting physical activity.

23. On October 17, 2022 Dr. Cynthia Rubio evaluated Claimant for low back pain, who was reporting both numbness and tingling at times. Claimant reported mid-lumbar pain everyday - 24/7, had a hard time sleeping, pain when walking, sitting, laying down, and driving. She noted that Claimant saw Dr. Zimmerman who suggested ESI, were apparently not approved by insurance and had no medical intervention/treatment since December 2021. Claimant reported that testicular pain was less frequent although he still noted intermittent throbbing pain. Discussed and reviewed MRI with degenerative changes although there was L4-5 disc pathology which may have been contributing to Claimant's right testicular pain. Dr. Rubio discussed treatment options including doing nothing, prescribing medications, physical therapy, chiropractic or acupuncture treatment and finally potential interventional pain procedures. On exam, Dr. Rubio noted that Claimant had loss of range of motion and tenderness to palpation in the paralumbar areas bilaterally. Otherwise, the exam was negative including Waddell signs. Dr. Rubio made referrals to physical therapy, Dr. Zimmerman and provided temporary restrictions of 20 lbs. lifting and up to 40 lbs. pushing and pulling.

24. TI's[Redacted] employment file for Claimant contained an Employee Status Sheet for Claimant showing that he had been hired as a journeyman welder on December 23, 2021 at the rate of pay of $33.00 per hour, which was $6.00 more per hour than he was earning with Employer. The referral from LU[Redacted] was issued on December

22, 2021, and certified that Claimant had taken a core class of fall protection pursuant to OSHA regulations. He completed paperwork for TI[Redacted] on December 23, 2021, including an Employer Status Sheet, Federal I-9 form, Designated Provider List, Safety Training Acknowledgement form, a Harness, Beamer[2] and Twin Retractable Issue and Use Agreement forms, and an Emergency Contact Form.

25. On February 21, 2022 Claimant received a second warning from TI[Redacted] due to attendance issues. On February 22, 2022 TI[Redacted] issued an Employee Warning Notice stating that Claimant was leaving early almost every day and not showing up at least once a week.[3] The TI[Redacted] Employee Terminated form shows Claimant was formally terminated from his employment on February 23, 2022 for attendance issues as "Employee leaves early almost every day he is here," noting that the final incident that cause the discharge being that he "left early again on 2/22/22."

26. Payroll records from TI[Redacted] show one payment of $83.50 for the week ending December 30, 2021. This ALJ infers that these initial wages were for the Safety Training which took place on December 23, 2021. Thereafter, from pay period January 7, 2022 through March 4, 2022, claimant continued to earn regular wages in a total amount of $10,466.50. Claimant testified that when he answered the interrogatories he completely forgot about the TI[Redacted] work he had done. This is not credible.

27. Once Claimant had hired an attorney, in approximately July 2022, he then found out that his workers' compensation benefits were not terminated but that he could return to see his authorized providers.

28. The LR[Redacted] Human Resources (HR) Director testified on behalf of Respondents. She worked for Employer for 30 years. She handled everything that fell under the HR wheelhouse, including compliance, benefits, and employee relations. She noted that Claimant was hired by Employer on May 17, 2021 as an ironworker apprentice.[4] The HR Director also stated that she dealt with a lot of work related injuries for Employer. She stated that the company offers modified duty to employees who were injured and that Claimant was notified that Employer would accommodate any and all work restrictions. In fact, Employer provided a formal offer for modified of employment to Claimant, which he accepted on November 17, 2021 and Claimant was supposed to be working that modified duty while he was under restrictions. The offer specifically noted that he was offered regular duty work with no lifting over 15 lbs. The HR Director stated that at no time did Claimant report to the HR Director work restrictions were not being followed by his supervisor. While Claimant testified that he did report the violation to the HR Director, he could not provide a date or time period in which the call or calls took place. As found the HR Director is more credible than Claimant in this matter.

29. Claimant testified that he spoke with his supervisor and was insulted in response. He stated that Employer did nothing to accommodate his restrictions.

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[2] An anchor for attachment to construction I-beams that then is attach to the twin retractable lead to a harness to prevent falls.

[3] This is not clear that this is the correct date since Claimant worked for TI[Redacted] from December 23, 2021 through March 4, 2022.

[4] Someone learning to be a journeyman ironworker.

30. Dr. Raschbacher testified by deposition on October 7, 2022 at Respondents' request as a Level II accredited occupational medicine expert. Claimant reported low back pain that was throbbing sometimes spreading to the right or the left side of the spine and sometimes would go into the buttocks. He noted that Claimant would take an ibuprofen every other day and that if he stood or sat for greater than 15 minutes, his pain would increase.

31. Dr. Raschbacher stated that Claimant underwent medical care which included physical therapy, dry needling and medications. Dr. Raschbacher noted that Claimant was placed on work restrictions of 15 lbs. lifting and to his knowledge Claimant was never taken off of those restrictions. He reviewed Claimant's medical records which included the MRI performed on November 18, 2021, which he did not consider had significant findings other than the unusual bony formation of the sacrum as a big shield-type of bone and some minimal other findings of disk bulging, disk protrusion and stenosis without impingement.

32. On exam, Dr. Raschbacher found no tenderness in the lumbar spine, though a slightly positive Patrick's test and limited range of motion, a negative straight leg test. He concluded that there really was not a good objective or physiological basis for Claimant's ongoing complaints of low back pain. He believed Claimant had reached MMI as of the time of his examination on September 20, 2022 without any impairment because, based on his opinion, Claimant had no objective findings that correlated to his subjective complaints of pain.

33. Upon cross examination, Dr. Raschbacher noted that lifting type injuries like Claimant were a common mechanism of injury for the low back injuries, including sometimes causing some pain into the inguinal area. He agreed that Claimant's MRI showed a moderate disk bulge, but denied that this was a significant finding.

34. As found, Claimant was under work restrictions placed on him by his authorized treating physicians as of October 20, 2021. His restrictions continued at least through December 7, 2021 and there are not records that contradict this. In fact, when Claimant returned to his ATPs in October 2022, his restrictions were continued

35. However, as found, Claimant's separation from employment with Employer on December 22, 2021 was due to finding a job which paid $6.00 more per hour, not because of his back complaints. As found, Claimant did not report to the HR Director for Employer that Employer was not complying with his work restrictions as the HR Director was more credible than Claimant in this matter. Claimant made a volitional decision in leaving Employer's employment. Further, as found, Claimant was responsible for his termination at TI[Redacted] for failure to comply with company attendance policies and not due to his low back injury. As Claimant committed volitional acts in leaving both his employment with Employer and with TI[Redacted] Claimant's right to temporary disability benefits is severed.

36. 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. Temporary Total Disability Benefits and Termination for Cause

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).

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." However, even if a claimant is terminated for cause, post-separation TTD benefits are available if the industrial injury contributed to some degree to the subsequent wage loss. *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872, 873 (Colo. App. 2001); see also *Gilmore v. ICAO*, 187 P.3d 1129 (Colo. App. 2008).

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 still under restrictions of 15 lbs. lifting throughout December 2021 and he continued to have a 20 lbs. lifting restriction on October 20, 2022. Claimant alleged his supervisor or Employer were requiring him to work beyond his work

restrictions. However, the HR Director for Employer credibly testified that she was not advised that Claimant's restrictions were not being observed on the job. Employer provided a modified job offer on November 16, 2021, which Claimant signed the following day. Claimant had been working under the same restrictions since October 20, 2021, almost a month before he signed the form sent to him by the HR Director with the offer of modified employment. While Claimant testified that he had communicated the violation of his restriction to the HR Director, Claimant's testimony in this regard is not credible. Bolstering this are the facts that 1) Claimant failed to disclose in his discovery responses that he had subsequent employment, 2) he underwent a drug screening at 8:21 a.m. on December 22, 2021, before he tendered his resignation, 3) he was undergoing a safety class with his subsequent employer, TI[Redacted], the following day, on December 23, 2023, 4) TI[Redacted] was offering Claimant a significantly higher wage. All of these facts shed light onto Claimant's true purpose in leaving Employer, which was more likely than not due to his own convenience or benefit and not due to any violation of his restrictions. Respondents have shown, by a preponderance of the evidence that it was more likely than not Claimant was responsible for his termination and subsequent wage loss as his resignation was volitional.

Claimant argues that he was not responsible for his termination of employment on March 4, 2022[5] from TI[Redacted]. However, the facts are tenuous at best. Claimant was not credible with regard to his termination of employment with Employer and offered little evidence other than his own testimony that he left when he could not perform his job due to back pain. The TI[Redacted] termination documents, however, speak for themselves. Claimant was terminated due to multiple instances of leaving the work site early without permission. This is also a volitional act by Claimant. There was no documentation or credible evidence tendered showing that he notified the TI[Redacted] HR office of his ongoing medical problems, or requested accommodations, or other indication that there was some communication with his supervisor showing he was having difficulty performing his job at TI[Redacted]. Respondents have shown, by a preponderance of the evidence that it was more likely than not Claimant was responsible for his termination from TI[Redacted] and subsequent wage loss as his termination was caused by his own volitional acts of leaving his work early without permission.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for temporary disability benefits from March 4, 2022 is denied and dismissed.

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

[5] The termination may have been February 22, 2022 based on the TI[Redacted] termination document but Claimant testified he worked at TI[Redacted] until March 4, 2022 and was seeking temporary disability benefits beginning March 5, 2022.

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 15th day of March, 2023.

By: _____
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-121-045-003

ISSUES

The hearing in this matter was set on the issues of overcoming the Division IME, conversion of the shoulder impairment, medical benefits after MMI (Maximum Medical Improvement), overpayment and recovery of overpayment. Respondent conceded the issue of medical benefits after MMI, clarifying the position taken on the Final Admission of Liability dated August 16, 2022. It was previously unclear as to whether the Final Admission admitted for medical benefits after MMI. Counsel for Respondent indicated that Respondent did admit for those benefits.

The issues remaining for determination are:

- Did Claimant overcome the DIME's determination of MMI by clear and convincing evidence?
- Did Claimant prove by a preponderance of the evidence the 10% right shoulder extremity rating should be "converted" to the 6% whole person equivalent?
- Did Respondent prove an overpayment of $5,349.00 and that Claimant is liable for repayment of the overpayment?
- Disfigurement.

FINDINGS OF FACT

1. Claimant was employed by Respondent on October 12, 2019 as a correctional officer/supervisor in food service and supervised inmate cooks at the correctional facility in Cañon City, Colorado. On that date, at approximately 6:00 a.m. she went to the freezer to get vegetables with two inmates. There was ice on the floor that she noticed as she entered the freezer. She stepped over the ice. As she was leaving the freezer, she was stepping over the ice and started to fall when her shoe caught the edge of the ice. She tried to catch herself, but fell on her right side. The claim was admitted.

2. Claimant sought treatment immediately at CCOM/Emergicare in Cañon City. She testified that they took an X-ray and the Nurse Practitioner put her knee in a brace and her arm in a brace. She continued to wear the right arm brace until the end of November. According to the initial report from Centura Orthopedics, she was diagnosed with right shoulder strain and contusion of the right knee.

3. Following the initial visit, Claimant had physical therapy for her leg but not for her shoulder. She did not receive physical therapy for her shoulder until later.

4. Claimant did have MRI's in February of 2020 for her shoulder and hip. The shoulder MRI on February 13, 2020 showed mild degenerative changes in the right AC

joint. The shoulder was otherwise negative. The MRI report of the hip showed inflammation of the adductor magnus at the ischial attachment; possible partial-thickness tearing of the semitendinousus and long head of the biceps femoris on the ischial tuberosity; mild geater trochanteric bursitis and anterior superior labral tear with CAM type femoroacetabular impingement. After the MRI's were performed Claimant was referred out for physical therapy for the hip only. After conservative treatment was unsuccessful, she underwent surgery for the hip in June 2020. Following surgery, Claimant resumed physical therapy for the hip.

5. A second incident occurred when Claimant returned to work following the surgery. She attempted to lift a 20 pound box and when she turned while holding it, her hip "popped". After additional imaging, the Claimant underwent a second hip surgery in March, 2021. Following this second surgery, she underwent months of physical therapy for the right hip and leg.

6. Following the shoulder MRI, Claimant did not receive treatment for her shoulder complaints until October, 2021 when she complained of pain in her shoulder. Prior to that, all treatment was focused on the right hip and leg. Following her complaints about her shoulder pain, she was referred for twelve sessions of massage therapy. Eventually, she also received three to four visits of physical therapy for her shoulder.

7. Claimant's authorized treating physician, Mr. Quackenbush, P.A. eventually referred her to Dr. Reiter for an impairment rating. Claimant was unaware of the purpose of the visit to Dr. Reiter. Dr. Reiter saw Claimant on March 11, 2022 and determined that Claimant was at MMI with a 16% of the right lower extremity rating for the hip. He stated that the whole person impairment rating, if converted was 6% whole person, as applicable. He concluded that the Claimant was at MMI as of the date of the visit, March 11, 2022. Dr. Reiter did not provide a rating for her shoulder. At the time of the rating, the Claimant continued to have pain in her shoulder.

8. At the time of MMI and continuing, the Claimant cannot perform activities that she previously did, including playing the fiddle, taking wet laundry out of the washing machine, sweeping, mopping or vacuuming. She can no longer work on cars, she has trouble picking up anything and she has lost a lot of strength in her right shoulder. Claimant's inability to perform these activities is due to pain and loss of strength in her right shoulder. Claimant testified that her shoulder pain is in her shoulder including the collarbone area, down into her armpit area as well as the rear aspect of the right shoulder area. Claimant testified at hearing that she feels a knot in the muscles of her upper back. At the hearing, Claimant's counsel described where the Claimant was pointing to on her body as she testified, which corresponded to her testimony.

9. Following the MMI determination and impairment rating, Claimant underwent a Division Sponsored IME (DIME) with Dr. Polanco. At the time of the evaluation, she did tell Dr. Polanco about her ongoing shoulder symptoms.

10. Dr. Polanco determined that the Claimant reached MMI on March 11, 2022. He determined that the Claimant had a 10% impairment rating to her right upper extremity,

which converted to 6% whole person and a 21% impairment rating to her right lower extremity which converted to 8% whole person.[1] Dr. Polanco did take a history from the Claimant that she experienced pain in her right shoulder and a tingling sensation on the back of her arm, 7 to 8 out of 10 on the pain scale, but did not provide any indication that she was not at MMI for all conditions.

11. Dr. Rook performed an IME on September 20, 2022. He took a history from the Claimant that included the details of her injury and her subsequent treatment. He did document her treatment to her right hip including the two surgeries. With respect to treatment to the Claimant's shoulder, he did take a history of the massage therapy that was provided. He also documented that after the MRI of the shoulder did not show surgical pathology, the Claimant's orthopedist at the time, Dr. Minihane had no further treatment recommendations.

12. With respect to treatment for Claimant's shoulder, there is a discrepancy between Dr. Rook's statement that "she has not had any physical therapy for her right shoulder since the on-the-job injury" and the testimony the Claimant gave at the hearing. She testified that she received three to four sessions of physical therapy after the massage therapy. Dr. Rook opined that the Claimant was not at MMI for the shoulder since she had not been provided the treatment as outlined in the Shoulder Medical Treatment Guidelines. However, he does not opine that Dr. Polanco's determination that Claimant is at MMI is clearly in error. His opinion that "Dr. Polanco erroneously stated that this patient had reached maximum medical improvement when in fact she has not received any treatment for her right shoulder dating back to her occupational injury" is not based on information that is entirely accurate. He does acknowledge in his narrative that she received massage therapy. That constitutes treatment despite his conclusory statement to the contrary. He is also mistaken about the Claimant's lack of physical therapy sessions based on Claimant's testimony. He incorrectly assumes that Claimant had no physical therapy for his shoulder. Whether that treatment would have changed his opinion is unknown. In any event, I view Dr. Rook's statement as to Claimant not being at MMI to be a mere difference of opinion with that of Dr. Polanco's determination of MMI.

13. Claimant also underwent an IME with Dr. Bernton on January 12, 2023 at the request of Respondents. With respect to Claimant's right shoulder, he notes that the MRI of the shoulder did not demonstrate the presence of structural injury to the shoulder. He also states that the degenerative changes in the AC joint were not caused by the occupational injury. Finally, he stated that the record does not reflect treatable work-related conditions are present in the right shoulder requiring further workup and evaluation. However, he did provide a range of motion impairment rating for the right shoulder of 13%.

14. Claimant testified that she told Dr. Bernton of her shoulder symptoms during his IME and also told Dr. Rook of her shoulder symptoms at the time of his IME.

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[1] Although the DIME examiner's summary sheet refers to impairment of the left lower extremity, it is clear from the narrative that the impairment rating given was to the right lower extremity.

15. Following the DIME report of Dr. Polanco, a Final Admission of Liability (FAL) dated August 16, 2022 was filed. With respect to the overpayment asserted, the notations attached to the FAL (Respondent's Exhibit E, p. 41) indicate that the total indemnity paid was $99,422.41 and the indemnity cap was $94,330.19, resulting in an overpayment of $4,376.60. There was no attachment to the FAL which substantiated the payments listed in the FAL, supporting the payment total asserted in that pleading. The Respondent did provide a detailed payment history for indemnity at the time of hearing which showed a different payment amount of $100,706.01. (Respondent's Exhibit F).

CONCLUSIONS OF LAW

A. Claimant did not overcome the determination of MMI by clear and convincing evidence

A DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear and convincing standard also applies to the DIME's determination of which impairments were caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME's whole person rating must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc.*, W.C. No. 4-842-550-01 (March 18, 2016).

Claimant's argument that she is not at MMI is based on the assertion that she had little evaluation and treatment for her shoulder condition over the course of her claim. Counsel for Claimant noted in his argument at hearing that Claimant treatment prior to MMI was primarily for her symptomatic hip injury. By the time she was approaching MMI, she did start receiving therapy for her shoulder. However, she still had pain in her shoulder in the range of 4 to 7 out of ten. Despite the ongoing pain, she was placed at MMI and did not even receive a rating for her shoulder injury from the rating physician, Dr. Reiter. Claimant further argues that Dr. Polanco erred by determining that she was at MMI despite the fact that she had a recognized shoulder injury, warranting a rating but he gave no consideration of ongoing treatment to improve her condition. However, it appears from Dr. Polanco's Division IME report that he considered the treatment for the shoulder, as documented, to be appropriate and that Claimant was at MMI for that condition. Dr. Polanco's determination of MMI is supported by the medical record and is credible. Dr. Rook's opinion to the contrary is a mere difference of opinion that does not rise to the level of proof that Dr. Polanco's opinion on MMI is clearly erroneous.

B. Claimant proved whole person impairment to her right shoulder.

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the "arm at the shoulder," they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc.*, W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved she suffered functional impairment not listed on the schedule. Claimant credibly described pain and associated functional limitation in areas proximal to her arm. Claimant testified as to her functional limitations with her shoulder. She struggles with activities of daily living due to her shoulder, including, but not limited to, mopping, turning a wrench, and vacuuming. Claimant testified feeling she currently felt a knot in the musculature of her upper back. She also indicated visually that the knot was slightly proximal to the shoulder. The preponderance of persuasive evidence shows Claimant's functional impairment extends beyond her "arm at the shoulder."

Claimant proved she suffered whole person impairment to her right shoulder. Claimant's testimony as to her limitations in functioning and anatomic pain adequately demonstrates that her impairment extends beyond the extremity.

C. Impairment

Claimant has argued in her proposed order that the most reliable ratings in the record are those of Dr. Rook. Dr. Rook assigned 18% for the right upper extremity, 19% for the right knee and 27% for the hip. The Claimant further argues that the DIME doctor erred in his failure to include the knee in his impairment ratings. The ALJ specifically rejects Claimant's implicit argument that Dr. Polanco clearly erred in the amount of his impairment rating or his decision not to include the knee in the impairment rating, notwithstanding Dr. Rook's opinions to the contrary. Claimant has failed to sustain her burden of proof that Dr. Polanco clearly erred with respect to the amount of impairment or the decision not to include the knee in the ratings.

D. Disfigurement

Claimant has a visible disfigurement to the body consisting of a limp due to her hip surgeries. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108(1). I determine that she is entitled to $1,500 based on her disfigurement.

E. Overpayment and repayment of overpayment.

Section 8-40-201(15.5) defines an overpayment as:

> [M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable . . . . For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits . . . .

Respondent has the burden to prove Claimant received an overpayment. *City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002).

Respondent has proven an overpayment of $5,349. The Final admission shows a total amount owed of $95,357.01. The third-party administrator's records show that the amount paid totals $101,706.01. The difference between the two results in an overpayment of $5,349.00. Although the overpayment on the Final Admission is less than asserted at hearing, the records submitted into evidence do support the revised overpayment amount and are credible, despite the discrepancy with the amount asserted in the Final admission of Liability. [2]

[2] Respondent has asserted an overpayment based on the difference between the indemnity due of $95,045.81 (Respondent Exhibit E, p. 41) and the indemnity paid of $100,706.01 (Respondent Exhibit F, p.43) for a total overpayment of $5,349.00. The Respondent is not asserting an overpayment based on the difference between the cap of $94,330.19 and the amount paid, as asserted in Exhibit F, and the ALJ does not consider that with respect to the overpayment issue before the Court.

Claimant has presented no credible evidence to the contrary. Based on the documentary evidence provided by the Respondent, the Respondent has proven by a preponderance of the evidence the amount of overpayment. Neither party provided any evidence regarding the rate of the repayment, which could include immediate repayment of the entire overpayment. In its position statement, Respondent argues that "Claimant has the ability to repay Respondent its overpayment in the amount of $5,349.00"[3] However, the argument does not rely upon any specific evidence presented at hearing. As such, the ALJ is without evidence to make that determination. If the parties are unable to agree as to the rate of repayment, they may set the matter for hearing on that issue.

ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME's determination that the Claimant is at maximum medical improvement is denied and dismissed.

2. Respondent shall pay Claimant PPD benefits based on a 6% whole person rating for Claimant's shoulder.

3. Respondent may take credit for any indemnity benefits previously paid to Claimant in connection with this claim up to the applicable combined indemnity cap for the date of injury.

4. Insurer shall pay Claimant $1,500 for disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

5. Claimant shall repay the overpayment of $5,349.00 at an amount to be agreed upon by the parties. If the parties are unable to agree as to the rate of repayment, they may set the matter for hearing on that issue.

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

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

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

[3] However, Respondent also asserts in the conclusion of its position statement that "It is fair and reasonable for Claimant to repay the overpayment to Respondent in set monthly installments until the overpayment of $5,349.00 is paid in full beginning the date after the Order so ordering becomes final." Based on this, Respondent does not dismiss that the repayment may be made in installments.

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: March 20, 2023

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that in November 2021 he suffered an injury arising out of and in the course and scope of his employment with the employer.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that the treatment he received at Glenwood Medical Associates was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

FINDINGS OF FACT

1. The employer operates a [Redacted, hereinafter GC]. The claimant worked for the employer as a part-time cashier.

2. The claimant testified regarding an incident that occurred in early November 2021.[1] The claimant described an incident in which he was removing a five gallon container of liquid fertilizer from a shelf. The claimant testified that he could not reach the handle of the container while sliding it off the shelf. The container slipped to the left and the claimant reached with his right hand to hold the container against the shelving. As a result, the claimant asked his coworker, [Redacted, hereinafter MG], to assist him with the container. The claimant further testified that he immediately felt pain in his right upper back. The claimant ultimately completed his shift that day and was then scheduled to be off for the next two days. The claimant testified that during those two days off, his upper back continued to be sore.

3. The claimant's coworker, MG[Redacted] testified at the hearing. MG[Redacted] testified that he did not assist the claimant with the container. It is MG's[Redacted] recollection that he observed the claimant move a container of liquid fertilizer by the handle and placed it on the ground. MG[Redacted] further testified that he did not observe the claimant engaging in any pain behaviors after that incident.

4. Sometime in November 2021, the claimant made the employer owner, [Redacted, hereinafter PK], aware that he was experiencing back pain. The claimant asked PK[Redacted] to allow him to avoid heavy lifting while at work. PK[Redacted] allowed this behavioral

[1] All materials filed with the Colorado Division of Workers' Compensation (DOWC) identify the date of injury as November 6, 2021. However, at hearing, it would appear that the incident occurred on November 3, 2021. For the sake of consistency the ALJ will identify the incident as occurrin in early November 2021.

accommodation. No formal report was made of the November 2021 incident. The claimant was not referred to any medical provider by PK[Redacted].

5. The claimant first attempted to seek medical treatment related to the early November 2021 incident on December 20, 2021. On that date, the claimant sought treatment at Glenwood Medical Associates (GMA). However, the claimant was running a fever at that time and was not seen. It was on December 30, 2021 that the claimant was seen by Dr. Coya Lindberg at GMA. On that date, the claimant described a mechanism of injury that mirrored his hearing testimony. The claimant also reported continuing pain in his right thoracic area. Dr. Lindberg diagnosed a muscular strain and ordered x-rays. In addition, Dr. Lindberg referred the claimant to physical therapy.

6. Thoracic spine x-rays were taken on December 30, 2021. The x-rays showed normal alignment, mild degenerative disc disease, with no acute findings.

7. On January 10, 2022, the claimant returned to Dr. Lindberg. In the medical record of that date, Dr. Lindberg identified the claimant's diagnosis as a right thoracic strain. Dr. Lindberg continued to recommend physical therapy. The claimant was to return in three weeks for follow-up. However, the claimant has not returned to Dr. Lindberg.

8. On February 4, 2022, the claimant filed a Worker's Claim for Compensation regarding the early November 2021 incident.

9. On February 10, 2023, a First Report of Injury or Illness was completed regarding the early November 2021 incident. The preparer of that document is identified as "IW & DOWC". The ALJ finds that these acronyms are for the "injured worker" and the "Division of Workers' Compensation".

10. The claimant underwent physical therapy with Keith Mccarroll with Peak Performance. The physical therapy records indicate that the claimant was seen between the dates of February 21, 2021 and April 11, 2022. The claimant testified that physical therapy assisted with his back symptoms.

11. On January 11, 2023, the claimant attended an independent medical examination (IME) with Dr. F. Mark Paz. In connection with the IME, Dr. Paz reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. On January 19, 2023, Dr. Paz issued an IME report and opined that Dr. Lindberg's diagnosis of thoracic strain was related to the early November 2021 incident and that strain had resolved by the date of the IME. Dr. Paz's testimony was consistent with his IME report. However, after hearing the testimony of the employer witnesses, Dr. Paz had concerns regarding whether the early November 2021 incident occurred. As a result, Dr. Paz intimated that perhaps the claimant had not in fact suffered a thoracic strain at work.

12. The ALJ credits the claimant's testimony and finds that he did feel some manner of pain in his right upper back while at work in early November 2021. However, the ALJ also finds that the onset of that pain does not rise to the level of an injury. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he suffered an injury causing disability and/or necessitating medical treatment. In reaching this factual conclusion, the ALJ notes that the claimant did not seek medical treatment until December 20, 2021, more than six weeks after the incident. The ALJ finds that although an incident occurred, it did not rise to the level of being an injury.

CONCLUSIONS OF LAW

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

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

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

4. 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 a/so *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, the claimant has failed to demonstrate, by a preponderance of the evidence, that in early November 2021 he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the early November 2021 incident did not rise to the level of an injury resulting in disability and/or necessitating medical treatment. Therefore, the ALJ concludes that the claimant did not suffer a compensable injury.

ORDER

It is therefore ordered that the claimant's claim related to an early November 2021 alleged injury, is denied and dismissed.

Dated March 16, 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. 5-189-008-003

ISSUES

- Did Claimant prove he suffered an injury while performing services for pay for Respondent?
- Did Respondent prove Claimant was an independent contractor?
- What is Claimant's average weekly wage ("AWW")?
- Did Claimant prove entitlement to TTD benefits from September 23, 2021 through March 23, 2022?
- The parties stipulated Dr. Mark Porter is the primary ATP if the claim is compensable. The parties further stipulated the treatment Claimant received for his injury was reasonably needed.
- Did Claimant prove Respondent should be penalized for failure to carry workers' compensation insurance?
- Did Respondent prove Claimant willfully violated a safety rule?
- Did Respondent prove Claimant was responsible for termination of employment?

FINDINGS OF FACT

1. Respondent is a marijuana farm, owned and operated by [Redacted, hereinafter PM].

2. Claimant worked for Respondent as a general laborer since the summer of 2018. He performed general landscape duties such as pulling weeds, digging holes, maintaining fences, basic greenhouse repairs and maintenance, and occasionally unloading deliveries.

3. In addition to his general labor duties, Claimant sporadically operated a de-stemming machine called a "bucker." Marijuana plants are fed into the bucker, which uses rollers or wheels to pull the plant through the machine and separate buds from stems.

4. On September 20, 2021, Claimant was operating the bucker when the machine became jammed. Claimant flipped the power switch and went around to the rear of the machine to dislodge the jam. When he loosened the clog, the machine began operating in reverse. It grabbed his glove and pulled his hand into the rollers. Claimant's wife also works for Employer and was standing a few feet away when Claimant's hand was pulled into the machine. She quickly switched off the machine and Claimant pulled

his hand out. Claimant suffered severe lacerations to his right hand and a dislocated right index finger.

5. Witnesses at hearing expressed confusion about how the machine resumed operating because Claimant believed he turned it off. The bucker's power switch is a three-position rocker or toggle switch, which operates in a FORWARD ➔ OFF ➔ REVERSE pattern. When the machine jammed, Claimant probably inadvertently switched it past the OFF position to the REVERSE position. Once the jam was loosened, the bucker suddenly started operating in reverse. Because Claimant was on the back side of the machine, the reverse motion pulled his hand into the rollers and caused the injury.

6. Claimant's hand was bleeding and obviously injured. PM[Redacted] helped Claimant wrap his hand and then drove him to the nearby volunteer fire department, where he hoped to find emergency medical personnel. No EMTs were available, so [Redacted, hereinafter MP] drove Claimant to the Parkview Medical Center emergency department.

7. MP[Redacted] exchanged text messages with PM[Redacted] when she and Claimant arrived at Parkview. PM[Redacted] stated, "Him saying he got hurt on the job is going to fuck me." MP[Redacted] replied, "He's not filling out the paperwork for it so you should be good." PM[Redacted] responded, "I appreciate that I really do." When asked at hearing about his texts, PM[Redacted] testified, "I figured I was going to have to pay for medical and stuff like that. . . . I just thought, he got hurt on the job, I'd probably have to."

8. The ER intake documentation identifies Claimant's "Employer" as "[Redacted, hereinafter DF]," and Claimant's occupation as "labor." Claimant reported "he was using a weed bucker that got jammed with debris. He attempted to clear the debris with his right hand." The ER physician observed large lacerations to the right index and middle fingers. The index finger PIP joint was dislocated, with associated disruption of the collateral ligament. The ER physician consulted the on-call hand surgeon, who recommended thorough irrigation, wound closure, and an external splint. The ER physician sutured the wounds, placed Claimant's fingers in a splint and wrapped the hand and wrist in a bandage. Claimant was discharged and advised to follow up with a hand surgeon. He was not given any specific work restrictions.

9. Claimant saw Dr. Mark Porter, a hand surgeon, on September 28, 2021. He described "mild" aching pain in the injured fingers, made worse by movement and lifting. His pain that date was 0/10. Examination showed lacerations to the right index and middle fingers, and some laxity of the radial collateral ligament of the index finger. Dr. Porter diagnosed complex lacerations and a sprain of the radial collateral ligament. He "buddy taped" Claimant's injured fingers and recommended continued icing and splinting until a follow up appointment in one week. Dr. Porter did not discuss no work restrictions.

10. Claimant returned to Dr. Porter on October 5, 2021. He reported 0/10 pain and was using no pain medication other than NSAIDs. Physical examination was unremarkable. Dr. Porter removed Claimant's sutures and recommended he continue with NSAIDs and buddy taping for one more month. No work restrictions were assigned.

11. Claimant pursued no additional treatment for seven months. On May 2, 2022, Dr. Porter referred him to occupational therapy and imposed work restrictions of no lifting over 35 pounds and no fine manipulation or keyboarding with the right hand. The basis for these restrictions is unclear, as no corresponding report of an office visit or telehealth appointment was offered into evidence.

12. Claimant had an initial OT evaluation on June 13, 2022. His condition appeared to have deteriorated since his last documented appointment with Dr. Porter. Claimant stated his fingers were very painful and he could not grip or catch objects. He also described "shooting" right wrist pain and limited range of motion. The therapist thought Claimant would benefit from OT.

13. There is no question Claimant was injured while performing tasks integral to Employer's business. PM[Redacted] conceded Claimant was paid for his time. Accordingly, Claimant proved the factual predicates for a determination that he was an "employee."

14. Employer is defending the claim on the theory that Claimant was an "independent contractor." Employer failed to prove Claimant was an independent contractor. There is no persuasive evidence Claimant was customarily engaged in an independent trade or business related to landscaping, maintenance, or marijuana farming. He performed those tasks exclusively for Employer. Claimant was paid personally in cash, and not in the name of any business. Claimant was paid on an hourly basis rather than a fixed or contract rate. Employer provided all tools and other equipment Claimant needed to perform his work, including gloves, shovels, wheelbarrows, post-hole diggers, a concrete mixer, and the bucking machine that caused the injury. Employer presented no 1099s, independent contractor agreements, or other corroborating documentation at hearing, despite alleging that "all" workers at the farm are independent contractors. PM[Redacted] alleged Claimant "was getting W-9s," but testified, "I don't have a copy with me." PM's[Redacted] testimony on this point not credible. Given the importance of any such evidence to its defense, the ALJ would expect such supportive documentation would have been offered into evidence if it existed. The ALJ also notes that IRS Form W-9 is the Request for Taxpayer Identification Number and Certification form,[1] and not used to report any payments to vendors. The Form 1099 is used to report payments to non-employees for services rendered.[2] PM's[Redacted] apparent lack of familiarity with standard IRS forms used for independent contractors belies the assertion that Employer operates its business solely using independent contractors. Finally, PM's[Redacted] text exchange with MP[Redacted] after the accident indicates his awareness that Claimant was an employee and not an independent contractor.

15. Employer paid Claimant exclusively in cash, at the end of each day. As a result, there are no paystubs, cancelled checks or direct deposit advices to establish Claimant's AWW.

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[1] 26 CFR § 31.3406(h)-3.
[2] 26 CFR § 1.6041-1(2).

16. Claimant and MP[Redacted] testified Claimant was paid $20 per hour for general "labor," and $17 per hour while running the bucking machine. PM[Redacted] testified he paid Claimant $17 per hour for all work and could not recall ever paying $20 per hour.

17. Claimant is alleging an AWW of $1,560, which equates to 78 hours per week at $20 per hour. Claimant presented no bank statements or other documentation of income. Claimant filed no income tax returns and there is no persuasive evidence he paid any income taxes. Claimant testified his earnings were always below the income threshold at which a tax return is required. This is inconsistent with his alleged AWW equating to more than $6,240 per month. Claimant also worked "under the table" for other employers and filed no tax returns for those wages either.

18. Claimant's only evidence regarding his alleged AWW consists of his and MP's[Redacted] testimony. Claimant offered conflicting testimony regarding his typical work schedule. He first testified he averaged 12 hours of work each week. He then testified he worked approximately 50-60 hours per week. Finally, he testified he worked 12 hours per day 5-6 days per week, which would be 60-72 hours each week. MP[Redacted] compounded the inconsistency by testifying they each worked 12 hours per day, 6-7 days per week (72-84 hours). Both Claimant and MP[Redacted] testified that neither of them "ever" earned less than $1,000 per week ($2,000 total). Neither Claimant nor MP's[Redacted] testimony regarding their alleged earnings is credible. Claimant failed to prove his AWW is $1,560. Claimant failed to prove any specific AWW by a preponderance of the evidence.

19. Employer maintained a rudimentary "record" of Claimant's wages, consisting of a handwritten list of hours Claimant worked each day. Employer had no time clock and relied on Claimant to track the number of hours he worked. At the end of each shift, PM[Redacted] wrote down the hours Claimant said he worked, and paid him accordingly. The handwritten list shows a total of 261.5 hours over the 262-day period from January 1, 2021 through September 19, 2021 (the day before the accident).[3] Assuming an hourly rate of $17 as testified by PM[Redacted], this equates to an AWW of $118.77 (261.5 x $17 = $4,445.50 ÷ 262 = $16.97 x 7 = $118.77).

20. Claimant and MP[Redacted] testified Claimant tried to work two days after the accident but could not continue because of his injury. PM[Redacted] testified Claimant was off work for approximately one week and returned to work on September 29, 2021, using primarily his left hand. PM's[Redacted] testimony is consistent with the handwritten record of hours, which shows Claimant worked three hours on September 29. This return-to-work date is plausible because it coincides with Claimant's initial appointment with Dr. Porter on September 28. Employer's wage record shows Claimant subsequently worked on October 1, 2, 5, 9, 11, 14, 16, 18, and 19, 2021.

[3] Claimant had only worked a few minutes before the accident on September 20, 2021 and was not paid for any time that day.

21. Claimant texted PM[Redacted]October 21, 2021 that he had an appointment at the DMV. PM[Redacted] asked Claimant "are you coming in after?" and Claimant replied, "Yeah, if you need us to." But he did not report to work that day. On October 22, Claimant texted he was unavailable because his father was having surgery. On October 25, Claimant texted he was having car trouble. And on October 30, 2021, Claimant texted his vehicle was still inoperable and "we are going to fix it when our checks come in . . . from the state [in] 7-14 days." The ALJ infers the text messages were intended to advise Employer why Claimant would not be coming to work those days.

22. At hearing, Claimant and MP[Redacted] denied having a DMV appointment in October 2021. However, PM[Redacted] retrieved Claimant's text message from his phone during his testimony. Claimant also denied that his father had a medical appointment or that he was waiting on a benefit check to repair his vehicle. Again, PM[Redacted] retrieved the text messages from his phone during the hearing to refute Claimant's testimony.

23. Claimant never returned to work for Employer after October 19, 2021.

24. The preponderance of persuasive evidence shows Claimant missed work as a direct and proximate result of the work accident from September 20 through September 28, 2021. Claimant is entitled to TTD from September 23 through September 28, 2021, accounting for the statutory three-day "waiting period."

25. Claimant's eligibility for TTD terminated on September 29, 2021 because he returned to work.

26. Claimant failed to prove he left work on or after October 19, 2021 because of the industrial injury. Claimant stopped reporting to work for personal reasons unrelated to the injury, including lack of transportation. Accordingly, Claimant failed to prove entitlement to TTD from September 29, 2021 through March 23, 2022.

27. Because Claimant failed to prove entitlement to TTD after September 28, 2021, Employer's defense that he was "responsible for termination" is moot.

28. PM[Redacted] testified Claimant was instructed not to unclog the bucker if it became jammed. He testified Claimant was told to ask a supervisor, [Redacted, hereinafter DC], for help. If DC[Redacted] was not available, Claimant could ask PM[Redacted] for help. Claimant denied every receiving such instructions. Employer produced no documentation, testimony of other witnesses (such as DC[Redacted]), or other persuasive evidence to corroborate the alleged "safety rule." Employer failed to prove Claimant willfully violated a safety rule.

CONCLUSIONS OF LAW

A. Claimant was an employee rather than 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." 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). 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 § 8-40-202(2)(b)(II), the ALJ concludes Claimant was an employee at the time of his accident. Some of the most significant factors are: (1) Claimant was not "customarily engaged in an independent trade or business." He had no business related to landscape maintenance or other farming activities, and never performed similar services for anyone else. (2) Employer paid Claimant an hourly rate rather than a fixed or contract rate. (3) Employer paid Claimant personally and not in the name of any business. (4) Employer never sent Claimant a 1099 or other appropriate tax documentation consistent with being an independent contractor. (5) Employer has no independent contractor agreements or similar documentation to corroborate the assertion that Claimant and "all" its employees are independent contractors. (6) Employer provided all tools Claimant needed to complete his work. (7) Claimant's tasks for each day were dictated by Employer and there is no persuasive evidence Claimant had any control over the work assignments. (8) There is no persuasive evidence of any limitation on Employer's ability to terminate Claimant's services at will. (9) PM[Redacted] admitted he was "fucked" if Claimant reported the injury as work-related.

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 had available on a given day. Claimant reported to work at Employer's farm with no prior negotiations about cost or the scope of work and was paid $17 per hour for the work he was assigned that day. This arrangement is far more akin to an employer-employee relationship than an independent contractor situation.

PM[Redacted] was clearly motivated to avoid the taxes, insurance cost, and other requirements associated with having employees. And no doubt Claimant was content to receive wages in cash with no withholding or reporting. But the parties' mutual willingness to avoid payroll taxes and other employment-related obligations it is not dispositive of whether Claimant was, in fact, an independent contractor. The preponderance of persuasive evidence shows Claimant was Employer's "employee."

B. Claimant's AWW is $118.77

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 § 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 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 failed to prove his AWW is $1,560. In fact, Claimant failed to prove any specific AWW by a preponderance of the evidence. Arguably, this would result in an AWW of zero. However, Employer confessed an AWW of $118.77, which is a reasonable interpretation of the handwritten wage record. Given the absence of any persuasive evidence to the contrary, the ALJ accepts Employer's proposed AWW of $118.77 as the most appropriate calculation under the circumstances.

C. Claimant is entitled to TTD benefits from September 23, 2021 through September 28, 2021

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). A claimant need not present formal restrictions from a physician to establish entitlement to TTD benefits but can rely on any competent evidence to establish disability and associated wage loss. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983).

No TTD benefits are payable for the first three days of an injury-related wage loss unless the total period of disability exceeds two weeks. Section 8-42-103(1)(a), (b).

As found, Claimant proved he is entitled to TTD benefits commencing September 23, 2021. He suffered a significant hand injury on September 20, 2021 that required him to leave work immediately and pursue emergent medical attention. Claimant was not paid for any work on September 20 because the injury happened shortly after he started his shift. After being discharged from the ER, Claimant reasonably required some brief period of convalescence while waiting for the orthopedic follow up. He returned to work on September 29, which is less than two weeks after the injury. Therefore, he is eligible for TTD from September 23, 2021 through September 28, 2021.

D. Claimant failed to prove entitlement to TTD after September 28, 2021

Once commenced, TTD benefits "shall continue" until the occurrence of an event enumerated in § 8-42-105(3)(a)-(d). One such terminating event is a return to "regular or modified employment," which in this case occurred on September 29, 2021.

Because his eligibility for TTD ceased when he returned to work, Claimant has the burden to reestablish entitlement to any subsequent period of TTD. Claimant's last day of work was October 19, 2021. As found, Claimant failed to prove he left work on or after October 19, 2021 because of the industrial injury. He stopped working for personal reasons unrelated to the injury, including lack of transportation. Accordingly, Claimant failed to prove entitlement to TTD from September 29, 2021 through March 23, 2022.

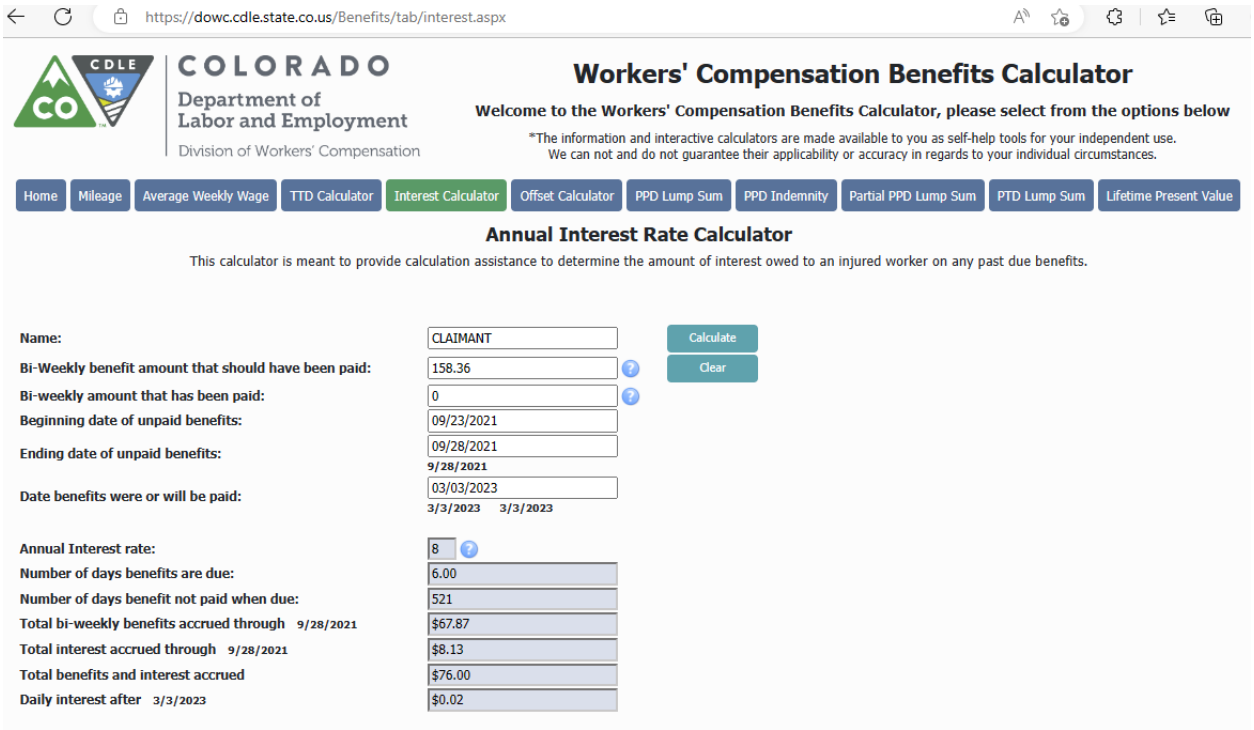
E. Respondent failed to prove Claimant willfully violated a safety rule

Section 8-42-112(1)(b) provides that an injured worker's indemnity benefits shall be reduced by 50% if the injury results from the willful failure to obey a reasonable safety rule adopted by the employer. The term "willful" means "with deliberate intent." *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968). A claimant's conduct is "willful" if they intentionally performed the forbidden act or recklessly disregarded the duty to the employer. *Sayers v. American Janitorial Service, Inc*. 425 P.2d 693 (Colo. 1967). A safety rule need not be formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Reduction of benefits under § 8-42-112(1)(b) is an affirmative defense that the respondents must prove by a preponderance of the evidence. *Id*.

Employer failed to prove Claimant willfully violated a safety rule. Although PM[Redacted] alleged a verbal rule against trying to clear a jam from the bucker, Claimant denied being told of any such rule. Employer produced no documentation, testimony of other witnesses (such as DC[Redacted]), or other persuasive evidence to substantiate the alleged safety rule. The only evidence on this point is PM's[Redacted] testimony. Given his obfuscations regarding Claimant's status as an employee, the ALJ is disinclined to credit PM's[Redacted] uncorroborated testimony to establish the existence of a safety rule.

F. Total TTD and statutory interest owed

Employers or insurers must pay statutory interest of 8% per annum on all benefits not paid when due. Section 8-43-410(2), C.R.S. Claimant's AWW of $118.77 corresponds to a TTD rate of $79.18 per week. Employer owes Claimant $67.87 for six days of TTD from September 23 through September 28, 2021 ($79.18 x 6/7 = $67.87). Employer also owes $8.13 in interest from September 23, 2021 through March 3, 2023. Interest will continue to accrue at the rate of $0.02 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



G. Penalty for failure to insure

Section 8-43-408(5) 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).

Employer has been ordered to pay Claimant $67.87 in TTD benefits. Twenty-five percent (25%) of the compensation awarded is $16.97.

H. 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. 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 total compensation, penalties, and interest Ordered herein is $92.97. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

It is therefore ordered that:

1. Claimant's injury on September 20, 2021 is compensable.

2. Dr. Mark Porter is Claimant's primary authorized treating physician.

3. Employer shall cover reasonably necessary treatment from authorized providers to cure and relieve the effects of Claimant's injury, including Parkview Medical Center on September 20, 2021 and Dr. Mark Porter on and after September 29, 2021.

4. No medical bills were submitted at hearing, so no specific order for payment of medical expenses can be entered.

5. Claimant's average weekly wage is $118.77.

6. Employer shall pay Claimant $67.87 in TTD benefits from September 20, 2021 through September 28, 2021.

7. Employer shall pay Claimant $8.11 in statutory interest accrued through March 3, 2023 on past-due TTD. Interest will continue to accrue at the rate of $0.02 per day until the past-due TTD is paid in full.

8. Claimant's request for TTD benefits from September 29, 2021 through March 23, 2022 is denied and dismissed.

9. Employer's request for a 50% reduction in indemnity benefits for violation of a safety rule is denied and dismissed.

10. Employer shall pay $16.97 to the Colorado Uninsured Employer Fund. The check shall be payable to the Division of Workers' Compensation, 633 17th Street, 9th Floor, Denver, CO 80202, Attention Iliana Gallegos, Revenue Assessment Officer.

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

12. In lieu of the direct payments set forth above, the Employer shall:

a. Deposit $92.97 with the Division of Workers' Compensation, as trustee, to secure payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, 633 17th Street, Suite 900, Denver, Colorado 80202, Attention: Gina Johannesman, Trustee Special Funds Unit; or

b. File a surety bond in the amount of $92.97 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.

13. 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.

14. 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.

15. If Employer fails to pay the Claimant indemnity and/or medical benefits as ordered herein, Employer shall pay an additional 25% penalty to the Colorado Uninsured Employer Fund of the Colorado Division of Workers' Compensation, pursuant to § 8-43-408 (6), C.R.S.

16. 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: March 3, 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. 5-201-483-002

ISSUES

- Did Claimant prove he contracted COVID-19 on or about January 12, 2022 because of work-related exposure?
- What is Claimant's average weekly wage (AWW)?
- Did Claimant prove entitlement to TTD on or after January 12, 2022?
- Did Respondents prove Claimant was responsible for termination of his employment?
- Did Claimant prove treatment by Dr. Carl Swendsen was authorized and reasonably needed to cure and relieve the effects of his compensable injury?
- Did Claimant prove the COVID-19 aggravated his pre-existing pancreatitis?

FINDINGS OF FACT

1. Claimant worked as the Activity Director at Employer's nursing home. His duties primarily involved designing and implementing activity programs for the residents. He also ran a vending "cart" and engaged in "one-to-ones" with residents, performing activities such as playing games, reading, or simply holding their hands. Claimant was initially hired in 2011. He left the company in approximately 2016 because of a family medical situation. He was rehired by Employer in 2019 and remained employed until his termination on February 4, 2022.

2. Claimant contracted COVID-19 in January 2022. The threshold question in this case is whether the COVID exposure probably occurred at work.

3. The nursing home was in "outbreak" status according the CDHPE from December 27, 2021 through March 31, 2022.

4. Employer had several COVID-19 safety protocols in effect in late 2021 and early 2022. Employees were tested for COVID-19 when they reported to work each day. Employees were required to wear masks in all common areas, and frequently wore goggles and face shields. Residents of the nursing home were "encouraged" but not required to wear masks. Some residents wore masks consistently, but many did not. The residents generally had serious end-stage health issues, including dementia, and many had difficulty wearing their masks properly even when they remembered to do so. And some residents simply refused to wear masks at all. No resident was ever forced to wear a mask because, as Claimant and [Redacted, hereinafter ML] noted, "this isn't a prison" and "they have rights."

5. Claimant had close personal interactions with numerous residents during a typical shift, which the ALJ infers were commonly within the 6-foot "social distancing" recommended by public health officials during the pandemic.

6. Claimant worked closely with his assistant, [Redacted, hereinafter TH], on a daily basis. They shared an office, which Claimant referred to as a "pod." Claimant and TH[Redacted] routinely removed their PPE in their pod, which was allowed under Employer's policies.

7. TH[Redacted] tested positive for COVID-19 on December 26, 2021. Claimant had last been in close contact with TH[Redacted] the day before (December 25). TH[Redacted] stayed home four days and returned to work on December 30, 2021.

8. Claimant worked double shifts while TH[Redacted] was out with COVID, and continued working extended shifts until his positive COVID test on January 12.

9. Claimant started feeling ill on January 11, 2022. He felt feverish when he awoke on January 12, but his home thermometer registered 99.9 degrees, which was apparently within Employer's acceptable range. However, his temperature registered 103 degrees when he got to work. A rapid test was positive for COVID and Claimant was sent home.

10. Two or three other individuals at Employer's facility contracted COVID-19 between December 26, 2021 and January 12, 2022.

11. Claimant maintained a restricted and isolated lifestyle in late 2021 and early 2022 to minimize his risk of contracting COVID-19. He primarily ordered groceries online for delivery, and his wife did the remainder of any shopping in brick-and-mortar stores. They disinfected groceries and other items before bringing them into the house. Claimant avoided crowded locations and situations. His public contact was even more limited after December 26, 2021 because of his busy work schedule.

12. There is no persuasive evidence that any other member of Claimant's household was exposed to or contracted COVID shortly before or after January 12. Nor is there persuasive evidence Claimant had contact with anyone outside of work known to have COVID. Claimant's adult son was ill with COVID on December 27, 2022. However, there is no persuasive evidence Claimant was physically in contact with his son around that time period.

13. Dr. Carlos Cebrian performed an IME for Respondents on November 10, 2022. Dr. Cebrian opined it is not medically probable Claimant contracted COVID from a work-related exposure. He noted Claimant was last exposed to TH[Redacted] on December 25, 2021 and did not develop symptoms of COVID until January 11. This 17-day period is outside the maximum incubation period of COVID-19. Dr. Cebrian emphasized that Claimant generally wore masks and eye protection at work. He stated there was no specific prolonged exposure to anyone diagnosed with COVID while Claimant was at work, within the COVID incubation period. He opined the most common

exposures to COVID-19 are from close household contact. Dr. Cebrian concluded Claimant's risk of exposure to COVID-19 was "equal in and out of the workplace."

14. Dr. Cebrian's opinion that Claimant was equally exposed to the risk of contracting COVID-19 outside of work is not persuasive.

15. Claimant proved he probably contracted COVID-19 from exposure at work.

16. Employer provided no list of designated providers despite knowledge Claimant had contracted COVID. Claimant's employment file contains a designated provider list from his original hire date in 2011. The document references only two providers, which does not comply with the current statutory requirement to provide a list of at least four providers. Moreover, there is no persuasive evidence that Claimant recalled the nearly 11-year-old document when he contracted COVID in January 2022.

17. After testing positive for COVID-19, Claimant spoke with his PCP, Dr. Yang, by telephone. Dr. Yang did not want Claimant to come in, because he had active COVID. No treatment was offered and no record of the telephone conversation was created. The ALJ finds this brief telephone contact insufficient to constitute Claimant's "selection" of a treating physician.

18. Claimant quarantined for five days after his positive COVID test. He then took preplanned annual leave for several days. There is no persuasive evidence Claimant traveled or participated in any "recreational" activities during his leave. Based on Claimant's credible description of the ongoing effects of COVID, the ALJ infers Claimant probably used his annual leave to rest and convalesce.

19. Claimant proved he left work because of his injury on January 12, 2022 and suffered an injury-related wage loss.

20. Claimant returned to work on January 26, 2022. By that date, his symptoms had improved and he was no longer considered infectious per CDC guidelines. However, Claimant credibly testified he still felt "ill" despite the relative improvement. He could not move around as well as before and received help from coworkers completing tasks. Claimant's testimony in this regard is corroborated Dr. Swendsen's February 3, 2022 medical report stating he was "feeling very weak, having a hard time doing his job." Also on February 3, Claimant texted TH[Redacted] that his medical situation was "pretty rough" and that he had discussed a medical leave with his doctor. Additionally, at the time of his termination, Claimant was given the option of taking FMLA leave, which implies Employer knew he was continuing to have medical issues affecting his ability to work.

21. Claimant proved the injury caused reduced efficiency and impaired his ability to perform his regular work after he returned to work on January 26, 2022.

22. Claimant was suspended without pay[1] on January 29, and terminated on February 2, 2022. The termination arose out of a conflict between Claimant and a co-worker, [Redacted, hereinafter TP], on January 29. When Claimant arrived at work that morning, he noticed flyers had been posted in common areas regarding a planned event. Claimant was concerned about allowing outsiders into the facility because of COVID, and upset that the activity had been set up without his knowledge or input. Claimant took down the flyers. Later that afternoon, Claimant questioned TP[Redacted] about the flyers. TP[Redacted] had apparently posted the flyers at the behest of Claimant's supervisor, [Redacted, hereinafter LJ].

23. TP[Redacted] later complained to LJ[Redacted] that she felt intimidated and harassed during the conversation with Claimant. LJ[Redacted] obtained statements from two other employees, neither of whom testified at hearing. LJ[Redacted] also texted and spoke to Claimant, who stated he had asked TP[Redacted] about the flyers, and she told him to discuss it with LJ[Redacted]. Claimant said he ended the interaction because TP[Redacted] was "very defensive."

24. LJ[Redacted] suspended Claimant the evening of January 29, and terminated him on February 2, 2022. The facility's acting HR Director, [Redacted, hereinafter KL], testified Claimant was terminated for violation of Employer's policy against "discrimination, harassment, and retaliation." The sole basis for the termination was the incident with TP[Redacted]; any previous performance issues had "nothing to do with" Claimant's firing.

25. Claimant and TP[Redacted] have substantially different perceptions of their encounter on January 29. TP[Redacted] did not testify at hearing but her written statement was admitted without objection. TP[Redacted] stated Claimant approached her and "pressed the issue." TP[Redacted] "felt he was coming off aggressive, demanding answers from me." TP[Redacted] alleged "he was close to me and made me feel surrounded and extremely uncomfortable." She claimed she tried to end the conversation but he continued to pursue her about it. TP[Redacted] felt embarrassed by the incident.

26. For his part, Claimant denied that he was aggressive or demanding. Claimant testified he simply asked TP[Redacted] about the flyers, and she became "aggravated" and "defensive." Claimant denied raising his voice, using foul language, or crowding TP[Redacted]. Claimant testified he was confused and surprised by TP's[Redacted] reaction and did not understand why she had gotten so upset.

27. Claimant presented the testimony of [Redacted, hereinafter MO], a former resident of the facility, to corroborate his version of the events. MO[Redacted] witnessed the interaction between Claimant and TP[Redacted]. MO[Redacted] testified TP's[Redacted] written description of the incident was "not at all" consistent with her

[1] The parties did not submit wage records showing the exact date Claimant was last paid. However, Claimant's February 2, 2022 text message to "[Redacted, hereinafter md]" states he was told he would not be paid during the suspension if he was "found guilty." Because Claimant was ultimately terminated for the same incident that triggered the suspension, the ALJ infers his pay was stopped effective January 30, 2022.

recollection. She testified Claimant spoke to TP[Redacted] "in a normal tone of voice, not threatening, or aggressive or anything like that." MO[Redacted] disagreed that Claimant "followed" TP[Redacted] to her desk, "because she didn't go anywhere. She was at her desk already."

28. MO's[Redacted] testimony is credible.

29. Respondents failed to prove Claimant was responsible for termination of his employment.

30. Claimant has a longstanding history of pancreatitis. The medical records document treatment for pancreatitis dating to 2012. The initial records show pancreatitis attacks approximately yearly. They were managed primarily by pain medication. In 2016, Claimant's pancreatitis attacks became more frequent.

31. Claimant started treatment with Dr. Carl Swendsen, a gastroenterologist, in September 2018. At the time, Dr. Swendsen discussed a Whipple procedure, but Claimant did not believe his condition was bad enough to warrant such a drastic option.

32. Claimant was hospitalized overnight on August 31, 2020 for acute pancreatitis. Claimant was offered a celiac plexus block, but he declined. He had another attack in February 2021, and this time he agreed to a celiac block. The block was helpful and relieved the pancreatitis for approximately 6 months. Claimant had another pancreatitis attack in August 2021, which resolved within a week.

33. Claimant has been seeing a pain management nurse, Brent Persons, since February 2021 for pain related to pancreatitis and shoulder issues. Mr. Persons uses an unfortunate template for his electronic medical records which includes numerous repetitive "cloned" entries. The format of Mr. Persons' records severely limits their usefulness in tracking the ebb and flow of Claimant's symptoms over time. For instance, Mr. Persons' January 7, 2022 report stated Claimant was "in acute pancreatitis last visit" which had subsequently improved in the interim. But the corresponding note from the prior appointment (December 10, 2021) simply said Claimant's "medications are working and he would like to keep it the same," with no mention of any pancreatitis flare. Mr. Persons' records are given little weight.

34. Claimant saw Dr. Swendsen on February 3, 2022. Dr. Swendsen noted Claimant's recent case of COVID-19 was "much worse in regards to symptoms" than a previous bout in November 2020. Claimant felt he was "losing weight, feeling very weak, having a hard time doing his job." Dr. Swendsen recommended a repeat celiac plexus block, and hoped recurrent blocks every 6 months would keep the symptoms under control. He also recommended an upper endoscopy and magnetic resonance cholangiopancreatography (MRCP). This appointment with Dr. Swendsen represents the exercise of Claimant's right to select his treating physician.

35. The celiac block was performed on March 9, 2022.

36. Claimant saw Dr. Swendsen's PA-C, Courtney Frerichs, on April 21, 2022. Claimant reported an increase in his average pain level and no benefit from the celiac block. Claimant stated his overall symptoms had increased since the recent COVID and wondered if COVID had caused him to become more "sensitive."

37. The most recent treatment record in evidence is a June 14, 2022 appointment with Dr. Swendsen. Claimant felt a lot of his ongoing issues were related to COVID. He reported fatigue, headaches, "feeling foggy," and periodic "mini attacks" of pancreas pain. He was also having diarrhea, gas, cramping, and distention after eating. Dr. Swendsen thought Claimant's symptoms "sounded more like IBS-D than I've heard from him in the past." Dr. Swendsen recommended medications and indicated he would consider another celiac block if Claimant were not improved by the next visit.

38. Dr. Miguel Castrejon performed an IME for Claimant on November 7, 2022. Claimant reported needing additional pain medication since contracting COVID in January 2022. He described daily fatigue that limited his activities. He was having difficulty walking ¼ mile because of the fatigue. He also reported frequent headaches, decreased concentration, and frequent gastrointestinal distress. Dr. Castrejon reviewed Claimant's medical records in detail, including records of his pre- and post-COVID pancreatitis treatment. Dr. Castrejon also performed a medical literature search regarding any association between pancreatitis and COVID, as well as the effect of COVID on pre-existing pancreatitis. He found literature supporting an association between acute pancreatitis and COVID-19. Dr. Castrejon concluded, "it is my professional opinion that a relationship exists between the exposure to COVID and the 'new' development not only of gastrointestinal but also physical symptoms which have become quite debilitating and fairly unresponsive to treatment. The literature surrounding the relationship of COVID to the development of acute, and chronic, pancreatitis, as well as the aggravating effects upon pre-existing chronic pancreatitis cannot be ignored."

39. Respondents' IME, Dr. Cebrian, disagreed that COVID had any effect on Claimant's pre-existing pancreatitis. Dr. Cebrian opined Claimant's abdominal symptoms after his diagnosis of COVID-19 were very similar to the complaints and need for treatment he had for several years. Dr. Cebrian also disagreed that medical literature supported a causal connection between COVID and worsening pancreatitis. Although he did not think the COVID was work-related, even if it were, Claimant was at MMI with no impairment, no restrictions, and no need for treatment as of January 18, 2022.

40. Dr. Castrejon's opinions are credible and more persuasive than the contrary opinions offered by Dr. Cebrian.

41. Claimant proved the evaluations and treatment provided by and through Dr. Swendsen from February 3, 2022 through June 14, 2022 were reasonably needed to cure and relieve the effects of his compensable injury.

42. Claimant proved the work-related COVID-19 caused at least a temporary exacerbation of his pre-existing pancreatitis.

43. Claimant proved his injury contributed at least in part to his wage loss commencing January 30, 2022.

44. Claimant was a salaried employee, earning $45,000 per year on the date of injury. Claimant's AWW is $865.39, calculated by dividing his annual salary by 52 weeks ($45,000 ÷ 52 = $865.39).

CONCLUSIONS OF LAW

A. 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); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Claimant proved he probably contracted COVID-19 from exposure at work. Dr. Cebrian's opinion that Claimant was at least equally exposed to the risk of contracting COVID outside of work is not persuasive. Claimant spent the vast majority of his waking hours at work between December 26, 2021 and January 11, 2022. His work required frequent close contact with numerous individuals, many of whom were not wearing masks or taking other precautions. There were at least three individuals at Claimant's workplace who had COVID-19 in the 17 days before he became sick. Thereafter, the nursing home remained in outbreak status until March 31, 2022, which indicates COVID continued to spread through the facility for weeks after Claimant became infected. By contrast, Claimant had no known contact with anyone infected with COVID outside of work in the two weeks before he became ill. No one in Claimant's household contracted COVID around that time. Claimant maintained a restricted and isolated lifestyle in December 2021 and January 2022 which minimized his exposure to members of the public outside of work. Although Claimant's adult son had COVID on December 27, there is no persuasive evidence Claimant was in contact with his son. In fact, the ALJ infers Claimant would have avoided his son while he had COVID, given Claimant's anxiety over contracting COVID himself and passing it to the nursing home residents. In any event, any contact with his son before December 27 would have been outside the incubation period, according to Dr. Cebrian.

B. 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 § 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. 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).

Claimant advocates dividing his annual salary by 52 weeks to determine his AWW. Claimant's proposed methodology is reasonable, and Respondents offered no competing calculation or argument regarding AWW. Claimant's AWW is $865.39, with a corresponding TTD rate of $576.93 ($45,000 ÷ 52 = $865.39 x 2/3 = $576.93)

C. TTD benefits from January 12 through January 25, 2022

Claimant was disabled and suffered an injury-related wage loss from January 12, 2022 through January 25, 2022. Employer sent Claimant home based on his positive COVID test, so there is no reasonable dispute that Claimant left work on January 12 because of the injury. Thereafter, he was required to stay home for at least five days, which exceeds the minimum requirement of three shifts.

Once commenced, TTD benefits continue until one of the terminating events enumerated in § 8-42-105(3). In this case, Claimant's eligibility for TTD ended when he returned to work on January 26, 2022. Section 8-42-105(3)(b).

D. TTD benefits commencing January 30, 2022

Claimant seeks resumption of TTD benefits after his suspension. Respondents dispute Claimant's entitlement to TTD on two grounds. First, Respondents deny that Claimant was "disabled" after he returned to work on January 26. Second, Respondents argue TTD is barred because Claimant was responsible for termination of his employment.

A claimant is entitled to TTD benefits "in case of temporary total disability lasting more than three working days' duration." Section 8-42-105(1). Proof of "disability" is a threshold requirement for an award of TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The concept of disability incorporates "medical incapacity" and "loss of wage earnings" proximately caused by the injury. *Montoya v. Industrial Claim Appeals Office*, 488 P.2d 314 (Colo. App. 2018). "Medical incapacity" does not necessarily mean complete inability to work, but can also be shown by reduced efficiency in the performance of regular job duties. *E.g., Ricks v. Industrial Claim Appeals Office*, 809 P.2d 1118 (Colo. App. 1991). A work injury need not be the sole cause of a wage loss; a disabled claimant is entitled to TTD benefits if the injury contributed "to some degree" to their wage loss. *PDM Molding, Inc. v. Stanberg, supra*. A claim for TTD benefits does not require formal work restrictions or expert opinions, but can be supported by any form of competent and persuasive evidence, including the claimant's testimony. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983).

As found, Claimant proved the injury caused reduced efficiency and impaired his ability to perform his regular work on and after January 26, 2022. Claimant credibly testified he still felt "ill" when he went back to work despite the relative improvement from the initial onset of COVID. He could not move around as well as before and received help from coworkers. Claimant's testimony in this regard is corroborated by Dr. Swendsen's February 3, 2022 medical report stating he was "feeling very weak, having a hard time doing his job." Also on February 3, Claimant texted TH[Redacted] that his medical situation was "pretty rough" and that he had discussed a medical leave with his doctor. Additionally, at the time of his termination, Claimant was given the option of taking FMLA leave, which implies Employer knew he was continuing to have medical issues affecting his ability to work.

Claimant also proved the work injury contributed "to some degree" to his wage loss after his termination. The persuasive evidence shows Claimant continued to suffer symptoms and associated limitations that reasonably limited his ability to sustain work, including severe fatigue, weakness, headaches, "foggy" thinking, pancreatic pain, and chronic diarrhea. On June 14, 2022, Dr. Swendsen noted Claimant wanted to work but was "fully disabled." Similarly, Dr. Castrejon considered Claimant "temporarily totally disabled."

E. Claimant was not responsible for termination

Respondents argue they are not liable for TTD after Claimant stopped working on January 29, 2022 because Claimant was responsible for termination of his employment.

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide:

> 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 "termination statutes" are an affirmative defense to a claim for temporary disability benefits. The respondents must prove by a preponderance of the evidence the claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This requires proof that 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*, 58 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 their termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Respondents failed to prove Claimant was responsible for termination of employment. The sole basis for Claimant's termination was the interaction between Claimant and TP[Redacted] on January 29, 2022. TP's[Redacted] written statement indicates she personally felt uncomfortable and embarrassed. But Claimant cannot be said to have acted "volitionally" if he had no reasonable basis to anticipate his co-worker's subjective reaction. Respondents presented insufficient persuasive evidence to prove that Claimant engaged in harassment, retaliation, discrimination, or any other behavior prohibited by Employer's policies. Respondents offered no sworn testimony of any witness with firsthand personal knowledge of the incident. By contrast, Claimant disputed TP's[Redacted] account at hearing, and his testimony was corroborated by MO[Redacted]. No reasonable employee would expect to be terminated for the interaction

described by Claimant and MO[Redacted]. Respondents failed to prove Claimant performed a volitional act he should reasonably have expected to lead to his termination.

F. Right of selection

Under § 8-43-404(5), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment "forthwith," or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). To properly exercise its right of selection, the employer must give the claimant a list of at least four providers from which he can choose. Section 8-43-404(5)(a)(I)(A). The effectiveness of a pre-injury designation by the employer turns on whether it gave the claimant actual notice of the employer's designated providers "at the time of the injury." *Trujillo v. Oppenheimer Management Corp*., W.C. 4-143-750 (August 9, 1993). In resolving this question, the ALJ may consider factors such as the nature of the notice given by the employer, how recently the notice was provided, and the claimant's individual capacity to recall the notice. *Jones v. Weld County Government*, W.C. No. 4-176-234 (December 8, 1996).

Claimant proved he had the right to select his own treating physician. Employer provided Claimant no list of designated providers despite knowing he had contracted COVID. Claimant's employment file contains a designated provider list from his original hire date in 2011. The document references only two providers, and therefore does not comply with the current statutory requirement to provide a list of at least four providers. Moreover, there is no persuasive evidence that Claimant recalled the nearly 11-year-old document when he contracted COVID in January 2022.

G. Claimant selected Dr. Swendsen

A claimant "selects" a physician when he demonstrates by words or conduct that he has chosen a physician to treat the injury. *Squitieri v. Tayco Screen Printing*, W.C. No. 4-421-960 (September 18, 2000).

The persuasive evidence shows Claimant selected Dr. Swendsen as his ATP. Although Claimant initially contacted his PCP, Dr. Yang by telephone, he was not offered an appointment because of his active COVID. Dr. Yang offered no treatment and made no record of the telephone conversation. There is no persuasive evidence Claimant ever saw Dr. Yang for any issues related to the January 2022 COVID diagnosis. A claimant does not "fully exercise" the right of selection unless the chosen physician is willing to treat the industrial injury. *Ruybal v. University Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988). The brief telephone contact with Dr. Yang was insufficient to constitute Claimant's "selection" of a treating physician.

Dr. Swendsen was the first physician Claimant saw after contracting COVID, and he continued to follow up with Dr. Swendsen's office thereafter. These factors persuasively demonstrate that Claimant selected Dr. Swendsen as his ATP.

H. Medical treatment

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). However, the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent treatment was causally related to the injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which they are seeking 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).

Dr. Swendsen treated Claimant on and after February 3, 2022 for ongoing symptoms related at least in part to COVID-19. Claimant proved the evaluations and treatment provided by and through Dr. Swendsen from February 3, 2022 through June 14, 2022 were reasonably needed to cure and relieve the effects of his compensable injury.

Claimant proved he suffered at least a temporary aggravation of his pancreatis, which caused a need for treatment and contributed to his temporary disability. Claimant repeatedly described worsened symptoms to Dr. Swendsen starting with the February 3, 2022 appointment, which he attributed at least partially to COVID. Dr. Castrejon cited medical literature showing an association between COVID and pancreatitis. After reviewing Claimant's history in detail, Dr. Castrejon opined Claimant's increased symptoms were causally related to COVID-19. Dr. Castrejon's opinions are credible and more persuasive than the contrary opinions offered by Dr. Cebrian.

Claimant argues the COVID "permanently" aggravated his pancreatitis. But a determination of whether the aggravation is "permanent" is premature at this time. No ATP has opined that Claimant is at MMI, and the ALJ has no jurisdiction to determine permanency. Additionally, the only post-COVID pancreatitis treatment documented in the record consists primarily of evaluations, diagnostic testing, and conservative treatments. It is therefore unnecessary, and would be inappropriate, to make findings and conclusions regarding the full extent of any aggravation, or speculate about other treatment that might be recommended in the future.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is compensable.

2. Claimant's average weekly wage is $865.39, with a corresponding TTD rate of $576.93.

3. Insurer shall pay Claimant TTD benefits at the rate of $576.93 per week from January 12, 2022 through January 25, 2022, and from January 30, 2022 until terminated by law.

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

5. Respondents' defense that Claimant was responsible for termination of his employment is denied and dismissed.

6. Dr. Carl Swendsen is Claimant's ATP.

7. Insurer shall cover medical treatment reasonably needed to cure and relieve the effects of Claimant's compensable injury, including but not limited to evaluations and treatment provided by and through Dr. Swendsen from February 3, 2022 through June 14, 2022.

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

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

March 24, 2023

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