OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-232-076-001

ISSUES

- Did Claimant prove that a right elbow surgery recommended by Dr. Chance Henderson is reasonably needed and causally related to the admitted December 14, 2022 work injury?

FINDINGS OF FACT

1. Claimant works for Employer as a Code Enforcement Officer. She suffered an admitted injury to her right elbow on December 14, 2022, while apprehending a stray dog. Claimant tripped and fell to the ground while attempting to load the dog into the back of her vehicle. Claimant fell on the asphalt and landed on her right elbow, left knee and left hand. Her right elbow was bleeding from an abrasion.

2. Claimant went to the Arkansas Valley Regional Medical Center emergency department after the accident. She reported pain in her right elbow, left wrist, and left knee. Examination of the right elbow showed abrasions, swelling, and pain with extension. X-rays of the elbow showed severe arthritic changes but no acute fracture or dislocation. She was prescribed NSAIDs and advised to follow up with a workers' compensation provider.

3. Claimant saw PA-C Brandon Madrid at Concentra on December 29, 2022. She reported ongoing right elbow pain and tingling down to the right hand. Her left knee was better. The elbow was tender at the olecranon and around the ulnar nerve area, with reduced range of motion. Mr. Madrid referred Claimant to PT.

4. On January 24, 2023, PA-C Tara Guy documented continued elbow pain, cracking/popping, and weakness. She referred Claimant to Dr. Chance Henderson for an orthopedic evaluation.

5. A right elbow MRI was completed on January 30, 2023. It showed severe osteoarthritis with cartilage erosion and osteophytes, multiple loose bodies, a large joint effusion, triceps tendonitis, ulnar neuritis, and a lateral collateral ligament tear.

6. Claimant saw Dr. Henderson on February 13, 2023. Her primary complaints were ongoing elbow pain and loss of extension. X-rays obtained that day showed severe degenerative arthritis with large osteophytes and malunion of a previous radial head fracture. Dr. Henderson administered a cortisone injection and ordered a CT scan.

7. Claimant returned to Dr. Henderson on February 20, 2023. The injection had provided no sustained benefit. The CT scan showed severe right osteoarthritis with multiple intra-articular loose bodies. Dr. Henderson noted Claimant had end-stage osteoarthritis, but she was "still very active." Therefore, he did not believe she was a good

candidate for total elbow arthroplasty. Instead, he recommended ulnohumeral arthroplasty with anterior capsular release and ulnar nerve decompression.

8. Dr. Timothy O'Brien performed a Rule 16 record review for Respondent on March 1, 2023. Dr. O'Brien concluded Claimant suffered a minor contusion from the work accident that "healed uneventfully and expeditiously and without sequela." He opined Claimant's ongoing elbow symptoms were solely related to severe, pre-existing osteoarthritis. He opined that all pathology shown on the MRI—including the loose bodies and ligament tear—was pre-existing. He agreed the proposed surgery was reasonable, but opined it is not causally related to the injury.

9. Claimant saw Dr. Craig Davis for an IME at Respondent's request on June 8, 2023. Claimant denied any prior injuries or problems involving her right elbow. Dr. Davis reviewed the imaging, which showed severe degenerative arthritis with multiple intra-articular loose bodies and significant deformity of the articular surfaces. He opined Claimant sustained a strain and/or contusion of her right elbow from the December 14, 2022 accident. He also believed the injury aggravated her pre-existing degenerative arthritis, necessitating a period of rest, activity modification, anti-inflammatory medications, and physical therapy for approximately 8 weeks. However, he opined the proposed surgery is unrelated to the work accident. He noted that sometimes an aggravation of arthritis can result in an increase in symptoms ultimately necessitating in more aggressive treatment such as surgery, which he believed was what happened in this case. However, he stated Claimant clearly had severe pre-existing degenerative arthritis, and he believed she eventually would have needed the surgery with or without the injury on December 14, 2022. He explained that continued daily use of her arm would have resulted in gradual deterioration of function and increasing pain and the eventual need for the proposed surgery.

10. After the IME, Respondent obtained medical records showing that Claimant had not accurately described her pre-injury history. Specifically, there is a report of right elbow pain in April 2016, and additional complaints of elbow pain in 2021 after a fall. There is no persuasive evidence Claimant received any specific treatment for the elbow in 2016. She underwent elbow x-rays after the 2021 fall, which showed a joint effusion, consistent with an occult radial head fracture.

11. Claimant conceded at hearing she neglected to mention the elbow symptoms in 2016 and 2021. She credibly testified she had forgotten the prior episodes because she had no ongoing symptoms and required no specific treatment. Records from Claimant's PCP corroborate her testimony in this regard, as there is no persuasive indication of elbow problems aside from the isolated instances in 2016 and 2021.

12. At hearing, Dr. Davis maintained that the proposed surgery is reasonably needed but not causally related to the December 22 work accident. He emphasized the significant morphological changes shown on imaging as illustrating the severity of the pre-existing condition. He thought it unlikely Claimant's elbow would have been asymptomatic before the accident, given the extensive arthritis. Regardless, he sees "no question" Claimant's range of motion was limited before the injury because of the bone deformity.

Dr. Davis reiterated that Claimant suffered an elbow contusion or strain from the accident, and the treatment she received was reasonable to treat the work-related condition. But he believes the surgery is solely to treat pre-existing arthritis.

13. Claimant's testimony is credible.

14. Claimant proved the surgery recommended by Dr. Henderson is reasonably needed to cure and relieve the effects of her compensable injury. Respondent's experts agree the surgery is reasonable, and the primary disagreement relates to causation. Dr. Davis's opinions are well-reasoned and credible in many respects. But the ALJ is not persuaded by his ultimate conclusion that the surgery is solely related to Claimant's pre-existing condition. Although Claimant had severe osteoarthritis before the work accident, it was minimally symptomatic and caused no significant limitations on her ability to work or perform other activities. Claimant's elbow has been continuously painful since the accident, with no significant break in symptomology to support the argument that the injury "resolved." Dr. Davis may be correct that Claimant "inevitably" would have required surgery for her elbow at some point, but it is speculative whether that would have been next month, next year, ten years from now, or ever. Claimant had no reason to pursue treatment for her elbow immediately before the accident, and there is no persuasive basis to conclude she probably would have needed surgery now absent the injury. The preponderance of persuasive evidence shows the injury combined with the pre-existing condition and accelerated the need for surgery.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not disqualify a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment they would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019).

As found, Claimant proved the surgery recommended by Dr. Henderson is reasonably needed to cure and relieve the effects of her compensable injury. Respondent's experts agree the surgery is reasonable, and the primary disagreement relates to causation. Dr. Davis's opinions are well-reasoned and credible in many respects. But the ALJ is not persuaded by his ultimate conclusion that the surgery is solely related to Claimant's pre-existing condition. Although Claimant had severe osteoarthritis before the work accident, it was minimally symptomatic and caused no significant limitations on her ability to work or perform other activities. Claimant's elbow has been continuously painful since the accident, with no significant break in symptomology to support the argument that the injury "resolved." Dr. Davis may be correct that Claimant "inevitably" would have required surgery for her elbow at some point, but it is speculative whether that would have been next month, next year, ten years from now, or ever. Claimant had no reason to pursue treatment for her elbow immediately before the accident, and there is no persuasive basis to conclude she probably would have needed surgery now absent the injury. The preponderance of persuasive evidence shows the injury combined with the pre-existing condition and accelerated the need for surgery.

ORDER

It is therefore ordered that:

1. Respondent shall cover the right elbow surgery recommended by Dr. Chance Henderson.

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 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: September 1, 2023

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

RELEVANT PROCEDURAL HISTORY

On October 16, 2020, a hearing was held before ALJ Kabler on Respondents' attempt to overcome the DIME opinions of Dr. Ranee Shenoi on permanent impairment, as well as Claimant's attempt to overcome the DIME opinions of Dr. Shenoi on causation, MMI and permanent impairment, Claimant's request for temporary total disability benefits, Claimant's request for permanent total disability benefits, and Claimant's request for medical benefits, including maintenance care. (Resp. Ex. F)

On December 8, 2020, ALJ Kabler issued Full Findings of Fact, Conclusions of Law, and Order, concluding Respondents overcame Dr. Shenoi's opinions with respect to cervical spine impairment and mental impairment, and finding Claimant sustained no such permanent impairment. (*Id*., bn 178) ALJ Kabler determined Claimant failed to overcome Dr. Shenoi's opinions with respect to causation, MMI and permanent impairment for the thoracic and/or lumbar spine. (*Id*., bns 178-179) ALJ Kabler also determined Claimant failed to prove entitlement to additional TTD benefits, Claimant failed to prove he was permanently and totally disabled, and Claimant failed to prove entitlement to additional medical benefits, including Grover medical care/maintenance care. (Id., bn 179)

Claimant appealed ALJ Kabler's Order to the Industrial Claim Appeals Office ("ICAO"), and on June 4, 2021, ICAO affirmed ALJ Kabler's Order. (Resp. Ex. H) Claimant then appealed ICAO's Order to the Colorado Court of Appeals, and on June 30, 2022, the Colorado Court of Appeals affirmed ICAO's Order. (Resp. Ex. I) Finally, Claimant filed a Petition for Writ of Certiorari to the Colorado Court of Appeals, and on February 21, 2023, the Colorado Supreme Court denied Claimant's Petition for Writ of Certiorari. (Resp. Ex. J) As a result, the issues determined by ALJ Kabler in his December 8, 2020 Order, as subsequently admitted to by Respondents in their January 12, 2021 Final Admission of Liability (Resp. Ex. G), closed by operation of law.

After losing his appeal, on March 15, 2023, Claimant applied for hearing on issues that included medical benefits, average weekly wage, disfigurement, temporary total and partial disability benefits, permanent partial disability benefits, permanent total disability benefits, penalties, and "other issues". (Resp. Ex. K) The penalties identified are that he did not get a hearing transcript, he was not permitted to submit his medical records at hearing, he continues to have pain in his head, neck, chest and back, and he is not able to think due to memory issues because the workers' compensation doctors did not provide treatment. (*Id*., bn 282) Under "other issues" section, Claimant identified MMI, termination of benefits, permanent total disability benefits, relatedness, loss of cervical range of motion, mental impairment, total disability, and lost income. (Id.)

On April 4, 2023, Respondents' filed a motion to strike Claimant's hearing application due to the issues being closed as a matter of law, or in case of average weekly wage and disfigurement, moot. (Resp. Ex. N) On April 11, 2023, ALJ Lovato issued an order granting Respondents' motion to strike hearing application, in part. (Resp. Ex. M)

ALJ Lovato struck compensability, temporary partial and total disability benefits, permanent partial disability benefits, permanent total disability benefits, medical benefits (including Grover medical benefits), and average weekly wage. (*Id*. at bn 414) This left only disfigurement, penalties, and "other" as issues remaining for hearing. (*Id*.)

During the hearing held on July 18, 2023, this ALJ reviewed Claimant's hearing application, including Claimant's identification of hearing issues under the "penalties" and "other issues" sections. The ALJ found that Claimant failed to identify with any specificity any penalty against Respondents for which a penalty can be assessed under the Act. The ALJ further found that there are no issues identified by Claimant under the "other issues" section that are open and ripe for litigation. Thus, the only remaining issue for hearing is disfigurement.

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained disfigurement as a result of his March 3, 2019 work injury and, if so, a determination of his disfigurement award.

FINDINGS OF FACT

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

1. The ALJ incorporates by reference the "Relevant Procedural History" stated above.
2. On March 3, 2019, Claimant was involved in a motor vehicle accident ("MVA") while working for Respondent Employer. (Resp. Exs. A - C) This MVA resulted in this admitted to claim. (Resp. Ex. G) According to the State of Colorado Traffic Accident Report, the other driver's speed was 15 mph, and Claimant's speed was documented as "unknown." (Resp. Ex. A)
3. Claimant was seen at Rose Medical Center after his accident on the day of his accident. (Resp. Ex. B) His accident was identified as a low speed MVA. (*Id*., bn. 005) There is no indication from the Rose Medical Center records that Claimant sustained any external injuries as a consequence of the MVA, including lacerations or cuts. (*Id*.)
4. In a report dated June 3, 2020, Dr. Kathleen D'Angelo summarized Claimant's medical history after reviewing his medical records, including records from the date of Claimant's MVA through April 30, 2020. (Resp. Ex. E) Dr. D'Angelo did not identify any records documenting that Claimant suffered external trauma or disfigurement as a result of his low speed MVA. (Id.) Dr. D'Angelo also did not identify that Claimant had undergone surgery following his work accident, due to his work accident (*Id*.)

5. At hearing, Claimant acknowledged that he did not sustain any lacerations or cuts or external trauma causing external disfigurement as a result of his MVA, and he further admitted that he had not undergone surgery as a result of his accident.
6. The ALJ has reviewed Claimant's medical records. The records do not provide credible or persuasive evidence that supports a disfigurement award due to his work accident.
7. The ALJ observed Claimant at the hearing and could not see that Claimant suffered from any disfigurement due to his work accident. Claimant did state that he has to wear glasses due to his work injury, however, the ALJ does not find that assertion to be credible.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

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

I. Whether Claimant proved by a preponderance of the evidence that he sustained disfigurement as a result of his March 3, 2019 work injury and, if so, a determination of his disfigurement award.

CRS §8-42-108(1) indicates that if an employee is seriously, permanently disfigured about the head, face or parts of the body "normally exposed to public view", in addition to all other benefits provided in this article and except as provided in subsection (2) of this section, the Director may allow compensation not to exceed $4,000 to the employee who suffers the disfigurement.

As found, the ALJ visually saw Claimant and could not discern any disfigurement. Plus, the Claimant was not wearing glasses. Moreover, the ALJ reviewed Claimant's medical records to determine whether the records contained credible evidence that Claimant sustained any disfigurement from the MVA. The ALJ did not find any credible evidence of a disfigurement in the medical records.

Claimant identified numerous symptoms and complaints he relates to his work injury, but none of which qualify as a serious, permanent disfigurement to an area about the head, face or body normally exposed to public view.

Based on the plain language of the statute, disfigurement is intended to compensate a worker for serious, permanent disfigurements about the head, face or parts of the body exposed to public view.

The ALJ finds and concludes that Claimant failed to prove by a preponderance of the evidence any such disfigurement related to this claim. As a result, Claimant's request for disfigurement benefits is denied and dismissed.

ORDER

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

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

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

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

DATED: September 5, 2023

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-185-285-001 & 5-202-084-001

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to maintenance medical care after maximum medical improvement (MMI) to cure and relieve the effects of his ongoing work related injuries of July 22, 2020 for WC No. 5-202-084-001.

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to maintenance medical care after maximum medical improvement (MMI) to cure and relieve the effects of his ongoing work related injuries of May 2, 2021 for WC No. 5-185-285-001.

III. If Claimant is entitled to maintenance care, whether the treatment and MRI recommended by the authorized treating physician (ATP), Dr. John Sacha is reasonably necessary and related to which injury.

PROCEDURAL HISTORY

Claimant sustained an admitted work related injury to his low back and right knee on July 22, 2020, which is the subject of WC No. 5-202-084.

Claimant sustained a second admitted work related injury to his low back and right knee on May 2, 2021, which is the subject of WC No. 5-185-285.

On March 9, 2022 Respondent filed a Final Admission in the May 2, 2021 claim admitting for maintenance care after MMI pursuant to Dr. Amanda Cava's February 22, 2022 medical report, including follow-up care with Dr. John Sacha.

On May 16, 2022, Respondents filed a Final Admission of Liability for date of injury July 22, 2020 admitting for maintenance care pursuant to Dr. Amanda Cava's medical opinion of January 18, 2021.[1]

Claimant requested a Division of Workers' Compensation Independent Medical Evaluation (DIME) in both matters. In the July 22, 2020 claim, Dr. Anjmun Sharma was selected as the DIME physician. In the May 2, 2021 claim, Dr. John Tyler was selected as the DIME physician.

Respondents filed Final Admissions of Liability consistent with both Dr. Sharma and Dr. Tyler's opinions, denying maintenance medical care in both claims pursuant to their respective reports. The FALs were both dated February 13, 2023.

Claimant filed Applications for Hearing in both matters. The sole issue to be determined was whether claimant was entitled to medical maintenance care. As both

[1] This claim was a medical benefits only claim and no admission was required as Claimant had not missed greater than three scheduled workdays.

claim involved the same body parts and similar issues in dispute, the parties indicated the claims were consolidated for purposes of the hearing.

STIPULATIONS OF THE PARTIES

The parties stipulated that, if it was determined that Claimant was entitled to maintenance medical benefits in either claim, Respondent will authorize the diagnostic MRI being recommended by Claimant's treating provider, Dr. John Sacha.

FINDINGS OF FACT

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

A. Generally:

1. Claimant was and continues to be a Deputy Sheriff Sargent working for Employer. Claimant was 55 years old at the time of the hearing. Claimant has worked in several of Employer's facilities and has been working for Employer for approximately 32 years.

2. Claimant sustained two separate admitted work related injuries.

3. The first occurred on July 22, 2020 and is the subject of W.C. No. 5-202-084. Claimant was in the officer's mess when he went to grab some paper towels and tripped over a partial wall. Claimant fell onto his right knee, and twisted his low back causing low back and right knee injuries.

4. The second incident occurred on May 2, 2021 and is the subject of W.C. No. 5-185-285. Claimant was responding to an inmate who attempted suicide. The inmate had covered herself and her cell with slippery personal hygiene products and, during a difficult attempt to restrain the inmate, claimant aggravated his low back and right lower extremity.

B. Medical Records for July 22, 2020 Injuries

5. Claimant was initially seen at Concentra on July 24, 2020 by authorized treating provider, Jonathan Joslyn, PA who took a history of stumbling on a small wall but did not fall all the way to the ground. Claimant reported immediate right knee pain with a popcorn sound in the right knee and back pain that radiated into the left gluteus. Claimant denied prior right knee injuries. PA Joslyn diagnosed claimant with low back strain, lumbar strain, and right knee strain. He referred claimant for physical therapy and designated a 10 pound lifting restriction.

6. Claimant was released back to full duty on July 28, 2020 despite Claimant's assertions that he was not ready for full duty work.

7. By September 8, 2020, claimant's symptoms had worsened. Dr. Jeffrey Peterson of Concentra noted that Claimant's symptoms had worsened including continued right knee soreness and low back pain that radiated both to the buttock and leg. Dr. Peterson ordered x-rays of the right knee and spine, and an MRI of the lumbar spine due to intervertebral disc disorder. He also reinstated work restrictions to up to 15 lbs. with push/pull up to 30 lbs., squatting and kneeling occasionally, and no walking on uneven terrain or climbing ladders.

8. The MRI of the lumbar spine taken on September 17, 2020 showed mild disc narrowing at the L4-5 level with a small disc bulge mildly indenting the dural sac and an associated annular fissure. Dr. Eduardo Seda read the imaging as degenerative disc changes with mild dural sac indentation without root sleeve deformity.

9. On September 23, 2020 Dr. Peterson referred Claimant for a physiatry consultation and continued Claimant's restrictions. By October 1, 2020 Dr. Peterson reported that Claimant's pain was worse, he administered a Ketorolac Tromethamine (Toradol) intramuscular injection and prescribed a methylPREDNISolone (Medrol) dose pack. Restrictions again remained the same.

10. Claimant was initially evaluated by John Sacha, M.D. on October 12, 2020 who documented that Claimant was stepping over a wall when he tripped, falling sideways and backwards, and landing on his bilateral low back. He had acute onset of bilateral low back pain, bilateral buttocks pain, and right peripatellar knee pain. Claimant complained of constant pain localized on the left greater than the right low back and left greater than right buttocks with pain worse when sitting. On exam, Dr. Sacha noted lumbar paraspinal spasm pain with straight leg raise and neural tension testing bilaterally but minimal pain with extension-rotation on the left. He diagnosed lumbosacral radiculopathy. He recommended a bilateral L5 transforaminal injection for both diagnoses and treatment purposes. He also prescribed Lyrica for neuropathic pain and insomnia.

11. Dr. Amanda Cava of Concentra took over Claimant's care on October 19, 2020, and reported that the dose pack and the intramuscular injection helped with symptoms. She noted that Claimant was awaiting authorization for the transforaminal injection. She continued work restrictions, though increased them to 30 lbs. On November 10, 2020, Dr. Cava noted that symptoms had returned and recommended he continued physical therapy and chiropractic care with Dr. Jason Gridley.

12. Dr. Sacha performed a bilateral L5 transforaminal epidural steroid injection (ESI) and nerve block on November 19, 2020. He reported that preprocedure Claimant reported pain on a visual analog scale (VAS) of 6/10 with a 7/10 with provocative maneuvers, and a 0/10 post procedure, which was an excellent result.

13. On December 28, 2020 Dr. Sacha wrote to Dr. Cava reported that Claimant had "done great" since the ESI and had an excellent lasting relief with an 80-90% response. On exam, he observed only mild residual paraspinal spasm in the lumbar spine. He also mentioned that Claimant had benefited from the chiropractic treatment provided by Dr. Gridley. Dr. Sacha cleared him for full duty and returned him to Dr. Cava, but recommended maintenance care.

14. By January 18, 2021 Dr. Cava placed Claimant at MMI with no impairment and no permanent restrictions. She recorded that now, Claimant's symptoms occurred only rarely but continued with occasional tightness in the lumbar spine with prolonged bending and had benefited from the chiropractic care and ESI. Dr. Cava did recommend chiropractic care as maintenance.

15. At MMI, because claimant had not lost more than 3 days from work due to the July 22, 2020 incident, the matter was being handled as a medical-only claim, and no Final Admission of Liability was filed. From February through April 2021, claimant underwent chiropractic care for his lumbar spine with Jason Gridley, DC.

16. Claimant underwent a DIME evaluation with Dr. Anjmun Sharma on September 30, 2022. Dr. Sharma took a history, reviewed the medical records and examined Claimant.[2] Dr. Sharma noted Claimant still reported pain in his lumbar spine with prolonged lifting, pushing and pulling at work as well as pain in his right knee. Dr. Sharma emphasized that Claimant continued to have some functional loss in range of motion of the right knee and the lumbar spine. He diagnosed lumbago, lumbar spine strain, right knee pain, and right knee strain. Dr. Sharma placed Claimant at MMI as of February 22, 2022 and provided a 12% impairment of the lumbar spine and a 3% impairment for the right knee. He did not make any recommendations with regard to maintenance care.

C. Medical Records for May 2, 2021 Injuries

17. Following the incident on May 2, 2021, while restraining an inmate who was attempting do self-harm, Claimant was evaluated by Yue Dai, M.D at Concentra. On May 3, 2021, Dr. Dai took a history consistent with Claimant's testimony. He noted that Claimant had been seen on the date of the injury at Presbyterian St. Luke's emergency room where they took lumbar spine x-rays, which were reportedly negative. Claimant complained of symptoms into his low back with tingling into the bottom of his feet. He assessed Claimant with a low back strain. Claimant was referred to physical therapy for the low back, wrist, hand, finger and right knee[3] and prescribed multiple medications. Dr. Dai also opined that Claimant's work-related mechanism of injury was consistent with objective findings and provided work restrictions of 20 lbs.

18. Claimant returned to Concentra on May 8, 2021 and was seen by Kara Marcinek, NP, who conveyed that Claimant still had some sharp shooting pains and discomfort in the low back, with night pain. She continued physical therapy and modified work.

19. On June 22, 2021 Claimant was evaluated by Dr. Amanda Cava on a virtual platform. She indicated Claimant complained of persistent central low back pain shooting down the buttocks to the calves. Claimant's pain was worse with twisting. He also reported his knee pain was still bothering him. Claimant was continued on modified duty (30 lbs.) and referred to start treatment with Dr. Gridley, the chiropractor, as well as to

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[2] Dr. Sharma reviewed records for both the July 2020 and the May 2021 admitted injuries.

[3] The main report itself nor the physical exam documented any issues with wrist, hand, finger and right knee, only the referral to physical therapy.

continue PT and medications.

20. Claimant returned to see Dr. Cava on July 9, 2021, who noted continued complaints of persistent central low back pain shooting down the buttocks to the calves, worse with twisting and bending, but there was some improvement in the right knee pain symptoms with physical therapy. Dr. Cava noted that objective findings were consistent with history and work-related mechanism of injury.

21. Dr. Cava conducted another virtual appointment on August 12, 2021, indicating Claimant continued to complain of persistent central low back pain shooting down the buttocks to the calves with difficulty when performing quick twisting motions. She documented that Claimant continued to have benefit with chiropractic care, physical therapy and medications, and continued the modified duty restrictions.

22. On August 27, 2021, during a virtual appointment with Dr. Cava, Claimant reported left and midline lower back pain that radiated to left buttock, left thigh, and left calf, and across the top of the foot to the middle toe, to the ball of the foot. Symptoms occurred intermittently but the pain was sharp, burning and shooting in nature and associated with stiffness and exacerbated by twisting. Relieving factors included physical therapy, manipulation and treatment with Dr. Gridley. She reported that Claimant was taking medications as prescribed. She diagnosed low back strain with left lumbar radiculopathy and continued Claimant on modified duty. Dr. Cava referred Claimant back to Dr. Sasha, the physiatrist.

23. Dr. Sacha evaluated claimant on September 13, 2021 for the first time regarding claimant's May 2, 2021 work injury. Dr. Sacha acknowledged Claimant's prior work related back injury in 2020 and that he had been placed at MMI and discharged. He documented that Claimant had been doing a takedown on an inmate in their jail cell, that after wrestling with and holding her down for 15 minutes, Claimant had a flare in his low back pain including radiation to the left leg with numbness and tingling in the foot. On exam, he detected lumbar paraspinal muscle spasms, pain with straight leg raise and neural tension on the left side, positive bowstring tests on the left, mild pain with extension and decreased sensation in the left L5 distribution. Dr. Sacha's impression was lumbar radiculopathy. Dr. Sacha ordered a new MRI to compare to the previous MRI and prescribed oral steroids as well as a muscle relaxant, Tizanidine.

24. Dr. Cava followed up with Claimant on September 14, 2021 by telemedicine. She noted Claimant felt like he had plateaued in recovery. She recommended continued physical therapy and chiropractic care, recommended a repeat MRI, and referred claimant back to Dr. Sacha.

25. The lumbar spine MRI of September 27, 2021 showed a transitional lumbosacral anatomy with transitional segment labeled L5, a trace retrolisthesis at the L4-L5 level, bilateral facet arthrosis with degenerative disc disease and desiccation, posterior annular fissuring, diffuse disc bulge, mild right foraminal narrowing, mild lower lumbar spondylosis, slightly greater at the L4-L5 level, although there was no significant spinal canal or neural foraminal stenosis. The imaging was read by Dr. Craig Stewart.

26. Claimant returned to Dr. Sacha on October 11, 2021, but since Dr. Sacha noted the oral steroids were helping, they held off on the lumbar epidural injection.

27. Dr. Sacha took a telemedicine visit on November 1, 2021 due to COVID-19 concerns. Claimant reported an increase in low back and left leg pain with increased numbness and tingling in the foot since the last visit, as the oral steroid relief did not last. He diagnosed intervertebral disorder with radiculopathy of the lumbar spine and strain of the muscles, fascia and tendons of the lumbar spine. Dr. Sacha ordered a left L5 and S1 transforaminal epidural/spinal nerve injections.

28. The transforaminal left L5 and S1 injections were performed on December 9, 2021 at Mile High Surgery Center. Dr. Sacha noted that the Claimant's VAS score preprocedure was 7/10 at rest, 8/10 with provocative maneuvers. At 30 minutes postprocedure, Claimant had a VAS score of 1/10 at rest and 2/10 with provocative maneuvers. He documented it as an 80% relief of his pain, which was a diagnostic response to the procedure. Further, Dr. Sacha noted that Claimant had reproduction of symptoms with placement of injectate into both neural foramina, indicating radiculopathy affecting both the L5 and S1 spinal nerves.

29. 41. On January 3, 2022, Dr. Sacha confirmed claimant had improvement after the last L5 and S1 transforaminal injection with 70% to 80% improvement, having less low back and leg pain. Claimant was still working light duty. Dr. Sacha recommended a brief trial of physical therapy with work strengthening and full duty before moving forward with case closure.

30. Claimant returned to see Dr. Cava on January 11, 2022. Dr. Cava verified Claimant was doing better since his last visit. However, she confirmed that he had a motor vehicle accident (MVA) a week after the ESI and was having neck/upper back problems for which he was seeing his primary care provider (PCP). She diagnosed left lumbar radiculopathy and ordered medications and PT for strengthening but continued the modified duty.

31. Dr. Sacha documented on January 31, 2022 that Claimant had been doing well but after a physical therapy visit he started having some left buttock pain which was still present at the time of his appointment. Dr. Sacha suggested proceeding with a one time left piriformis injection and trigger point injection.

32. When Claimant returned to see Dr. Sacha on February 7, 2022, he reported increased left low back pain and buttock pain down the left posterior thigh. Claimant advised Dr. Sacha he did want to do the trial of piriformis and sciatic nerve blocks, as well the trigger point injections (TPI). Dr. Sacha performed the injections in the office.

33. Dr. Cava reported on February 14, 2022 that since his recent flare he was improving post TPI and nerve blocks with Dr. Sacha. She released Claimant to full duty work.

34. On February 22, 2022 Dr. Cava had a telephone visit with Clamant and noted Claimant continued to have soreness and muscle pain from his lumbar strain but had been working full duty. Dr. Cava placed claimant at MMI with no impairment but ordered maintenance care under Dr. Sacha.

35. Claimant proceeded with a DIME in this case with Dr. John Tyler. On

December 16, 2022,[4] Dr. Tyler took a history, reviewed the medical records and conducted a physical examination. Dr. Tyler opined that Claimant's ongoing symptoms regarding the right knee were related to the July 22, 2020 work-related injury. Dr. Tyler assessed Claimant's ongoing low back problems, took measurements and apportioned the impairment in a report dated January 22, 2023 giving an additional 6 % whole person impairment for the lumbar spine. He did not make any recommendations for maintenance care.

D. Post MMI Care

36. Dr. Sacha attended to Claimant on November 21, 2022 following a worsening of symptoms. Dr. Sacha expressed that this was a chronic problem with a significant exacerbation. Claimant reported bilateral low back pain radiating to the bilateral legs with numbness down the feet with lumbar paraspinal spasm and pain with straight leg raise and neural tension tests bilaterally. He also had an absent deep tendon reflex. Dr. Sacha opined that the flare of symptoms was related to the May 2, 2021 claim and prescribed an oral steroid. He stated that if Claimant did not improve he would proceed with a repeat lumbar epidural injection at the L5 and S1 levels.

37. Claimant returned to Dr. Sacha on December 1, 2022. Dr. Sacha communicated that the oral steroids only gave Claimant temporary relief and then the pain returned. He reported Claimant continued with ongoing low back and posterior thigh pain, affecting both legs. Dr. Sacha recommended a repeat bilateral L5 and S1 transforaminal ESIs.

38. On December 29, 2022, Dr. Sacha further evaluated Claimant in maintenance follow-up. He noted he had not received authorization for bilateral L5-S1 transforaminal injection yet. He commented that this case should not be a new date of injury. Dr. Sacha opined that Claimant met the Medical Treatment Guidelines criteria for a TESI. On exam he again noted increase symptoms positive for lumbar paraspinal muscle spasm (left greater than right), pain with straight leg raise and neural tension testing on the left side; positive bowstring test on the left, and decreased sensation in the left L5 versus the S1 distribution. He diagnosed lumbar radiculopathy and lumbar disc displacement. He continued to recommend TESIs. He did trigger point injections at that visit while awaiting authorization for the bilateral L5-S1 TESIs. Dr. Sacha renewed claimant's trazodone and Baclofen prescriptions.

39. Claimant had bilateral L5 and S1 transforaminal steroid injections on January 26, 2023.

40. On March 9, 2023 Claimant saw Dr. Sacha for a maintenance visit. Dr. Sacha voiced that Claimant had ESIs in January that were diagnostic but that they had not provided lasting relief (only 6 weeks). On exam he continued to test positive for lumbar paraspinal muscle spasm pain with straight leg raise, and neural tension, left sided pain with extension and extension rotation with loss of sensation in a patchy distribution of the left foot. He recommended a repeat MRI to compare to prior films. Claimant was

[4] Claimant was supposed to be evaluated by Dr. Tyler on July 8, 2022 but on route was involved in a motor vehicle accident.

working full duty. Dr. Sacha also recommended an additional 8 physical therapy visits as maintenance for lumbar spine.

41. Dr. Sacha responded to correspondence from Claimant's counsel on May 24, 2023 stating that Claimant required maintenance care, including a repeat MRI. He stated that further care depends on the MRI findings.

E. Motor Vehicle Accidents

42. Claimant was in an MVA on December 17, 2021. This accident was unrelated to claimant's employment. A December 22, 2021 report from Dr. Thompson at Kaiser noted, claimant "is seen and examined for non-work-related motor vehicle collision initial encounter, strain of his neck muscle initial encounter lumbar spine as well." The records from Kaiser show a pattern of treatment for the cervical spine, including chiropractic treatment, not for the low back.

43. On July 8, 2022, Claimant presented to the emergency room at Penrose Hospital after a minor MVA. It is noted claimant was nearly stopped when he was rear-ended. Claimant had immediate onset of neck pain. The records states claimant has known chronic back pain that is slightly worse after the accident. The final findings only involved the cervical spine injury.

F. Claimant's Testimony

44. Claimant testified at hearing that the treatment that he received over both admitted claims had helped his condition and injuries significantly. Specifically, claimant testified that the ongoing physical therapy and injections helped his overall condition and provided relief of his symptoms.

45. Claimant testified at hearing that the post injury motor vehicle accident that occurred on December 17, 2021 involved injuries to his neck, left hand, left knee, and left ankle. Claimant testified that he treated at Kaiser for the accident and that he did not receive treatment for his low back or right knee.

46. Claimant testified that he was in another post injury motor vehicle accident on July 8, 2022. Claimant testified that in this accident he injured his neck and his left hand, and that his existing nerve pain increased. Claimant treated at Kaiser for the July 8, 2022 motor vehicle accident but not for the lumbar spine.

47. Claimant testified at hearing that he wanted to proceed with the treatment recommended by Dr. Sacha, including the diagnostic MRI.

48. However, at the time of the hearing, he was no longer treating with either Dr. Cava or Dr. Sasha as no further maintenance care was being authorized.

49. Claimant stated that he continued to have low back pain that is constant and that the pain gets worse without the injections.

G. Conclusive Findings of Fact

50. As found, Claimant has shown that it is more likely than not that he requires further maintenance care regarding his July 22, 2020 claim to relieve the effects of his injury. He was placed at MMI, without impairment, by his authorized treating physician, Dr. Cava, who recommended maintenance care, including chiropractic care for the lumbar spine. Claimant continued to have symptoms. Maintenance care was not admitted by Respondents until May 16, 2022. Claimant then proceeded with a DIME evaluation. The DIME physician, Dr. Sharma, found that Claimant continued to report pain in his lumbar spine with prolonged lifting, pushing and pulling as well as pain in his right knee. He did not recommend any maintenance care. As found, Dr. Cava's opinions were more persuasive than the opinion of the DIME physician. As found, despite significant resolution of symptoms with the treatment Claimant received from authorized treating providers, Claimant continued with need maintenance care after MMI to maintain him at MMI and relieve him of the symptoms of the July 22, 2020 work related injuries.

51. As found, Claimant has shown that it is more likely than not that he requires further maintenance care regarding his May 2, 2021 claim to relieve the effects of his injuries. He was placed at MMI, without impairment, by his authorized treating physician, Dr. Cava, who recommended maintenance care for the lumbar spine under Dr. Sacha, Claimant's pain specialist. As found, Claimant had a history of aggravating his prior injury to the lumbar spine, with increasing lumbar spine pain and radicular symptoms into the lower extremities. Claimant continued to have symptoms that would improve with transforaminal injections, which were beneficial and provided Claimant with significant relief of symptoms. Maintenance care was originally admitted by Respondents on March 9, 2022. Claimant then proceeded with a DIME evaluation. The DIME physician, Dr. Tyler, found that Claimant continued to report pain in his lumbar spine with radicular symptoms and provided an additional impairment. He did not recommend any maintenance care. As found, Dr. Sacha's opinions are more persuasive than the opinion of the DIME physician. As found, despite significant resolution of symptoms with the treatment Claimant received from authorized treating providers, Claimant continued to need maintenance care after MMI to maintain him at MMI and relieve him of the symptoms of the May 2, 2021 work injury to the lumbar spine, including medications, physical therapy, and treatment under Dr. Sacha for injections.

52. As found, Claimant has shown by a preponderance of the evidence that he is entitled to reasonably necessary and related maintenance care that includes but is not limited to the treatment recommended by Dr. Sacha. Dr. Sacha recommended medications, physical therapy, injections and an MRI of the lumbar spine in order to compare the progression of Claimant's work related injuries and determine Claimant's ongoing needs for medical care. The diagnostic test is specifically determined to be causally related to the May 2, 2021 claim.

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

CONCLUSIONS OF LAW

A. Generally

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

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

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

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

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

B. Maintenance Medical Benefits

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc., supra*. 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*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009). The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office, supra.* To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n., supra*; *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*, *supra.* Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, *supra*; *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Even with a general award of maintenance medical benefits, respondents still retain the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. See *Hanna v. Print Expediters Inc*., *supra,* (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra; Hobirk v. Colorado Springs School District #11, supra*; *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003).

The Medical Treatment Guidelines (Guidelines) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); *See also*, *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo.App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide that "All health care providers shall use the Guidelines adopted by the Division". *Hall v. Industrial Claims Appeals Office,* 74 P.3d 459 (Colo.App. 2003). "Accordingly, compliance with the Guidelines is mandatory for medical providers." *Chrysler v. Dish Network*, W.C. No. 4- 951-475-002 (ICAO, July 15, 2020). In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. Section 8-43-201(3)(C.R.S. 2020). Indeed, Rule 17-4 (A) acknowledges that "reasonable medical care may include deviations from the Guidelines in individual cases." *Chrysler v. Dish Network*, *supra.* Nonetheless, the Guidelines carry substantial weight and should be adhered to unless there is evidence justifying a deviation. *See Hall v. Industrial Claim Appeals Office, supra*; *See Logiudice v. Siemans Westinghouse*, W.C. No. 4- 665-873 (ICAO, January 25, 2011).

As found, Claimant has shown that, after being placed at MMI for both the July 22, 2020 work injuries and the May 2, 2021 work related injuries, Claimant's ATP, Dr. Cava, clearly opined that maintenance care was reasonably necessary and related to Claimant's injuries. The DIME physician opinions only carry the weight of clear and convincing proof in matters related to causation, MMI and impairment. Further, neither DIME physician even bothered to make any comments regarding maintenance care other than "[n]o maintenance care is required" and [n]one". Neither of them explained their comments regarding maintenance medical care. There was no analysis or explanation for arriving at these conclusions and their opinions regarding maintenance care were not persuasive.

As found, Dr. Sacha was very persuasive that Claimant clearly required ongoing maintenance care and provided such including prescribing prescription medications such as of steroids, muscle relaxants including trazodone and Baclofen prescriptions, and transforaminal steroid injections with the benefits of reduced symptoms and Claimant's increased functionality with the care that was carried out post MMI. Dr. Sacha was credible and persuasive in stating that Claimant had ongoing symptoms which were improved with the ESIs but required a repeat MRI in order to further delineate the Claimant's maintenance program. He recommended maintenance physical therapy as well. All of these treatments are addressed as part of reasonable maintenance care for chronic pain cases and Dr. Sacha credibly opined that they were reasonably necessary and related to Claimant's ongoing maintenance needs related to his July 22, 2020 and May 2, 2021 work injuries. Lastly, but not least, Claimant persuasively testified that he required and continued to need maintenance care in order to remain functional gains and continue working full duty, full time.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay for reasonably necessary maintenance care with regard to Claimant's July 22, 2020 claim, including but not limited to maintenance chiropractic care in order to relieve Claimant of the effects of the work related injuries to his lumbar spine and lower extremity.

2. Respondents shall pay for reasonably necessary maintenance care with regard to Claimant's May 2, 2021 claim, including but not limited to maintenance follow up care with Dr. Sacha, prescribed medications related to the injuries, physical therapy, and a follow up MRI for purposes of determining Claimant's ongoing maintenance care needs in order to relieve Claimant of the effects of the work related injuries to his lumbar spine and the radicular symptoms to his lower extremities.

3. All maintenance care shall be in accordance with the Colorado Fee Schedule.

4. 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 7th day of September, 2023.

Digital Signature

By: _____

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

ISSUES

The issues set for determination included:

- Is Claimant entitled to medical benefits after maximum medical improvement (*Grovers*)?

- Whether the treatment provided at the emergency room at UC Health on August 31, 2022 reasonable and necessary as emergent care?

- Disfigurement.

FINDINGS OF FACT

1. Claimant worked for Employer, a fast food restaurant, on July 21, 2021 as a cashier. On that date, she was working the drive-thru and touched a metal table and suffered an electrical shock type injury.

2. Claimant received medical treatment from Concentra beginning on July 23, 2021.

3. Nurse Practitioner Jennifer Livingston at Concentra diagnosed Claimant with left upper extremity injury and situational mixed anxiety and depressive disorder. Claimant Exhibit 7, p. 137. She made a referral for psychiatric treatment on September 9, 2021. However, Claimant never received psychiatric evaluation or treatment before being placed at MMI.

4. After the claim was denied, Claimant was placed at MMI on September 23, 2021 by Dr. Bradley with no impairment and no maintenance care.

5. Dr. Burris performed an IME at the request of Respondents. In his first IME report dated December 14, 2021, he stated "During her care at the WC clinic, a psychological referral was made for "situational mixed anxiety and depressive disorder", which was not pursued. Given the overall clinical picture, it is likely that any psychological issues are the cause of continued symptoms and not the result of the workplace event or continued symptoms. However, given the close interplay between psychological and physical issues in delayed recovery (as identified by the Colorado DOWC), it is reasonable to pursue a short course of claim-directed psychological treatment. Given the lack of physical pathology, this treatment does not need to interfere with MMI and can be provided through the maintenance process." (Exhibit G, p. 163).

6. Claimant requested a hearing on compensability. It was then determined to be compensable after a hearing before ALJ Lamphere. The order of Judge Lamphere was dated April 7, 2022.

7. After the order of compensability, a final admission of liability was filed on May 17, 2022.

8. Claimant objected to the Final Admission of Liability and requested a Division IME. That DIME was performed by Dr. Sharma. Dr. Sharma determined that Claimant had 12% impairment and did not make a recommendation for any post MMI treatment.

9. Claimant displayed her left arm at the hearing which showed splotchy darker redness when compared to the right arm. This appeared on the Claimant's bicep and triceps.

10. Dr. Burris opined in his deposition that there is nothing to support the conclusion that Claimant would develop redness or blotchiness as a result of this injury. (Deposition p. 14, l. 11 – 15).

11. Dr. Burris also opined in his deposition that psychological factors may be playing a part in how the Claimant experiences pain. (Deposition p. 38). He also commented that if psychological treatment were offered, that could be considered maintenance treatment.

12. Claimant sought treatment at the emergency room at UC Health on August 31, 2022. With respect to her visit to the ER, Dr. Geiger states "Discussed with patient that the emergency department is really intended to work-up emergent, life-threatening condition and is limited in the evaluation and management of her chronic arm pain."

Conclusions of Law

General

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

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. 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). The ALJ must make specific findings only as to the evidence found persuasive and determinative. An ALJ "operates under no obligation to address either every issue raised or evidence which he or she considers to be unpersuasive". *Sanchez v. Indus. Claim Appeals Office of Colo.*, 411 P.3d 245, 259 (Colo. App. 2017), citing *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, *supra*, 5 P.3d at 389.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Grover Medical Benefits

§ 8-42-101(1), C.R.S. requires Employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* 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. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

To prove entitlement to medical maintenance benefits, Claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When Respondents challenge Claimant's request for specific medical treatment 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).

Once Claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to

contest compensability, reasonableness, or necessity". *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether 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 v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

The ALJ concludes Claimant met her burden to show she is entitled to Grover medical benefits. Based upon the totality of medical evidence in the record, as well as Claimant's testimony, the ALJ concludes that Claimant requires maintenance medical treatment.

EMERGENCY ROOM TREATMENT

Dr. Geiger's chart note for Claimants visit to the ER on August 31, 2022, implies that her visit was not truly an emergency treatment situation. I conclude that based on Dr. Geiger's comments that her treatment was not a bona fide emergency and there for not covered as a benefit. *See, Sims v. ICAO*, 797. P.2D 777 (Colo. App. 1990).

DISFIGUREMENT

The question of whether the claimant carried his/her burden to establish a right to disfigurement benefits is one of fact for the ALJ. See Metro Moving & Storage Co. v. Gussert, 914 P.2d 411 (Colo.App. 1995)." In re Claim of Deleon, 121313 COWC, 4-902-368-01 (Colorado Workers' Compensation Decisions, 2013). I conclude that the Claimant has failed to prove that the blotchiness on her left upper extremity was due to her work injury. I am persuaded by Dr. Burris' testimony that there is no causal relationship between that the blotchy redness on left arm and the industrial injury.

ORDER

It is therefore ordered:

1. Claimant met her burden and established she is entitled to maintenance medical benefits.

2. Respondents shall pay for *Grover* medical benefits.

3. The request for payment of the UC Health emergency room bill is denied and dismissed.

4. The request for disfigurement is denied and dismissed.

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

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

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

DATED: September 7, 2023

STATE OF COLORADO

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-139-409-002

ISSUE

Whether Claimant has presented substantial evidence to support a determination that medical maintenance benefits after Maximum Medical Improvement (MMI) will be reasonably necessary to relieve the effects of her November 18, 2019 admitted industrial injury or prevent further deterioration of her condition.

FINDINGS OF FACT

1. Claimant worked for Employer as a Police Officer Recruit. On November 18, 2019 Claimant suffered an admitted right elbow injury while performing triceps dips.

2. Claimant experienced shooting pain from her elbow into her fingertips. The symptoms progressed into constant numbness and tingling. Claimant also noticed coldness in her fingers as well as spasms in her arm and hand.

3. Claimant was initially diagnosed with right elbow epicondylitis. An MRI found borderline increased signal within the ulnar nerve at and distal to the cubital tunnel without overt enlargement of the ulnar nerve. An EMG also revealed mild to moderate ulnar neuropathy at the elbow.

4. After failed conservative care through Authorized Treating Provider (ATP) Concentra Medical Centers, Claimant underwent an ulnar nerve transposition on June 1, 2020 with Craig Davis, M.D. Claimant was able to return to modified duty shortly after the procedure and underwent a normal course of postoperative care.

5. On August 14, 2020 ATP Amanda Cava, M.D. placed Claimant at Maximum Medical Improvement (MMI) with no permanent impairment. Dr. Cava recommended maintenance treatment of physical therapy one time per week for four weeks to continue strengthening.

6. On August 21, 2020 Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Cava's MMI and impairment determinations. Claimant did not object to the FAL and the claim closed by operation of law. Claimant continued in her regular course of employment.

7. Claimant returned to Dr. Cava on June 18, 2021 or almost one year after originally reaching MMI. Dr. Cava noted right upper extremity symptoms had returned in November or December 2020 and progressed to where Claimant felt she could not safely perform her job duties. Claimant was subsequently referred back to Dr. Davis and received work restrictions.

8. On June 29, 2021 Dr. Davis re-evaluated Claimant and diagnosed recurrent ulnar neuropathy. He ordered repeat nerve study testing. On June 30, 2021 Respondent voluntarily reopened the claim.

9. On September 29, 2021 Dr. Davis performed revision neurolysis and subcutaneous transposition of the right ulnar nerve. Postoperative medical treatment consisting of chiropractic care, acupuncture, physical therapy and neuropathic medications were not helpful in decreasing Claimant's pain or improving her function.

10. Claimant remained symptomatic following the surgery and began receiving treatment from John Aschberger, M.D. Electrodiagnostic testing was negative. Dr. Aschberger recommended a cervical MRI to rule out cervical radiculopathy. The MRI revealed degenerative changes without encroachment. Dr. Aschberger diagnosed Claimant with upper back and proximal myofascial pain with restrictions. He also noted thoracic restrictions with recurrent findings in the upper ribs. Dr. Aschberger referred Claimant to a physical therapist who specializes in rib mobilization and to Dr. Stephen J. Annest, M.D. for a thoracic outlet evaluation.

11. On July 18, 2022 Dr. Annest evaluated Claimant. He recommended pectoralis minor and scalene muscle blocks. Dr. Annest performed the blocks on August 30, 2022.

12. After the injections Claimant had a 40% decrease in pain, significant range of motion improvement, and a return of grip strength to almost pre-injury levels. Dr. Annest summarized that Claimant had a "20% improvement in symptoms after pec block. Overall, she had a 40% improvement in symptoms after the combination of both pec and scalene block. Improved were grip shoulder ROM, pec stretch and ULTT [upper limb tension test]."

13. On September 21, 2022 Claimant underwent an Independent Medical Examination (IME) with Lawrence A. Lesnak, D.O. Dr. Lesnak addressed the potential Thoracic Outlet Syndrome (TOS) diagnoses as well as treatment recommendations for body parts beyond the elbow. He concluded Claimant had sustained a right elbow sprain, may have developed some medial epicondylitis and possibly had some ulnar neuritis as a result of her admitted work injury. Dr. Lesnak further determined that the revision surgery performed by Dr. Davis may not have been warranted, and it was unsurprising that the procedure did not improve Claimant's condition. Regarding Claimant's current symptoms, Dr. Lesnak noted there was no documentation of any reproducible objective findings to explain her condition. He specifically referenced a relatively benign cervical MRI and multiple normal EMG studies. Dr. Lesnak concluded Claimant did not have TOS and required no further medical care for her work injury. He commented that Claimant reached MMI on March 24, 2022.

14. On November 10, 2022 Alexander Feldman, M.D. performed another EMG of Claimant's right upper extremity. The testing did not reveal any evidence of cervical radiculopathy, brachial plexopathy, ulnar neuropathy, median neuropathy, peripheral neuropathy or myopathy.

15. On November 17, 2022 Dr. Aschberger diagnosed Claimant with TOS. He stated that Claimant "has had objective findings consistent with the symptomology. She has had consistent examination without exaggerated pain behaviors. There is nothing that suggests a psychosomatic disorder based on her presentation."

16. Claimant returned to Dr. Aschberger on December 1, 2022 and January 4, 2023. At the evaluations, Dr. Aschberger assessed Claimant with right TOS, status post ulnar nerve surgery at the elbow, upper back/trapezial myofascial pain, cervical myofascial irritation, and clavicle dysfunction. He recommended Botox injections for Claimant's thoracic irritations. Dr. Aschberger made no treatment recommendations for Claimant's elbow. He instead focused treatment on cervical issues, brachial plexus irritation and TOS.

17. On February 6, 2023 Claimant visited Eric Chau, M.D. at Concentra. Dr. Chau had taken over as Claimant's ATP from Dr. Cava. Like Dr. Aschberger, Dr. Chau focused on differential diagnoses including TOS, first rib dysfunction and radiating symptoms. Dr. Chau discussed surgical intervention and other treatment options, but made no recommendations for Claimant's right elbow.

18. On March 16, 2023 Ranee Shenoi, M.D. performed a 24-month Division Independent Medical Examination (DIME) on Claimant. She issued a report dated April 5, 2023. Although she had access to the reports of Drs. Aschberger and Annest, Dr. Shenoi limited her findings regarding Claimant's work-related conditions to right ulnar neuritis/neuropathy and status repeat post ulnar nerve transpositions. Dr. Shenoi agreed with Dr. Lesnak that Claimant reached MMI on March 24, 2022.

19. Relying on the *American Medical Association Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*), Dr. Shenoi assigned a total 13% upper extremity impairment rating. She reasoned that Claimant warranted a 1% impairment for right elbow range of motion deficits. Based on "neurological symptoms of ulnar nerve irritation and ulnar weakness in the right hand," Dr. Shenoi assigned a 12% upper extremity rating. Combining the ratings yields a 13% total right upper extremity impairment.

20. In addressing medical maintenance care Dr. Shenoi recommended the following:

> daily stretching exercises, proper body mechanics for lifting, and to maintain good posture. I discussed with [Claimant] that Botox injections in the neck and shoulder have significant risks given surrounding vital structures and are not recommended in my opinion. Independent home exercise is safer. Further, [Claimant] mentioned she has been offered the option of thoracic outlet surgery with rib resection, which is not to be taken lightly.

21. On April 10, 2023 Respondent filed an FAL consistent with Dr. Shenoi's DIME report. Respondent denied medical maintenance care. Claimant has not challenged Dr. Shenoi's findings regarding MMI, relatedness or impairment. Consequently, Claimant's work-related conditions based on DIME Dr. Shenoi's findings include only right ulnar neuritis and right ulnar nerve transposition surgeries. Dr. Aschberger's additional findings of TOS, upper back/trapezial myofascial pain, cervical myofascial irritation, and clavicle dysfunction are unrelated to her November 18, 2019 work injury.

22. Claimant last visited Dr. Chau at Concentra on April 17, 2023. At the evaluation, Dr. Chau reiterated his adoption of Dr. Aschberger's findings from earlier in the year regarding TOS and other conditions related to the cervical spine and upper back. Dr. Chau had no treatment recommendations. He instead determined that Claimant would be approaching MMI and receive an impairment rating.

23. Claimant testified at the hearing regarding her condition and continuing symptoms. She sought ongoing medical care to address her symptoms and improve her function. Regarding her right elbow, Claimant commented that she last underwent related physical therapy in November 2022. Gripping, pushing, and pulling have gotten more difficult. Claimant commented that she has gotten weaker since she stopped receiving physical therapy.

24. Dr. Lesnak also testified at the hearing in this matter. He explained that Claimant's work-related condition is limited to her right elbow and does not extend into the potential diagnoses of Drs. Aschberger and Annest. Dr. Lesnak remarked that, based on the limited nature of Claimant's work-related conditions, she does not require further medical care. He explained that Claimant's work-related right elbow condition has long resolved and is stable. Furthermore, no additional care would help maintain her condition. Dr. Lesnak explained that Claimant's treatment had, for almost a year after MMI, focused on unrelated body parts. Although Claimant had not received elbow treatment since at least November 2022, her condition remained stable without intervention.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A

preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. 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.

5. As found, Claimant has failed to present substantial evidence to support a determination that medical maintenance treatment after MMI will be reasonably necessary to relieve the effects of her November 18, 2019 admitted industrial injury or prevent further deterioration of her condition. Initially, on November 18, 2019 Claimant suffered an admitted right elbow injury and was diagnosed with right elbow epicondylitis. After conservative treatment failed, Claimant underwent an ulnar nerve transposition. On

August 14, 2020 ATP Dr. Cava placed Claimant at MMI with no permanent impairment. Her claim subsequently closed by operation of law. However, because Claimant continued to suffer right upper extremity symptoms, she returned to Dr. Cava on June 18, 2021. Respondent voluntarily reopened the claim. Claimant then underwent revision neurolysis and subcutaneous transposition of the right ulnar nerve. Because Claimant remained symptomatic after the surgery, she received additional medical treatment from Dr. Aschberger. He eventually assessed Claimant with right TOS, status post ulnar nerve surgery at the elbow, upper back/trapezial myofascial pain, cervical myofascial irritation, and clavicle dysfunction. Dr. Aschberger focused medical care on cervical issues, brachial plexus irritation, and TOS. He did not make any treatment recommendations for the right elbow.

6. As found, on March 16, 2023 Claimant underwent a 24-month DIME with Dr. Shenoi. Dr. Shenoi limited her findings of Claimant's work-related conditions to right ulnar neuritis/neuropathy and status repeat post ulnar nerve transpositions. She determined that Claimant reached MMI on March 24, 2022. Relying on the *AMA Guides*, Dr. Shenoi reasoned that Claimant warranted a 1% impairment for right elbow range of motion deficits. Based on "neurological symptoms of ulnar nerve irritation and ulnar weakness in the right hand," Dr. Shenoi also assigned a 12% upper extremity rating. Combining the ratings yields a 13% total right upper extremity impairment.

7. As found, Dr. Shenoi recommended general self-care, but did not state Claimant would require medical maintenance benefits for her right elbow. Specifically, Dr. Shenoi merely recommended independent home exercises in the form of daily stretching, proper body mechanics for lifting, and maintaining good posture. She cautioned against possible Botox injections and thoracic outlet surgery with rib resection. Dr. Shenoi's recommendations on maintenance medical care are supported by the written report and testimony of Dr. Lesnak.

8. As found, after conducting an IME, Dr. Lesnak concluded that Claimant reached MMI on March 24, 2022. He persuasively explained that Claimant's work-related condition was limited to her right elbow and did not extend into the potential diagnoses of Drs. Aschberger and Annest. Dr. Lesnak remarked that, based on the limited nature of Claimant's work-related diagnoses, she does not require further medical care. He explained that Claimant's treatment had, for almost a year after MMI, focused on unrelated body parts. Although Claimant had not received right elbow treatment since at least November 2022, her condition remained stable without intervention.

9. As found, the opinions of Claimant's treating physicians reflect that she may require additional medical care for her right upper extremity, neck, thoracic spine, clavicle, and upper back. However, for her work-related conditions of right ulnar neuritis/neuropathy and status repeat post ulnar nerve transpositions, Claimant has failed to present evidence that additional medical care is necessary to maintain her condition at MMI. From the date of MMI through hearing, Claimant's treatment has focused on unrelated body parts, specifically potential TOS and upper back/trapezial myofascial pain, cervical myofascial irritation, and clavicle dysfunction. Drs. Aschberger and Annest provided treatment recommendations for the unrelated conditions, but made no

recommendations for her work-related right elbow condition. Furthermore, recent medical records from both Drs. Aschberger and Chau reflect no change or worsening of the elbow despite months without any treatment.

10. As found, the persuasive medical opinions of Drs. Shenoi and Lesnak demonstrate that Claimant's work-related conditions are limited to her right elbow. Claimant has not challenged DIME Dr. Shenoi's findings regarding MMI, relatedness or impairment. Consequently, Claimant's work-related conditions include only right ulnar neuritis and status post ulnar nerve transpositions. For the preceding conditions, Claimant has failed to show any further treatment is required. Claimant has not undergone treatment for her right elbow since at least November 2022 and provided no credible evidence that her condition has changed or worsened without treatment. For her work-related conditions of right ulnar neuritis/neuropathy and status repeat post ulnar nerve transpositions, Claimant has failed to present evidence that additional medical care is necessary to maintain her condition at MMI. Specifically, she has failed to produce medical record evidence demonstrating the reasonable necessity for future medical treatment. Accordingly, Claimant's request for medical maintenance benefits is denied and dismissed.

ORDER

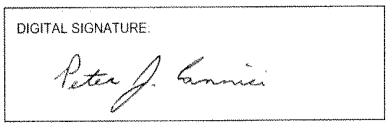
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

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

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

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

DATED: September 7, 2023.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the surgical treatment she received from Dr. Evans on March 2 and May 10, 2023, was reasonably necessary to cure and relieve Claimant of the effects of her November 2, 2022 injury.

FINDINGS OF FACT

1. Claimant was working as a meat and seafood clerk for Respondent on November 5, 2022, when she was struck in the face by an elevator door. Claimant later testified at hearing that the door struck her "almost dead on the nose, but kind of . . . slightly off center to the right." Claimant testified that the incident occurred "at the end of [her] shift."

2. Claimant was able to stop the bleeding from her lip, provided service to another customer, and then obtained assistance from the head cashier. The head cashier took a photo of Claimant's lip and mouth. It showed bruising on the inside of Claimant's upper lip corresponding with the location of tooth number eight. The Court observed no other visible evidence of injuries in the photo.

3. Claimant completed a signed voluntary statement around the time of her injury. The statement was witnessed by the head cashier. In her statement, Claimant described the injury: "Approx. 5pm Elevator door closed while I was pushing carts out and turned for the last cart; it hit my lip and R incisor. Caused headache bruised lip (swollen/sore tooth/gums)."

4. Claimant also completed an Employee's Report of Injury on November 22, 2022. In that form, Claimant stated, "elevator door hit my face."

5. Claimant's supervisor also completed a report of injury that same date. The report read, "EE turned to get cart out of elevator at the time the door was closing. Door struck EE in upper lip causing pain to front teeth."

6. On November 26, 2022, Claimant's supervisor completed a statement on a "QUESTIONABLE CLAIM FORM" in which the supervisor stated, "[Redacted, hereinafter SA] admitted she has a previous injury to her jaw from a car accident. She initially reported the injury to her front teeth but now claims impact hurt her jaw."

7. Claimant first saw her authorized treating physician, Dr. Kathryn Bird, D.O., on December 1, 2022. Dr. Bird documented Claimant's subjective account of her history as follows: "Patient reports that she was working as a meat clerk for

[Redacted, hereinafter KS] when she was in an elevator, turned her head and her upper lip hit the elevator door as it was closing. She reports getting a blood blister on the upper inner lip which has resolved. However, she has pain in a few teeth and some pain in a muscle on the right cheek." Dr. Bird's handwritten notes document the mechanism of injury as "hit top lip chip top R tooth loose." Upon examination, Dr. Bird observed no chips or irregularities in teeth numbers eight and twenty-eight. Dr. Bird referred Claimant to Old Town Dental.

8. On December 9, 2022, Claimant saw Dr. Christopher Evans, D.D.S, at Old Town Dental, at Dr. Bird's referral. Dr. Evans documented the injury as facial trauma at work involving Claimant's jaw being slammed up into her other teeth. He recounted that Claimant's front tooth took the brunt of the force. He observed that tooth number thirty was fractured and infected, requiring a non-surgical root canal and filling. He also noted that tooth number eight was mobile and had irreversible pulpitis, requiring a root canal and crown.

9. Claimant returned to Dr. Bird on December 20, 2022, who documented that "Tooth 8 is intact. It is not loose." Under "Discussion/Summary", Dr. Bird stated "Awaiting authorization for dental treatment. If plan in place, consider releasing at next visit with maintenance for dental care."

10. Dr. Bird's report dated February 2, 2023, again opined that "Tooth 8 appears normal. Good occlusion." On that date, she placed Claimant at maximum medical improvement with no impairment. As for maintenance medical care, Dr. Bird provided that Claimant "[m]ay have care related to 11/5/22 injury at Old Town Dental as needed."

11. Claimant returned to Dr. Evans on March 2, 2023, for the root canal treatment he previously recommended to tooth number thirty due to the fractured and infected filling. Dr. Evans's notes indicates that after starting the root canal, upon access to the chamber of tooth number thirty, "it was noted that tooth was cracked [mesially to distally] completely and tooth was unrestorable", so after consultation with Claimant he extracted tooth number thirty, grafted the bone, and prepared for an implant to replace tooth number thirty.

12. Claimant returned to Dr. Evans on May 10, 2023, for the non-surgical root canal he previously recommended to tooth number eight for irreversible pulpitis. Dr. Evans's notes indicate that he started the root canal but it "was discover[ed] a mid root fracture had occurred." Dr. Evans documented that he completed the root canal to the level of the fracture and then stopped the root canal and that tooth number eight would need extraction, bone graft, and implant.

13. Dr. James Berwick, D.D.S, performed an IME of Claimant at Respondents' request on June 5, 2023, and issued a report on June 23.

14. Dr. Berwick noted that none of Claimant's teeth appeared to have sustained incisal or occlusal fractures. Dr. Berwick also noted that Claimant did not note complaints regarding her teeth or jaws after the accident until she reduced her medication, which she had been taking for other musculoskeletal complaints following the accident.

15. Dr. Berwick also reviewed Claimant's medical history, which included a history of temporomandibular disorder in the 1980s and 1990s arising from clenching and stress. Dr. Berwick's examination observed wear on Claimant's incisors consistent with bruxism (teeth grinding). Claimant's prior records from January 2017 documented enamel fractures observed on teeth numbers eight, nine, and thirty. Records from March 2017 also documented pain resulting from a suspected cracked tooth number eighteen, and clinical photos from April 2021 showed possible fracture lines in tooth number thirty.

16. Dr. Berwick concluded that Claimant's present dental issues, specifically the fractures in teeth numbers eight and thirty, were not the result of the November 5, 2022 accident. He felt that Claimant did not likely sustain trauma from a traumatic occlusion at the time of the accident. He also observed that bruxism can cause fracture to teeth over longer periods of time, which he felt was consistent with Claimants' pre-injury dental history. In his opinion, Claimant's fractures pre-dated her injury and she likely began to notice symptoms only because she reduced her pain medications.

17. Dr. Evans, in what appears to be a response to Dr. Berwick's report, authored an open letter dated July 7, 2023, which opined on causation:

> *While I was not present at the accident that took place so I cannot say definitively that that was what caused the fractured teeth, in my opinion fractures such as this only occur due to trauma. I have never seen a mid-root fracture like the one that was present on #8 which caused the tooth to be extracted from anything other than trauma of some sort. It seems reasonable that the accident SA[Redacted] experienced at work could be the trauma that resulted in these dental injuries.*

18. At hearing, Claimant testified that she works as a cashier at the KS[Redacted] grocery store at University and Hampden. She started her job in March 2022 and was initially a meat and seafood clerk.

19. During her testimony, Claimant explained that on November 5, 2022, near the end of her shift, she took the elevator to retrieve carts from the mezzanine. While coming out of the elevator with a cart, she noticed a customer who needed help with fish. As she turned to assist the customer, the elevator door suddenly closed and struck her face. Claimant described the impact as hitting her "almost dead on the nose" but slightly off center to the right.

20. Claimant testified that the impact caused immediate and severe pain, and she experienced symptoms such as eyes watering, crying, trembling, fear, extreme pain, and a headache. She bled and had a bruised and swollen lip. She informed a customer about her injury and asked for help, but the customer refused. Claimant attended to the bleeding, packed her lip with ice and pressure, and then sought assistance from the head cashier. Claimant testified that she experienced pain in her lip and right incisor.

21. On direct examination, Claimant testified about the contents of her November 22, 2022 employee report of injury in which Claimant indicated that the body parts involved included, "Face, head, teeth, bone, muscle spasm." Claimant explained that by "bone," she "meant like the mandible, the jaw. Teeth are a kind of bone."

22. Claimant was asked about her written and signed voluntary statement, which indicated that the elevator door struck her lip and right incisor, but did not explicitly mention her jaw. When asked if she had specific memories of the door hitting her jaw, she responded that her jaw is part of her face.

23. She later clarified on redirect examination that the elevator impacted the protruding parts of her face, and that it went on to impact her whole face. When asked by her attorney whether it struck the lower part of her jaw, Claimant testified, "High probability, yes." When pushed further on the question as to whether she specifically recalled being struck in the jaw by the elevator door, Claimant responded, "I have a recollection from a door hitting my face. My jaw is part of my face."

24. Claimant's initial statements regarding how she struck her face appear inconsistent with Claimant impacting her jaw in the accident. Claimant's testimony appears to reconcile those earlier statements with her current position that she injured tooth number thirty in the accident by suggesting that by "face" Claimant meant she impacted her jaw in the accident. However, the Court finds that Claimant, in her testimony, to have adopted a broad explanation of her prior written statement, an explanation which was tailored so as to merely insinuate an injury to the jaw. Yet, when pressed to commit beyond insinuation, Claimant's testimony was calculatingly evasive and vague. The Court to finds Claimant's testimony to be improbable in light of the totality of the evidence, including the early medical records, the photo of the injury, and Claimant's own written statements, and the Court finds Claimant to not be a reliable witness and does not credit her testimony.

25. Dr. Berwick testified at hearing as an expert in general dentistry and oral/maxillofacial surgery.

26. Dr. Berwick expressed his opinion that Claimant's dental issues, particularly regarding tooth number thirty, were not a result of the November 5, 2022 injury. He based this opinion on several factors, including the location and nature of the

impact, the absence of direct trauma to the affected area, and Claimant's occlusion (the way her teeth come together). He pointed out that the force from the incident would not have likely caused the type of dental injury observed. Additionally, he noted that Claimant had a history of clenching and grinding her teeth, which could explain the dental problems.

27. Addressing Claimant's dental records, Dr. Berwick discussed X-rays taken before and during the root canal procedure performed by Dr. Evans. He highlighted that the X-rays did not provide evidence of a fracture as described by Dr. Evans and that the tooth's condition appeared more consistent with pre-existing issues rather than trauma. Dr. Berwick also examined Dr. Evans's July 7, 2023 open letter. Regarding Dr. Evans's observation that the mid-root fracture of tooth number eight was likely due to trauma, Dr. Berwick testified that root fractures can be caused by grinding one's teeth or clenching one's jaw, which Claimant's prior dental records document for the past thirty-five years.

28. Dr. Berwick noted that tooth number eight was in the vicinity where the door might have struck Claimant's face. However, he testified that the lips had absorbed most of the impact, and there was no apparent direct injury to the teeth in the provided photo, and there was no evidence of bleeding, cracking, or injury to the surrounding gums.

29. Dr. Berwick testified that had a mid-root fracture been present since November 5, 2022, the tooth had not shown more severe symptoms, such as increased mobility or discomfort. Dr. Berwick testified that the fact that Claimant's tooth mobility on tooth number eight was identical to that of tooth number nine on examination suggests that the irreversible pulpitis was not limited to tooth number eight and was likely due to Claimant's longstanding periodontal disease.

30. Dr. Berwick also explained irreversible pulpitis. He explained that anything that causes inflammation or swelling within the tooth can produce irreversible pulpitis. Because the living tissue in teeth is confined to the hard structure of the tooth, there is no room for expansion. The increasing pressure prevents blood from entering the tooth at normal blood pressure, and the tooth dies.

31. During cross-examination, Dr. Berwick was questioned about his assertion that tooth number thirty did not have a traumatic occlusion. Dr. Berwick explained that where a person has a normal occlusion, all teeth on the top of the mouth meet those on the jaw at the same time, and a traumatic occlusion is unlikely. Dr. Berwick pointed out that Claimant had a relatively normal occlusion and that he believed the mechanism of injury would not have caused any closing force other than Claimant's own voluntary closure of her mouth.

32. Regarding Dr. Evans's December 9, 2022 note finding that Claimant had an abscess in tooth number thirty, Dr. Berwick felt that the abscess predated the date of injury. Specifically, he opined that an abscess takes time to develop and

would not have developed within the past month. In his opinion, Claimant likely did not notice symptoms from the abscess until after the injury due to Claimant's having stopped taking pain medications around that time.

33. The Court finds Dr. Berwick's observations, as set forth in his IME report and testimony, to be credible. The Court also finds Dr. Berwick's opinions as to tooth number 30 persuasive. However, the Court does not find Dr. Berwick's opinions as to whether Claimant sustained a mid-root fracture to tooth number eight on the date of injury to be persuasive.

34. Dr. Berwick, in his IME report and testimony, pointed out several inconsistencies that cast doubt on Claimant having sustained a mid-root fracture of tooth number eight on the date of injury. The photo from immediately after the injury did not show evidence of bleeding of the gums, which Dr. Berwick testified would be inconsistent with a fractured tooth. Dr. Bird noted "no irregularity" in tooth number eight on December 1, 2022, that tooth number eight was intact and not loose as of December 20, 2022, and that tooth number eight appeared normal as of February 2, 2023. Claimant's history of bruxism involving tooth number eight, which had previously resulted in an enamel fracture, provides an alternate explanation as to the mechanism by which Claimant's tooth number eight sustained a mid-root fracture.

35. Dr. Berwick also felt that Claimant's pulpitis of tooth number eight was not due to the work injury, as the same tooth mobility was observed in tooth number nine, suggesting that the pulpitis was not limited to tooth number eight and was more likely due to Claimant's pre-existing periodontal disease.

36. On the other hand, the early records, including Claimant's written statement, the photo of Claimant's upper lip, and the supervisor's report of injury, clearly establish that Claimant did impact the elevator door at her upper lip in the location of tooth number eight. There is no evidence that Claimant was experiencing pain or mobility in tooth number eight immediately prior to the injury. Yet, Claimant's pursuit of treatment after the injury—albeit a somewhat delayed pursuit of treatment—convinces the Court that Claimant did have a new onset of pain in tooth number eight following the accident.

37. Based on the totality of the evidence, the Court finds it more likely that Claimant's mid-root fracture and irreversible pulpitis of tooth number eight were either the result of the November 2, 2022 injury or at least aggravated by the injury so as to necessitate surgical intervention. Therefore, the surgical treatment Claimant underwent with Dr. Evans for tooth number eight on May 10, 2023, was reasonably necessary to cure and relieve Claimant of the effects of her November 2, 2022 injury.

38. As for tooth number thirty, the Court finds that the mechanism of injury was not consistent with any injury to that tooth. Claimant's initial accounts of her injury

described striking the front of her face against the elevator door. Her voluntary written statement included the right incisor (tooth number eight) but made no mention of any injury to any molars or the jaw. Although Claimant later testified that she included "face" on her November 22, 2022 statement, and that "face" includes the jaw, the Court found that post-hoc explanation to lack credibility. Similarly, the photo of the injury site did not include any photos of Claimant's molars, leading the Court to infer that Claimant did not believe she had injured tooth number thirty at the time the photo was taken.

39. Additionally, Claimant's history of bruxism, and history of fractures of several other teeth, including tooth number eighteen, which is the tooth contralateral to tooth number thirty, provides a more likely explanation for Claimant's fracture of tooth number thirty. The abscess noted to be present only thirty-four days after the date of injury also appears to predate the injury itself given its apparent age based on Dr. Berwick's IME report and testimony.

40. The Court therefore finds that Claimant's need for treatment for tooth number thirty to be wholly unrelated to the November 2, 2022 injury. Therefore, the surgical treatment Claimant received with Dr. Evans for tooth number thirty on March 2, 2023, was not reasonably necessary to cure and relieve Claimant of the effects of her November 2, 2022 injury.

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*, 592 P.2d 792 (Colo. 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. 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. 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 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. Commission,* 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. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo.App.2000).

Medical Benefits

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

Although respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo.App.2002)(upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

As found above, Claimant's need for surgery for tooth number eight was reasonably necessary and related to the November 2, 2022 injury. The need for surgery for tooth number thirty, however, did not arise from the November 2, 2022 injury. Therefore, the Respondents are responsible for the cost of the surgical treatment Claimant received for tooth number eight on May 10, 2023, but not for the surgery for tooth number thirty on March 2, 2023.

ORDER

1. Claimant's request for an order compelling Respondent to pay for the surgical treatment Claimant received with Dr. Evans on March 2, 2023, is denied.

2. Claimant's request for an order compelling Respondent to pay for the surgical treatment Claimant received with Dr. Evans on May 10, 2023, is

granted. Respondents shall pay all medical expenses for the May 10, 2023 surgery.

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, C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 7, 2023.

Stephen J. Abbott
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 5-043-919-004

ISSUES

1. Whether Claimant established by a preponderance of the evidence grounds for reopening his case for a "mistake" pursuant to section 8-43-303, C.R.S.

FINDINGS OF FACT

1. Claimant is a 58-year-old man who was employed by employer as a welder. On April 11, 2017, Claimant sustained admitted injuries when he fell approximately 12 feet from a ladder. Claimant sustained a severe head injury and shoulder injury arising out of the course of his employment with Employer. Claimant required a decompressive craniectomy, and a left frontal ventriculostomy to address brain hemorrhages. As a result of his injuries, Claimant has continued difficulty with some cognitive functions, impairment of his ability to use his shoulder, and a loss of his sense of smell (*i.e.*, anosmia).

2. After his initial care, Claimant was admitted to Craig Hospital for more than two months from May 1, 2017 until discharge on July 20, 2017. At discharge from Craig, Claimant's diagnoses included traumatic encephalopathy, cognitive and memory impairments, and attention impairments. Following discharge from his inpatient admission, Claimant received additional therapy from Craig on an outpatient basis through August 29, 2017. (Ex. 7).

3. After discharge from Craig, Claimant attended psychological therapy at Behavioral Medicine Center through February 5, 2019. (Ex. 9). He underwent a neuropsychological evaluation, at BMC in late October and early November 2017. The neuropsychological testing indicated Claimant has neuropsychological deficits as a result of his head injury, including significant deficits in bilateral visual, auditory and tactile stimulation, attention deficits, and impairment with manual dexterity for his left hand. He was also determined to have bilateral anosmia (loss of smell). (Ex. 9). A second neuropsychological evaluation at BMC in October 2018 demonstrated that two-thirds of Claimant's previously areas of impairment had normalized. Although Claimant continued to have impairment with left-sided inattention when presented with bilateral visual stimulation, anosmia, sustained auditory attention deficits, and visuospatial deficits. The provider indicated that these areas were not likely to improve further with the passage of time. (Ex. 9). At his visit with BMC on November 6, 2018, Claimant expressed concerns about returning to work, and was encouraged to "continue working with the [Redacted, hereinafter CR] in this regard." (Ex. N).

4. Claimant also underwent occupational therapy and speech/language/cognitive therapy at O.T. Plus through August 2018. (Ex. L and 12). On September 12, 2018, Claimant's treating therapists at O.T. Plus authored a letter indicating Claimant "may not be a candidate for gainful employment due to [his] lack of insight (especially for safety considerations) and his inability to follow through with tasks of priority without significant

oversight, cueing, and assistance." It was noted that Claimant as referred to the CR[Redacted] and ha an appointment for the end of September 2018 to begin the process of changing vocations, if possible. (Ex. 12).

5. On May 9, 2018, Claimant underwent a functional capacity evaluation (FCE) with Vickie Mallon, OTR at Colorado Occupational Medical Partners. The FCE demonstrated that Claimant had no functional limitations sitting or standing, and no significant pain with the evaluation. Claimant was able to occasionally lift 80 pounds and frequently (*i.e*., 1 left every 5 minutes) 35 pounds, and he had normal manipulative ability with both hands, (although he had diminished left hand grip strength which was likely attributable to a prior left thumb injury). Ms. Mallon determined Claimant was able perform the physical demand requirements of the "heavy work" category. The FCE did not assess Claimant's cognitive abilities. (Ex. F).

6. On June 1, 2018, Claimant was evaluated by treating psychiatrist, Stephen Moe, M.D. Dr. Moe indicated that due to the effects of his brain injury, Claimant "may struggle in very important settings, especially the workplace. Such challenges returning to the workforce may be aggravated by his relatively older age, which by itself can be an impediment in a competitive work environment that favors younger workers." (Ex. H).

7. On June 21, 2018, Claimant's authorized treating physician (ATP), Hiep Ritzer, M.D., placed Claimant at maximum medical improvement (MMI). Dr. Ritzer also recommended permanent work restrictions which included limitations of 80 pounds occasional lifting and carrying; 35 pounds repetitive lifting and overhead lifting; and 210 pounds pushing/pulling. She indicated that Claimant is not able to safely operate heavy equipment, use ladders, work on roofs, or have safety sensitive duties. Dr. Ritzer's recommended physical work restrictions are consistent with the May 9, 2018 functional capacity evaluation. (Ex. F).

8. Dr. Ritzer referred Claimant to Yusuke Wakeshima, M.D., to perform a permanent impairment rating. On July 6, 2018, Dr. Wakeshima assigned Claimant a 15% whole person impairment, and a 4% right upper extremity impairment for his shoulder injury. The two impairment ratings correspond to an 18% whole person impairment. (Ex. K). Dr. Wakeshima indicated in his report: "At his juncture I do not foresee patient be able to return to work back to his former line of work, as a welder/iron workers, base[d] on his work restrictions as delineated by Dr. Ritzer. He may be able to find an alternative line [of] work through vocational rehab [through] the state." (Ex. K).

9. On July 26, 2018, Respondents filed a Final Admission of Liability, admitting for a 15% whole person impairment and 6% upper extremity impairment. (Ex.).

10. Claimant then underwent a Division-sponsored independent medical examination (DIME) with Bennett Machanic, M.D. on December 17, 2018. Dr. Machanic agreed with the June 21, 2018 MMI date, and assigned a 20% impairment for cognitive issues and a 9% impairment for Claimant's left shoulder. (Ex. 11). In his December 17, 2018 report, Dr. Machanic indicated that he was concerned about Claimant's future employment productivity, given his significant permanent impairment issues. (Ex. 11).

11. Subsequently, the parties agreed to a stipulation regarding the impairment rating and requiring Respondents to file a revised FAL, which was approved on March 27, 2019. (Ex. 5). Respondents filed a revised FAL on March 29, 2019, admitting to the impairment assigned by Dr. Machanic. (Ex. 5). Pursuant to the stipulation, Claimant did not challenge the revised FAL, and Claimant's claim closed, subject to reopening as permitted by law.

12. On March 2, 2023, Claimant underwent a neuropsychological assessment with Susanne Kenneally, Psy.D., at respondent's request. Based on her testing, Dr. Kenneally opined that Claimant had made a substantial recovery from his brain injury, and had improved over time when compared to his prior neuropsychological testing. She opined that Claimant had no cognitive impediments preventing him from returning to competitive employment. (Ex. B).

Claimant's Work History

13. Before his injury, Claimant was employed as a union welder, and was steadily employed for many years. Claimant had completed core safety classes, and obtained welding certifications necessary to work as a welder and to be a "lead man" on welding jobs. Claimant credibly testified that prior to his injuries, his work required a significant amount of physical work, that he did not have difficulty performing.

14. Claimant testified that after he was placed at MMI, he applied for retraining with the CR[Redacted], but he could not be retrained to perform a job that he thought would sustain his family financially. He testified that CR[Redacted] could not find a job for him, so he re-took welding certification tests three or four times, but was unable to pass and was not able to obtain his prior certifications.

15. In May 2019, Claimant was able to return to employment. Claimant first worked as a millwright for [Redacted, hereainfter RI] (a mechanical company), from May 30, 2019 through July 22, 2019. Claimant testified that the position included performing service and installation of mechanical equipment, which he testified he was not qualified to perform. He testified he was unable to keep up with the work assigned because he was not qualified to perform the job. Claimant was terminated due to a "reduction in force," and was not eligible for rehire. He earned $8,564.32 working for RI[Redacted]. (Ex. 15). No credible evidence was admitted indicating that Claimant was terminated from RI[Redacted] due to the effects of his industrial injury.

16. From August 26, 2019 through September 4, 2019, Claimant worked as a handyman for a homeowner. Claimant performed work such as repairing a fence, trimming trees, general house maintenance, and cleaning. (Ex. 17). He testified that he worked until completion of the project. Claimant earned $627.00 for his work during this time. (Ex. 15).

17. From September 30, 2019 through October 18, 2019, Claimant worked as a handyman for a different homeowner. He worked 20-25 hours per week, performing landscaping, painting, and trash removal. He worked until the completion of the work, and earned $920.00. (Ex. 17 and 15).

18. On October 24, 2019, Claimant began working for [Redacted, hereinafter TB]. Claimant worked 25 hours per week, performing fence work, drywall repair, and painting with a crew. (Ex. 17). Claimant testified that he worked until completion of the project. During this job, Claimant lost his grip on a hammer while working, and the hammer struck a co-worker in the head. He indicated he was "let go" because a younger co-worker in charge of the job, and Claimant felt he could not keep up with the pace of work. He testified that prior to his work injury, he did not have difficulty "keeping up" with work.

19. Claimant has not worked since the TB[Redacted] position ended in November 2019. In 2019, Claimant applied for other positions in the construction industry, and was not hired. No credible evidence was admitted indicating Claimant was not hired as a result of his industrial injury.

20. Claimant has not applied for other employment since 2019. Although, Claimant testified that he attempted to apply for a customer service position at [Redacted, hereinafter HD], but did not complete the online application process.

Claimant's Abilities and Limitations

21. As a result of his work injuries, Claimant has permanent limitations that did not exist previously. As a result of these limitations, Claimant is not able to return to his prior profession as a welder and iron worker. While Claimant does have some physical limitations, such as lifting restrictions, these restrictions do not prevent Claimant from obtaining employment. The primary area of concern relates to Claimant's cognitive function.

22. Claimant's wife of twenty years, [Redacted, hereinafter AL], testified at hearing. Claimant and AL[Redacted] have two teenage sons. AL[Redacted] testified that prior to his industrial injury, Claimant was a hard worker, involved with his family, and enjoyed outside activities such as biking and fishing. She testified that since his injury, Claimant is more forgetful, sleeps less, has difficulty with crowds, is irritable, less communicative, and no longer has interest in outside activities.

23. AL[Redacted] testified that presently Claimant wakes up early every day, walks the dog, makes himself breakfast, drives their sons to and from school, and helps their sons with homework in the evening. She testified that Claimant handles the family finances, including going to the bank and paying the family bills. Although she maintains some degree of control over the family's bank accounts. She testified that Claimant helps with cleaning around the house, but uses too much cleaning product because he cannot smell. Claimant is able to drive a car, although he attempts to avoid heavy traffic areas. Claimant's wife testified that he "always drives," although he becomes angry in certain situations. Claimant testified that he does household chores such as vacuuming, and shoveling snow in the winter.

24. She testified that in her opinion, Claimant cannot accept that he has limitations. She testified that Claimant attempted to return to work, and that he wanted to return to his previous line of work, but could not do so. She testified that Claimant has not applied for non-construction jobs because his experience is in construction-related fields.

25. Claimant and his wife testified that he does unpaid volunteer work for his church, including going door-to-door evangelizing, counseling members via Zoom, providing teaching services, and performing computer research for the church. Claimant is bilingual in English and Spanish, and uses this skill in his volunteer work. During the Covid pandemic, Claimant assisted the church delivering food. Claimant testified he spends approximately one hour, two times per week going door-to-door with his church, and that he attends two 2-hour meetings with the church per week. Claimant reported to Respondents' vocational rehabilitation consultant, Roger Ryan, that he spends approximately 17 hours per week with church-related activities. (Ex. C).

26. Claimant testified that since his injury, he is not as aware of his surroundings, which would make industrial jobs difficult because these jobs require situational awareness. He testified he needs to take breaks to focus, and he gets tired easily. Claimant also testified he has anxiety when dealing with crowds and noisy situations. He testified he sometimes uses ear plugs to help him concentrate. He recognized that his loss of smell would create a safety issue with some areas of employment, such as working in a kitchen.

27. Claimant testified that his ideal situation is to work for himself doing ornamental welding, but he does not have the financial ability to purchase the equipment necessary to start a business.

28. The evidence demonstrates that Claimant has limited insight into the limitations placed upon him by his brain injury. However, Claimant is not unaware of his limitations. Claimant's testimony demonstrates that he understands that he has difficulty concentrating, a lack of awareness of his surroundings, tires easily, needs to take breaks to refocus, and has difficulty communicating. Claimant is also aware of his difficulties in noisy, crowded, and stressful situations, and also in situations that would require a sense of smell. Claimant testified that his physicians told him prior to being placed at MMI that he possibly could not return to construction work.

29. Claimant demonstrated this awareness in his testimony regarding jobs he believes he may be able to perform. For example, Claimant testified he believes he could work as a cashier in a non-stressful situation. He testified that he has not looked for work such as cashier jobs because he is looking for something more substantial and consistent with his experience. He testified that he could not work as a collection agent because it is too confrontational, and that he could not work as a telephone solicitor because of the potential conflict. He testified that he could not work in fast food, because of his loss of smell, and that he could not work as a security guard because he is not comfortable with weapons.

30. Claimant testified that he wants to work and in his opinion he could potentially work in a number of jobs. These include assembly job, as a storage facility or rental clerk, a courier, a parking lot attendant, house or office cleaner, restaurant host, cafeteria attendant, hotel/motel desk worker, or shipping/ receiving clerk. He agreed that he could possibly work in a library, or book store, or could be a greeter at a store. Claimant testified that he could perform the job of delivering food, as long as he did not have to deal with payment, and that he could work for a rental car agency moving and cleaning vehicles.

Vocational Assessments

31. In November 2020, Claimant underwent a vocational assessment with Doris Shriver, OT/L. Ms. Shriver did not testify at hearing, as a result, no explanation of her recommendations and opinions was offered. Claimant reported to Ms. Shriver experiencing difficulty focusing, short-term memory issues, confusion with over-stimulation, a limited verbal filter, slower more methodical thinking, and mental and physical fatigue, and that these symptoms are worse in a busy and distracting environment. Ms. Shriver's testing demonstrated that Claimant is able to read, sentence comprehension and spell at a 12th grade level, and that his math skills are at an 8th to 9th grade level. She determined that Claimant has impairment of his auditory memory, and deficits in fine and gross motor coordination. However, the majority of her testing of Claimant's physical abilities fell within normal limits. Based on her testing, Ms. Shriver opined that Claimant was in the 11th percentile of workers nationwide (although no cogent explanation of what that metric represents was provided), and that he did not meet the necessary criteria for accommodated work options and that he is not a candidate for vocational rehabilitation. (Ex. 17). Implicit in Ms. Shriver's opinion is the idea that Claimant is only able to work in an accommodated work position without vocational retraining, however no cogent explanation for this opinion was offered. Her opinions are not persuasive, nor are they consistent with Claimant's testimony, his other medical providers, or his post-injury work history.

32. At Respondents' request, Claimant underwent a vocational rehabilitation assessment with vocational consultant Roger Ryan, M.S. Mr. Ryan issued multiple reports between February 17, 2022 and May 13, 2023. Based on his assessment, Mr. Ryan identified twenty-five areas of employment available to Claimant and within his physical work restrictions. These included cashier, driving vehicles for repair shops, a courier, information clerk, check cashier, collection clerk, telephone solicitor, night auditor, sales clerk, unarmed security guard, presser, assembler, fast food worker, storage facility rental clerk, office cleaner, parking lot attendant, appointment clerk, restaurant host, management trainee, cafeteria attendant, pastoral assistant, janitor, shipping and receiving clerk, dining room attendant, and kitchen helper. (Ex. C). In May 2023, Mr. Ryan issued a report in which he indicated that positions within Claimant's work restrictions as an office cleaner, unarmed security guard, and night auditor were available in the Denver market. (Ex. C).

CONCLUSIONS OF LAW

Generally

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

facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

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

Claimant's Petition To Reopen

Claimant seeks to re-open his claim for an alleged mistake, pursuant to § 8-43-303, C.R.S. Claimant has failed to establish by a preponderance of the evidence sufficient grounds to justify reopening his claim.

Once a case has been closed, the issues resolved by a Final Admission of Liability are not subject to litigation unless they are reopened pursuant to § 8-43-303, C.R.S. § 8-43-203 (2)(d), C.R.S.; *see also Berg v. Indus. Claim Appeals Office*, 128 P.3d 270, 272 (Colo. App. 2005); *Webster v. Czarnowski Display Serv., Inc*., W.C. No. 5-009-761-03 (ICAO, Feb. 4, 2019). Section 8-43-303(1) C.R.S., allows an ALJ to reopen any award within six years of the date of injury on a several grounds, including error, fraud, or mistake. *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). Reopening of a closed claim may be granted based on any mistake of fact that calls into question the propriety of a prior award. § 8-43-303(1), C.R.S.; *Richards v. Indus. Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). When a party seeks to reopen based on mistake the ALJ must determine "whether a mistake was made, and if so, whether it was the type of mistake which justifies reopening." *Travelers Ins. Co. v. Indus. Comm'n*, 646 P.2d 399, 400 (Colo. App. 1981). When determining whether a mistake justifies reopening the ALJ

may consider whether it could have been avoided through the exercise of available remedies and due diligence, including the timely presentation of evidence. *See Indus. Comm'n v. Cutshall*, 433 P.2d 765 (Colo. 1967); *Klosterman v. Indus. Comm'n*, 694 P.2d 873 (Colo. App. 1984).

The power to reopen is permissive, and is therefore committed to the ALJ's sound discretion. Further, the party seeking to reopen bears the burden of proof to establish grounds for reopening. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO, Mar. 7, 2012).

Claimant has failed to establish grounds for reopening his claim due to a "mistake." As found, pursuant to the parties' March 27, 2019 Stipulation, Claimant's claim closed with the filing of the revised FAL on March 29, 2019, subject to reopening as permitted by law. Claimant asserts he mistakenly "believed that he was going to be able to return back to work because of the loss of 'insight' as to his difficulties caused by his brain injury," and that but for this mistake, Claimant would have pursued a claim for permanent total disability benefits. (Claimant's Position Statement, p. 4).

Claimant has failed to establish that his belief that he could return to work constituted a "mistake." While the evidence demonstrates that Claimant has impairments and restrictions on his ability to work, it does not demonstrate that he is unable to work. Claimant was employed briefly in 2019, and earned an income. He did not remain in those jobs, but the credible evidence does not establish his employment was terminated due to his industrial injury. Claimant testified his employment with RI[Redacted] ended due to a reduction in force, and he was not qualified to perform mechanical work. The two handyman jobs Claimant performed ended after he completed the projects for which he was hired. Although Claimant was, more likely than not, terminated from his employment with HD[Redacted] due to the effects of his industrial injury, the inability to perform the requirements of that position do not establish a complete inability to work. Claimant's lack of employment since 2019 is explained by the fact that he has not applied for employment since 2019, rather than an inability to work. The ALJ credits the opinions of Mr. Ryan that work is available for Claimant within the Denver area that can accommodate his work restrictions and experience.

Claimant's ability to work in some capacity is demonstrated by current activities and supported by his testimony. As found, Claimant performs volunteer work for his church, which has the hallmarks of employment, Claimant is able to go door-to-door to speak with people, he counsels church members over the phone and through Zoom in both English and Spanish, and he performs research on a computer. Claimant is able to drive, maintain household finances, perform work around the home, including cooking, cleaning, and yard work. His past employment as a handyman also demonstrates that Claimant is able to perform some level of light construction work.

Although Claimant may not have complete understanding of his physical and cognitive limitations, he is not unaware of them. Claimant testified concerning some of his limitations, including his avoidance of crowded locations, his difficulty focusing, his need to take breaks, and his situational awareness. Despite these limitations, Claimant testified

that he could perform many of the jobs identified by Mr. Ryan, but has not attempted or applied for any. Claimant's testimony that he could not perform certain jobs due to the effects of his injuries also demonstrates his awareness of his circumstances. Based on the totality of the evidence, the ALJ finds that Claimant has failed to establish that his belief that he could return to work was a mistake.

Notwithstanding his ability to work, information regarding Claimant's limitations and impairment were known prior to his claim closure. Claimant's physical and cognitive condition has not significantly changed since his case closed on March 29, 2019. Prior to March 29, 2019, Claimant was subject to work restrictions, and multiple providers expressed concerns regarding his ability to return to work, particularly in his prior career. Despite the existence of this information, Claimant entered into the Stipulation closing his claim, and elected not to pursue a permanent total disability claim. Claimant's decision to resolve his claim without pursuing a permanent total disability claim does not constitute a "mistake" justifying reopening.

Because Claimant has failed to establish that he is unable to work in any capacity, he has failed to establish that his belief that he could return to work was "mistaken." Claimant's request to reopen his claim based on a mistake is denied.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his claim pursuant to §8-43-303, C.R.S., for a "mistake" is denied and dismissed.

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

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

DATED: September 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. 5-121-045-004

ISSUES

- What is the appropriate repayment rate for the $5,349 overpayment previously determined by ALJ Perales in a final order dated March 20, 2023?

FINDINGS OF FACT

1. Claimant suffered an admitted injury on October 12, 2019. She received temporary benefits in the aggregate amount of $101,706.01.

2. Claimant reached MMI on March 11, 2022.

3. A hearing was held before ALJ Michael Perales on February 7, 2023, on Claimant's attempt to overcome the DIME regarding MMI, PPD benefits, and Respondents' asserted overpayment of $5,349.

4. Judge Perales found that Claimant failed to overcome the DIME regarding MMI. He further determined that Claimant suffered a 6% whole person impairment to her right shoulder and 21% scheduled impairment to her left hip. Judge Perales also found Claimant was overpaid $5,349 in TTD benefits. The terms of repayment were reserved for future determination.

5. The overpayment occurred because Claimant received TTD benefits in excess of the statutory benefit "cap." There is no persuasive evidence Claimant contributed to the creation of the overpayment.

6. Claimant is ineligible for PPD benefits because her combined impairment rating is less than 26%. As a result, Respondents cannot recoup the overpayment from other indemnity benefits owed on this claim.

7. Claimant's household consists of Claimant and three minor children.

8. Claimant receives no direct child support payments. The father of one of the children pays expenses such as school supplies and clothing for the child.

9. Claimant recently started working as an account representative with an insurance agency. She works 40 hours per week. Claimant is receiving the minimum wage of $13.65 per hour while studying to obtain various insurance licenses. She expects to receive a property and casualty license by the end of August 2023, at which point she will receive a $2 per hour pay raise. After receiving her property and casualty license, Claimant intends to pursue a life and health insurance license, which would result in an additional $2 per hour raise. There is no established or anticipated timeline for obtaining the life and health license.

10. At the time of the hearing, Claimant's gross wages were approximately $546 per week, or $2,365.82 per month ($13.65 x 40 = $546 x 4.333 = $2,365.82). When she receives the $2 per hour pay raise based on the property and casualty license, her gross wages will increase to $626 per week, or $2,712.46 per month ($15.65 x 40 = $626 x 4.333 = $2,712.46).

11. Claimant credibly testified to recurring household expenses of at least $2,885 per month:

Monthly Expense	Amount
Rent	$1,250.00
Utilities	$267.00
Phone	$261.00
Car payment	$372.00
Auto insurance	$185.00
Groceries	$550.00
Total:	**$2,885.00**

12. Claimant's recurring expenses exceed her monthly earned income.

13. Claimant was recently approved for SNAP benefits of $397 per month. When the SNAP benefits are included, Claimant's household will have $224.46 remaining each month for discretionary spending ($2,712.46 + $397 – $2,885 = $224.46).

14. Claimant anticipates the SNAP benefits will be reduced or terminated soon because of her income.

15. Two of Claimant's children receive Social Security survivors benefits in an unknown amount on the earnings record of their recently-deceased father. Claimant receives no survivor benefits.

16. Thirty-five dollars ($35) per month is an appropriate repayment rate considering Claimant's financial circumstances and lack of culpability in contributing to the overpayment.

CONCLUSIONS OF LAW

Judge Perales previously determined Claimant received an overpayment of $5,349 in a final order dated March 20, 2023. Where, as here, an overpayment cannot be collected from ongoing benefits, the respondents may seek an order of repayment. Section 8-42-113.5(1)(c). The statute prescribes no specific recovery rate or period, and repayment terms are left to the ALJ's discretion. *Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo. App. 1994).

As found, $35 per month is an appropriate repayment rate in this case. Claimant is the sole wage-earner in a household that includes three minor children. Claimant's recurring monthly expenses exceed her monthly earned income. If the SNAP benefits are

included, Claimant's household has $224.46 each month for discretionary spending ($2,712.46 + $397 – $2,885 = $224.46). However, it appears the SNAP benefits will be reduced or terminated shortly. The amount of the children's Social Security survivors benefits is unknown, but the household qualified for public assistance despite the benefits. A monthly payment greater than $35 would create an undue hardship for Claimant and her children. The ALJ also considers it significant that Claimant did not contribute to creation of the overpayment.

ORDER

It is therefore ordered that:

1. Claimant shall repay $5,349 to Respondent, in monthly installments of $35. The first payment shall be due thirty (30) days after this Order becomes final, with payments continuing thereafter on a monthly basis until the overpayment is repaid in full.

2. Any 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: September 8, 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. WC 5-218-979-003

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she suffered a compensable injury on November 8, 2021, and is entitled to medical benefits.

2. Whether penalties should be assessed against Respondents for not initiating a worker's compensation claim prior to receiving a demand letter from counsel.

FINDINGS OF FACT

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

1. Claimant is a 51 year-old woman who worked for Employer. Claimant was hired to work for Employer[1] through a partnership with [Redacted, hereinafter MD] on November 1, 2021. The partnership provided MD[Redacted] clients with employment opportunities. Individuals were hired to perform regular janitorial services for the MD[Redacted] buildings and facilities in the Denver Metro area Monday through Friday, from 5:00 pm to 9:00 pm. Daily shifts originated at a MD[Redacted] facility where the employees, including Claimant, met, and then would separate into their assigned crews. Employer provided passenger vans for transportation to the facilities and buildings to be cleaned.

2. [Redacted, hereinafter TW] is the Owner and President of Employer. He credibly testified that [Redacted, hereinafter DE] was the supervisor of the MD[Redacted] crews. TW[Redacted] also credibly testified that all employees, including Claimant, were give an employee handbook. The employee handbook explains that employees are to notify their supervisor within 24 hours of any injuries at work.

3. Claimant credibly testified that she knew she should tell her supervisor if she sustained any injuries at work.

4. On November 8, 2021, Claimant was working with a crew that included [Redacted, herainfter TS], [Redacted, hereinafter DT], and [Redacted, hereinafter PN]. TS[Redacted] was the crew leader, and he drove the team to each assignment in a van. The van had two bucket seats in front, and two rows of seats in back. TS[Redacted] was driving, Claimant was in the front passenger seat, DT[Redacted] was in the middle row sitting behind the driver, and PN[Redacted] was in the far back row sitting on the passenger side. TS[Redacted] made a left turn at a yellow light when a small car traveling through

[1] [Redacted, hereinafter LM] is the parent company of [Redacted, hereinafter MO], and [Redacted, hereinafter SS].

the intersection hit the tail end of the van on the passenger side. The impact did not cause the air bags in the van to deploy.

5. Claimant was wearing her seatbelt when the accident occurred. She testified on direct examination that when the car hit the van, it lightly rocked the van from side to side. This is consistent with the testimony of DT[Redacted] and PN[Redacted]. DT[Redacted] testified that it felt like a small bump, like the van ran into the curb. PN[Redacted], who was seated in the back where the car struck the van, testified that the car barely nicked the van and it felt like the van had driven over a speed bump.

6. Claimant, DT[Redacted], and PN[Redacted] all credibly testified that the damage to the van was minimal. The photograph of the van supports this testimony. The paint on the van was scratched and there was small dent. (Ex. B).

7. The ALJ finds that the accident on November 8, 2023 was a minor accident, and resulted in minimal damage to the van.

8. DT[Redacted] and PN[Redacted] both credibly testified that they were not injured in the accident. They also testified that TS[Redacted] asked them if they were okay, and they confirmed that they were. The ALJ infers that TS[Redacted] also asked Claimant if she was injured.

9. TS[Redacted] called the police, and he contacted DE[Redacted], to inform him of the accident. According to Claimant, DE[Redacted] was already on his way to their location because he was bringing the team additional cleaning supplies. DE[Redacted] arrived on scene while all the crew members were still waiting for the police to arrive.

10. PN[Redacted] credibly testified that when DE[Redacted] arrived at the scene, he asked PN[Redacted] if he was okay, and PN[Redacted] confirmed he was not injured.

11. On direct examination, Claimant testified she hurt her neck and hit her head in the accident, but did not tell anyone that she needed medical treatment. On cross-examination, Claimant testified she hurt her neck and back in the accident. Claimant further testified she told TS[Redacted] she hurt her neck and back and that she was going to the hospital the next day.

12. On direct examination, Claimant testified she told both TS[Redacted] and DE[Redacted] that she was injured in the accident. On cross-examination, Claimant testified that even though DE[Redacted] arrived at the accident scene, she did not tell him anything that night because she assumed TS[Redacted] would relay that she had allegedly been injured. Neither TS[Redacted] nor DE[Redacted] testified at the hearing.

13. Claimant credibly testified that she believed TS[Redacted] was her supervisor. DT[Redacted] also credibly testified he believed TS[Redacted] was his supervisor. PN[Redacted] testified that he now understands DE[Redacted] was their supervisor, and not TS[Redacted]. The ALJ finds that the crew members reasonably assumed TS[Redacted] was their supervisor.

14. TW[Redacted] testified that DE[Redacted] called him the evening of November 8, 2021, to tell him about the accident. DE[Redacted] confirmed to TW[Redacted] that none of the crew members, including Claimant, had been injured. The ALJ infers that DE[Redacted] checked on all of the crew members, including Claimant, and confirmed that none of them were injured.

15. Based on the totality of the evidence, the ALJ finds that Claimant did not tell TS[Redacted] or DE[Redacted] that she was allegedly injured in the accident.

16. DT[Redacted] and PN[Redacted] both testified that Claimant did not appear to have been injured in the accident, and she did not tell either of them she had had been injured.

17. After waiting approximately 30-60 minutes for the police to arrive, the crew, including Claimant, proceeded across the street to the next building to be cleaned. Claimant went to the building and continued her work without difficulty. Claimant testified she performed all of her tasks without problem and even assisted with vacuuming, which was not her job.

18. DT[Redacted] credibly testified that Claimant performed her janitorial duties efficiently and without any apparent pain following the accident. Claimant completed his task of vacuuming the floors while he continued to mop. Likewise, PN[Redacted] testified Claimant completed her work without any issues or apparent pain, that she seemed find and did not seem to be hurt in any way.

19. Based on the totality of the evidence, the ALJ finds that Claimant did not tell anyone on November 8, 2021, that she had allegedly been injured in the motor vehicle accident. The ALJ also finds that following the accident, Claimant was able to continue working without any issues.

20. On November 9, 2021, the day following the motor vehicle accident, Claimant presented to the emergency room at Presbyterian/St. Lukes. According to the medical record, Claimant reported being involved in a motor vehicle accident the previous day. Claimant initially felt okay, just a bit stiff. She reported developing “worsening left low back pain stiffness mild to moderate severity worse with movement.” Claimant was diagnosed with a lumbar strain, and was excused “from sport” for one day. The medical record specifically notes that Claimant had “[n]o numbness [or] weakness in extremities” and no neck pain. Claimant was not given any work restrictions. (Exs. C, 6 and 7).

21. There is no objective evidence in the record that Claimant notified Employer that she went to the emergency room the day after the motor vehicle accident because of low back pain.

22. Claimant testified she subsequently went to her chiropractor, Steve Visentin, D.C. Claimant saw Dr. Visentin on November 12, 2021. Claimant testified she saw Dr. Visentin every day for three to four months. Claimant further testified she stopped seeking medical treatment because there was no one to pay for it.

23. There is no objective evidence in the record that Claimant notified Employer she was receiving chiropractic care, allegedly related to the November 8, 2021 accident.

24. In a February 7, 2022, "special report," Dr. Visentin notes Claimant saw him on November 12, 2021 seeking treatment related to a motor vehicle accident where the "car was totaled." Under subjective complaints, Dr. Visentin noted Claimant reported experiencing sharp lower and midback pain and she suffered paresthesia in both of her legs. Claimant also told Dr. Visentin she had to "quit [her] job because [she] was unable to stand 8 hours." Claimant rated her back pain as a 9 out of 10. (Ex. 5).

25. As found, the motor vehicle accident was minor and resulted in minimal damage to the van. The van was not totaled. Further, the November 9, 2021 emergency room records specifically note Claimant had no numbness or weakness in her extremities.

26. Claimant testified she continued to work every day following the accident, without any difficulty. This is in stark contrast to what she reported to Dr. Visentin on November 12, 2021. Further, there is no objective evidence in the record that Claimant ever had difficulty standing, or that she quit her job because of her inability to stand.

27. PN[Redacted] credibly testified that a few days after the accident Claimant told him she was suing the company because they were in a company car when the accident occurred. She wanted PN[Redacted] to join her and sue the company, but he declined. PN's[Redacted] testimony was unclear as to whether Claimant told him she had been injured. But PN[Redacted] credibly testified that he continued to work with Claimant and there was no indication she was injured in any way.

28. Claimant continued to work her regular shift and duties without difficulty and/or accommodation until she voluntarily resigned her position in late November/early December 2021 due the requirement by MD[Redacted] that she obtain a Covid vaccination, which she chose not to obtain.

29. Claimant was subsequently hired by Employer a few days later to work at [Redacted, hereinafter SY] performing janitorial services. She left that job after the school determined she was not a good fit. Employer offered her employment at two other schools. Claimant testified that she checked out the schools and did not care to work at either. She voluntarily resigned her employment. Employer hired Claimant a third time in August 2022 to work as a day porter at the [Redacted, hereinafter EW]. Claimant worked there until she was terminated for cause on January 13, 2023. Claimant's supervisor when she worked as a day porter was [Redacted, hereinafter JH].

30. At no time during any of claimant's subsequent employment with Employer did she ever inform any supervisor or TW[Redacted] that she had sustained a work related injury in the November 8, 2021 accident.

31. TW[Redacted] credibly testified that the first time he ever learned that Claimant alleged sustaining a work injury in the accident on November 8, 2021, was when he received a demand letter from Claimant's attorney dated October 5, 2022. He credibly

testified that he was very surprised because Claimant had never reported any injury from the November 8, 2021 accident.

32. After receipt of the demand letter, TW[Redacted] and JH[Redacted] met with Claimant at the company's main office on October 12, 2022. At the meeting, they asked Claimant to explain what happened and to describe the injuries she sustained. As both TW[Redacted] and JH[Redacted] credibly testified, Claimant described at length her personal health history, and treatment with medical providers, including chiropractors, for many years for back and neck issues, and scoliosis. TW[Redacted] credibly testified that Claimant never gave them an answer regarding the alleged injury on November 8, 2021.

33. On October 12, 2022, TW[Redacted] completed a Workers' Compensation First Report of Injury. (Ex. A). The ALJ finds that Employer did not know of Claimant's alleged work injury until October 2022, nearly a year after the motor vehicle accident occurred. The ALJ further finds that Employer timely reported Claimant's alleged injury.

34. Based on the totality of the evidence, Claimant failed to prove by a preponderance of the evidence that she suffered a compensable work injury on November 8, 2021.

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).

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).

Argument

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

A claimant is required to prove by a preponderance of the evidence that at the time of the alleged injury she was performing service arising out of and in the course of employment and the alleged injury or occupational disease was proximately caused by the performance of such service. §8-41-301(1)(b)&(c), C.R.S. The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." §8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *Boulder v. Payne*, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, WC 4-898-391-01, (ICAO, Aug. 25, 2014).

It is undisputed that the motor vehicle accident that occurred on November 8, 2021, occurred in the course of Claimant's employment with Employer. As found, this was a minor accident. PN[Redacted] and DT[Redacted] both credibly testified that Claimant never said she was injured, nor was there any indication in her behavior for either of them to believe she had been injured. TW[Redacted] credibly testified that he was informed of the accident and he asked about each of the crew members to see if anyone had been injured. DE[Redacted] assured him that all of the crew member were safe and were not injured. As found there is no objective evidence in the record that Claimant told anyone she had been injured in the accident.

Claimant continued working after the accident without any issue. She continued with her janitorial/cleaning tasks that same evening and was even able to assist other crew members with their cleaning tasks. Moreover, Claimant continued to work her regular shift without interruption and without any complaint, apparent difficulty or need for accommodation, for the next several weeks until she voluntarily resigned her job when she was required to obtain a Covid vaccination to which she objected.

While Claimant went to the emergency room the day after the accident, and then to the chiropractor, this is not sufficient to prove by a preponderance of the evidence that

she suffered a compensable work injury. As found, the subjective report Claimant gave to Dr. Visentin was in sharp contrast to the events that occurred, and her report to the emergency department. The van had not been totaled, and in fact only suffered minor damage. Additionally, there is no objective evidence that Claimant ever had a time where she was unable to stand for eight hours. While Claimant voluntarily quit her job on multiple occasions, there is no objective evidence in the record that she quit because she not stand for eight hours. Through Claimant's own statements to TW[Redacted] and JH[Redacted], and by her own testimony, Claimant admitted that she has suffered from scoliosis and calcium deficiency, for which she has regularly sought medical treatment.

The Act requires that "[e]very employee who sustains an injury … shall notify the employee's employer in writing of the injury within ten day days after the occurrence of the injury." § 8-43-102(1), C.R.S. It is uncontroverted that Claimant failed to submit any written notice to her Employer of an alleged injury. Similarly, Claimant failed to provide her employer with any medical treatment records. As found, the first notice Employer ever received of an alleged injury was the demand letter dated October 5, 2022, sent by Claimant's counsel, nearly a year after the accident.

Based on a totality of the evidence, Claimant failed to prove by a preponderance of the evidence that she sustained a compensable work injury in the November 8, 2021 motor vehicle accident. Accordingly, Claimant is not entitled to medical benefits.

Penalties

Claimant endorsed a claim for penalties in her application for hearing. Claimant asserted that Respondents violated the Act because Insurer denied/contested the injury as not work related and because a workers' compensation claim was not opened until October 2022. An Employer is required to report an injury that results in active medical treatment for a period of more than 180 calendar days after the date the injury was first reported to the employer within 10 days to the Division. § 8-43-101(1), C.R.S. As found, Claimant failed to timely report her injury and Employer had no knowledge of the alleged injury until the receipt of the October 5, 2022, demand letter. Upon receipt of the demand letter, Employer notified insurer and a claim was opened. The claim was subsequently denied as not work related. The denial of the claim as not work related is not a violation of the Act.

Based on the totality of the evidence, Claimant failed to prove by a preponderance of the evidence that she is entitled to penalties.

ORDER

It is therefore ordered that:

1. Claimant failed to prove by a preponderance of the evidence that she sustained a compensable work injury.

2. Claimant is not entitled to medical benefits.

3. Respondents did not violate the Workers' Compensation Act and therefore are not subject to any penalties asserted by Claimant.

4. Claimant's claim is denied and dismissed with prejudice.

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

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

DATED: September 11, 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 5-109-153-004

ISSUES

1. Whether Claimant established by a preponderance of the evidence that physical therapy and a gym membership, as recommended by authorized treating provider Theodore Villavicencio, M.D., are reasonable and necessary to relieve the effects or prevent further deterioration of Claimant's industrial injury pursuant to *Grover v. Indus. Comm'n*, 795 P.2d 705 (Colo. App. 1988).

2. Whether Respondents established by a preponderance of the evidence grounds for withdrawal of its admission for maintenance medical benefits.

FINDINGS OF FACT

1. Claimant was employed by Employer as a youth specialist working at a juvenile detention facility. On April 26, 2019, Claimant sustained an admitted lower back injury arising out of the course of his employment while restraining a juvenile who had attacked a staff member.

2. Claimant has a history of back issues dating to a 2016 injury. In May 2016, Claimant underwent lumbar surgery including decompressive bilateral laminotomies at L3, L4, and L5, medial facetectomies and foraminotomies at L3-4 and L4-5, right sided hemilaminotomy at L5-S1, microdiscectomy at L5-S1, and excision of an extruded disc at L4-5. Claimant's last documented lower back treatment prior to April 26, 2019 was on September 26, 2017, when he saw James Nelson, PA-C, at Spine Colorado, and reported recurrent low back pain and bilateral lower extremity radiculopathy. (Ex. K)

3. As a result of his April 26, 2019 industrial injury, Claimant received treatment through his authorized treating physician (ATP), Theodore Villavicencio, M.D., for diagnoses of lumbar radiculopathy and adjustment disorder. Over the course of his care, Dr. Villavicencio referred Claimant for physical therapy, injections, medial branch blocks, and nerve root ablation. Claimant also consulted with a physical medicine and rehabilitation physician (Samuel Chan, M.D.), an orthopedic surgeon (Andrew Castro, M.D.), and a psychiatrist (William Boyd, Ph.D.).

4. On December 30, 2019 and January 3, 2019, Claimant underwent independent medical examinations (IME) with Gary Zuehlsdorff, M.D., and Kathleen D'Angelo, M.D., respectively. Both IME physicians diagnosed Claimant with a new injury at the L2-3 level, and opined that Claimant's April 26, 2019 injury was a new, separate, and distinct injury from his pre-existing lower back conditions. (Ex. 1, Ex. A). Both IME physicians agree Claimant sustained a disc herniation at the L2-3 level as a result of his work injury. (See Ex. 1, and D'Angelo Depo., p. 19, l. 19-21).

5. Claimant had lumbar MRIs on April 27, 2019, July 30, 2020, and September 9, 2020 to evaluate his lumbar spine. Each of the MRIs showed pathology at multiple levels of Claimant's lumbar spine, including disc bulges at L2-3, L3-4, L4-5, and L5-S1. The September 9, 2020 MRI was compared to the April 27, 2019 MRI, and showed evidence of a "new extruded disc fragment at the L4-5 level", and evidence of "new severe L5-S1 lateral recess stenosis" (Ex. J).

6. On September 29, 2020, Dr. Villavicencio placed Claimant at maximum medical improvement (MMI) and assigned a 14% whole person impairment for his lumbar spine. Claimant reported lumbar axial area pain rating 0-1/10; and mid thoracic pain wrapping around the bilateral chest area, which had decreased from its prior levels. On examination, Dr. Villavicencio noted limited range of motion in the lumbar and sacral spine, but an otherwise normal examination. Dr. Villavicencio recommended maintenance care including a 12-month gym membership, and six physical therapy visits over the following six months. Dr. Villavicencio indicated that physical therapy was "medically necessary to address objective impairment/functional loss and to expediate return to full activity." (Ex. F). Respondents' payment ledger indicates Claimant did not begin physical therapy until December 9, 2021, and attended a total of 44 sessions through March 1, 2023. (See Ex. M). Claimant testified that he did use the gym membership to perform physical therapy exercises.

7. After being placed at MMI, Claimant continued to see Dr. Villavicencio, Dr. Chan, and Dr. Castro. Each of these physicians, at various times, recommended that Claimant receive physical therapy and participate in a home exercise program.

8. On January 11, 2021, Claimant saw Dr. Chan reporting a lumbar spine axially, without radiation, numbness, or tingling. On examination, Dr. Chan noted diffuse tenderness over the lumbosacral muscles with hypertonicity, and limited range of motion. He opined that Claimant's clinical symptoms were most consistent with facetogenic pain, and that Claimant remained at MMI. He recommended an additional medial branch block, which, if positive, would make Claimant a candidate for a medial branch radiofrequency rhizotomy ("RFA") On March 24, 2021, Claimant had bilateral RFAs, which Claimant reported as effective. (Ex. D).

9. On April 8, 2021, Claimant returned to Dr. Chan. Claimant reported being seen at UC Health[1] outside the workers' compensation system for his back symptoms. Claimant reported that a repeat MRI performed on April 7, 2021, demonstrated new discogenic issues. Dr. Chan indicated that the new findings were no longer related to Claimant's April 2019 industrial injury, and that treatment for those issues should be pursued outside the workers compensation system. He also recommended that Claimant continue with an active exercise program, with emphasis on flexibility, isometric strengthening, and cardiovascular strengthening, given the chronicity of his symptoms. (Ex. D).

10. Claimant saw Dr. Castro on October 1, 2021, and November 10, 2021. Dr. Castro noted that Claimant was responding favorably to physical therapy. He recommended

[1] No records from UC Health were offered or admitted into evidence.

physical therapy strengthening, stretching and range of motion continue “on his own” and referred Claimant for additional physical therapy. (Ex. C).

11. Dr. Chan evaluated Claimant again on December 6, 2021, noting that Claimant had undergone bilateral RFAs and that he had medial branch blocks on December 1, 2021. Claimant reported no sustained relief from the medial branch blocks. Dr. Chan characterized the medial branch blocks as non-diagnostic, and that no further injection therapy should be scheduled. He opined that Claimant should follow through with physical therapy and a core stabilization exercise program, and develop a cardiovascular strength and exercise program. (Ex. D).

12. On March 11, 2022, Claimant saw Dr. Castro. Dr. Castro indicated that Claimant did not have any clear indications for surgery, and recommended physical therapy in conjunction with a home exercise program for core and pelvic strength to support the lumbar spine. He indicated that exercise was the best treatment option for long term relief and prevention of symptom progression. (Ex. C).

13. On July 13, 2022, Claimant saw Brian Altman, M.D. at SCL Health for complaints of lower back pain, extending into the thighs with standing and walking. Dr. Altman’s record includes a lumbar MRI report which shows moderate spinal canal stenosis and a disc-protrusion at the L2-3 level (the date of the MRI is not clear from the record). Dr. Altman indicated he suspected L2-3 as the pain generator, he referred Claimant for an epidural steroid injection at L2-3, and recommended an EMG to confirm L2-3 as the source of Claimant’s pain. (The record is unclear whether Claimant received the ESI or EMG recommended by Dr. Altman). Claimant reported he had been in physical therapy for three years, under workers compensation, and that Dr. Chan had performed more than 14 different injections. Claimant was encouraged to continue physical therapy and a home exercise program. Dr. Altman prescribed gabapentin for Claimant’s pain. (Ex. G)

14. On September 7, 2022, Claimant returned to Dr. Altman reporting that his pain had decreased with gabapentin. Claimant also reported noticing a “new flare of his bilateral leg burning radiations.” Dr. Altman opined that the symptoms were likely due to an L5-S1 disc herniation likely irritating his bilateral L5 nerve roots. No credible evidence was admitted indicating that Claimant’s L5-S1 pathology is causally related to his April 2019 work injury. He recommended that Claimant continue physical therapy. Claimant also reported seeing a gastroenterologist for “significant GI issues” and requested an x-ray to determine if his GI issues could be related to pathology in his coccyx. X-rays were performed, and showed no bony or soft tissue issues, but did identify significant degenerative change at the lumbosacral junction. (Ex. G). No additional records from Dr. Altman were offered or admitted into evidence.

15. On October 6, 2022, Claimant saw Dr. Chan. Claimant reported his low back pain was minimal at that time, but he had been experiencing abdominal pain, and asked for Dr. Chan’s opinion as to whether the abdominal pain was related to his work injury. Dr. Chan indicated that Claimant’s abdominal pain was unrelated to his lower back injury. He further opined that no further diagnostic or therapeutic intervention was necessary for Claimant’s work injury, and that Claimant’s work injury had completely resolved. (Ex. D).

16. On April 19, 2023, Claimant returned to his ATP, Dr. Villavicencio. Dr. Villavicencio's medical record from that date is 18 pages in length, and summarizes approximately 15 previous visits with Claimant. Throughout the record, Dr. Villavicencio notes that Claimant improved with a home exercise program, which increased Claimant's ability to walk and function. Dr. Villavicencio recommended six additional physical therapy sessions for Claimant and a 12-month gym membership to continue his home exercise program. Dr. Villavicencio indicated that physical therapy "is medically necessary to address objective impairment/functional loss and to expediate return to full activity," but offered no other cogent explanation for formal physical therapy. (Ex. 2).

17. Dr. D'Angelo was admitted as an expert in internal medicine and her testimony was presented through a post-hearing deposition. Dr. D'Angelo performed an IME at Respondents' request in January 2020, in which she opined that although Claimant had pre-existing spinal injuries, and prior surgery, he sustained a new injury at the L3 level which was separate from his prior condition. She did not re-examine Claimant again after the January 2020 IME, but did review additional medical records in preparation for her deposition. Dr. D'Angelo agreed with Claimant's MMI date of September 29, 2020. She opined that Claimant's work-related issues were isolated at the L2-L3 levels, and that Claimant no longer has any symptoms relating to his L2-L3 level. She opined that Claimant's ongoing issues were more likely related to underlying spinal disease, than the April 2019 injury. Dr. D'Angelo does not agree with Dr. Villavicencio's recommendation for physical therapy and a 12-month gym membership. Dr. D'Angelo testified that the nature of a home exercise program is that they do not require a gym membership. However, Dr. D'Angelo offered no evidence that she was aware of the exercises Claimant had been recommended to perform, or whether his particular home exercise program requires gym equipment. Her testimony on this issue was too general to be persuasive. She testified that she does not believe Claimant's current condition is related to his April 2019 work injury.

18. Claimant testified that he has been doing weekly physical therapy and that it helps with his mobility, and to maintain strength. He testified that if he does not do physical therapy, his body "seizes up," and that he cannot do physical therapy at home because he does not have the exercise equipment necessary to perform he exercises. He testified that a gym membership is necessary for him to perform his home exercise program, because the gym offers equipment he does not have at home. Specifically, Claimant testified that at the gym he uses tables on which he can stretch and do abdominal exercises, and uses leg abduction and adduction machines, and machines with cables. Although Claimant indicated he is able to perform the exercises requiring cables at home using bands provided by his physical therapist, he credibly testified that it is not as effective as using equipment at a gym.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to

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

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

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

Medical Maintenance Benefits

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). "An award of Grover medical benefits is typically general in nature and is subject

to the respondent's subsequent right to challenge particular treatment." *Trujillo v. State of Colorado*, W.C. 4-668-613-03 (ICAO Aug. 21, 2021).

There is no bright line test to distinguish treatment designed to cure an injury from treatment designed to relieve the effects of the injury. Surgery may be designed to cure an injury or may be maintenance treatment designed to relieve the effects or symptoms of the injury. Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

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,* 759 P.2d at 710-13; *Stollmeyer v. Indus. 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 Dist. No.11*, WC No. 3-979-487, (ICAO Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna*, 77 P.3d at 866; *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). 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 Ctr.,* 919 P.2d at 704.

Physical Therapy

Claimant has failed to establish that additional physical therapy is reasonably necessary to relieve the effects of or prevent further deterioration of his April 26, 2019 work injury. Claimant seeks authorization of six additional sessions of physical therapy, based on the April 19, 2023 referral of his ATP, Dr. Villavicencio. Claimant was placed at MMI in September 2020, and had 44 physical therapy visits after that time. The stated rationale for physical therapy in Dr. Villavicencio's April 19, 2023 record appears to be boilerplate and is identical to the rationale from September 29, 2020. The April 19, 2023 record does not offer any cogent explanation of the need for six additional physical therapy after the completion of 44 therapy visits, or how the recommended therapy is causally related to Claimant's injury from four years earlier. Claimant's testimony that he cannot do physical therapy at home because he does not have the proper equipment does not establish that he requires additional sessions of formal physical therapy, but only access to equipment to perform the exercises, which may be addressed through a gym membership.

Gym Membership

Claimant has established that a 12-month gym membership is reasonably necessary to relieve or prevent further deterioration of Claimant's industrial injury. Claimant's health care providers have routinely and consistently recommended that he

participate in a home exercise program. Claimant testified that performing exercises increases his mobility and allows him to function better. The ALJ finds credible Claimant's testimony that using gym equipment, as opposed to home equipment is more effective for him. The ALJ finds persuasive Dr. Castro's statement that exercise is "the best treatment option for long term relief and prevention of symptom progression," which indicates that a home exercise program will, more likely than not, prevent deterioration of Claimant's condition. Although the evidence demonstrates that Claimant's current lower back condition is not limited to his work injury, the ALJ finds that some portion of Claimant's current condition is likely attributable to his work injury. This is demonstrated by Dr. Altman's opinion from July 2022 that Claimant's L2-3 area was strongly suspected to be a pain generator, and the fact that Claimant's symptoms have continued. The ALJ does not find persuasive the opinions of Dr. Chan and Dr. D'Angelo that Claimant's work injury has completely resolved, or that he has no ongoing effects from that injury.

Withdrawal Of Admission To Maintenance Medical Benefits

When respondents attempt to modify an issue previously 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 Dist.*, W.C. No. 4-702-144 (ICAO June 5, 2012); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO July 8, 2011). 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 Hosp.*, W.C. No. 4-754-838-01 (ICAO Oct. 1, 2013). As applicable to this matter, Respondents must, therefore, prove by a preponderance of the evidence that no future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. 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).

Respondents have failed to establish by a preponderance of the evidence that no future medical treatment will be reasonably necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition. As found, Claimant credibly established that a gym membership is reasonable and necessary to relieve the effects of or prevent deterioration of his work-related condition. Accordingly, Respondents' have failed to establish a basis for termination of Claimant's maintenance medical benefits.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of six additional sessions of physical therapy is denied and dismissed.

2. Claimant's request for authorization of a 12-month gym membership is granted.

3. Respondents' request to withdraw their admission for medical maintenance benefits is denied and dismissed.

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

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

DATED: September 12, 2023

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

PROCEDURAL HISTORY

Respondents filed an Application for Hearing on September 8, 2022, primarily on the issue of overcoming the Division of Workers' Compensation Independent Medical Examination (DIME) physician's determination that Claimant had not reached maximum medical improvement (MMI). Other issues included medical benefits that are reasonably necessary and permanent partial disability benefits. Respondents clarified at hearing that waiver, overpayment and credit offsets were no longer issues for hearing, as Claimant's benefits were terminated as of July 8, 2022 when the authorized treating physician (ATP) placed Claimant at MMI and that the issues were listed because Respondents were concerned that Claimant may have been receiving benefits on another worker's compensation claim for her right upper extremity with a date of injury of August 25, 2019. He noted that Claimant's benefits on the prior claim had stopped prior to Claimant's date of injury in this matter. Counsel also mentioned that there were delays in obtaining both a DIME in the prior claim and the DIME with Dr. Orent for this injury. The DIME in this matter was requested by Respondents, took place on August 8, 2022 and a report was issued on August 29, 2022. No Final Admissions of Liability have been lodged in this claim.

Claimant filed a Response to Application for Hearing on October 7, 2022 on issues that included medical benefits that are reasonably necessary, average weekly wage, temporary disability benefits and, if Claimant was found to be at MMI, then permanent partial disability benefits and *Grover* medical benefits.

Claimant and Dr. Sander Orent, M.D. testified on behalf of Claimant, and John Aschberger, M.D. and Douglas Scott, M.D. testified on behalf of Respondents.

Claimant's exhibits 1 through 10 were admitted into evidence. Respondents' exhibits A through L, N, and P were admitted into evidence. Exhibits M, O and Q were not admitted.

Also submitted, post-hearing, was Respondent Addendum Report from Dr. Aschberger dated January 16, 2023 (Integrated Medical Evaluation report dated January 18, 2023). This exhibit was designated as Respondents' Exhibit R. During the hearing and following the DIME physician's testimony, Respondents made an offer of proof regarding Dr. Aschberger's potential rebuttal testimony. Respondents' moved for leave to submit this report, in lieu of a continued hearing, as further evidence for review, which was granted over Claimant's objection. Exhibit R was admitted.

Also discussed was the outstanding Motion to Withdraw as Counsel by [Redacted, hereinafter BR], Claimant's prior counsel. The parties agreed that an order would be appropriate considering his passing and an order was issued on January 12, 2023.

A status conference was held on January 24, 2023 regarding evidentiary matters. The parties agreed to a submission deadline of February 8, 2023 for position statements

or proposed orders. Claimant withdrew his motion to submit as supplemental exhibit the IME recording of Claimant's appointment with Dr. Kleinman. Respondents withdrew their request for submission of Respondents' Supplemental Exhibits 1 through 5. Those exhibits were stricken from the record by order of this ALJ dated January 24, 2023. There was no further discussion with regard to Dr. Aschberger's addendum report dated January 16, 2023.

This ALJ issued Findings of Fact, Conclusions of Law and Order on February 17, 2023. Respondents filed a Petition to Review on March 8, 2023 and the transcript was filed with the OAC on July 18, 2023. The Notice of Briefing was issued on July 28, 2023. Respondents filed their Brief in Support of Petition to Review on August 17, 2023 and Claimant filed a Brief in Opposition of the PTR on September 8, 2023. This Supplemental Order is filed in response.

STIPULATIONS OF THE PARTIES

The parties stipulated that Claimant is entitled to *Grover* maintenance medical care if Respondents meet their burden of proving by clear and convincing evidence that the DIME was overcome on the issue of MMI.

The parties further stipulated to an average weekly wage of $333.00 and that, if Claimant was found not at MMI in accordance to with the DIME physician's opinion, and that Claimant was entitled to continued temporary total disability benefits, the period of benefits should be from July 20, 2021 to present. The parties further agreed that the calculation of TTD would be agreed upon by the parties and this ALJ need not address the exact amount.

The stipulations of the parties were accepted and approved by this ALJ and are incorporated in this order.

ISSUES

I. Whether Respondents proved by clear and convincing evidence that the Division Independent Medical Examination (DIME) physician, Dr. Sander Orent, was incorrect in his determinations of maximum medical improvement (MMI).

II. If Respondents proved that Claimant is at MMI, whether Respondents proved by a preponderance of the evidence that the date of MMI was July 20, 2021.

III. Whether Respondents proved by a preponderance of the evidence that there was a non-work related intervening event that ended Respondents' liability towards Claimant.

IV. If Respondents failed to prove that Claimant was at MMI, whether Claimant is entitled to temporary total disability (TTD) benefits and interest from July 20, 2021 to the present and continued until terminated by law.

FINDINGS OF FACT

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

A. Generally

1. Claimant was 56 years old at the time of the hearing. She was employed as a housekeeper for Employer as of approximately May 2019. Her duties involved cleaning hotel rooms, including kitchenettes with microwaves and refrigerators. This ALJ noted that Claimant was short in stature and the medical records noted that she was four foot, eight inches tall[1] and has no formal education. Claimant had difficulty reaching the tops of the microwaves as they exceeded her height.

2. Claimant sustained an admitted work related injury of August 25, 2019 related to her right upper extremity. She was placed on modified duty that included working up to three hours a day, lift, push and pull up to 10 lbs. constantly, and no reaching above shoulder with the right upper extremity, could not grip, squeeze or pinch with the right upper extremity, should wear a splint or brace on the right upper extremity constantly, could do no sweeping, mopping or vacuuming with the right hand and no overhead work with the right arm.[2] The medical records suggest that Claimant was required to exceed her restrictions.

3. On February 15, 2020 Claimant was in the process of cleaning a microwave. She could not reach the top in order to clean, it due to her height. She stepped onto a chair with the left foot. She was cleaning with the left hand since she was restricted from using her right hand overhead due to her 2019 injury. She was in the process of lifting her right leg onto the chair when her right leg slipped, then the chair slipped out from under her, causing her to lose her balance. She twisted her back and lower extremities then Claimant fell onto her left side, landing on her back, left hip and knee, injuring her right ankle, knees, lower back and hip. The medical records suggest that the chair landed on her.

B. Medical Records

4. Claimant was seen the same day at Concentra Fort Collins by Sheree Montoya, NP. She documented Claimant's mechanism of injury as follows:

> Left side posterior hip pain Pt states when she went to stand on a chair to clean the top of a refrigerator the chair fell on top of her causing her to fall down landing on her left side twisting her back and landing on her *left lateral knee* She has not treated with anything as it happened just prior to arrival. *[Emphasis added]*

5. Nurse Montoya noted that Claimant had burning pain radiating to the left buttocks, causing decreased lateral bending, decreased spine range of motion (ROM), and decreased rotation. The symptoms were exacerbated by twisting, climbing stairs, and walking. On exam she noted that Claimant had joint stiffness, back pain, with tenderness in the left lumbar paraspinals and left sacroiliac joint. She also noted that

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[1] Claimant reported to Psychologist Brady on August 3, 2020 that she was four foot six inches.

[2] Respondents' Exhibit D, Bates 295 through 298, PA Toth, January 18, 2020.

claimant had abnormal thoracolumbar spine range of motion and a positive FABER test[3] on the left, but otherwise within normal limits. She diagnosed sacroiliac strain and prescribed ice, medications, physical therapy, and provided modified work restrictions. She noted that history and mechanism of injury were obtained directly from the patient and appeared to be consistent with presenting symptoms and physical exam.

5. Claimant presented to Jeffrey Baker, MD, on February 17, 2020, with *complaints of left hip, left le*g, and lower back pain *with radiating pain to the knee*. The pain was worse when going up the stairs as she *gets a "pulling" sensation, lifting her leg*, and had difficulty sleeping through the night due to the pain. Claimant reported that she was under restrictions due to her prior workers' compensation claim and that Employer was having her work in excess of her restrictions, which is why she fell. On exam, Claimant had tenderness in the left sacroiliac joint and loss of range of motion, but had a negative exam otherwise. An *injection of dexamethasone sodium phosphate* was administered[4*] and Claimant was diagnosed with sacroiliac strain. She was returned to modified work, including restrictions of 10 lbs. lifting occasionally, push/pull up to 20 lbs. occasionally, bend or twist occasionally and no climbing ladders.

6. Claimant was also seen by Nicholas Wright, DPT, in physical therapy on February 17, 2020. PT Wright noted Claimant was tender to palpation in the left quadrant of the paraspinals and the gluteus maximus, and had abnormal range of motion (ROM) in extension, bilateral thoracolumbar side bending, pain in the left low back and gluteus with resisted motion, pain in the low back with hamstring, gluteal and hip stretching. She had symptoms consistent with left lumbosacral contusion and experienced notable benefit from manipulation. Claimant retuned for therapy with Mr. Wright on February 18, 2020 and reported that her back pain was improving but that she continued to have pain in the lateral knee but had no symptoms distal to the knee. *He put a patch with dexamethasone on the left lateral knee*, noting that Claimant had a lateral collateral ligament (LCL) sprain. On February 19, 2020 Mr. Wright stated that Claimant reported decreased lateral knee and gluteal region pain but that the pain persists in the left low back.

5. On February 24, 2020, Claimant reported that she was still having notable pain to the left low posterior ribcage but the gluteal and lateral knee pain were both improving. Mr. Wright noted Claimant had *a "popping" sound occurring bilaterally in her knees and the left knee was painful*. Claimant continued with physical therapy complaining of both low back/SI joint as well as left knee pain.

6. Dr. Baker attended Claimant on February 25, 2020. Claimant complained of *sharp left lateral knee* pain with intermittent and variable degrees of intensity and dullness. Claimant informed Dr. Baker that the *injection in her left knee* did not make much difference.[5] *Associated symptoms included clicking, tenderness, and painful walking*. *Exacerbating factors included knee extension, direct pressure*, using stairs and walking. On exam Dr. Baker noted that there was *tenderness over and in the lateral tibial*

[3] Test to identify pathology within the hip, lumbar spine or sacroiliac region.

[5] This ALJ infers that the injection of dexamethasone sodium phosphate administered on February 17, 2020 was for the left knee. See [4*] above.

plateau of the left knee with a slight flexion limitation, but was otherwise unremarkable. He also noted that Claimant continued to have tenderness in the left sacroiliac joint with limited range of motion. Dr. Baker diagnosed contusion of the left knee and referred Claimant to physical therapy. He also diagnosed sacroiliac strain. Claimant reported that physical therapy and the patches of lidocaine were helping. Claimant described her low back pain as burning and constant though did wax and wane.

5. Mr. Wright attended Claimant on March 17, 2020 and noted that Claimant's low back was painful to the point that it caused difficulty breathing. Claimant had pain to "left low back/glute" with resisted glute in prone, pain to left low back with hamstring, gluteal and hip external and internal rotation (ER/IR) with passive range of motion and stretching.[6] Mr. Wright noted that progress was slower than expected.

6. On March 24, 2020, Dr. Baker's diagnoses were sacroiliac strain and thoracic myofascial strain. He specifically noted as follows:

> [Claimant] is returning for a recheck of injury(s): Left thoracolumbar strain that occurred on 2/15/2020. This is her 2nd WC claim, she is being treated for her right wrist, shoulder and neck also. She reports that her boss makes her do activities that are outside her WC and that is why she fell. She was put on naproxen and *lidocaine patches but the patches were not approved.* She has done 12 PT visits and is progressing slower than expected. The pain is a left thoracolumbar area. She is applying the bengay and that is helping. Pain is sharp and worse with stairs, sleeping and *lifting her leg*. She has had 12 visits with PT and feels that it s (sic.) improving. She feels that she is about 70%. *Her Adjustor did call and stated that the knee would not be covered. (Emphasis added).*
>
> *…*
>
> There is left mid back pain. There is left lower back pain. The pain does not radiate. The symptoms occur intermittently. She describes her pain as sharp in nature. The severity of the pain is variable (constantly present but the level of intensity waxes and wanes). Associated symptoms decreased lateral bending, decreased rotation, decreased flexion, … Exacerbating factors include twisting, lifting and bending, but not sitting and not standing. Relieving factors include heat, rest, nonsteroidal anti-inflammatory drugs, physical therapy and muscle rub.

Claimant restrictions were changed to 20 lbs. lifting frequently, push/pull up to 40 lbs. frequently, bend and twist frequently, but was to perform no ladder climbing. He referred Claimant to chiropractic care for the lumbar spine.

7. On April 2, 2020 Claimant returned to manual therapy with Mr. Wright to address ongoing left hip mobility as it reduced the complaints of lumbar spine pain, stating that Claimant's *left hip dysfunction* almost certainly limited her lumbar spine recovery.

8. On April 7, 2020 Dr. Baker noted that "Her Adjustor did call and stated that the knee would not be covered." He also noted that Claimant was not currently working due to COVID-19. He noted Claimant had muscle pain, back pain, *muscle weakness*, night pain, and limited ROM.

9. On April 22, 2020, Claimant *complained of left knee and right leg pain* with walking. The pain was also in the left thoracolumbar area. She was applying the muscle

[6] This ALJ infers that IR is internal rotation, ER is external rotation and PROM is passive range of motion.

rub and that was helping. Pain was sharp and worse with stairs, sleeping and lifting her leg. She was doing PT and felt that it was improving her function. Stephen Toth, PA, noted that Claimant was referred to a Chiropractor and that was currently on hold per DORA due to COVID-19. PA Toth also noted that Claimant's Adjustor called and stated that the knee would not be covered. She was not currently working also due to COVID-19. This ALJ noted that from this date forward, Claimant's providers did not mention either examining Claimant's knee or taking Claimant's complaints of knee pain. In fact, the knee was left blank in some of the records.

> Physical Exam
> Constitutional: well appearing and well nourished.
> Head/Face: Normocephalic and atraumatic.
> Eyes: conjunctiva and lids with no swelling, erythema or discharge. Extraoccular movement intact.
> ENT: No erythema or edema of the external ears or nose. Hearing is grossly normal.
> Neck: trachea midline, no JVD.
> Pulmonary: no increased work of breathing or signs of respiratory distress.
> Knee:
> Lumbosacral Spine: Appears normal. Tenderness present in left sacroiliac joint, but

10. Claimant continued with physical therapy for her lumbar spine and SI joint. On May 8, 2020 Claimant reported that she had low back pain upon standing from a prolonged sitting position. She was also *worried about dragging her left toes* when trying to walk quickly. Mr. Wright noted in the assessment that:

> Therapy Assessment:
> Overall Progress Slower than expected Today is the first time that I can remember [Claimant] reporting a concern with L toe dragging The complaint is with fast walking/running. As she hasn t (sic.) had any sign of DF weakness from radicular compression, I assume this complaint comes from altered mechanics, potentially due to lumbar stiffness I have provided her with a heel walking exercise to address this issue, but remain focused on the low back

11. Scott Parker, D.C., evaluated Claimant on May 13, 2020. He took a history of the mechanism of the injuries consistent with Claimant's hearing testimony. Claimant was complaining of left-sided thoracolumbar pain which she rated at 7/10, *left lateral knee pain* which aggravated her back, *numbness* traveling from the left gluteus musculature laterally *in the lower extremity to the left great toe and second toe* which was constant since this fall. He noted on exam that restrictions were palpated at left SI joint, L5 slightly to the left, T6-T7 anterior, the left T7 rib, T12 LP in the left, and L1 slightly to the left. He noted that Claimant had moderate muscle spasm palpated in the thoracic and lumbar regions, trigger points noted in the bilateral thoracic and lumbar regions and adhesions palpated throughout bilateral thoracolumbar fascia.

12. On May 27, 2020, Claimant reported to PA Toth that her back pain was worse with pain radiating down her left side radiating down her left glute. She noted that she had been tripping as a result of her *left foot giving way while walking*.

13. Claimant had multiple chiropractic visits focused on her lumbar, sacroiliac dysfunction and thoracolumbar pain. On June 3, 2020 Dr. Parker noted that Claimant continued with low back pain, that it was especially so when she would put on her pants or shoes. He documented that her pain was a 6/10. She complained that she continued to have *lower extremity numbness* though it was somewhat improved. Claimant was

also complaining of *continuing knee pain* that was concerning to her. While Dr. Parker states Claimant had full range of motion of the lumbar spine, they were not documented as being with an inclinometer or whether it was passive or active range of motion, and Claimant complained of discomfort. Dr. Parker clearly examined the lower extremities because he stated that Claimant gave a "suboptimal effort." He also noted that there were adhesions palpated in the bilateral thoracolumbar fascia, trigger points in the bilateral thoracolumbar muscles and mild muscle spasm palpated.

14. PA Toth evaluated Claimant on July 8, 2020 and continued to diagnose thoracic myofascial strain, sacroiliac strain and radicular low back pain. He ordered lumbar and sacroiliac MRIs at this time. He noted that, while Claimant did have improvement in her range of motion, she was still stiff, having lower left back and hip pain and *numbness radiating down the left leg*. He ordered continued chiropractic care, and her HEP[7], noting that she declined dry needling due to concerns of risks, as noted in prior records. On July 17, 2020 PT Wright noted Claimant was tolerating the dry needling treatment.

15. Claimant continued with chiropractic care, due to continued low back pain, adhesions and muscle spasms in the lumbar spine, including when he released her from his care on July 29, 2020. What is apparent from reading Dr. Parker's records and the records from other providers at Concentra is that significant portions of the reports are likely copy and pasted information from prior records and this ALJ is disinclined to rely on every notation in Dr. Parker's reports stating that there was full range of motion despite "moderate muscle spasms," trigger points, and adhesions.

16. Claimant was evaluated by Molly M. Brady, Psy.D. on August 3, 2020 pursuant to a referral from Mr. Toth to evaluate whether any mental or emotional factors could complicate the treatment of Claimant's medical condition, and to make recommendations with regard to treatment. The Behavioral Health assessment was initially recommended in January 2020 by Jon Erickson, M.D., who had completed an IME at Respondents' request regarding the 2019 claim. BHI 2 testing was valid though potentially indicated that psychological factors may have been contributing to Claimant's perception of pain and disability. Results also were indicative of the presence of an optimistic outlook, emotional control, or an unusual degree of acceptance with a likely support system. Dr. Brady wrote that "[G]iven that validity indicators do not suggest that [Claimant] is magnifying her sense of distress by responding in a biased manner, this may be an accurate report of her internal perception of emotional distress." Dr. Brady diagnosed Claimant with pain disorder and adjustment disorder with mixed anxiety and depressed mood. She noted that "the onset of the injury to [Claimant]'s right arm, a significant stressor, functioned to exacerbate that pre-existing anxiety and dysphoria to a significant extent." She opined that the majority of the symptoms of psychological adjustment developed related to her workplace injury.[8] Dr. Brady recommended interventions including relaxation training, mindfulness-based stress reduction training, biofeedback training, coping skill development to decrease psychological distress, stress management techniques, behavioral activation, and education on the interaction

[7] Home exercise program.

[8] Specifically relating to the August 25, 2019 work related injury. Dr. Brady was engaged to treat Claimant under that claim.

between psychological distress and physiological pain experiences. Claimant continued with psychologic treatment through April 12, 2021 and Dr. Brady recommended an additional 5 visits given Claimant's progress with treatment.[9]

17. Claimant had an MRI of the lumbar spine without contrast on August 14, 2020. Dr. Eric Nyberg read the results as follows:

> Disc Spaces:
> Lower thoracic spine: Mild disc bulges without significant spinal canal or foraminal stenosis.
> L1-2: Mild disc degeneration without spinal canal or foraminal stenosis.
> L2-3: Mild disc degeneration without spinal canal or foraminal stenosis.
> L3-4: Mild disc degeneration with broad disc bulge resulting in mild bilateral foraminal stenosis.
> L4-5: Mild disc degeneration with minimal disc bulge resulting in mild bilateral foraminal stenosis.
> L5-S1: Mild disc degeneration and bilateral facet arthrosis resulting in mild to moderate right and mild left foraminal stenosis.

18. Also on August 14, 2020 Claimant had a MRI of the pelvis. Dr. Andrew Mills noted that there was no acute or aggressive osseous abnormality, chronic degenerative changes of the lumbar spine at L3-S1 and patent appearance of the SI joint which showed minimal degenerative changes.

19. On August 18, 2020 Nurse Elva Saint advised Claimant to return to physical therapy for more PT as the left low back pain persisted. The *main concern at that point is was the left lower extremity (L LE) heaviness and quickness to fatigue as well as the left knee complaints.* Claimant gave good effort and tolerated the PT sessions, treatment and exercises well. Claimant completed her course of PT without much improvement. In fact the records show that Claimant slowly continued to deteriorate.

20. Claimant was seen on September 9, 2020 by PA Toth who documented that Claimant complained of back pain, *difficulty bearing weight on the left foot, and some numbness in the left leg*. She also *complained of bilateral knee pain* and *was limping since seeing the chiropractor and states that is the reason for not going anymore*. Claimant denied "outside causation of injury including sports, hobbies, accidents or external employment." On system review, PA Toth documented *back pain and limping*, but found nothing abnormal during exam. PA Toth referred Claimant to a physiatrist for further evaluation.

21. On October 5, 2020, Claimant presented to Gregory Reichhardt, MD for evaluation of her low back injury and knee pain. Dr. Reichhardt reviewed the mechanism of injury, which was consistent with Claimant's testimony. He mentioned that Claimant was referred to Dr. Brady who diagnosed pain disorder and adjustment disorder with mixed anxiety and depressed mood. Upon exam, Claimant complained of low back pain across the L4-L5 level, diffuse *left gluteal pain*, lateral hip and *lateral thigh symptoms going down to the foot, with leg weakness and left knee pain*. Dr. Reichhardt's work-

[9] No other records were provided as exhibits after April, 2021. Exhibit D was the DIME packet provided under the 2019 claim and Dr. Lindenbaum (DIME) conducted his evaluation on May 27, 2022. This ALJ infers that no further treatment with Dr. Brady took place as Claimant was found to be at MMI as of December 4, 2020 in the 2019 claim.

related impressions and diagnosis were low back pain, probably discogenic, with possible component of radicular involvement, causing left lower extremity pain and weakness, left knee pain with a February 15, 2020 mechanism of injury, pain disorder and adjustment disorder with mixed anxiety and depressed mood, and *right ankle pain*. *Dr. Reichhardt deferred to Concentra providers regarding the causation of any right lower extremity complaints*. Dr. Reichhardt recommended trigger point injections for the lumbar spine, an *MRI of the left knee* and that she continue treating with Dr. Brady for the pain disorder and adjustment disorder. On the M-164 he also recommended an *EMG/NCV[10] study of the left lower extremity*.

22. Dr. Reichhardt noted on October 28, 2020 that Claimant had a normal left lower extremity electrodiagnostic evaluation. The study was negative for left-sided axons loss lumbosacral radiculopathy, lumbosacral plexopathy, peroneal or tibial mononeuropathy and for peripheral polyneuropathy. Dr. Reichhardt did not have a good explanation for the *lower extremity weakness* and recommended she see her PCP. Claimant requested the trial of trigger point injections. He also stated that future considerations would also be for a hip MRI arthrogram.

23. Dr. Baker followed up with Claimant on October 19, 2020 and noted on physical exam that Claimant had *left knee tenderness in the lateral femoral condyle*, in the *lateral hamstrings*, diffusely *over the lateral knee* and in the *lateral tibial plateau*, a positive lateral McMurray test and positive medial McMurray test.[11] He diagnosed sacroiliac strain, radicular low back pain and *strain of the left knee*. He *ordered the MRI of the left knee* and noted that the EMG/NCV was already scheduled. He also documented that he did not anticipate MMI until at least January 31, 2021.

24. Claimant proceeded with trigger point injections on November 18, 2020 over the bilateral L5 paraspinals, left gluteus maximus and left tensor fascial latae. His diagnosis did not change.

25. Claimant was evaluated by Dr. Reichhardt for an impairment evaluation with regard to her August 25, 2019 claim on December 4, 2020. He placed her at MMI for that claim and provided an impairment rating. He noted that Claimant had completed a Functional Capacity Evaluation on October 27, 2020 during which Claimant functioned at a "sub-sedentary level."[12] Claimant demonstrated the ability to lift 5 pounds floor to waist, 5 pounds waist to shoulder, and 20 pounds pushing, 15 pounds forced pulling.

26. On December 8, 2020 Claimant had an MRI of the left knee. Dr. Jamie Colonnello noted that the left knee medial and cruciate ligaments were intact, there was medial and patellofemoral compartment predominant chondrosis/osteoarthritis of the left knee, cartilage loss most pronounced at the medial compartment involving weight-bearing surfaces of the medial femoral condyle as well as joint effusion. This ALJ infers that the joint effusion is a sign of joint inflammation or aggravation of underlying joint osteoarthritis.

27. Claimant returned to see Dr. Reichhardt on December 11, 2020 and noted

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[10] Electromyography (EMG) and Nerve Conduction Velocity (NCV).

[11] McMurrays test is a test to assess knee injuries, including meniscal tears.

[12] The functional capacity evaluation (FCE) report is not contained in the exhibits in evidence and the records indicate it may have been ordered in regard to the 2019 claim.

that she was having *weakness in the right leg* which she thought was *related to dry needling.* Claimant complained that they hit a nerve and one day after her second dry needling treatment, she had difficulty coordinating her right leg then got worse after her last chiropractic treatment and had paresthesias over the lateral aspect of the left lower leg. She was having *pain down the posterolateral aspect of both thighs*. Moderate pain behavior was noted. He observed Claimant to be somewhat angry, but he was not sure if this was just her communication style. He noted giveaway weakness but overall normal strength with encouragement. His impression was probable discogenic pain, and he felt that there was a pain disorder with adjustment disorder and mixed mood and anxiety. The doctor was unclear why her legs were weak and the loss of coordination, and he recommended possibly a repeat MRI. She indicated that she was upset because she had not met the orthopedic doctor. Dr. Reichhardt recommended an evaluation with an orthopedist with regard to Claimant's left knee complaints. Multiple other evaluations occurred following this exam, he documented Claimant's distress at the failure to identify the causes of her pain and discomfort, provided a knee neoprene brace as well as topical medications for the knee, while awaiting the results of an IME as the orthopedic evaluation was not authorized. Claimant was insistent that her right lower extremity symptoms of weakness were related to dry needling, chiropractic care and the EMG testing.

28. An Independent Medical Evaluation (IME) took place on January 6, 2021 with Dr. Jon M. Erickson. He noted that he had previously evaluated Claimant regarding her 2019 upper extremity injuries, and those findings are not relevant in this matter.

29. Dr. Reichhardt attended her on January 28, 2021, rating her pain as 9 out of 10 with weakness in both legs and inability to walk. He felt that her leg weakness was related to the pain. The patient still wanted to see an orthopedist at that point.

30. On February 11, 2021 Dr. Reichhardt noted Claimant had a mild gait alteration and discussed Claimant's left knee pain with PA Toth who advised Dr. Reichhardt that Claimant did not have immediate pain in her left knee following the accident and had not reported it until after 10 days of the injury. Relying of the accuracy of this information Dr. Reichhardt noted that the left knee condition was probably not related to her injury. As found, this is not accurate or credible, as Nurse Montoya documented on February 15, 2020 that Claimant landed on her left lateral knee and Dr. Baker documented on February 17, 2020, two days later, that Claimant complained of left hip, left leg, and lower back pain with radiating pain to the knee, with pain worse when going up the stairs as she had a "pulling" sensation, lifting her leg. He further injected that knee with medication.

31. Claimant underwent an IME with Dr. Douglass Scott on February 23, 2021. He noted that claimant had a lower back injury, and that Claimant informed him she had left knee pain as well as issues with the right leg. On exam, the left knee appeared normal, with no tenderness and had full range of motion and strength. He reviewed the medical records and drew multiple conclusions based on this analysis of the records that are not persuasive to this ALJ. He conducted a physical examination and noted no swelling in the left knee and no crepitus and no deformity or tenderness to the left knee. He noted in his diagnosis that the right knee was unrelated to the original injury. The pain disorder was noted and he suspected there were psychological or somatoform disorders

present. He noted that the changes on the MRI of the left knee of chondrosis/ osteoarthritis probably pre-existed the injury. He reviewed the mechanism of injury, and opined that it occurred without significant force or velocity as her right foot was on the floor and her given height of 4'8. He diagnosed her with a lumbosacral strain as he noted that the EMG was normal, without neurological impairment and did not appreciate an injury to either lower extremity. He stated that, based on Claimant's initial response to treatment for the low back, he opined Claimant had reached MMI on June 3, 2020 without impairment and required no further medical care after that date.

32. On April 8, 2021 Dr. Reichhardt recommend evaluation with Dr. Quickert for an SI joint injection as provocative maneuvers qualified her for the treatment, including tender to palpation, pain in the low back, pain over both sacroiliac areas, negative straight leg test, positive Patrick's maneuver, positive gapping and positive iliac compression tests. He also referred Claimant for x-ray of the lumbar spine to rule out a foreign body (dry needling needle). There were multiple subsequent records documenting symptoms of the left knee as sharp pain, worse with cold, constantly present, with symptoms of clicking, "popping" sound at the time of her injury, tenderness and painful walking. Documentation of joint pain, muscle pain, back pain, joint stiffness, muscle weakness, limping and night pain. Exams of the left knee showing tenderness diffusely over the anterior knee, diffusely over the anterolateral aspect, diffusely over the anteromedial aspect, in the lateral femoral condyle, in the lateral hamstrings, diffusely over the lateral knee and in the lateral tibial plateau.

33. Dr. Scott issued a Rule 16 UMR on April 23, 2021 noting that, based on Dr. Reichhardt's exam, it may be reasonable to perform an SI joint injection. However, based on his prior opinion, that Claimant was at MMI as of June 3, 202 and required no further care, it was not related to the February 15, 2020 work related injury.

34. Claimant had the x-ray performed at Banner Imaging on May 7, 2021, which was read by Dr. Gregory Reuter. It showed mild L5-S1 degenerative changes but no foreign body.

35. On June 24, 2021 Dr. Reichhardt recommended a trial of massage therapy. Claimant returned to Concentra on June 30, 2021 and Dr. Baker made a referral for massage therapy, which took place at Medical Massage of the Rockies from July 9 through August 3, 2021.

36. Claimant was evaluated by Julie Quickert, APRN[13] on June 25, 2021. She noted tenderness with light palpation of the lumbar spine and left SI joint, paraspinal tenderness and muscle tightness noted with light palpation, generally reduced ROM of L- spine, increased pain reported with forward flexion greater than extension, or bilateral flexion. Strength to the bilateral lower extremities was normal and equal, straight leg raise test was negative, FABER test was positive on the left and thigh thrust and iliac compression test were positive. She recommended proceeding with the SI joint injection but, as Claimant requested a guarantee that there would be no further complications, she did not proceed.

37. On June 28, 2021 Dr. Douglas Scott issued a report in response to a Rule

[13] Advanced Practice Registered Nurse.

16 request for authorization from Dr. Timo Quickert/Nurse Quickert for the SI joint injection. He opined that the SI joint injection was not reasonably necessary or related to the February 15, 2020 work related injury as Claimant had reached MMI as of June 3, 2020.

38. On July 20, 2021, Dr. Reichhardt examined Claimant finding tenderness to palpation in the lumbar spine with mild lumbar paraspinal muscle spasm and decreased lumbar range of motion. Examination of the left knee also showed tenderness to palpation though no effusion or instability. Dr. Reichhardt's final impressions were that Claimant had a low back and left lower extremity pain and weakness. He related the lumbar spine and left knee pain mechanism of injury as related to the February 15, 2020 work related fall and injury. He opined that Claimant should be allowed to have an SI joint injection under maintenance care as well as physical therapy to review her home exercise program (HEP), medications, laboratory tests, and follow ups with an advanced practice provider.

39. Dr. Reichhardt placed Claimant at MMI as of July 20, 2021 and assigned permanent lifting, pushing and pulling restrictions of 20 pounds and limit bending and twisting at the waist to an occasional basis.

40. He assigned a 14% lower extremity rating based on range of motion limitations of the left lower extremity, and a 5% rating for arthritis for a total of 18% for the lower extremity. Claimant's lower extremity rating converted to a 7% whole person rating. He assigned Claimant a 5% whole person impairment for specific disorder and a 12% for loss of range of motion of the lumbar spine, which combined to a 16% whole person impairment. Dr. Reichhardt also issued a mental impairment rating of 1% whole person impairment. Claimant's combined impairments were 23% whole person related to the February 15, 2020 work related injuries.[14]

41. On July 30, 2021 Dr. Baker ordered the maintenance physical therapy to review a HEP, which took place with Brian Busey, MPT beginning as of August 5, 2021, through September 13, 2021, and February 15, 2022 through March 31, 2022. Mr. Busey noted Claimant had moderate antalgia, with abnormal range of motion. She was using a cane in the left hand due to her right "wrist injury." He noted that the overall response was that Claimant was not progressing.

42. Dr. Baker's final diagnosis as of August 20, 2021 were strain of the left knee, radicular low back pain, and adjustment disorder. He stated that the objective findings were consistent with the history and work related mechanism of injury. His final work related restrictions were to limit lifting, pushing, pulling and carrying to 20 lbs., and limit bending and twisting at the waist to an occasional basis. These restrictions were consistent with Dr. Reichhardt's final restrictions given on July 20, 2021. Dr. Baker also recommended maintenance care, concurring with Dr. Reichhardt in this regard, including 6 follow up visits with a provider, 4 follow up visits with a PT, coverage of medications, and any lab tests to monitor for side effects, if needed over each for the next 2 years

[14] While Dr. Reichhardt's narrative report notes that Claimant's mental impairment is "zero" the final combined impairment rating includes the 1% mental impairment. The 16% lumbar spine rating combined with 7% whole person for the left lower extremity is 22%. The 22% combined with the 1% is 23% whole person impairment in accordance with the *AMA Guides* Combined Values Chart at p. 254.

Availability of an SI injection and an Orthopedic consult for the left knee.

43. Respondents requested a DIME and Sander Orent, MD was selected to conduct the examination. Dr. Orent documented on August 10, 2022 that Claimant reported she had constant low back pain when walking, bending, sitting, and sleeping. The pain started at waist level and radiated down both legs. Dr. Orent noted marked weakness in the right leg and trouble raising her left leg. Claimant had pain and swelling noted in both knees and her right ankle.

44. Dr. Orent's diagnoses were (1) Lumbar strain secondary to fall with symptoms of lumbar radiculopathy and some symptom magnification noted, but clear evidence of injury. (2) Bilateral knee contusions. The left occurring at the time of injury with swelling and notably an effusion in the joint on imaging and the right apparently manipulated by a chiropractor causing her ongoing pain and discomfort. This happened in the course and scope of her injury. He noted it was strange that a chiropractor would be manipulating her knee. The diagnoses of the knees were bilateral knee strains, possible meniscal injuries and on the left exacerbation of preexisting osteoarthritis as the result of the fall with ongoing symptomology requiring further care. (3) A diagnosis of right ankle sprain. The swelling was obvious over the right lateral malleolus. His opinion was that the mechanism of injury was certainly consistent, there had been no intervening events, there was swelling over the joint and he believed the patient's history.

45. Dr. Orent found Claimant was clearly not at MMI as she required a repeat MRI of the lumbar spine, repeat EMG nerve conduction studies to determine why her legs were so weak, consideration of hyaluronic or other viscosupplementation into the left knee and an MRI of the right knee and the right ankle. Further care would be dictated based on the findings of those studies. Regarding her lumbar spine, it was clear and obvious she had ongoing pain, and recommended repeat imaging. He also stated that injection into the SI joint was reasonable and should proceed given the changes noted on her imaging. In addition, she had a facet syndrome and possible discogenic pain in the lumbar spine which should be further sorted by a repeat MRI with further treatment as necessitated.

46. Dr. Orent assigned a provisional impairment rating to Claimant. He rated the lumbar spine, bilateral knees, and right ankle for a combined 50% whole person impairment without basis for apportionment. He specifically found that Claimant's range of motion of the lumbar spine was valid.[15] Claimant was also unable to work as she was barely able to ambulate or get out of a seated chair at the time of his examination.

47. Following the initial report, on August 18, 2022 Dr. Orent issued a supplemental report correcting an error regarding the impairment for the right lower extremity, but concluded the error was minor and, with the corrected rating, the final whole person impairment did not change.

48. Claimant was evaluated on November 11, 2022 by Dr. John Aschberger, for an IME requested by Respondents. Dr. Aschberger opined that Claimant had an upper motor neuron neurological problems, likely above the cervical spine. Dr. Aschberger opined that there had been progressive involvement affecting both lower extremities that

[15] See Figure 83, Exhibit E, bate18

may be explained by further workup. He further stated that Claimant's presentation showed deterioration probably affecting her presentation at the time of the DIME, affecting the impairment rating issued by Dr. Orent, and that it may not reflect the actual residual from the work injury alone. He further opined that Dr. Reichhardt's impairment would be the best estimate for the correct impairment.

49. Dr. Reichhardt did examine Claimant on November 14, 2022, following his conversation with Dr. Aschberger. He confirmed Claimant had lower extremity clonus and a positive right sided upper extremity Hoffman's, which had been negative previously. He noted that the clonus was likely caused by cervical spine impingement and stenosis at the cervical spine level. He recommended Claimant be seen immediately by Salud Clinic. He did not relate any cervical spine issue with her February 15, 2020 fall.

50. On December 14, 2022 Dr. Scott issued a supplemental report at Respondents' request. He reviewed further records and noted that his opinions had not changed with regard to the February 15, 2020 work related injury, opining that Claimant reached MMI as of June 3, 2020, and that any impairment provided by Dr. Orent was questionable, in light of Dr. Parker's findings on that date.

C. Claimant's Testimony

51. Claimant stated that she recalled her treatment at Concentra with multiple providers. She also recalled her care under Dr. Reichhardt, and that he took measurements of her movement. She recalled seeing Dr. Quickert and that injections were recommended. She denied having declined to go through them only that the injections were not authorized by Insurer, so she was unable to have the injection. She continued to be open to having the injections. She recalled seeing an IME physician but did not recall his name. She recalled being released by Dr. Reichhardt but continued with physical therapy after that date for several months. Her condition with the weakness in her lower extremities continued to deteriorate and she started using a cane over a year before the hearing in this matter.[16] She stated that she had recently returned to see Dr. Reichhardt due to her continued deterioration including her right ankle. She informed Dr. Reichhardt that she has had many falls due to the weakness in her lower extremities.

52. Claimant recalled when they tried to perform dry needling in her lumbar spine, they pinched a nerve and there was a lot of blood. The next day she could not move her right foot properly. Somehow, it affected her right leg. Since that time she has had greater weakness in both legs and has had many falls.

53. Claimant testified that prior to her work related injuries of August 25, 2019 and February 15, 2020 she was healthy and did not have any limitations or restrictions. However, she now has limitations caused by her injury and could not work at this time. Even when she was working, prior to being laid off due to COVID-19, her employer would violate her restrictions and make her perform activities outside of her restrictions.

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[16] This ALJ notes that the Hearing was conducted in January 2023. One year before the hearing would have been approximately January 2022. She was placed at MMI in July 2021. She went to Mexico for a month, after she was released from physical therapy in September 2021, in September or October, 2021.

54. In November 2022 she was called in for an evaluation with Dr. Reichhardt, who asked her questions related to the weakness in her lower extremities and for the name of her personal care provider (PCP). She noted that Dr. Reichhardt attempted to contact her PCP but could not reach her. He recommended that she schedule an appointment. Claimant scheduled the appointment and was evaluated by Katie at Salud Family Health in Fort Collins.

55. Claimant acknowledge that she had travelled due to an emergency to Mexico but was only there for approximately one month after she was released and no longer going to therapy. After she returned, she restarted therapy in the spring of 2022. She testified that she started using a cane approximately a year before because the weakness in her legs caused her to be unstable and caused multiple falls.

D. Testimony of Dr. Douglas Scott

56. Dr. Douglas Scott testified at hearing on behalf of Respondents, as a Board Certified Occupational Medicine expert as well as a Level II accredited physician. He explained his examination of Claimant when he conducted the IME as well as review of the records. He opined that, based on the mechanism of injury and his consideration of the chiropractor's finding on June 3, 2020, Claimant reached MMI without impairment at that time. He stated that he disagreed with Dr. Orent's findings, especially with regard to the lower extremities, as they were not part of the initial injury in his opinion. Further, he question Dr. Orent's range of motion numbers.

57. He was of the opinion that Claimant was disqualified from receiving further care under the workers' compensation system because her current problems were not related to her work related injury. However, he did concede that a degenerative or chronic conditions did not disqualify Claimant from receiving benefit under the WC system. He further opined that Claimant should have been released to work without restrictions as of June 3, 2020 as she had a normal exam including the ability to perform a squat despite the pain. He opined that pain alone does not equate to injury or impairment.

E. Testimony of Dr. John Aschberger

58. Respondents also called Dr. John Aschberger to testify in this matter as a Board Certified expert in Physical Medicine and Rehabilitation as well as a Level II accredited physician. He noted he had reviewed the records and examined Claimant. He specified that at the time of the exam, Claimant was having difficulty walking and standing, and was assisted by her husband. He could not perform ROM measurements because she was not stable on her feet. He stated he found clonus of the left knee and bilateral ankles representing a possible upper motor neuron neurological finding. She had an abnormal gait.

59. Dr. Aschberger recalled that Claimant reported having worsening of condition following her treatment with the chiropractor, though there was some mention in the records that following a walk with a friend she had problems with walking. He further opined that the records did not support a left knee or left lower extremity injury. He opined that Claimant reported multiple falls and that they may constitute an

aggravation or new injury. He agreed with Dr. Reichhardt's determination of MMI and impairment. He stated that the SI joint injection could provide some relief and could be done as maintenance medical care. He did not change his opinions relayed in his IME report.

F. Testimony of Dr. Sander Orent, DIME physician

60. Dr. Orent, a Board Certified Occupational Medicine and Internal Medicine expert, as well as a Level II accredited physician, was called by Claimant as the Division selected DIME physician. He stated that there were no upper motor neuron findings when he examined Claimant in August 2022. He did identify severe lumbar dysfunction as well as bilateral lower extremity injuries. He noted that he considered the medical records as well as Claimant's reports of the injuries when he made the determination to relate the right lower extremity and ankle injuries to the February 15, 2020 work related injury. He chose to believe Claimant's reports despite the lack of a specific report in the medical documentation that Claimant had been hurt either by the dry needling or the chiropractor's records, especially considering his examination and findings of swelling in the knees and the right ankle. He opined that something was going on in Claimant's spine that needed to be addressed as well as her lower extremities, especially considering that the weakness of her lower extremities has resulted in multiple falls. He opined that Claimant's ongoing deterioration required further investigation and that providers should not rely on 2 year old exams.

61. Dr. Orent stated that simply because a Claimant had an asymptomatic condition did not mean that the condition could not be aggravated, causing the asymptomatic condition to flare and become symptomatic. He opined that this is what happened when the chiropractor manipulated Claimant's knees. He failed to understand why the chiropractor, who was in charge of addressing lumbar spine issues, was addressing anything with regard to Claimant's knees. Now Claimant has effusion in both knees as well as an antalgic gait, which he related to the February 15, 2020 work injury.

62. Dr. Orent further considered the Claimant's adequate mechanism of injury and the sequelae caused by the ongoing injuries and treatment when making his causation analysis. He continued to opine that Claimant was not at MMI and required further diagnostic testing and medical care as stated in his report. This included viscosupplementation in the knees, SI joint injection and even repeat MRI of the lumbar spine and repeat EMG, related to her February 15, 2020 admitted work injury as laid out in his DIME report. He stated that Dr. Scott and Dr. Aschberger simply disagreed with his opinions and that physicians frequently disagree with each other.

63. Dr. Orent testified persuasively that he took valid measurements of Claimant's lumbar spine at the time of his examination. He confirmed that the measurements were in fact the numbers he took during the examination and disputed Dr. Scott's opinion that it was not possible to obtain the numbers Dr. Orent actually obtained. Dr. Orent continued to opine that Claimant injured her lumbar spine and bilateral lower extremities, including her right and left knees and her right ankle. He appropriately provided a provisional rating as required by the Division in accordance with the requirements for a DIME physician. He considered the medical records, Claimant's

testimony and the responses Claimant provided to him at the time of her examination, as well as the mechanism of injury and the sequelae treatment she received to arrive at his opinions as laid out in his DIME report. He continued to opine that Claimant was not at MMI and required further diagnostic evaluation and treatment as he had previously laid out. His opinion did not change from that reflected in his DIME report despite the testimony of Drs. Scott and Dr. Aschberger. He stated that they simply have a different opinion.

64. Dr. Orent stated that, even if Claimant was found to be at MMI, that she continued to require medical care related to her work injury.

G. Ultimate Findings of Fact

65. As found, Respondents have failed to overcome by clear and convincing evidence the opinions of Dr. Sander Orent, the DIME physician in this matter. Dr. Orent considered the evidence, the facts as described by Claimant, the medical records, the mechanism of injury and examined Claimant in order to arrive at his opinions in this matter. Dr. Orent is credible and his opinions more persuasive than the contrary opinions provided by Dr. Aschberger and Dr. Scott. Claimant explained to Dr. Orent how her injury occurred, Dr. Orent reviewed the records and examined Claimant in order to perform a causality analysis and reach the determination that Claimant injured her low back, left lower extremity, her bilateral knees and her right ankle, all as a consequence of the February 15, 2020 work related injury. This includes further injury to her lower extremities caused by treatment while under the care of her workers' compensation authorized treating providers.

66. As found, Dr. Orent credibly concluded that, due to the progression of Claimant's symptomology, she required further medical care, including but not limited to repeat MRI of the lumbar spine, repeat EMG nerve conduction studies to determine why her legs are so weak, consideration of hyaluronic or other viscosupplementation into the left knee, SI joint injections and MRIs of the right knee and the right ankle. He credibly opined that this diagnostic care and treatment are essential to cure and relieve Claimant from the effects of her February 15, 2020 admitted work related injury.

67. Drs. Aschberger and Scott did not disagree that Claimant needed further evaluations. In fact, they recommended Claimant seek further evaluation outside of the workers' compensation system with her PCP. However, neither were able to identify what exactly was happening to Claimant other than that she continuing to have complaints of pain in her low back, lower extremities including weakness that may be related to clonus. Those physicians simply concluded that since the treatment provided did not resolve her complaints that they were probably unrelated to the work injury. Dr. Orent credibly opined that Claimant continue to suffer from the work related injuries and required further care and diagnostic treatment and that Drs. Aschberger's and Dr. Scott's opinions were simply a difference of opinions.

68. Dr. Scott is simply not credible in his opinion that, based on his understanding of the mechanism of injury, Claimant should have reached MMI as of June 3, 2020 when the chiropractor identified Claimant was able to perform a squat, despite Claimant's continuing symptoms. He relied heavily on Dr. Parker's notations. However,

Dr. Parker's notes are suspect. From the initial exams on May 13, 2020 he stated that Claimant "transitions from a seated to a standing position without difficulty, pain complaints or pain behaviors." The phraseology of "transitioned from a seated to a standing position without difficulty, pain complaints, or pain behaviors" is commonly added in most of Dr. Parker's reports despite complaints of pain and symptoms. Dr. Parker clearly documents that Claimant was having significant pain with ratings at 6/10 and 7/10, with left lateral knee pain and numbness traveling from her gluteus musculature laterally in the left lower extremity to the left great toe and second toe. He noted significant loss of range of motion, positive Patrick's, Hibb's, Yeoman's, and hyperextension, and while he may not have provided significant chiropractic care to the lower extremity, his exam notes that he clearly examined the lower extremity, manipulating them. On June 3, 2020 Dr. Parker documented that Claimant continued to have a 6/10 pain with activity and noted that she had palpable adhesions, trigger points and muscle spasms. Therefore, Dr. Scott's reliance of Dr. Parker's normal findings make his opinions not credible.

69. Claimant was under medical restrictions issued by her ATPs, including Dr. Reichhardt who stated as of July 20, 2021 that Claimant was limited in her ability to work including a 20 lbs. lifting, pushing and pulling limitation as well as limited bending and twisting. These restrictions are similar to Claimant's restrictions when she was laid off from her employment due to COVID-19. Further, both Dr. Aschberger and Dr. Reichhardt noted in their more recent reports that Claimant was not able to engage in employment at that time. This is consistent with Dr. Orent's opinion as well. Claimant has shown the she has been unable to return to her employment with Employer of injury or any other employment due to her work restrictions.

70. As found, Claimant's loss of employment was caused by a combination of her physical limitations, her restrictions and due to the COVID-19 pandemic. As found, from the totality of the evidence, including Claimant's credible testimony and the medical records, Claimant has proven that it was more likely than not that that she left work as a result of the disability related to this claim and has incurred an actual wage loss. This has caused a disability lasting more than three work shifts. Claimant has proven that it was more likely than not that there was a causal connection between a work-related injury which caused her subsequent wage loss. As found, Claimant continues to have work restrictions that limit her ability to return to her prior employment or any other employment.

71. 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. Whether Respondents overcame the DIME physician's opinion by clear and convincing evidence, that Claimant is not at MMI.

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S.

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Sec. 8-42-107(8)(b)(III), C.R.S. The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. ICAO*, 961 P.2d 590 (Colo. App. 1998); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence means evidence which is stronger than a mere preponderance. It is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. ICAO,* 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, *ICAO,* (March 18, 2016); *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523- 097, ICAO, (July 19, 2004); *Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). A finding that the claimant needs additional medical treatment (including diagnostic evaluations) to improve her injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). That means that a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. *Cordova v. Industrial Claim Appeals Office, supra.* Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. See Cordova v. Industrial Claim Appeals Office, *supra.*

If the DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*,

(if DIME physician offers ambiguous or conflicting opinions on MMI, it is for ALJ to resolve such ambiguity and conflicts and determine the DIME physician's true opinion). A DIME physician's finding of MMI consists not only of the initial report, but also any subsequent opinion given by the physician. See *Andrade v. ICAO*, 121 P.3d 328 (Colo. App. 2005). Thus, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. ICAO*, 984 P.2d 656, 659 (Colo. App. 1998); *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion regarding MMI. Section 8-42-107(8)(b), C.R.S.; see *Fera v. Resources One, LLC, D/B/A Terra Firma,* W. C. No. 4-589-175, ICAO, (May 25, 2005) [aff'd, *Resources One, LLC v. Industrial Claim Appeals Office* 148 P.3d 287 (Colo. App. 2006)]; *Leprino Foods Co. v. ICAO*, *134 P.3d 475 (Colo. App. 2005); In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*. Lastly, Respondents bear the burden of proof to overcome by clear and convincing evidence the DIME physician's finding that MMI had not been attained. See also *Viloch v. Opus Northwest, LLC*, W. C. No. 4-514-339, ICAO, (June 17, 2005); *Gurule v. Western Forge*, W. C. No. 4-351-883, ICAO, (December 26, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. ICAO, supra*. Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. ICAO, supra.*

In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination [and true opinion] is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., *supra*; *Shultz v. Anheuser Busch, Inc*., *supra.*

In the case at bench, Respondents' had the burden of proof to overcome Dr. Orent's opinions on MMI and causation. Respondents relied on the opinions of Drs. Scott and Aschberger, as well as other medical reports, to support their contentions. The ALJ found Drs. Scott and Aschberger were unpersuasive in their opinions with regard to causation and MMI, especially their diverging opinions. Dr. Aschberger put great emphasis on his findings that there was a clonus sign at the low extremities but more importantly at the right upper extremity. It is clear from the record that Claimant has continuously complained of right upper extremity problems related to the admitted August 25, 2019 work related injury. Dr. Aschberger's report makes little mention of his review of records from the 2019 claim or Claimant's symptoms in that case, which are extensive in this ALJ consideration and that case is not before the court at this time. Dr. Aschberger actually recommended further diagnostic work up with regard to Claimant's symptoms

outside of the Workers' Compensation system considering his examination to determine if there was a true upper motor neuron condition, though he suspected there was. However, there was no specific diagnosis provided and little that shows that Dr. Orent is incorrect in his determination. Dr. Aschberger's opinion was, in fact, somewhat speculative and just a different opinion than Dr. Orent's. Dr. Aschberger's opinion amounted to a mere difference of medical opinion compared to those of Dr. Orent's, which does not rise to the level of clear and convincing evidence that is unmistakable and fee from serious or substantial doubts and is insufficient to show that it is highly probable the DIME physician's opinion on MMI is incorrect. See *In re Claim of Tomsha*, W.C. No. 5-088-642-002 (I.C.A.O. March 18, 2021).

With regard to Dr. Scott's opinions, he is simply not credible. In his estimation Claimant should have reached MMI within four months of her injury. In his opinion, based on his understanding of the mechanism of injury, Claimant should have reached MMI as of June 3, 2020 when the chiropractor identified Claimant was able to perform a squat, despite Claimant's continuing symptoms. He relied heavily on Dr. Parker's notations. However, Dr. Parker's notes are suspect and conflicting. From the initial exams on May 13, 2020 he stated that Claimant "transitions from a seated to a standing position without difficulty, pain complaints or pain behaviors," which is a phrase he frequently used in his notes despite complaints of pain and symptoms. Dr. Parker clearly documented that Claimant was having significant pain with ratings at 6/10 and 7/10, with left lateral knee pain and numbness traveling from her gluteus musculature laterally in the left lower extremity to the left great toe and second toe. He noted significant loss of range of motion, positive Patrick's, Hibb's, Yeoman's, and hyperextension, and while he may not have provided significant chiropractic care to the lower extremity, his exam notes that he clearly examined the lower extremity, manipulating them. On June 3, 2020 Dr. Parker documented that Claimant continued to have a 6/10 pain with activity and noted that she had palpable adhesions, trigger points and muscle spasms. Therefore, Dr. Scott's reliance of Dr. Parker's normal findings make his opinions not credible.

As found, Dr. Reichhardt found Claimant at MMI as of July 20, 2021 based on a stagnated system. He was awaiting authorization for SI joint injections he recommended with Dr. Quickert, which were denied. Dr. Reichhardt also recommended trigger point injections for the lumbar spine, an *MRI of the left knee* and noted that future considerations for a hip MRI arthrogram. Dr. Reichhardt also recommended an evaluation with an orthopedist with regard to Claimant's left knee complaints. None of which were authorized or took place. His hands were tied as he found his recommendations rejected and could offer no further treatment triggering him to find Claimant at MMI. Further, Dr. Reichhardt relied on communications from Mr. Toth that Claimant had not complained of leg pain during the initial visits. Mr. Toth mislead Dr. Reichhardt in this matter. And while this ALJ was more persuaded by Dr. Reichhardt's opinion than by Dr. Scott or Dr. Aschberger, his opinion did not rise to the level of clear and convincing evidence that was free from doubt to overcome Dr. Orent's DIME opinion. As found, Dr. Reichhardt's opinions were simply a difference of opinions.

Respondents argued that because Dr. Brady mentioned that Claimant was wearing an ankle brace on August 3, 2020 and that clearly the somatic distress and pain magnification were the causes of Claimant's continuing symptoms, and her continuing

problems were not the work related injury. This is not persuasive. In fact, Dr. Brady diagnosed a pain disorder and adjustment disorder which were either caused by or aggravated by the work related claim of 2019.

Respondents also argued that Dr. Orent made a mistake, which was not corrected, following the Incomplete Notice of August 18, 2022. This is not correct. In fact, Dr. Orent did correct his mistake and issued a letter on the same day, including the revised summary form.[17] Immediately thereafter, the DIME Unit at the Division issued the "Notice: DIME Report "Not at MMI"" on August 25, 2022 to the parties.[18] As found, Dr. Orent's true opinion is found to be inclusive of this revised report.

Respondents also argued that based on Dr. Scott and Dr. Kleinman's opinions, Claimant's conditions were preexisting. 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). Here, as found, Dr. Orent assessed Claimant's history, medical records and exam and determined that Claimant had work related injuries caused by the February 15, 2020.

As found, Claimant credibly testified that, before her workers' compensation incidents, Claimant was in good health and did not have any medical or health problems which affected her low back and bilateral lower extremities. Neither were any medical record in evidence presented that showed to the contrary. While the diagnostic testing showed Claimant clearly had degenerative conditions, those conditions were asymptomatic. Dr. Orent credibly testified that Claimant's current problems with her low back and bilateral lower extremities are related to her February 15, 2020 work related accident. He also credibly testified that the need for the recommended care was related to the claim. Further, he opined that it was not only the injuries she sustained at the specific date and time of the work related event or accident but the sequelae that results from those injuries were also related to the February 15, 2020 work related claim. In

[17] See Claimant's Exhibit 7, bates 25, and Exhibit 8, bates 27-29.
[18] See Exhibit 9, bate 32.

short, because Claimant was further injured during the course of her treatment for the work related injury, those additional injuries are also related to the February 15 2020 claim and compensable. While Dr. Parker's records did not record causing an injury to Claimant's right knee, he did examine them including doing range of motion of the knee. It is not surprising or unanticipated that he would not record causing an injury to a patient.

Respondents argued that Dr. Orent was in error because he relied on Claimant's reports instead of pointing to particular medical records to substantiate his opinion.[19] Respondents argued that Dr. Orent should be found to have been overcome as he failed to follow the *AMA Guides*. However, deviations from the AMA *Guides* do not mandate that the DIME physician's impairment rating is incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the AMA *Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* In determining the rating, the ALJ can take judicial notice of the contents of the *AMA Guides*, Level II Curriculum, the Division's Impairment Rating Tips (Desk Aid #11), and other such documents promulgated by the Division of Workers' Compensation. *Id*. Whether the DIME physician properly applied the AMA *Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* ICAO, W.C. No. 4-677-750 (April 16, 2008); *In re Claim of Pulliam*, ICAO, WC 5-078-454-001, (July 12, 2021). Here, impairment is not a factor and not awarded, as Claimant was found to be not at MMI, and impairment is premature when a Claimant is determined to be not at MMI.

As found, Dr. Orent did substantiate his opinions, first by stating that he acknowledge that Dr. Reichhardt obtained better range of motions but that Claimant's condition had clearly worsened since that time. Secondly, Dr. Orent's range of motion testing was valid and therefore no second set needed to be completed under the *AMA Guides*. Further, he opined that Claimant clearly explained what had occurred with regard to the reporting. Claimant did complain of her lower extremity weakness. The medical records show a pattern of Claimant's complaints, despite the providers being told by Insurer that the knee complaints were not compensable. Dr. Reichhardt also documented in his records that Claimant was complaining of bilateral lower extremity pain and weakness from his initial report of October 5, 2020, despite noting that it was not initially reported because Employer did not list it initially.

As Dr. Orent testified, chiropractors are not trained in range of motion for the purposes of evaluating MMI and impairment. Dr. Scott's opinion also ignores the reports that followed from Dr. Parker. Claimant reported she still experienced low back pain, but treatment was helpful. The fact that treatment continued to be helpful to Claimant shows that Claimant had not reached the level of maximum improvement. It is reasonable to believe additional care would continue to improve Claimant's condition. All of Dr. Parker's impressions noted "slowly improving (objective greater than subjective) low back pain/ lumbosacral strain and thoracolumbar pain complaints." By definition, Claimant had not reached a point of stability.

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[19] Respondents specify in their brief that Dr. Orent's reliance of Claimant's statements is "outside of the Guides page 246." The AMA Guides have nothing on this page and the MTGs for both low back and lower extremities have less than 246 pages each.

Lastly, Respondents argued in their Brief in Support of Petition to Review that this ALJ erred by relying on Dr. Orent's testimony based on hypotheticals related to evidence that was not admitted. This is not correct. The evidence that was withdrawn, was the audio recording of the IME with Dr. Kleinman, Respondents' expert psychiatrist. Nothing in the facts listed in the original Findings of Fact, Conclusions of Law and Order issued by this ALJ on February 17, 2023 relied on hypotheticals concerning Claimant's psychological or psychiatric condition or examination.

Respondents are correct that Dr. Orent, the DIME physician in this case, is a non-retained expert as neither parties has the ability to communicate with the DIME without further steps. Rule 11-3(F) prohibits the DIME physician from communicating with the parties unless specifically authorized by order of an ALJ or agreed to by the parties. Rule 11-6 specifically prohibits the parties from contacting the DIME unless specifically authorized by order of an ALJ, by agreement or for purposes of deposing the DIME physician. Here, as found, Dr. Orent's opinions were detailed in his report and any testimony that was offered at hearing, and included in the findings in this and the prior order, were essentially reiterations or clarifications of those opinions from his report or opinions in response to other witnesses' testimony at hearing. Dr. Aschberger provided testimony regarding his opinion on the cause of the clonus. The hypothetical provide another explanation to that opinion and in no way relied on what was said during the IME with Dr. Kleinman. In fact, this ALJ never received the recording and it was not in evidence. Further, the DIME report provided Respondents sufficient basis to prepare for hearing in this matter.

As far as Respondents argue that the DIME physician was not allowed to address body parts that were not listed on the Application for a DIME, this case differs from the matter in *Rodriguez v. Aarons,* ICAO, WC 5-119-986 (March 8, 2023), which had not been decided at the time of this ALJ's original Order. In *Rodriguez,* Claimant was deemed to have reached MMI by an ATP who provided multiple impairments for physical and mental impairment. In that case, Respondents' requested a DIME but marked only the physical impairment to be considered. Here, Claimant did not reach MMI in accordance with the DIME physician's opinion. MMI is a status that a Claimant is either at or is not at, and particular body parts are not divisible and cannot be parceled out among the various components of a multi-faceted industrial injury. See *Paint Connection Plus v. ICAO,* 240 P.3d 429 (Colo. App. 2010); *In re Claim of Burren,* ICAO, WC 4-962-740-06 (March 15, 2019). Further, W.C.R.P. Rule 11-4(C) states the parties may agree to 'limit' the issues to be addressed by the DIME physician. To do so the parties are directed to use the Division form Notice of Agreement to Limit the Scope of the DIME. The form allows only for Maximum Medical Improvement, Permanent Impairment or Apportionment to be excluded from the determinations. In this case, neither party filed the Notice to Limit the Scope or body parts/conditions.

As stated in *Rodriguez*, the rule does not provide a different method by which Claimant may add a body region to the DIME application when an employer is making the application, like in this case, and only the requesting party (Respondent) is allowed to do so under W.C.R.P. Rule 11(4)(A)(1) when they are the requesting party. Claimant is impeded from filing an Amended DIME application by the rule, as the rule is silent when a Final Admission of Liability has not been filed, and Respondent is the one requesting

the DIME. The statute's purpose in providing a DIME system is, in part, to allow a Claimant to challenge the decisions of an Employer selected ATPs regarding MMI and/or impairment. Here, the ATP, Dr. Reichhardt did not state that Claimant was at MMI with regard to the lower extremity complaints. Rather, he simply followed the determination of the ATP, PA Toth, that he did not find the lower extremity complaints related to the claim and that the adjuster was not authorizing further care for the lower extremities. In this matter, Dr. Orent found Claimant was not at MMI as she required a repeat MRI of the lumbar spine, repeat EMG nerve conduction studies to determine why her legs were so weak, consideration of hyaluronic or other viscosupplementation into the left knee and an MRI of the right knee and the right ankle. In short, the DIME physician found that diagnostic evaluations were necessary to flesh out what was really going on with Claimant in order to determine causation of work related injuries and provide appropriate treatment.

After considering the multitude of reports in evidence[20] from both the 2019 and the 2020 claims as well as the testimony of three experts, this ALJ concludes from the totality of the evidence, based on the heightened standard of proof, Respondents failed to show by clear and convincing evidence that Dr. Orent was in error. Based on the totality of the evidence, there is insufficient evidence establishing that it is highly probable Dr. Orent erred in his opinion on determining that Claimant is not at maximum medical improvement. To the extent Drs. Aschberger and Scott provided different opinions with regard to causation and need for medical care, their opinions represent mere differences of opinion that do not rise to the level of clear and convincing evidence.

C. Whether there was an Intervening Event

An intervening injury may sever the causal connection between the industrial injury and the claimant's condition. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). Further, the existence of an intervening event is an affirmative defense. Consequently, it is Respondent's burden to prove that Claimant's disability is attributable to the intervening injury or condition and not the industrial injury. *See Owens v. ICAO*, 49 P.3d 1187 (Colo. App. 2002); *see also Atlantic & Pacific Insurance Co. v. Barnes*, 666 P.2d 163 (Colo. App. 1983). Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.* It is also clear that, pursuant to the Court's conclusion in the *Owens* case cited above, that no compensability exists if the disability or need for treatment was caused as a direct result of an independent intervening cause. Whether Respondents have sustained their burden to prove Claimant's disability was triggered by an intervening event is a question of fact for resolution by the ALJ. *See City of Aurora v. Dortch*, 799 P.2d 462 (Colo. App. 1990).

Respondents stated that Claimant had an intervening event, speculating that something must have happened when Claimant was in Mexico on an emergency. Claimant testified that she had traveled to Mexico and stayed there for approximately one month but did not recall exactly when. She confirmed it was after she had been released from physical therapy in the fall of 2021 and when she restarted physical therapy in

[20] There are approximately 1,300 pages of records, including medical records and pleadings.

February 2022. However, there was no confirmation or credible evidence that Claimant suffered any accident or incident while she was in Mexico.

Claimant did testify that the weakness in her legs had caused her to fall multiple times. This was documented by Dr. Reichhardt in his November 2022 report. However, it has not been persuasively proven that it was more likely than not that Claimant's falls were caused by a condition other than the documented and diagnosed lumbar spine injury with radiculopathy or the bilateral lower extremity injuries diagnosed by Dr. Orent in his DIME report. The records are full of complaints that Claimant had weakness in her bilateral lower extremities. Dr. Aschberger and Dr. Reichhardt speculated that Claimant has some stenosis or upper motor neuron condition, but this has not been confirmed either, and no diagnostic testing has been completed to rule out the probability that the falls are a consequence of the weakness caused by the work related lower extremity injuries or the radicular symptoms. Dr. Reichhardt continued to note in his November 14, 2022 report that Claimant had suffered a work related low back discogenic injury with radicular involvement and a left knee injury. He rated both. And these records and opinions were considered by the DIME physician. Nothing in those reports persuaded this ALJ that there was clear and convincing evidence of a diagnosis that was not work related as determined by Dr. Orent.

Respondents also point to the event Claimant reported when she was walking with a friend in April 2020 and was feeling pain in her knee. This ALJ finds no merit in this theory or suggestion as walking in and of itself is found not to be a causative intervening event. Claimant likely walked many places, including in her home, the medical providers buildings, and for every other activity of daily living. Even if Claimant had just been walking while in the course and scope of her employment that would likely not be considered a work related injury as there would be no cause and effect, no heightened risk.

This ALJ has insufficient evidence to determine that it is more probable than not that Claimant suffered an intervening event. Respondents have failed to show that it was more probable than not that Claimant had an intervening event.

It is further found that Respondents have failed to overcome the determination of the DIME physician's opinion by clear and convincing evidence that there was no intervening event. Dr. Orent acknowledged reading the opinions of Dr. Aschberger and Dr. Reichhardt with regard to the clonus signs, as well as Dr. Aschberger's testimony, and this information did not change his opinions.

D. Entitlement of Temporary Total Disability benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, which she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity

evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume 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).

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. Sec. 8-42-105(3)(a)-(d), C.R.S.

Claimant was given work restrictions as of the date of her injury on February 15, 2020. She continued working until sometime in March 2020, when she was laid off from work due to the COVID-19 pandemic. This was a time when her employer failed to comply with her work restrictions. She continued on work restrictions when Dr. Reichhardt placed her at MMI on July 20, 2021. At that time she continued having work restrictions of 20 lbs. lifting, pushing and pulling, and limit bending and twisting at the waist to an occasional basis. In fact, Dr. Orent stated that he saw no possibility of Claimant engaging in any form of active employment at that time and Dr. Aschberger opined that Claimant could not work or was not employable. Claimant has established by a preponderance of the evidence that she is entitlement to TTD benefits as a result of her work related injury from the date she had previously been placed at MMI on July 20, 2021 until terminated by law.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents failed to prove by clear and convincing evidence that the DIME physician was incorrect. Claimant is not at maximum medical improvement.

2. Respondents shall pay for reasonably necessary and medical care related to the February 15, 2020 work injury, in accordance with the Colorado Fee Schedule, to cure and relieve her of the compensable injury.

3. Respondents shall pay temporary total disability benefits as of July 20, 2021 and continuing until terminated by law.

4. Respondents shall pay interest on any benefits at the rate of eight percent (8%) per annum for all benefits that were not paid when due.

5. Claimant's average weekly wage is $333.00 pursuant to the stipulation of the parties.

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

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

DATED this 14th day of September, 2023.

Digital Signature

By: _____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-228-773-003

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable right knee injury during the course and scope of his employment with Employer on September 14, 2022.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the right knee surgery recommended by Authorized Treating Physician (ATP) Michael S. Hewitt, M.D. is reasonable, necessary and causally related to his September 14, 2022 industrial injury.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $1,666.43.

FINDINGS OF FACT

1. Claimant worked as a Driver for Employer. He explained that on September 14, 2022 he suffered an injury to his right knee while removing a directional sign. Specifically, after walking on wet grass, Claimant attempted to enter his utility truck. However, Claimant's right foot slipped, he fell backwards and struck his right knee on a curb.

2. Claimant testified that, on the day of the incident, he reported the event to Dispatcher [Redacted, hereinafter RC]. He remarked that he subsequently left town to attend his mother's funeral in California.

3. Claimant explained that on October 3, 2022 he told another dispatcher "[Redacted, hereinafter PL]" that he had injured his knee several weeks earlier. "PL[Redacted]" then directed Claimant to Employer's Safety and Training Manager [Redacted, hereinafter JE]. JE[Redacted] instructed Claimant to complete an incident report. He testified that October 3, 2023 was the first time he had heard about Claimant's knee injury. He immediately approved medical treatment and drove Claimant to Authorized Treating Provider (ATP) Midtown Occupational Health Services.

4. On October 3, 2022 Claimant visited ATP Lori Rossi, M.D. at Midtown Occupational for his September 14, 2022 right knee injury. Dr. Rossi noted the mechanism of injury was that Claimant had to "get a sign that was on wet grass. As he stepped up into his truck his foot slipped on the running board and hyperextended." Claimant's chief complaints were pain and instability of the right knee. Dr. Rossi diagnosed Claimant with a right knee strain. She determined that there was a greater than 50% probability that Claimant's knee strain was work-related.

5. Following the injury, Claimant continued to work with activity restrictions. The restrictions included no squatting, kneeling, climbing, or crawling.

6. On October 12, 2022 Claimant underwent an MRI of the right knee. The imaging revealed a full-thickness cartilage defect of the medial femoral condyle.

7. On November 3, 2022 Claimant returned to Dr. Rossi for an evaluation. She commented the MRI was "remarkable only for degenerative changes" and Claimant's "subjective complaints do not match the MRI findings." Dr. Rossi continued to diagnose Claimant with a right knee strain. She remarked that she had requested a referral to a knee specialist at Claimant's previous visit.

8. On November 28, 2022 Claimant visited Orthopedic Surgeon ATP Michael S. Hewitt, M.D. for an examination. Dr. Hewitt recounted that Claimant is a 57-year-old male who presented for evaluation of his right knee. He remarked that on September 14, 2022 Claimant had been walking on wet grass and was entering his truck. His foot slipped and he hyperflexed his right knee. Claimant was holding onto the door handle of the truck and did not fall to the ground. However, he experienced the immediate onset of right knee pain and swelling. Dr. Hewitt noted the October 12, 2022 right knee MRI revealed the following:

> Small joint effusion, no loose bodies, anterior and posterior cruciate as well as medial and lateral collateral ligaments are intact, mild patellofemoral chondromalacia, focal full-thickness, cartilage defect involving the medial femoral condyle measuring 3 x 18 mm with well-defined margins, focal subchondral edema, no loose bodies appreciated.

He commented that Claimant's occupational injury was a "right medial femoral condyle focal articular cartilage defect" and there was no "significant underlying arthritis." Dr. Hewitt discussed multiple treatment options with Claimant "including observation, activity modification, optimiz[ation of] body weight, therapy, [use of] medial compartment unloader brace, cortisone injections, viscosupplementation injections, PRP injections and finally surgery."

9. On December 5, 2022 Claimant returned to Dr. Hewitt for an evaluation. He remarked that Claimant was approaching three months after a right knee twisting injury at work. Dr. Hewitt again reviewed treatment options. He remarked that Claimant "understands prognosis in patients over the age of 50 with an elevated body mass index are decreased. Patient would like to consider treatment options and will follow-up with this clinic in the coming weeks, all questions were answered."

10. On December 22, 2022 Dr. Hewitt submitted a request for surgical authorization of Claimant's right knee. He specifically sought to perform a right knee arthroscopy with chondroplasty and microfracture of the MFC augmented with an intra-articular platelet rich plasma injection.

11. Claimant returned to Dr. Rossi on January 13, 2023. Dr. Rossi explained that Claimant had visited specialist Dr. Hewitt and discussed four treatment options. A decision was made to proceed with surgery. However, Insurer subsequently denied the surgical request

because Claimant had not completed any therapy or undergone injection treatment. Dr. Rossi noted that Claimant "has been adamantly against injections or therapy." She ordered six physical therapy visits and specified that Claimant "is quite against therapy and injections but realizes he will need to participate in these modalities if he wishes to have surgery." Dr. Rossi again diagnosed Claimant with a right knee strain.

12. Respondents referred Claimant for a medical record review with Orthopedic Surgeon William Ciccone, II, M.D. on January 2, 2023. Dr. Ciccone commented that Claimant's October 12, 2022 right knee MRI revealed a "full-thickness cartilage defect in the femoral condyle with patellofemoral degenerative disease." However, after reviewing Claimant's medical records, Dr. Ciccone concluded that Claimant only suffered a minor strain/sprain to his right knee at work on September 14, 2022. He explained that:

> [i]t is unclear from the MRI that the findings are actually related to a work injury. If the claimant had caused an acute cartilage defect from the work event one would expect to see a loose body. This is not present on the MRI. Appropriate care for early degenerative changes in a knee is conservative, not operative. The claimant has not had any physical therapy, injections, or other conservative measures. I do not believe that the need for a potential surgery is causally related to a work event. The findings on the MRI are likely preexisting.

13. Following conversations with Dr. Hewitt, [Redacted, hereinafter MS] decided to forego conservative treatment options. He did not obtain physical therapy and injections, but insisted on pursuing surgery. When asked at hearing if there was any medical treatment he wished to have prior to surgery, Claimant replied, "No. I just want my knee fixed."

14. Dr. Hewitt referred Claimant to Nathan Faulkner, M.D. for a second opinion evaluation. At a February 22, 2023 examination Dr. Faulkner recounted that Claimant developed the acute onset of right knee pain when he slipped getting into his work truck on September 14, 2022. Claimant twisted his right knee and struck it on a curb. After reviewing Claimant's October 12, 2022 right knee MRI he explained that:

> MRI shows full-thickness cartilage defect of the MFC. There is also adjacent edema which would indicate that this is more of an acute injury causing the patient's pain. Patient also had no right knee pain or dysfunction prior to his work injury, which would also make it more likely than not that he developed this cartilage defect from the work injury. Long alignment x-rays show only 3 degrees of varus to the femur, so I do agree with Dr. Hewitt's plan of a right knee arthroscopy with chondroplasty and microfracture of the MFC augmented with intra-articular platelet rich plasma injection. Patient has failed extensive more conservative treatment as outlined above.

15. On June 28, 2023 Claimant underwent an independent medical examination with Dr. Ciccone. After reviewing Claimant's medical records and conducting a physical examination, Dr. Ciccone determined that Claimant suffered a minor sprain/strain to the right knee as a result of his September 14, 2022 work accident. He detailed that the October 12, 2022 MRI revealed a full-thickness cartilage defect as well as cartilage loss along the patellofemoral joint. Dr.

Ciccone commented that Claimant's persistent complaints of instability were unrelated to the MRI findings. He noted Claimant did not suffer a ligament injury that would be associated with instability. Claimant's pain over the anterior aspect of the knee was likely related to the pre-existing degenerative changes on the patellofemoral joint. Dr. Ciccone also explained that it was unclear whether Claimant suffered an acute cartilage injury related to his work injury. He reiterated that, if the injury had been acute, there would likely have been a loose body of the cartilage that corresponded with the chondral loss.

16. Dr. Ciccone determined the proposed surgery was unlikely to improve Claimant's symptoms. He explained that it is well-known that the results of microfracture surgery are variable in patients over the age of 40 with a BMI over 25. Additionally, Claimant already exhibited degenerative changes in the right knee with cartilage loss noted in the patellofemoral joint. Dr. Ciccone ultimately concluded that a right knee arthroscopy with chondroplasty and microfracture was not reasonable or necessary and should be denied. He instead recommended physical therapy.

17. On August 1, 2023 the parties conducted the pre-hearing evidentiary deposition of Dr. Ciccone. He maintained that Claimant suffered a minor sprain/strain to the right knee as a result of his September 14, 2022 work accident. Appropriate treatment for the minor injury was physical therapy to focus on range of motion and strengthening. Dr. Ciccone determined that Dr. Hewitt's surgical recommendation of a right knee arthroscopy with chondroplasty and a microfracture with a PRP injection was not reasonable, necessary and causally related to the September 14, 2022 work incident.

18. After reviewing Claimant's October 12, 2022 right knee MRI Dr. Ciccone observed that Claimant "has a full-thickness cartilage defect along the medial femoral condyle," There was also "a piece of cartilage missing" from the femur bone. Dr. Ciccone explained that Claimant's cartilage defect would not necessarily have any associated symptoms. He specifically stated that Claimant's right knee MRI did not reflect an acute injury. Dr. Ciccone detailed that the imaging did not reveal any fracture, bone contusion, ostochondral fragmentation, significant swelling or loose bodies. Importantly, the MRI report noted that there was no joint effusion or abnormal swelling of the right knee. Because of the lack of any intra-articular loose bodies on the MRI, it was more likely that Claimant's missing cartilage constituted a pre-existing condition rather than an acute traumatic trauma. He thus could not "relate any of the findings on the MRI scan to the injury at work." Appropriate treatment for Claimant's right knee sprain/strain would be conservative care that included additional physical therapy. Notably, Claimant had only attended five physical therapy sessions during his course of treatment. If Claimant had persistent symptoms, Dr. Ciccone remarked that right knee injections might be appropriate.

19. Claimant has established it is more probably true than not that he suffered a compensable right knee injury during the course and scope of his employment with Employer on September 14, 2022. Initially, after walking on wet grass, Claimant attempted to enter his utility truck. However, Claimant's right foot slipped, he fell backwards and struck his right knee on a curb. On October 3, 2022, after returning from his mother's funeral in California, Claimant was directed to ATP Midtown Occupational Health Services for treatment.

20. On October 3, 2022 Claimant visited ATP Dr. Rossi for an examination. Dr. Rossi

noted the mechanism of injury was that Claimant had to "get a sign that was on wet grass. As he stepped up into his truck his foot slipped on the running board and hyperextended." Claimant's chief complaints were pain and instability of the right knee. Dr. Rossi diagnosed Claimant with a right knee strain. She determined that there was a greater than 50% probability that Claimant's knee strain was work-related. After an MRI of the right knee revealed a full-thickness cartilage defect of the medial femoral condyle, Dr. Rossi referred Claimant to surgeon Dr. Hewitt for an evaluation. Dr. Hewitt determined the September 14, 2022 work incident caused Claimant's full-thickness cartilage defect. He recommended right knee surgery. Furthermore, Dr. Faulkner recounted that Claimant developed the acute onset of right knee pain when he slipped getting into his work truck on September 14, 2022 and agreed with Dr. Hewitt that surgery was warranted. Finally, although Dr. Ciccone disagreed with the surgical recommendation, he determined that Claimant suffered a minor sprain/strain to the right knee as a result of his September 14, 2022 work accident.

21. The medical records thus reveal that there is no significant dispute about whether Claimant injured his right knee at work on September 14, 2022. Claimant has consistently maintained that he injured his right knee when he slipped on the running board of his truck after retrieving a sign from wet grass. The only conflict between physicians involves whether Claimant's right knee injury was limited to a sprain/strain that required conservative treatment or the September 14, 2022 incident caused Claimant's full-thickness cartilage defect that warranted surgical intervention. Accordingly, Claimant suffered a right knee injury during the course and scope of his employment with Employer on September 14, 2022.

22. Claimant has failed to demonstrate it is more probably true than not that the right knee surgery recommended by ATP Dr. Hewitt is reasonable, necessary and causally related to his September 14, 2022 industrial injury. Notably, Dr. Hewitt commented that Claimant's occupational injury was a "right medial femoral condyle focal articular cartilage defect." He discussed multiple treatment options with Claimant and ultimately requested surgical authorization for a right knee arthroscopy with chondroplasty and microfracture of the MFC augmented with an intra-articular platelet rich plasma injection. Dr. Faulkner agreed with Dr. Hewitt's surgical recommendation. He detailed that Claimant's October 12, 2022 right knee MRI reflected an edema that suggested an acute injury was causing Claimant's pain. Moreover, because Claimant had no right knee symptoms prior to his work injury, Dr. Faulkner reasoned it was more likely than not that Claimant developed the cartilage defect from the work accident. Dr. Faulkner also remarked that Claimant has failed extensive conservative treatment.

23. Despite the surgical recommendation of Dr. Hewitt and the support of Dr. Faulkner, the record reveals that the proposed right knee surgery is not causally related to Claimant's September 14, 2022 right knee injury. The record does not reflect that Dr. Hewitt connected Claimant's right knee full-thickness cartilage defect to the September 14, 2022 work event. Furthermore, Dr. Faulkner only noted that the right knee MRI revealed edema that was indicative of an acute injury. He did not provide any other details besides noting that Claimant had no right knee symptoms prior to his work injury.

24. In contrast, Dr. Ciccone maintained that Claimant only suffered a minor sprain/strain to the right knee as a result of his September 14, 2022 work accident. He reasoned that Dr. Hewitt's surgical recommendation of a right knee arthroscopy with chondroplasty and a

microfracture with a PRP injection was not causally related to the September 14, 2022 work event. Dr. Ciccone persuasively explained that Claimant's right knee MRI did not reveal an acute injury. He detailed that the imaging did not reflect any fracture, bone contusion, ostochondral fragmentation, significant swelling or loose bodies. Importantly, the MRI report noted that there was no joint effusion or abnormal swelling of the right knee. Furthermore, because of the lack of any intra-articular loose bodies on the MRI, it was more likely that Claimant's missing cartilage constituted a pre-existing condition. Moreover, ATP Dr. Rossi also consistently maintained that Claimant only suffered a right knee sprain/strain as a result of his September 14, 2022 work accident. Even after Dr. Hewitt sought surgical authorization, Dr. Rossi continued to diagnose Claimant with a right knee strain. Importantly, she commented the MRI was "remarkable only for degenerative changes" and Claimant's "subjective complaints do not match the MRI findings."

25. The record also reveals that the proposed right knee surgery is not reasonable and necessary because Claimant has not exhausted conservative treatment. Dr. Ciccone persuasively commented that appropriate treatment for Claimant's right knee sprain/strain would be conservative care that included additional physical therapy. Notably, Claimant had only attended five physical therapy sessions during his course of treatment. Dr. Ciccone commented that Claimant has not attended enough physical therapy appointments to see improvement and highlighted that "five [physical therapy visits] isn't very many." He also remarked that, if Claimant had persistent symptoms, right knee injections might be appropriate. The record also reflects that Claimant seeks to circumvent conservative treatment modalities suggested by Dr. Hewitt, including observation, activity modification, body weight optimization, therapy, a medial compartment unloader brace, cortisone injections, viscosupplementation injections, and PRP injections. Dr. Rossi also specified that Claimant "is quite against therapy and injections but realizes he will need to participate in these modalities if he wishes to have surgery." The record reveals that Claimant has not exhausted conservative treatment options before pursuing surgery. Claimant has thus failed to demonstrate that the proposed right knee surgery is reasonable, necessary and causally related to his September 14, 2022 industrial injury. Accordingly, Claimant's request for the right knee surgery recommended by Dr. Hewitt is denied and dismissed.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See*

Magnetic Engineering, Inc. v. ICAO, 5 P.3d 385, 389 (Colo. App. 2000).

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

Compensability

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

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a pre-existing condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has established by a preponderance of the evidence that he suffered a compensable right knee injury during the course and scope of his employment with Employer on September 14, 2022. Initially, after walking on wet grass, Claimant attempted to enter his utility truck. However, Claimant's right foot slipped, he fell backwards and struck his right knee on a curb. On October 3, 2022, after returning from his mother's funeral in California, Claimant was directed to ATP Midtown Occupational Health Services for treatment.

8. As found, on October 3, 2022 Claimant visited ATP Dr. Rossi for an examination. Dr. Rossi noted the mechanism of injury was that Claimant had to "get a sign that was on wet

grass. As he stepped up into his truck his foot slipped on the running board and hyperextended." Claimant's chief complaints were pain and instability of the right knee. Dr. Rossi diagnosed Claimant with a right knee strain. She determined that there was a greater than 50% probability that Claimant's knee strain was work-related. After an MRI of the right knee revealed a full-thickness cartilage defect of the medial femoral condyle, Dr. Rossi referred Claimant to surgeon Dr. Hewitt for an evaluation. Dr. Hewitt determined the September 14, 2022 work incident caused Claimant's full-thickness cartilage defect. He recommended right knee surgery. Furthermore, Dr. Faulkner recounted that Claimant developed the acute onset of right knee pain when he slipped getting into his work truck on September 14, 2022 and agreed with Dr. Hewitt that surgery was warranted. Finally, although Dr. Ciccone disagreed with the surgical recommendation, he determined that Claimant suffered a minor sprain/strain to the right knee as a result of his September 14, 2022 work accident.

9. As found, the medical records thus reveal that there is no significant dispute about whether Claimant injured his right knee at work on September 14, 2022. Claimant has consistently maintained that he injured his right knee when he slipped on the running board of his truck after retrieving a sign from wet grass. The only conflict between physicians involves whether Claimant's right knee injury was limited to a sprain/strain that required conservative treatment or the September 14, 2022 incident caused Claimant's full-thickness cartilage defect that warranted surgical intervention. Accordingly, Claimant suffered a right knee injury during the course and scope of his employment with Employer on September 14, 2022.

Medical Benefits

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

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

12. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the right knee surgery recommended by ATP Dr. Hewitt is reasonable, necessary and

causally related to his September 14, 2022 industrial injury. Notably, Dr. Hewitt commented that Claimant's occupational injury was a "right medial femoral condyle focal articular cartilage defect." He discussed multiple treatment options with Claimant and ultimately requested surgical authorization for a right knee arthroscopy with chondroplasty and microfracture of the MFC augmented with an intra-articular platelet rich plasma injection. Dr. Faulkner agreed with Dr. Hewitt's surgical recommendation. He detailed that Claimant's October 12, 2022 right knee MRI reflected an edema that suggested an acute injury was causing Claimant's pain. Moreover, because Claimant had no right knee symptoms prior to his work injury, Dr. Faulkner reasoned it was more likely than not that Claimant developed the cartilage defect from the work accident. Dr. Faulkner also remarked that Claimant has failed extensive conservative treatment.

13. As found, despite the surgical recommendation of Dr. Hewitt and the support of Dr. Faulkner, the record reveals that the proposed right knee surgery is not causally related to Claimant's September 14, 2022 right knee injury. The record does not reflect that Dr. Hewitt connected Claimant's right knee full-thickness cartilage defect to the September 14, 2022 work event. Furthermore, Dr. Faulkner only noted that the right knee MRI revealed edema that was indicative of an acute injury. He did not provide any other details besides noting that Claimant had no right knee symptoms prior to his work injury.

14. As found, in contrast, Dr. Ciccone maintained that Claimant only suffered a minor sprain/strain to the right knee as a result of his September 14, 2022 work accident. He reasoned that Dr. Hewitt's surgical recommendation of a right knee arthroscopy with chondroplasty and a microfracture with a PRP injection was not causally related to the September 14, 2022 work event. Dr. Ciccone persuasively explained that Claimant's right knee MRI did not reveal an acute injury. He detailed that the imaging did not reflect any fracture, bone contusion, ostochondral fragmentation, significant swelling or loose bodies. Importantly, the MRI report noted that there was no joint effusion or abnormal swelling of the right knee. Furthermore, because of the lack of any intra-articular loose bodies on the MRI, it was more likely that Claimant's missing cartilage constituted a pre-existing condition. Moreover, ATP Dr. Rossi also consistently maintained that Claimant only suffered a right knee sprain/strain as a result of his September 14, 2022 work accident. Even after Dr. Hewitt sought surgical authorization, Dr. Rossi continued to diagnose Claimant with a right knee strain. Importantly, she commented the MRI was "remarkable only for degenerative changes" and Claimant's "subjective complaints do not match the MRI findings."

15. As found, the record also reveals that the proposed right knee surgery is not reasonable and necessary because Claimant has not exhausted conservative treatment. Dr. Ciccone persuasively commented that appropriate treatment for Claimant's right knee sprain/strain would be conservative care that included additional physical therapy. Notably, Claimant had only attended five physical therapy sessions during his course of treatment. Dr. Ciccone commented that Claimant has not attended enough physical therapy appointments to see improvement and highlighted that "five [physical therapy visits] isn't very many." He also remarked that, if Claimant had persistent symptoms, right knee injections might be appropriate. The record also reflects that Claimant seeks to circumvent conservative treatment modalities suggested by Dr. Hewitt, including observation, activity modification, body weight optimization, therapy, a medial compartment unloader brace, cortisone injections, viscosupplementation injections, and PRP injections. Dr. Rossi also specified that Claimant "is quite against therapy

and injections but realizes he will need to participate in these modalities if he wishes to have surgery." The record reveals that Claimant has not exhausted conservative treatment options before pursuing surgery. Claimant has thus failed to demonstrate that the proposed right knee surgery is reasonable, necessary and causally related to his September 14, 2022 industrial injury. Accordingly, Claimant's request for the right knee surgery recommended by Dr. Hewitt is denied and dismissed.

ORDER

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

1. On September 14, 2021 Claimant suffered a right knee injury while working for Employer.

2. Claimant's request for the right knee surgery recommended by Dr. Hewitt is denied and dismissed.

3. Claimant earned an AWW of $1,666.43.

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

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

DATED: September 14, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-159-034-003

ISSUES

1. Whether Respondents have established by clear and convincing evidence that DIME physician Matthew Brodie, M.D.'s determination that Claimant is not at maximum medical improvement is incorrect.

2. If Respondents establish that the DIME physician's MMI determination is incorrect, whether Respondent established by clear and convincing evidence that the impairment rating assigned by the DIME physician is incorrect.

FINDINGS OF FACT

1. On December 22, 2020, Claimant sustained admitted injuries to his right index finger and middle finger arising out of the course of his employment as a millwright for Employer. Claimant sustained fractures of the phalanx of the right index and middle fingers when his hand was crushed between a steel plate and a piece of machinery.

2. Following his injury, Claimant was evaluated by Chelsea Rasis, PA-C, physician assistant for Theodore Villavicencio, M.D., at Concentra. X-rays demonstrated a comminuted fracture of the right index finger proximal phalanx and possible fracture of the right middle finger proximal phalanx. Ms. Rasis diagnosed Claimant with fractures of the phalanx of the right middle and index fingers, a hand crush injury and laceration of the right index finger, and referred Claimant to hand specialist, Craig Davis, M.D., for further evaluation. (Ex. 5).

3. On December 29, 2020, Dr. Davis performed a closed reduction and percutaneous pin fixation of Claimant's right index finger proximal phalanx. Claimant was placed in a short arm splint following surgery. (Ex. 6).

4. On January 5, 2021, Claimant saw Ms. Rasis and reported continued pain in his right hand, with pressure and diffuse numbness throughout all fingers. He also noted pain in his right elbow since surgery. (Ex. 5).

5. On January 25, 2021, Dr. Davis removed the pin placed during surgery from Claimant's right index finger. Claimant reported to Dr. Davis that he felt numbness affecting all of his fingers. (Ex. 6).

6. Claimant continued to report similar symptoms to Ms. Davis when he returned on February 2, 2021, indicating that he felt a "grabbing sensation over the metacarpals as if someone is squeezing his hand." (Ex. 5).

7. On February 2, 2021, Claimant began occupational therapy through Concentra. Over the course of the following nine months, Claimant attended 45 sessions of occupational therapy. (Ex. 7).

8. On February 8, 2021, Claimant saw physiatrist Kathy McCranie, M.D., on referral from Ms. Rasis. (Ex. 5). Dr. McCranie noted significant pain throughout Claimant's right hand, numbness in all fingers (except the thumb), and tenderness in Claimant's right elbow with palpation. Dr. McCranie referred Claimant for electrodiagnostic testing of the right arm to rule out compressive neuropathy. (Ex. 5).

9. On March 1, 2021, Allison Fall, M.D., performed electrodiagnostic testing of Claimant right arm. ON examination, she noted that Claimant had no pain at the elbow or wrist, and had pain across the joints of his fingers. The electrodiagnostic testing was negative, with no evidence of compressive neuropathy. (Ex. 5).

10. Claimant returned to Dr. McCranie on March 8, 2023, continuing to report numbness in his hand, pain in the right wrist, and a continued crushing pain in his right hand. She noted that Claimant had tried gabapentin for ten days, which did not provide any relief of his symptoms. As with several other providers, Dr. McCranie noted signs in Claimant's right hand suggestive of complex regional pain syndrome (CRPS), including discoloration, increased hair growth, and cooler temperature. She indicated that Claimant was scheduled for MRIs of the right hand and wrist, and if those tests did not show the cause of Claimant's symptoms, a work up for sympathetically mediated pain would be considered. (Ex. 5)

11. Claimant underwent right hand and wrist MRIs on March 8, 2023. The right-hand MRI showed "sequela of likely subacute or chronic sprain of the ulnar collateral ligament of the second MCP joint," and apparent stripping/detachment of the ulnar sagittal band of the second MCP joint. The right-wrist MRI was interpreted as showing no specific internal derangement of the wrist, no fractures or bone contusion. (Ex. 8 & K).

12. On March 22, 2021, Claimant returned to Dr. Davis' clinic, and saw physician assistant Timothy Abbott, PA-C. Mr. Abbott indicated the MRI demonstrated a sprain of the left index finger MP joint and index finger sagittal band. He opined that it was unclear why Claimant was having diffuse pain throughout the right hand, and that his fingers did not appear to be the source of his pain. (Ex. 6).

13. Claimant returned to Dr. McCranie for follow up on April 16, 2021. Dr. McCranie noted that Claimant was continuing to experience pain predominantly across the right palm which was not specific to the distribution of objective findings. Dr. McCranie indicated that Claimant's examination did not fit the Budapest criteria (i.e., criteria for CRPS), although Claimant did have some varying discoloration of the right hand. To rule out a sympathetic component of his pain, Dr. McCranie ordered a triple phase bone scan. She also noted two cyst-like structures between the fingers of Claimant's right hand, and asked Claimant to follow up with Dr. Davis regarding those issues. (Ex. C).

14. On April 21, 2021, Claimant returned to Dr. Davis reporting some improvement in his hand, but experiencing discoloration and cold in the right hand, and the squeezing sensation previously reported. Dr. Davis noted that Claimant's right-hand pain was of "unclear etiology," and that Claimant did not appear to have CRPS. Dr. Davis indicated that he did not have further treatment to offer Claimant, and discharged Claimant from his

care. (Ex. 6). Also on April 21, 2021, Dr. Villavicencio referred Claimant to hand-specialist Tracy Wolf, M.D., for a second opinion concerning his continuing right-hand pain. (Ex. C).

15. Claimant saw Dr. Wolf on April 30, 2021. Dr. Wolf noted that Claimant's original injury "mainly smashed right along the distal half of the palm and then pulled the fingers backwards." Claimant reported continued pain in the right hand. She noted that Claimant had pain at the distal end of the palm and across the dorsal aspect of the hand, and that he was "getting a little wrist pain" as well. Dr. Wolf opined that the cyst-like structures in Claimant's hand were more consistent with Dupuytren's changes rather than a cyst. On examination, Dr. Wolf performed Tinel's testing at several locations in Claimant's right hand and arm, and noted an equivocal Tinel's signs over the dorsal aspect of the MP joint; questionable superficial radial Tinel's; questionable carpal tunnel Tinel's sign which produced numbness and tingling in the small finger; and "some tenderness and Tinel's with palpation over Guyon's canal." Dr. Wolf indicated that with a crushing injury, such as Claimant's, the soft tissues became swollen affecting neurovascular structures, scarring that can occur which causes stiffness. She opined that the color changes in Claimant's hand could relate to this. She agreed with Dr. McCranie's decision to perform a triple phase bone scan, and if that test was negative, to consider aa sympathetic block to see if it provided relief. Dr. Wolf indicated that she could not offer surgical options, and that if Claimant's condition was a soft tissue and/or nerve response, it would hopefully continue to get better. (Ex. C).

16. On May 14, 2021, the triple phase bone scan was performed. Claimant followed up with Dr. McCranie on June 11, 2021. Dr. McCranie noted that the bone scan demonstrated abnormalities which could be seen in the setting of CRPS or a more proximal vascular abnormality/injury. Given the abnormalities shown on the bone scan, Dr. McCranie recommended pursuing treatment and diagnostic testing for CRPS, including a right stellate ganglion block, and further CRPS testing, depending on the result of that the stellate ganglion block. (Ex. 5).

17. On July 1, 2021, John Sacha, M.D., performed the stellate ganglion block recommended by Dr. McCranie. Claimant reported a decrease in his pain at 30 minutes post procedure. (Ex. 9). However, at his July 15, 2021 visit with Ms. Rasis, Claimant reported no benefits from the block, and experiencing new symptoms in the right hand. These included a pressure sensation when making a fist, a constant "Charlie horse" sensation in the right elbow, and pain in his right rhomboid. (Ex. 5).

18. Claimant next saw Dr. McCranie on August 13, 2021. Dr. McCranie characterized the stellate ganglion block as non-diagnostic and non-therapeutic. Although she noted no specific signs of CRPS, she recommended a complete CRPS work-up including QSART and thermogram testing. (Ex. 5).

19. On October 18, 2021, George Schakaraschwili, M.D., performed the additional CRPS testing recommended by Dr. McCranie. Dr. Schakaraschwili indicated that that the testing results thermogram testing was normal, and the autonomic testing (which the ALJ infers was a QSART test), was negative or low probability for CRPS. (Ex. H).

20. Claimant returned to Dr. McCranie on November 5, 2021. She indicated that the testing performed by Dr. Schakaraschwili "definitively" ruled out CRPS, and that Claimant did not meet the clinical criteria for CRPS. She indicated that Claimant was approaching maximum medical improvement (MMI), and recommended an impairment rating after completion of visits with Dr. Villavicencio. (Ex. 5).

21. On November 19, 2021, Dr. Villavicencio recommended a functional capacity evaluation (FCE). (Ex. 5). The FCE was performed on January 3, 2022, and demonstrated Claimant could work in the "heavy work" category, and could lift up to 80 pounds in some situations. (Ex. J).

22. On January 14, 2022, Dr. McCranie placed Claimant at MMI, and assigned Claimant a right upper extremity permanent impairment rating of 17%. She recommended limited maintenance care, to include completion of therapy. (Ex. 5). When Claimant was placed at MMI, no provider had offered a definitive diagnosis of Claimant's continued right-hand symptoms, or identified the etiology of those complaints.

23. On February 16, 2022, Respondents filed a Final Admission of Liability consistent with Dr. McCranie's opinions regarding MMI and permanent impairment. (Ex. J).

24. On May 18, 2022, Claimant returned to Ms. Rasis reporting that he had a sudden spike of pain in the radial wrist, radiating to his right elbow. Claimant denied new trauma, and reported that prior to the sudden onset of pain, his right wrist was "achy", but he was progressing. Claimant reported that his work at that time was working at a front desk job, and required the use of a computer mouse. Ms. Rasis referred Claimant for acupuncture treatment. (No records of further treatment after May 18, 2022 were admitted into evidence).

25. On January 4, 2023, Claimant underwent a Division Independent Medical Examination (IME) with Matthew Brodie, M.D. Dr. Brodie determined that Claimant was not at MMI. On January 4, 2023, Claimant underwent a Division-sponsored independent medical examination (DIME) with Matthew Brodie, M.D. Based on his examination and review of records, Dr. Brodie opined that Claimant was not at MMI. Claimant reported persistent numbness and tingling in a circumferential pattern in the and through the fifth fingers of the right hand. Claimant also reported medial right elbow pain occurring approximately one year following the injury. Based on his examination and review of records, Dr. Brodie diagnosed Claimant with a crush injury to the right hand with closed fractures of the right index and middle finger proximal phalanx; and status post closed reduction with internal fixation of the right index finger with subsequent K-wire removal. In addition, he included diagnoses of clinical findings of right cubital tunnel syndrome with potential ulnar neuropathy at the level of the right elbow; and clinical findings of neurogenic right upper extremity thoracic outlet syndrome. (Ex. 4)

26. Dr. Brodie indicated neither the thoracic outlet syndrome nor cubital tunnel syndrome diagnoses were definitively attributable to Claimant's work injury, although he did opine that there is a "plausible causal association" between the right upper extremity symptoms and Claimant's work injury. He also indicated that other non-work-related

causes for these conditions were plausible, including Claimant's current occupation. He recommended additional diagnostic testing to investigate the diagnoses, causation, and validity of the potential diagnoses, including repeat electrodiagnostic testing, imaging, and specialist evaluation. Consequently, Dr. Brodie found that Claimant could not be considered at MMI until additional clinical testing could be obtained to determine the Claimant's diagnoses, and whether those diagnoses are related to his work injury. (Ex. 4).

27. Dr. Brodie found no impairment of Claimant's right hand and fingers, and provided a provisional 10% impairment rating for thoracic outlet syndrome, while acknowledging that the impairment rating was provided for "reference only at this time because the issues of diagnosis(es), validity, causality and permanence of impairment will require additional tests and evaluations…." (Ex. 4).

28. On March 21, 2023, Claimant underwent an IME with Sean Griggs, M.D. at Respondents' request. Dr. Griggs testified at hearing and was admitted as an expert in orthopedic surgery with an emphasis on treatment of upper extremity injuries. Dr. Griggs examined Claimant, reviewed his medical records, and issued a report dated March 21, 2023. (Ex. M). He testified that on his examination, Claimant did have ulnar nerve irritation some clinical findings of thoracic outlet syndrome, but that neither diagnosis was definitive. Cubital tunnel syndrome is caused by compression of the ulnar nerve, while thoracic outlet syndrome typically involves the brachial plexus, which is anatomically located near the neck. He indicated that the symptoms associated with cubital tunnel syndrome can be similar to thoracic outlet syndrome symptoms.

29. Dr. Griggs opined that the Claimant's mechanism of injury is not consistent with thoracic outlet syndrome or cubital tunnel syndrome. He testified that cubital tunnel syndrome is typically caused by trauma to the elbow or prolonged flexion of the elbow. He testified that neurogenic thoracic outlet syndrome is typically caused by postural issues or a traction injury to the arm. He further indicated that the distribution of Claimant's neurologic symptoms in his hand are more consistent with a nerve injury to Claimant's hand, than an injury to either the ulnar nerve or the brachial plexus. He indicated that if Claimant had experienced an injury to the brachial plexus, one would expect symptoms throughout the arm, rather than limited to the hand.. He further testified that Claimant's post-surgical splinting would not be expected to cause either cubital tunnel or thoracic outlet syndrome. Dr. Griggs indicated that Claimant had an extensive work-up which showed no evidence of thoracic outlet compression, and did not have findings of thoracic outlet compression until his January 4, 2023, evaluation by Dr. Brodie. Dr. Griggs also indicated that on his examination, Claimant had irritation of the brachial plexus bilaterally, which would indicate that it was the result of a postural issue, most likely related to his new job as a receptionist. Dr. Griggs agreed with Dr. McCranie's January 14, 2022, MMI determination, and percent scheduled impairment rating to the hand below the wrist.

30. Claimant testified at hearing that prior to his December 22, 2020 work injury, he had no symptoms in his right arm or hand. He testified that after receiving the stellate ganglion block, he had symptoms down his right arm, and after the block his symptoms in the right arm and palm expanded and worsened. He testified that when he was placed

at MMI, he continued to have numbness in his palm and the ulnar aspect of his wrist. Following his injury, Claimant switched jobs, and now works at the front desk for a dental practice. He testified that his current position consists of phone and computer work, and that his employer has supplied him with ergonomic devices, that do not aggravate his right hand or arm. Claimant further testified that he has not had any additional injuries or trauma to his right hand or arm since his work-related injury.

CONCLUSIONS OF LAW

Generally

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

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

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

OVERCOMING DIME ON MMI

Respondents contend that Dr. Brodie's determination that Claimant has not reached MMI was incorrect. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office, supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office*, *supra*.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." § 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion,* W.C. No. 4-732-992 (ICAO, Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a

reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO, May 20, 2004). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI.

Respondents have failed to establish by clear and convincing evidence that Dr. Brodie's opinion that Claimant is not at MMI is incorrect. Since his initial injury, Claimant has continued to exhibit symptoms in his right hand. Although Claimant's ATPs ruled out CRPS as the cause of his symptoms, once that was done, no definitive diagnosis was provided. At his examinations with Dr. Brodie and Dr. Griggs, Claimant was found to have symptoms consistent with ulnar nerve irritation and thoracic outlet syndrome. While Dr. Griggs opined that these are not likely related to Claimant's work injury, Dr. Brodie opined that there is a plausible connection between the conditions and Claimant's industrial injury. Dr. Brodie's report points to several potential work-related causes for Claimant's symptoms, including immobilization, postural changes, and treatment associated with the work injury, as well as potentially unrelated causes. He further noted that the ulnar collateral ligament pathology noted on Claimant's MRI correlated with the site of the K-wire position during the fixation surgery. Because of this plausible connection, Dr. Brodie determined that Claimant is not considered at MMI until additional testing and evaluation is performed to define Claimant's condition and determine causation. Dr. Brodie's opinions amount to a determination that additional diagnostic procedures are necessary to define Claimant's condition, and determine if additional treatment is appropriate.

While Dr. Griggs' testimony and opinions regarding the distribution of Claimant's neurological symptoms is credible, his opinion regarding potential causation of Claimant's condition is a difference of opinion with Dr. Brodie that does not establish it is "highly probable" Dr. Brodie's opinion is incorrect.

Because Respondents' have failed to establish by clear and convincing evidence that Dr. Brodie's MMI opinion is incorrect, the issue of whether his provisional impairment rating is incorrect is not ripe for determination.

ORDER

It is therefore ordered that:

1. Respondents have failed to overcome Dr. Brodie's MMI opinion by clear and convincing evidence.

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

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

DATED: September 18, 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 5-227-960-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that total shoulder replacement surgery recommended by ATP Nathan Faulkner, M.D. is causally related to his January 19, 2023 work injury.

FINDINGS OF FACT

1. Claimant is a 77-year-old man who works for Employer as a driving instructor. On January 19, 2023, Claimant slipped and fell while brushing snow off of a work vehicle, injuring his right shoulder.

2. In August 2020 and September 2020, Claimant was seen at Kaiser Permanente and reported lifting some heavy concrete blocks, resulting in pain and reduced range of motion in his right shoulder. Claimant reported pain with internal rotation and elevation of the right arm. An MRI was performed that demonstrated some rotator cuff tendinosis, bursal inflammation, and mild to moderate arthritic changes of the GH joint. Claimant was diagnosed with right shoulder rotator cuff syndrome and referred for physical therapy. Claimant refused steroid injections, indicating that he had them in the past and they were not effective. (Ex. I). No additional records of prior medical treatment for Claimant's right shoulder were offered or admitted into evidence.

3. Following his January 19, 2023, fall Claimant was first seen at Kaiser. Claimant reported he fell onto his right shoulder and heard a "pop." X-rays of his right shoulder were interpreted as showing no acute bony abnormality, but demonstrated a nonspecific widening of the acromioclavicular (AC) distance which could be due to "erosion, prior surgery or old trauma." It was also determined that Claimant had moderate AC osteoarthritis, mild glenohumeral (GH) osteoarthritis, and degenerative cysts in the humeral head. (Ex. 5).

4. Later that day, Claimant saw Lacie Esser, PA-C at Concentra. Claimant reported wiping snow off a car when he slid and landed on his right shoulder. Claimant reported going to Kaiser earlier in the day for x-rays, and indicated he was told he may have had a torn rotator cuff. Ms. Esser noted tenderness in the right shoulder, mostly lateral and anterior with limited range of motion and pain in all planes. She diagnosed Claimant with a right shoulder sprain and contusion. Claimant was referred to orthopedist Michael Hewitt, M.D., for physical therapy, and for a right shoulder MRI. (Ex. 6)

5. The right shoulder MRI was performed on January 20, 2023, and interpreted as showing advanced GH arthritis, extensive tearing of the superior to posterior glenoid labrum, and rotator cuff tendinopathy, but no full thickness tear. (Ex. 7)

6. Claimant returned to Ms. Esser on January 23, 2023. Claimant had minimal to no motion in the shoulder with significant pain. Ms. Esser indicated the MRI showed an extensive labral tear and partial rotator cuff tear, and significant GH arthritis. Claimant was assigned work restrictions to include no use of the right upper extremity and no driving. (Ex. 6).

7. Claimant began physical therapy for his right shoulder on January 24, 2023, and attended approximately 25 visits through April 24, 2023. (Ex. F). Claimant's right shoulder range of motion improved with physical therapy, but he continued to report significant pain in the right shoulder.

8. On January 31, 2023, Respondents filed a General Admission of Liability, admitting for medical benefits and temporary total disability benefits.

9. On February 6, 2023, Claimant saw Dr. Hewitt at Concentra. Claimant reported that he had undergone rotator cuff and labral repair approximately twenty years earlier. Dr. Hewitt reviewed Claimant's MRI films and indicated that Claimant had advanced arthritis pre-existing his work injury. In discussing potential surgical options, Dr. Hewitt indicated he did not believe shoulder arthroscopy would provide significant long-term benefits, and that surgery would require a joint replacement (a procedure Dr. Hewitt does not perform). He then referred Claimant to Nathan Faulkner, M.D., at Orthopedic Centers of Colorado (OCC) for further evaluation. (Ex. 6).

10. Claimant saw Dr. Faulkner on February 24, 2023. Claimant reported falling on his right side and feeling a pop in his shoulder with immediate pain. He advised Dr. Faulkner of his prior right rotator cuff/labral repair, and indicated he was doing very well until his injury. Dr. Faulkner reviewed Claimant's MRI films and interpreted them as showing advanced GH and moderate AC degeneration with several subchondral glenoid cysts, mild bursal-sided fraying of the supraspinatus, moderate partial articular subscapularis tearing, and but the rotator cuff was otherwise intact. Dr. Faulkner noted that Claimant had tried anti-inflammatories and physical therapy without significant relief. Dr. Faulkner completed a WC 164 form listing Claimant's work-related diagnoses as right shoulder degenerative joint disease and partial rotator cuff tear. He recommended a right total shoulder arthroplasty. (Ex. 8).

11. On March 2, 2023, Dr. Faulkner's office submitted a surgical request to Insurer, requesting authorization of total shoulder arthroplasty[1]. (Ex, 8).

12. On March 8, 2023, Insurer submitted Dr. Faulkner's surgical request to Jon Erickson, M.D., for utilization review. Dr. Erickson indicated that he did not see evidence of acute injury on Claimant's MRI report, or evidence of aggravation or worsening of Claimant's preexisting conditions. He opined that the surgery, the need for surgery was

[1] The Request for Authorization sought approval of a reverse total arthroplasty. Dr. Faulkner later noted that this was a mistake, and the recommended surgery was an anatomic right total shoulder arthroplasty. (Ex. 8).

to address Claimant's pre-existing conditions, rather than his work-related injury, and recommended denial of the authorization. (Ex. 8).

13. On March 13, 2023, Claimant had an increase in his symptoms after he braced his arm against a car dashboard when a car pulled in front of his wife's vehicle. Claimant reported the incident to his physical therapist, although the therapist noted that Claimant's tolerance for therapy on that day was poor due to his pain, Claimant's tolerance for treatment returned to normal at the following visit. At Claimant's March 23, 2023, visit, the physical therapist noted decreased range of motion since the incident. (Ex. F).

14. On March 15, 2023, Dr. Faulkner authored a letter responding to Dr. Erickson's opinion. Dr. Faulkner indicated that the lack of MRI evidence of an acute injury does not rule out an exacerbation of pre-existing conditions. He indicated that in a case of advanced arthritis, it is less common to see signs of injury on MRI. He noted that Claimant had objective findings of exacerbation including significantly decreased range of motion caused by his work injury (*i.e.*, barely able to lift his arm above 90 degrees). He opined that the recommended surgery (anatomic total shoulder replacement) was the best option to restore Claimant to his pre-injury status. (Ex. 8).

15. Dr. Erickson authored a response to Dr. Faulkner's letter on March 28, 2023, in which he opined that "the simple complaint of pain and limitation of range of motion is not considered an objective abnormality as evidence of aggravation or worsening." He recommended that Claimant's MRI be reviewed by "an expert" to look for evidence of an acute injury, and if evidence was found, the requested surgery should be approved. (Ex. H).

16. On April 3, 2023, Dr. Erickson authored a third report in which he indicated that he had reviewed the Claimant's MRI films, and found no evidence of acute injury. He opined that Claimant's January 19, 2023 fall "did not result in any significant worsening or aggravation of his pre-existing condition and that the increase in his symptoms are more likely than not due to the progression of his significant arthrosis." (Ex. H). Dr. Erickson's opinion that Claimant's sudden progression of symptoms following his January 19, 2023 fall were merely the progression of his pre-existing condition is neither credible nor persuasive.

17. On April 3, 2023, Claimant reported to his physical therapist that his car door struck him in the front of his right shoulder causing increasing pain and popping, prompting Claimant to wear a sling over the weekend. The therapist noted decreased range of motion due to this incident.

18. Claimant continued to follow up with physicians at Concentra through July 6, 2023. At Claimant's last documented visit with Theodore Villavicencio, M.D., he reported that his shoulder had not improved, and that he continued to experience high levels of pain. On examination, Dr. Villavicencio noted that Claimant remained symptomatic with shoulder pain, limited range of motion in all planes and limited functional status. As of July 6, 2023, Claimant remained subject to work restrictions, including no use of the right arm, and no driving for work. (Ex. E).

19. On June 29, 2023, Claimant underwent an independent medical examination (IME) with Mark Failinger, M.D., at Respondents' request. Dr. Failinger authored a report (Ex. C), and his testimony was presented through a pre-hearing deposition. Dr. Failinger was admitted as an expert in orthopedic surgery. Dr. Failinger opined that the surgery requested by Dr. Failinger is not causally related to Claimant's work injury. He indicated that Claimant's MRI films do not demonstrate objective evidence of an acute injury or new pathology in the Claimant's shoulder. He indicated that Claimant's right shoulder was a significantly degenerated joint, and that it could become symptomatic at any time and with no injury, or mild injury. In substance, Dr. Failinger opined that Claimant's MRI did not demonstrate an objective change in the pathology of Claimant's right shoulder, thus the need for surgery was unrelated to his work-injury, and that his need for surgery was solely due to his pre-existing condition. Dr. Failinger's opinion is not persuasive.

20. At hearing, Claimant testified that since his January 19, 2023 injury, he now has significant limitations using his right arm that did not exist prior to his injury. These include difficulty opening car doors, eating, cutting food, putting, using his cane, and doing other household chores with his right arm. He testified that his wife assists him in getting dressed and bathing. He testified that he can only lift his right arm to approximately his shoulder level. He testified, credibly, that he could perform these tasks prior to his injury.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a

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

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

SPECIFIC MEDICAL BENEFITS (Shoulder Surgery)

Respondents are responsible for medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. § 8-42-101(1)(a), C.R.S. When respondents challenge a claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits, including the causal relationship. *Martin v. El Paso School Dist. No.11*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Trans. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009); Snyder v. Indus Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997). Whether a claimant meets his burden of proof is a question of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002); *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

"Further respondents are liable if employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for treatment." *Snyder, supra*. "Pain is a typical symptom from aggravation of a pre-existing condition. The claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition." *Id*. That is, the need for treatment must be proximately caused by the aggravation, and not simply as direct and natural consequence of the preexisting condition. *Witt v. James. J. Keil*, W.C. No. 4-225-334 (ICAO April 7 1998). This includes circumstances where a claimant has pre-existing arthritic conditions that are aggravated and result in the need for surgery. *See e.g., In re Claim of Johnson*, W.C. No. 4-963-269-01 (ICAO Nov. 24, 2015). "[W]hether there is a sufficient nexus or causal relationship between the claimant's employment and the injury is one of fact, which the ALJ must determine based on the totality of the circumstances." Id., citing In Re Question Submitted by the United States Court of Appeals, 759 P.2d 17 (Colo. 1988).

Claimant has established that the surgery proposed by Dr. Faulkner is causally related to Claimant's January 2023 work injury. There appears to be no dispute that Claimant's MRI does not demonstrate objective evidence of acute pathology in Claimant's shoulder. However, the Claimant's right shoulder was functional and minimally symptomatic prior to his January 19, 2023 fall. Prior to his work injury, Claimant was able to perform his job, including driving a car, and perform household tasks, and personal care. Immediately after his injury, and continuing at least through hearing, Claimant's right shoulder has greatly diminished range of motion and function. Respondent's contention

that the March 13, 2023 and April 3, 2023 incidents that caused temporary increases in Claimant's symptoms constitute intervening incidents is not persuasive. Dr. Faulkner recommended surgery based on Claimant's condition before these incidents occurred, thus, the need for surgery arose independent of these incidents, which may have further aggravated his underlying condition.

The ALJ finds credible Dr. Faulkner's opinion that the treatment most likely to return the Claimant to his pre-injury status is the recommended total shoulder arthroplasty. The ALJ does not find persuasive the opinions of Dr. Failinger and Dr. Erickson that Claimant's current symptoms and need for surgery are unrelated to his January 19, 2023 fall, or his condition is simply a progression of his pre-existing condition that coincidentally began to worse immediately after his work injury. While Claimant's pre-existing condition likely contributes to his symptoms, but for his work injury, he likely would not require the surgery recommended. The ALJ finds that, more likely than not, Claimant's industrial injury has combined with his preexisting conditions to cause the need for the recommended surgery.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of the total shoulder arthroplasty recommended by Dr. Faulkner is granted.

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

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

DATED: September 18, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-214-571-001

ISSUES

- What is Claimant's Average Weekly Wage?
- Did Respondents prove they are entitled to modify terminate or suspend TTD based on Claimant's voluntary termination?

FINDINGS OF FACT

1. Claimant worked for employer as a meat/produce team associate.

2. Claimant gave his notice of his voluntary resignation prior to his injury. The notice was given on August 5, 2022 and he intended to stop working August 11, 2022 which was the last day of the pay period.

3. Claimant sustained an admitted injury to his low back while lifting a watermelon on August 11, 2022. He experienced deep shocking pain from his back into his legs. He rated his pain as a 9 ½ out of 10. The injury occurred on the Claimant's intended last day of work.

4. The general admission of liability was filed on September 7, 2022. Respondents filed a petition to modify, terminate or suspend benefits on January 24, 2023. As grounds for the petition, Respondents stated "[Redacted, hereinafter MW] was returned to work with restrictions on 9/15/2022 per Dr. Quackenbush. Light duty was available. . . Voluntary terminated employment before a light duty position could be offered". Claimant timely objected to the petition.

5. At the time of his injury Claimant's hourly rate was $16 per hour for 32 hours per week. However, the weekly hours varied. He also received quarterly bonuses of $300 that were based on the store's performance and the employee's performance.

6. Claimant participated in the Employers' 401K program where the employer matched 6% of Claimant's wages.

7. After he reported his injury, he received treatment at Centura Health. He was initially seen at Centura Health on the date of the injury. He was taken off work. On the following day, he was seen by Mr. Quakenbush, a physician's assistant. He ordered an MRI on August 12, 2022. The MRI showed mild disc desiccation at L5-S1 as well as small central and left paracentral disc herniation resulting in impingement left S1 nerve root and mild encroachment of the right S1 nerve root. He was again taken off work with

a return visit scheduled for August 15, 2022. He did return to Centura on August 15, 2022 and was again restricted from work. He was restricted to modified work with no lifting, carrying, pushing or pulling more than 5 pounds and limited to sedentary office work. Claimant was not notified that he was released to return to modified duty.

8. The employer did not offer the Claimant modified job within his restrictions.

9. On August 26, 2022 Claimant returned to Centura and referred to Dr. Sparr and was prescribed physical therapy and massage therapy. The Claimant continued to be restricted from work, with the anticipation that he might be restricted to modified work at the next visit.

10. Mr. Quakenbush referred Claimant to Dr. Stanton who in turn referred him to Dr. Malinky.

11. On January 31, 2023, Physician's Assistant Quackenbush again restricted Claimant from all work activities. (Exhibit F, p. 351).

12. In the twelve-week period predating August 11, 2023 the claimant's "regular" earnings, overtime earnings and bonus earnings, totaled $5,393.18. This results in an average weekly rate of $449.43. I find that this figure best represents the Claimant's earnings for a fair average weekly wage. This results in a TTD rate of $299.62.

CONCLUSIONS OF LAW

A. Generally

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

respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

B. Temporary Total Disability

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

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." A claimant's responsibility for termination not only provides a basis to terminate temporary disability benefits, but also limits the initial eligibility for TTD. Section 8-42-103(1)(g); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Valle v. Precision Drilling*, W.C. No. 5-050-714-01 (July 23, 2018). The respondents must prove the 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 moral turpitude or culpability but merely 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 his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

It is well established that a claimant who voluntarily resigns his job is "responsible for termination" unless the resignation was prompted by the injury. *Anderson v. Longmont*

Toyota, 102 P.3d 323 (Colo. 2008); *Kiesnowski v. United Airlines*, W.C. No. 4-492-753 (May 11, 2004); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (April 24, 2002). I conclude that on based on Claimant's testimony, which is credible, Claimant did voluntarily resign his job on August 5, 2023, effective for August 11, 2023.

Having determined that Claimant was responsible for his termination, Respondents are entitled to prospective relief from the admission filed September 7, 2022. C.R.S. §8-43-203(2)(d), *HLJ Management Group v. Kim, 804 P.2d 250 (Colo. App. 1990).* At the hearing, counsel for Respondents conceded that Respondents were liable for TTD beginning on January 30, 2023. Similarly, Respondents again conceded in their proposed order that Respondents were liable for TTD beginning On January 31, 2023 when Claimant was again restricted from all work activities. (Proposed Order Finding of Fact 16).

C. AVERAGE WEEKLY WAGE

Section 8-40-201(19)(a), C.R.S., provides, "'Wages' shall be construed 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". Section (19)(b) goes on to provide, "[T]he term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan, and gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns and the reasonable value of board, rent, housing, and lodging received from the employer, the reasonable value of which shall be fixed and determined

from the facts by the division in each particular case, but does not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19). [Emphasis supplied]. The Employer's matching contribution to the claimant's 401K plan is not analogous to "board, housing, lodging, or any other similar advantages." See Gregory v. Crown Transportation, 776 P.2d 1163 (Colo.App.1989) (FICA tax payments are not wages under § 8–47–101(2) for purposes of calculating average weekly wage). To the extent the claimant seeks to include the value of the Employer's 401K matching contributions to his average weekly wage the request is inconsistent with the applicable statute and is denied.

Section 8-42-102(4), C.R.S., provides, "[W]here the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the injury or would have worked if the injury had not intervened, to determine the daily wage; then the weekly wage shall be determined from said daily wage in the manner set forth in paragraph (c) of this subsection (2). The entire objective of wage calculation under the Act is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Campbell v. IBM Corporation, 867 P.2d 77 (Colo. App. 1994). I conclude that while the bonuses were discretionary they were paid in the past and constituted part of the wages paid to Claimant. I conclude that a fair calculation of the wages would be to include the bonuses, as an average, to be added to his average weekly wage.

ORDER

It is therefore ordered that:

1. Respondents are entitled to withdraw their admission for TTD benefits prospectively beginning the date of their petition to modify terminate or suspend compensation, namely January 24, 2023 until January 30, 2023, as requested by Respondents.

2. The Claimant's average weekly wage is $449.43. This results in a TTD rate of $299.62.

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

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

DATED: September 19, 2023

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that the recommended surgical treatment is reasonable, necessary and related to the May 4, 2022 industrial injury.

FINDINGS OF FACT

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

1. Claimant worked for Employer as an Overnight Stocker. On May 4, 2022, Claimant suffered an admitted injury in the course and scope of her employment. She was on a ladder working when she slipped and slid down the last three steps of the ladder. Claimant testified she landed on her left ankle, then her buttocks, and eventually fell back on her arm. (Tr. 10:8-17).

2. Claimant testified on cross-examination that she fell approximately one foot. (Tr. 16:7-12). On redirect, Claimant testified she meant to say she fell closer to three feet. (Tr. 22:22-24). Claimant consistently told her medical providers that she fell approximately one foot. (Ex. E). The ALJ finds that Claimant fell approximately one foot.

3. Following the accident on May 4, 2022, Claimant sought treatment at the emergency department at Swedish Hospital (Swedish). Claimant told the providers at Swedish she injured her left ankle after falling about one foot off a ladder while at work. Claimant reported falling on her left foot and twisting her left ankle. The pain radiated from her left ankle to her leg. Ariel Chez, M.D. examined Claimant and documented tenderness over her left midfoot and lateral malleolus of the ankle, as well as the distal lateral tibia/fibula. Claimant had full passive range of motion of the left ankle mortise but with pain. Claimant had x-rays taken of her left foot, left ankle, and left tibia/fibula. The x-rays were negative for acute fractures or dislocations. Claimant was discharged home with an Ace wrap for comfort. (Ex. E).

4. The following day, May 5, 2022, Claimant was evaluated at CareNow Urgent Care (CareNow). Claimant told Jennifer Tetrault, P.A., she fell off a one-foot ladder at work, landed on her left foot, and twisted her left ankle. She told Ms. Tetrault that she injured her left ankle the previous year, and was diagnosed with an avulsion fracture. Ms. Tetrault examined Claimant and found she had no swelling or mass of her ankle, foot, or toes. There was no ecchymosis or rash of the ankle, foot, or toes. Claimant was diagnosed with a sprain of an unspecified ligament of her left ankle. She was given an ankle brace, and released to return to work with a restriction of seated duties only. If she did not improve, Ms. Tetrault would recommend physical therapy. (Ex. F).

5. Claimant returned to CareNow on May 11, 2022 for a follow-up appointment. She reported slight improvement in her symptoms and denied any swelling or ecchymosis. Claimant complained of tingling in her great left toe. Claimant's work restrictions remained. On May 18, 2022, Claimant was referred for physical therapy, twice a week for four weeks. (Ex. F).

6. At her follow-up appointment at CareNow on June 21, 2022, Claimant reported feeling better, and having less pain. She also told the provider that she still had numbness at the 1st MTP joint. Claimant felt like she could do more at work. Her previous work restrictions were lifted, but Claimant could still have breaks every hour as needed. Ms. Tetrault put in a referral to an orthopedic doctor to "evaluate continued numbness in the great toe." (Ex. F).

7. Claimant was seen at CareNow on September 9, 2022 for a follow-up appointment. She reported improvement in her symptoms, but also reported tripping at home because her ankle gave out. On physical exam, Claimant had a normal gait and posture. There was no swelling or bruising of the ankle, foot or toes. Claimant had normal active and passive range of motion of her ankle and foot. Ms. Tetrault noted in the record that she wanted Claimant to finish physical therapy to fully strengthen her ankle and foot, but anticipated closing Claimant's case at the next visit. (Ex. F).

8. Claimant first saw Stuart Myers, M.D., an orthopedic surgeon on September 27, 2022. Dr. Myers noted in the record that Claimant presented "for an evaluation of the ankle." Dr. Myers made no reference to the numbness in Claimant's toe. He noted Claimant was diagnosed with a sprain as a result of her May 4, 2022 injury. He further noted a prior October 25, 2021, left ankle injury treated by immobilization and physical therapy. Dr. Myers's impression was "multiple left ankle injuries culminating in workplace injury May 4, 2022, with ongoing symptoms." (Ex. H).

9. Dr. Myers referred Claimant for a left ankle MRI. The October 5, 2022, MRI was read as showing a previous high-grade/complete avulsion of the anterior talofibular and possibly calcaneofibular ligament from the distal fibula with a nondisplaced osseous fragment. A small chronic focus of subchondral cyst formation in the central talar dome with no discrete chondral defect, loose body, or joint effusion was also identified. Based on the MRI findings, Dr. Myers requested prior authorization to perform an ankle arthroscopy and Brostrom procedure with excision of the distal fibular ossicle. (Ex. H).

10. On December 16, 2022, Timothy O'Brien, M.D., conducted an Independent Medical Evaluation (IME) of Claimant. (Ex. K). Based on the opinions expressed in Dr. O'Brien's IME report, Dr. Myers' surgery request was denied. (Ex. 7).

11. Dr. O'Brien testified via deposition in support of his IME. Dr. O'Brien's opinion was influenced by Claimant's prior history of left ankle injuries, the associated pain, and Claimant's medical history. He noted that on September 18, 2018, Claimant went to the Federico F. Pena Family Health Center because of chronic left ankle pain. Claimant had fallen out of a truck a month prior and had sprained her ankle. Claimant, now four weeks later, still had constant pain in her left ankle, at a level of 7/10, with significant swelling,

lateral malleolus tenderness, and she had difficulty walking. Claimant was given an air cast and home exercises. (Ex. D).

12. Dr. O'Brien also noted that on October 26, 2021, Claimant sought treatment at the emergency room at Swedish after falling on the stairs and landing hard on her left ankle. X-rays of Claimant's left ankle were read as showing a possible osteochondral defect in the talar dome. The providers at Swedish imposed work restrictions, prescribed Norco for pain control, NSAID, RICE, and orthopedic follow-up if Claimant failed to improve as expected. (Ex. E).

13. Claimant did not improve, so she was evaluated by orthopedic surgeon, Joseph Assini, M.D., on November 2, 2021. Claimant told Dr. Assini she had a rollover injury and sustained an avulsion fracture to the left fibula. On physical exam, Claimant walked in a walking boot with a notable antalgic gait. She had significant pain over the distal fibula, especially over the tibial-fibular area anteriorly and over the anterior aspect of the fibula. There was an effusion anterolaterally. Her left ankle range of motion was limited by pain. Claimant was prescribed a knee scooter, and she was to continue using the walking boot. She was instructed to avoid weight bearing on the left as much as possible.

14. Claimant returned to see Dr. Assini on November 30, 2021, with ongoing complaints of left ankle pain. The x-rays confirmed a small avulsion fracture off of the distal fibula. She was instructed to continue in the boot for two weeks, following which she could transition to an ASO brace. Dr. Assini referred Claimant to physical therapy. (Ex. G).

15. Claimant started physical therapy on January 3, 2022. She reported pain in the left ankle when she moved in certain ways, but the pain was not constant. At times, she rated the pain as high as a 10/10, but this level of pain was short lived. Claimant noted difficulty walking and stiffness of the left ankle. On assessment, the physical therapist documented notable limitations in Claimant's left ankle range of motion. The recommended physical therapy was intended to decrease pain, improve balance, increase range of motion, increase strength, and return Claimant to work. Claimant continued physical therapy through April 7, 2022, although her participation was not consistent. The physical therapist noted that Claimant continued to complain of anterior ankle pain with soleus stretches and mobilizations. The physical therapist, however, was unable to assess Claimant's current understanding of her prognosis and home exercise program due to Claimant not completing her plan of care. On April 7, 2022, Claimant was discharged from physical therapy for failure to complete her plan of care and noncompliance. (Ex. I).

16. Claimant testified that prior to the May 4, 2022 work-related injury, she only experienced pain in her left ankle every once in a while when walking. She described the pain as feeling like a pinch or twitched nerve. Claimant testified that since the May 4, 2022 injury whenever she stands up, it feels like she is standing on pins and needles. (Tr. 13:5-25).

17. Claimant's testimony was not consistent with the medical records. From January through April of 2022, Claimant was reporting left ankle pain. (Ex. I). Based on the totality of the evidence, the ALJ finds that Claimant experienced left ankle pain prior to the admitted May 4, 2022 work injury.

18. Dr. O'Brien credibly testified that, based on his review of the physical therapy notes, Claimant's left ankle joint had not healed by April 7, 2022, less than one month prior to her work injury. Claimant's ankle remained inflamed, dysfunctional and unstable. (Depo. Tr. 22:14-17).

19. Claimant's October 5, 2022 imaging showed a previous high-grade/complete avulsion of the anterior talofibular and possibly calcaneofigular ligament from the distal fibula with a nondisplaced osseous fragment. In his October 31, 2022, treatment note, Dr. Myers specifically relates the need for the requested surgery to "the findings on the MRI". (Ex. H).

20. Dr. O'Brien credibly testified that the October 5, 2022, MRI findings, including the high-grade/complete avulsion of the anterior talofibular and calcaneofibular ligament from the distal fibula with a nondisplaced osseous fragment were present on the October 26, 2021, imaging. The radiologist interpreting the October 5, 2022, MRI read it as showing a ***previous*** high-grade/complete avulsion of the anterior talofibular and possible calcaneofibular ligament from the distal fibula with a nondisplaced osseous fragment. (emphasis added). Dr. O'Brien credibly testified the findings on the October 5, 2022, MRI are chronic and unrelated to the May 4, 2022, work incident. He further credibly testified the findings on the October 5, 2022, MRI were not aggravated or accelerated by the May 4, 2022, work incident. (Depo. Tr. 34:24-35: 25 and 41:17-42:8).

21. Dr. O'Brien credibly testified that while the surgery requested by Dr. Myers is reasonable, it is unrelated to the May 4, 2022, work incident. Dr. O'Brien credibly testified the surgery requested by Dr. Myers is to repair ligaments that have been incompetent for years and to address a bone fragment that was pulled off in 2018 or 2021. (Depo. Tr. 40:12-24). Dr. O'Brien credibly testified that the May 4, 2022, incident did not accelerate Claimant's need for surgery. (Depo. Tr. 47:3-9).

22. Dr. Myers disagreed with Dr. O'Brien and asserted that the May 4, 2022, accident permanently exacerbated Claimant's pre-existing condition. Dr. Myers argues, "Dr. O'Brien concludes that any symptoms currently being experienced are related to her prior injury and not that from May 04, 2022. In other words Dr. O'Brien indicates it is plausible that [Claimant] had symptoms following her first injury of November 2021 up until March 2022 which ceased to be present after her injury in May. The symptoms would then have had to again arise from a period of being asymptomatic later that year when she was referred to me, specifically for this issue. It is not plausible that the patient will be symptomatic for five months after an injury, then following a re-injury ceases to have symptoms to the affected body part for five or six months and then would out of nowhere resume having symptoms prompting orthopedic referral. In fact, it is much more likely that after her injury in November 2021, she had ongoing symptoms, but was functional and

making progress with physical therapy then following re-injury had a setback that has led to the current predicament." (Ex. 4).

23. There is no objective evidence in the record that Claimant ceased having symptoms with her left ankle after March 2022. Claimant was dismissed from physical therapy because of her non-compliance, not because she was functional and making progress. Further, Claimant was referred to Dr. Myers for numbness in her great toe, not for her ankle.

24. Dr. Myers' opinion is credible, and he certainly wants to help Claimant. The ALJ, however, does not find his opinion regarding the recommended surgery being related to the May 5, 2022 injury to be persuasive.

25. Dr. O'Brien credibly testified that Claimant's May 4, 2022 injury was not significant, as indicated by the lack of swelling, bruising, or redness. If a tissue tears there is almost always bruising and swelling. (Depo. Tr. 10:1-13). Dr. O'Brien further testified that Claimant has an unstable ankle, and was a candidate for the recommended surgery prior to the May 4, 2022 injury. The May 4, 2022 injury did not accelerate the need for the surgery. (Depo. Tr. 45:18-47:9). The ALJ finds Dr. O'Brien's testimony credible and persuasive.

26. The ALJ finds that Claimant has a preexisting chronic left ankle, and the May 4, 2022 injury did not exacerbate or aggravate her pre-existing condition.

27. Based on the totality of the evidence, the ALJ finds that the surgery recommended by Dr. Myers is not causally related to Claimant's May 4, 2022 injury.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Medical Benefits

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1), C.R.S.; *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Snyder*, 942 P.2d at 1339. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and is reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colo., Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). It is the ALJ's prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met her burden of proof. *Id.* (citing *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999)).

As found, Claimant's work-related injury on May 4, 2022 was not a significant injury. There is no objective evidence that Claimant's left ankle was ever swollen, red or bruised following this injury. Dr. O'Brien credibly testified that when a tissue tears there is almost always bruising and swelling. (Finding of fact ¶ 25). Claimant has chronic left ankle pain related to previous injuries, and the May 4, 2022 injury did not exacerbate or aggravate her pre-existing condition. (Finding of fact ¶ 26) As found, Claimant was a candidate for surgery before the May 4, 2022 injury. (Finding of fact ¶ 25).

Dr. O'Brien and Dr. Myers agree that the recommended surgery is reasonable and necessary. As found, however, Dr. O'Brien's opinion regarding causality is more persuasive. (Finding of fact ¶ 24). Based on the totality of the evidence, Claimant has failed to prove, by a preponderance of the evidence, that the surgery requested by Dr.

Myers is related to the admitted May 4, 2022, work injury. Here, the evidence presented persuades the ALJ that the testimony and opinions of Dr. O'Brien are the most credible and persuasive.

ORDER

It is therefore ordered that:

1. Claimant's left ankle condition is not causally related to the May 4, 2022 industrial accident. Claimant's request for Respondents to authorize and pay for the recommended surgical treatment to her left ankle, is dismissed and denied.

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

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

DATED: September 19, 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. 5-211-460-001

ISSUES

I. Whether Claimant suffered a compensable injury.

II. Whether Claimant is entitled to temporary total disability benefits from May 26, 2022 through July 13, 2022.

III. Whether Claimant is entitled to medical benefits.

STIPULATIONS

1. Claimant's average weekly wage is $1,301.90.

2. If the claim is compensable, Claimant will receive temporary total disability benefits from May 26, 2022 through July 13, 2022.

3. If the claim is compensable, the surgery Claimant underwent is reasonable, necessary, and related.

FINDINGS OF FACT

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

1. Claimant, who was 57 on the date of the alleged accident, has worked for Employer as a "lumper" unloading trucks for about 15 years.

2. Claimant's job requires him to unload and move boxes that weigh up to 65 pounds.

3. On May 24, 2022, or May 25, 2022, Claimant was lifting and moving boxes at work and developed pain in his abdomen. As the day went on, his abdominal pain got worse. At some point, his abdominal pain got so bad, he told his supervisor, [Redacted, hereinafter JM], that he could no longer work that day due to his abdominal pain and left work early. Claimant did not, however, tell his supervisor that lifting and moving boxes at work caused his pain.

4. On May 26, 2022, Claimant still had bad abdominal pain, Thus, Claimant went to the emergency room at Platte Valley Medical Center. The medical records from this visit do not state Claimant injured himself while lifting and moving boxes at work. The records also do not indicate that Claimant alleged this was a work-related injury. The records do indicate that Claimant was "uninsured" and was a "self-pay." (*Resp. Ex., Page 38 and 50*.) As a result, it does not appear Claimant told them that he injured himself while lifting or moving boxes at work and that this was a work-related injury.

5. The medical report from his May 26, 2022, does note that Claimant's pain developed the day before. The report also states a horse kicked Claimant when he was seven years old and living in Mexico and that he suffered a bowel injury that required surgery.

6. At the emergency room, the doctor performed a physical examination and noted the surgical scar from Claimant's prior bowel surgery as a child as well as a current palpable hernia. Due to his findings, the doctor ordered a CT scan. Claimant underwent the CT scan and the scan showed a ventral hernia with small bowel obstruction – an incarcerated hernia. Based on having a bowel obstruction - an incarcerated hernia - Claimant required surgery that day.

7. After learning that he required surgery, Claimant called his supervisor, JM[Redacted], and told him that he had to have surgery that day and would be unable to return to work. Claimant, however, did not specifically tell his supervisor that he injured himself at work and needed surgery due to a work injury. After speaking with his supervisor, Claimant underwent surgery to repair his hernia and obstructed bowel.

8. On July 2, 2022, Claimant, who only speaks Spanish, completed an Employee Accident/Incident Statement with help from someone else. First, the statement indicates at the top of the Statement that the incident occurred on May 26, 2022, and that he reported it on May 26, 2022. The Statement later indicates the incident happened on the 25th. The Statement provides:

> I was feeling pain since 5/25 and let my supervisor know that I was having pain. Next day I went to emergency [room] in the afternoon the next day and doctors informed me I needed emergency surgery. I called JM[Redacted] to let him know I was going to have the surgery and that I was told the hernia was caused from heavy lifting at work.

9. Respondents retained Kathleen D'Angelo, M.D., to perform an Independent Medical Examination to determine the cause of Claimant's hernia and bowel obstruction. Dr. D'Angelo attempted to take a detailed history from Claimant to determine how and when he suffered his hernia and whether it was work related. In taking his history, she asked Claimant whether he was claiming that his pain developed due to a discrete event, or whether it came on gradually due to lifting and moving several boxes over time. Claimant was equivocal in answering her questions. At one point, Claimant could not tell her whether lifting or moving a single box caused his pain, or whether lifting and moving many boxes over time caused his pain. At another point, Claimant said he felt pain develop after he pushed some boxes. In the end, Claimant basically told her that he was lifting and moving boxes at work one day and developed stomach pain that prevented him from working the rest of his shift.

10. As part of her IME, Dr. D'Angelo went through several inconsistencies in Claimant's version of events when compared to statements or information contained in the medical records. For example, she pointed out that Claimant said he injured himself on May 24, 2022, but the medical records from May 26th, state Claimant developed pain the day before, May 25th. She also pointed out that none of the medical records from the emergency room state Claimant said he hurt himself at work.

11. After going through some of the factual inconsistencies in the record, Dr. D'Angelo addressed the medical causation issue. She stated that Claimant sustained an incisional hernia. She then stated that the primary etiology of an incisional hernia is weakness at a prior incisional site. She then provided additional risk factors for developing incisional hernias. These risk factors include obesity, smoking history, and chronically increased intraabdominal pressure associated with constipation, sneezing, and chronic coughing. Lastly, she also stated that heavy lifting could also cause incisional hernias because it increases the intraabdominal pressure. That said, in the end, she concluded that based on the inconsistencies in the record, combined with the other factors that can cause an incisional hernia, Claimant's incisional hernia was not work related.

12. Dr. D'Angelo, did not, however, adequately address how Claimant's daily job, of lifting and moving heavy boxes all day, which she agreed increases intraabdominal pressure, is not the most likely cause of Claimant's incisional hernia based on the temporal relationship between his work and the development of his symptoms. Instead, Dr. D'Angelo spent most of her report determining the credibility of Claimant based on the inconsistencies in the medical record and Claimant's lack of clarity during her IME. In essence, she provided more of a credibility opinion than a medical opinion. In the end, the ALJ credits a portion of her report. The ALJ credits that portion of her report that indicates a prior abdominal surgery can result in weakness at the prior incisional site and make someone more susceptible to an incisional hernia. The ALJ also credits that portion of her report that indicates the potential causes of an incisional hernia, which Claimant developed, includes lifting since it increases the intraabdominal pressure. The ALJ does not, however, credit or find persuasive her ultimate opinion that Claimant's incisional hernia was not caused by lifting at work.

13. Claimant also testified at the hearing. Claimant is not found to be a good historian regarding when and what he was doing when he developed abdominal pain. That said, the ALJ does find Claimant credible regarding his job duties and that he developed abdominal pain while moving boxes at work and told his supervisor the day of the accident that he developed abdominal pain and could no longer work.

Ultimate Findings of Fact

14. Claimant underwent abdominal surgery in Mexico when he was about 7 years old. The prior surgery resulted in an incision that made Claimant more susceptible to an incisional hernia.

15. Claimant's job duties required him to move heavy boxes. Moving and pushing boxes on May 24th or May 25th, 2022, caused an increase in Claimant's intraabdominal pressure and caused Claimant's incisional hernia that resulted in abdominal pain and an obstructed bowel.

16. Although Claimant's prior abdominal surgery combined with his obesity, and history of smoking, predisposed Claimant to suffer an incisional hernia, the primary and proximate cause of Claimant's incisional hernia was his lifting and moving boxes at work on May 24th or May 25th of 2022.

17. The Claimant's incisional hernia did not result from the natural progression of a preexisting condition. The Claimant's incisional hernia and need for medical treatment was proximately caused by him moving boxes at work on May 24th or May 25, 2022.

18. The is no credible or reliable evidence to suggest that Claimant was equally exposed to the same intrabdominal pressure that caused his hernia while he was not working. It was the increase in intraabdominal pressure caused by lifting and moving boxes at work on May 24th, or May 25th, 2022, that caused his hernia.

19. Due to the incisional hernia caused by his job duties, which caused an obstructed bowel, Claimant needed immediate surgery, which he underwent on May 26, 2022, to cure and relieve him from the effects of his work injury. f

20. The surgery was reasonably necessary to treat Claimant from the effects of his work injury.

21. Due to his injury and subsequent surgery, Claimant was unable to perform his regular job duties and work from May 26, 2022, through July 13, 2022.

22. Claimant's average weekly wage is $1,301.90.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and

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

I. Whether Claimant suffered a compensable injury.

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Off.,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Moreover, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Med. Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005).

While an accidental injury must be attributable to a specific date, time, and place, it is not required that the exact date and time be identified. Rather, the ALJ may determine that the claimant's testimony of a specific incident attributed to a reasonably definite time is sufficient. See *Gates v. Central City Opera House Assoc*., 100, 108 P.2d 880, 883 (1940)("A time reasonably definite is all that is required."); see also *London v. Tricon Kent*, W.C. No. 3-993-471 (April 2, 1992)(it is not required that exact date and time be identified; rather, ALJ may determine that claimant's testimony of a specific incident attributed to a reasonably definite time is sufficient); see also *Puderbaugh v. Kabance Janitorial Serv.*, W.C. No. 3-895-248 (Jan. 8, 1990)(inconsistencies in the evidence concerning exact date on which injury occurred do not render claimant's testimony concerning occurrence of the injury incredible as a matter of law).

The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Off.,* 12 P.3d 844 (Colo. App. 2000).

The Court finds and concludes that while Claimant is inconsistent as to whether he injured himself on May 24th or May 25th, 2022, the Claimant's overall testimony and statements to medical providers is found to be consistent and credible. In essence, Claimant was lifting and moving boxes at work and developed severe abdominal pain on May 24th or 25th, 2002. On the same day he told his supervisor that he had stomach pain and could not continue working, went to the emergency room, was diagnosed with an incisional hernia, and had emergency surgery.

The Court has considered the opinions of Dr. D'Angelo. While Dr. D'Angelo was retained to provide a medical opinion about causation, she spent a disproportionate amount of time pointing out information that was not contained in the medical records and inconsistencies in Claimant's description of when he developed pain, instead of the consistency of the Claimant's development of pain while moving boxes at work, which she concluded can be a causative factor for the development of an incisional hernia. In other words, she spent more time assessing the Claimant's credibility than assessing whether Claimant's job duties caused his incisional hernia. As a result, the Court does not find her ultimate opinion, that the incisional hernia is not work related, to be persuasive. The Court does, however, credit and find persuasive that portion of her report that concludes that lifting does cause an increase in intrabdominal pressure which can result in an incisional hernia.

The Court is mindful of the logical fallacy of mistaking temporal proximity for a causal relationship and that correlation is not causation. *See Shaffstall v. Champion Technologies*, W.C. No. 4-820-016 (March 2, 2011). On the other hand, the Court is also mindful of the fact that such logic may also yield inaccurate results, *i.e*., that sequence is not relevant to causation. *See Wilson v. City of Lafayette*, No. 07-cv-01844-PAB-KLM, 2010 U.S. Dist. LEXIS 24539, at *23 (D. Colo. Feb. 25, 2010).

In this case, the Court finds and concludes that the sequence of events is relevant to causation here. As a result, the Court finds and concludes that the temporal relationship between Claimant lifting and moving boxes at work and the development of his abdominal pain, combined with the diagnosis of a hernia, establishes a causal connection between his work and his hernia.

Claimant did have a prior bowel injury, for which he underwent surgery when he was about 7 years old, that predisposed him to an incisional hernia. But, on May 24 or 25th of 2022, Claimant was lifting and moving boxes at work. The work activities increased Claimant's intrabdominal pressure and caused Claimant to develop an incisional hernia, which required surgery and prevented Claimant from performing his job duties.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that he suffered a compensable injury in the form of an incisional hernia, which caused the need for his surgery and prevented him from performing his regular job duties.

II. Whether Claimant is entitled to temporary total disability benefits from May 26, 2022 through July 13, 2022.

Pursuant to the parties' stipulation, Claimant is entitled to temporary total disability benefits from May 26, 2022, through July 13, 2022.

III. Whether Claimant is entitled to medical benefits.

Pursuant to the parties' stipulation, Claimant is entitled to medical benefits, including hernia surgery.

ORDER

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

1. Claimant suffered a compensable injury in the form of an incisional hernia.
2. Respondents' shall pay for reasonable and necessary medical treatment provided to Claimant – which includes the hernia surgery.
3. Respondents shall pay Claimant temporary total disability benefits from May 26, 2022, through July 13, 2022, based on an AWW of $1,301.90.
4. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: September 20, 2023.

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-148-399-004

ISSUES

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

IF THE CLAIM IS FOUND COMPENSABLE, THEN:

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

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

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

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

STIPULATIONS OF THE PARTIES

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

was most pronounced over the thoracic spine with a positive straight leg test. He prescribed oxycodone and cyclobenzaprine, an antidepressant. He ordered a thoracic x-ray and continued to recommend further diagnostic testing, which Claimant declined due to the cost.

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

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

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

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

16. Claimant was seen on April 14, 2022 by Dr. Alejandro Stella at Avista Adventist Hospital for low back and right lower extremity pain. He was diagnosed with

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

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

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

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

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

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

[1] Deep vein thrombosis.

and were placed on steamers by the wait staff. Claimant would wash them when they were empty. The pots full of chili or beans are taken out to the platers to put the food and then brought back with some residue and food at the bottom of the pots.

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

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

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

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

26. While the clocked-in time shows seven or less hours worked per day, this does not count the time that Claimant was at the job site, including his breaks, which may be what Claimant was referencing and that is consistent with his testimony that he was at work seven to eight hours a day. The argument that co-workers were complaining and

that he was not finishing on time is inconsistent with the time clock which has Claimant clocking out between 9:00 p.m. and 9:30 p.m. at the latest each night.

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

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

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

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

CONCLUSIONS OF LAW

A. Generally

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

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

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

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

B. Compensability

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

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

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

had food stuck and water was placed in the pot in order to assist with cleaning the pot later. And while Claimant's assessment of weight may be imperfect, it does not change the fact that Claimant lifted items that he considered heavy, and at one of those events, injured his thoracolumbar spine. This is supported by the records from Clinica Family Health and Dr. Reichhardt as well as Claimant's testimony, which are found credible. This ALJ does not consider Claimant's being a poor historian, which was documented in various records, as being untruthful but a result of multiple factors, including use of interpreters instead of direct communication with medical providers[2], his clear lack of education demonstrated by Claimant's word usage and patterns of speech at hearing, his demeanor and difficulty understanding simple questions, in addition to his age, memory, and documented depression. Claimant has shown that he was injured in the course and scope of his employment with Employer on August 27, 2020.

C. Medical benefits

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

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

Claimant has shown he is entitled to medical benefits that are reasonably necessary and related. Following Claimant's lifting incident on August 27, 2022, Claimant immediately contacted his primary care provider at Clinica Family Health. Claimant has

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[2] While this ALJ is fluent in Spanish and heard both Claimant's direct testimony and the interpreters' interpretation, this ALJ only relied on the Claimant's testimony as documented in the transcription of the hearing to write these Findings of Fact, Conclusions of Law and Order.

proven by a preponderance of the evidence that Claimant's medical care through Clinica and Avista Adventist was authorized, reasonably necessary medical treatment causally related to the August 27, 2020 accident.

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

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The parties stipulated to an average weekly wage of $103.85 which provides a temporary total disability rate of $69.23. This stipulation is accepted.

E. Temporary Total Disability Benefits and Interest

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

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

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

[Redacted, hereinafter IRC]

F. Termination for Cause

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

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

ORDER

IT IS THEREFORE ORDERED:

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

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

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

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

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

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

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

DATED this 21st day of September, 2023.

Digital Signature

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

ISSUES

I. Whether Respondents established, by a preponderance of the evidence, that Claimant's need for a total knee arthroplasty (TKA) was causally related to an intervening July 11, 2022 non-industrial injury rather than his admitted September 18, 2021 work injury.

II. Whether Respondents produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinions of Dr. Miguel Castrejon regarding causation and maximum medical improvement (MMI).

III. Whether Respondents produced clear and convincing evidence, to overcome Dr. Castrejon's impairment rating opinion.

FINDINGS OF FACT

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

Claimant's September 18, 2021 Injury

1. Claimant is a former heavy equipment/truck mechanic for Employer. On September 18, 2021, Claimant injured his left knee while exiting the cab of a large work truck. Claimant testified that he was in a hurry to get off the truck. Consequently, he descended the stairs from the cab facing forward. When he reached the last stair, Claimant testified that he strode forward off the stairway rather than using the truck's hand rail to turn around and lower himself to ground by stepping off the riser backward. As Claimant walked off the stairway, he dropped approximately 1 ½ feet, landing hard on his left leg. (See Clmt's. Ex. 1, p. 2). Claimant testified that he twisted his left knee slightly and experienced immediate pain upon making contact with the ground.

2. Claimant was able to complete his work shift and return home for the evening. He reported the injury to his supervisor the following morning.

3. Claimant was subsequently sent to Dr. Frank Polanco for evaluation and treatment. Dr. Polanco saw Claimant for an initial evaluation on September 21, 2021. (Resp. Ex. A, p. 1). Dr. Polanco diagnosed Claimant with a left knee sprain and referred him to physical therapy (PT). *Id*. Maximum medical improvement (MMI) was unknown as of this appointment because Claimant's injury was "acute". *Id.* Dr. Polanco provided Claimant with a prescription for Toradol and Naprosyn and imposed physical restrictions of no lifting or carrying greater than 15 pounds. *Id*. He also precluded Claimant from kneeling, crawling squatting of climbing. *Id*.

4. Claimant failed to respond to conservative care. Thus, on October 13, 2021, Dr. Polanco imposed additional restrictions to include limiting Claimant's walking and standing to 15-20 minute intervals. (Resp. Ex. B, p 2). He also referred Claimant for an MRI of the left knee. *Id*.

5. An MRI of the left knee was obtained on October 18, 2021. (Resp. Ex. C, p. 3). Indications for the MRI were documented as "[l]eft knee pan (sic) and swelling after [stepping] off a work truck and the knee gave way on September 28, 2021". *Id*. Based upon the evidence presented, the ALJ finds the reference to the injury occurring on September 28, 2021, a probable typographical error. Indeed, the ALJ is convinced that the injury occurred on September 18, 2021. Regardless, the MRI revealed a "large acute appearing bony contusion involving the entire medial femoral condyle", a "small osteochondral defect along the central articular surface" and "significant loss of the medial femoral condyle articular cartilage with full-thickness cartilaginous defects". (Resp. Ex. C, p. 3). Also noted was a "bony contusion involving the medial tibial plateau", "significant cartilage loss . . . along the medial tibial plateau articular surface" and minimal marginal osteophyte formation". *Id*. Finally, the MRI demonstrated "thinning and irregularity of the articular cartilage within the lateral compartment without full-thickness cartilaginous defect" along with "moderate irregularity and increased signal intensity of the cartilage within the patellofemoral joint". *Id.*

6. Claimant's MRI findings supported the following impressions according to Dr. Michael McCollum:

- Large acute appearing bony contusion involving the entire medial femoral condyle. Given history, this most likely is secondary to a traumatic impaction injury. There is a small osteochondral defect along the articular surface of the medial femoral condyle. Milder bony contusion is noted involving the medial tibial plateau.

- Complex tear of the body of the medial meniscus. This may be acute or chronic in nature.

- Grade 1 versus 2 injury of the MCL (medial collateral ligament).

- Large amount of soft tissue edema, consistent with a recent injury. There is a large knee joint effusion.

- Degenerative changes as described above.

7. Claimant returned to Dr. Polanco on October 20, 2021 following his MRI. (Resp. Ex. D). During this encounter, Dr. Polanco noted that he discussed with Claimant the results of the October 18, 2021 MRI. *Id*. at p. 7. According to Dr. Polanco the "MRI findings [were] not consistent with [Claimant's] report of injury and [gave] [him]

cause to believe something more happened to [Claimant's] knee other than stepping out of his truck". *Id*. Indeed, Dr. Polanco expressed his skepticism that Claimant was injured as he described as evidenced by the following passage contained in his October 20, 2021 report: "[Claimant's] imaging does not match with [his] report of injury and I believe [Claimant] may have had a previous injury aside from his reported work injury". *Id.* Nonetheless, Dr. Polanco referred Claimant to Dr. Michael Simpson for an orthopedic evaluation.

8. Dr. Simpson evaluated Claimant on November 8, 2021. (Resp. Ex. E). Dr. Simpson obtained a history of Claimant's injury noting that Claimant was injured "while stepping off a truck" during which time there was a "pop". *Id*. at p. 13. Dr. Simpson reviewed Claimant's October 18, 2021, MRI opining that it revealed "quite a bit of bone marrow edema in [the] medial femoral condyle", which in combination with Claimant's reported tenderness over this area, was "consistent" with a subchondral insufficiency type fracture that was posttraumatic in nature and which occurred in the presence of pre-existing osteoarthritis. (Resp. Ex. E, p. 11). While Claimant did have pre-existing arthritis[1], Dr. Simpson opined that the MRI also demonstrated a complex tear of the body of the medial meniscus which would be amenable to a meniscal debridement type surgery. *Id*. at p. 12. Because Claimant had been able to work for Employer for 9 years without restriction until the September 18, 2021 injury, Dr. Simpson concluded that "a lot" of Claimant symptoms were "posttraumatic in nature". *Id.*

9. Claimant was taken to the operating room on December 9, 2021, where Dr. Simpson performed an arthroscopic partial medial meniscectomy and subchondroplasty of the medial femoral condyle at the distal femur. (Clmt's Ex. 1, p.4).

10. Post-surgically, Claimant struggled with persistent pain. (Resp. Ex. H, p. 24). A platelet rich plasma (PRP) injection was not helpful in relieving Claimant's pain. *Id.* On July 6, 2022, Dr. Simpson noted that a review of Claimant's December 9, 2021 surgical photos demonstrated an extensive area of grade 4 degenerative change over the medial femoral condyle, some early grade 4 changes over the medial tibial plateau and a "pretty macerated degenerative meniscal tear". *Id.* While Claimant's bone marrow edema had been treated, Dr. Simpson noted that his pre-existing left knee arthritis remained symptomatic. *Id.* Dr. Simpson felt that Claimant needed to consider a TKA and reiterated his belief that any replacement procedure would fall outside the scope of Claimant's workers' compensation claim. *Id.* Dr. Simpson then referred Claimant to Dr. Douglas Adams for consultation regarding his candidacy for a TKA. Dr. Adams would go on to recommend that Claimant proceed with a total knee replacement procedure.

[1] Regarding this arthritis, Dr. Simpson noted that Claimant may, at some point, require a knee replacement arthroplasty for complete relief but that if that replacement procedure was required, it would need to be done outside the workers' compensation system under Claimant's primary insurance due to its preexisting nature. (Resp. Ex. E, p. 11).

11. On August 8, 2022, Claimant's counsel forwarded correspondence to Dr. Adams requesting his opinion as to whether Claimant's September 18, 2021 knee injury was one of the causes resulting in his need to undergo a knee replacement procedure. (Clmt's Ex. 4, p. 1; Resp. Ex. K, p. 41). Dr. Adams simply responded: "Yes". *Id.*

12. Dr. Polanco placed Claimant at MMI with 17% lower extremity scheduled impairment on August 15, 2022. (Resp. Ex. I, J, pp. 35-36). He returned Claimant to modified duty work with a 30 pound lifting restriction and walking and standing limited to 4 hours. (Resp. Ex. J, p. 35). Dr. Polanco opined further that Claimant did not require further active treatment and instead encouraged him to continue his home exercise program to increase his strength and range of motion (ROM). *Id.*

13. Claimant underwent a TKA procedure performed by Dr. Adams on September 29, 2022. (Clmt's Ex. 2). Findings during surgery included, "Severe, end-stage tricompartmental osteoarthritis of the left knee with varus deformity. *Id*. at p. 1. The costs associated with Claimant's TKA surgery were covered by his personal health insurance, Anthem who asserts a total claim for all medical and prescription costs of $37,755.80. (Clmt's Ex. 3).

14. Claimant requested a Division Independent Medical Examination (DIME) following his placement at MMI by Dr. Polanco. Dr. Miguel Castrejon was identified as the DIME physician and he completed the requested examination on January 5, 2023. (Clmt's Ex. 1, pp. 1-11; Resp. Ex. K, pp. 37-47). After taking a history, completing a records review and performing a physical examination, Dr. Castrejon diagnosed Claimant with the following:

- Left knee strain/sprain.
- Aggravation of pre-existing asymptomatic degenerative joint disease, left knee.
- Status post left knee arthroscopic partial medial meniscectomy, subchondroplasty of medial femoral condyle at distal femur and chondral debridement and mircofracture of 1 cm traumatic full thickness chondral lesion medial femoral condyle, 12/9/21, Michael Simpson, M.D.
- Status post left total knee arthroplasty, 9/29/22, Douglas Adams, M.D.

15. In support of his diagnostic opinions, Dr. Castrejon explained that the mechanism of injury (MOI) "consisted of a 'hard drop' from a distance of approximately 1 ½ feet onto a hard surface with the claimant having experienced a twisting motion to his knee on impact". (Resp. Ex. K, p. 44). Relying on the MRI findings, Dr. Castrejon concluded that the complex tear in the medial meniscus was acute and "consistent with [an] impact force that involved the 'entire' medial femoral condyle". *Id*. Dr. Castrejon

also commented on his opinion that the MOI also aggravated the pre-existing degenerative joint disease in Claimant's left knee, leading directly to his symptoms and his need for the TKA performed by Dr. Adams on September 29, 2022. Indeed, Dr. Castrejon noted:

> During surgery Dr. Simpson described grade IV [degenerative] changes involving the medial femoral condyle and similar early changes involving the medial tibial plateau with a "macerated" meniscal tear. Keep in mind that these are the same areas that were injured at the time of the fall, as described by the MRI finding. The lack of appreciable benefit following arthroscopy is well explained by ongoing symptomology at these areas of involvement. Were it not for the industrial fall the claimant would not have sustained injury to the medial femoral condyle, medial tibial plateau and medial meniscus that permanently aggravated the underlying previously asymptomatic degenerative changes involving these same body parts. Therefore, this examiner respectfully disagrees with Dr. Simpson's conclusion that any ongoing symptoms post-surgery were related to claimant's nonindustrial degenerative changes. At the time of the knee replacement surgery, Dr. Adams documented significant extensive full thickness cartilage loss involving the medial femoral condyle and medial tibial plateau, as well as degenerative changes at the level of the patellofemoral joint and lateral compartment. These latter anatomical areas were not described by Dr. Simpson during his initial operative evaluation of the claimant's left knee, nor were they described to any significant extent on MRI. One can only conclude that there was an objective worsening of the underlying asymptomatic degenerative changes that also involved the lateral compartment. In my professional opinion, the MRI and operative findings by both specialists serve only to support the fact that the industrial event resulted in a permanent aggravation of a previously asymptomatic degenerative condition.

(Resp. Ex. K, p. 45)(Emphasis in original).

16. Upon concluding that Claimant's ongoing symptoms and need for a TKA procedure were causally related to the September 18, 2021 work incident involving Claimant's stepping to the ground from a work truck, Dr. Castrejon noted that because Claimant was "just over three months post left total knee replacement he was not at MMI for the injuries related to that incident. (Resp. Ex. K, p. 43). After recommending additional physical rehabilitation to "maximize" function by improving range of motion and strength, Dr. Castrejon opined that Claimant could be expected to reach MMI within 6-9 months post-surgery.

The Testimony of Dr. Polanco

17. Dr. Polanco testified by deposition, as an expert in occupational medicine, on July 31, 2023. He testified that Claimant reported that "in the course of stepping down from his truck, that he felt a pop in his knee, and subsequently developed knee pain." (Depo. Dr. Polanco, p, 6, ll. 13-19). According to Dr. Polanco, Claimant's MRI demonstrated "extensive changes, degenerative changes with an insufficiency chondral injury", which he opined is a "repetitive-type injury that is associated with a meniscal tear. (Depo. Dr. Polanco, p. 7, ll. 14-17). According to Dr. Polanco, Claimant had a "tear through the body of the meniscus and osteophytes; and basically end stage degenerative changes of the knee"[2]. *Id*. at ll. 18-20.

18. During his direct testimony, Dr. Polanco again questioned Claimant's reported MOI. Dr. Polanco reiterated that during his initial evaluation, Claimant did not describe any twisting activity, but he subsequently reported twisting the knee to Dr. Castrejon. (Depo. Dr. Polanco, p. 6, ll. 21-24). Dr. Polanco also disagreed with the opinion of Dr. Castrejon that Claimant's need for knee replacement surgery was a direct result of the industrial event, noting instead that, like Dr. Simpson, the need for a TKA was not a part of the workers' compensation case. (Depo. Dr. Polanco, p. 8, ll. 24-25, p. 9, ll. 1-4). Dr. Polanco testified as follows:

> "And I am basically in disagreement with his conclusion – with his conclusions for a number of reasons.
>
> Q: And what are those?
>
> A: Well, first of all, there was no specific mechanism of injury to explain the extensiveness of the findings on the MRI. [Claimant] did not report, to me, a twisting-type injury; neither did he report that to Dr. Simpson.
>
> A twisting-type injury will cause a meniscus injury. I indicated I did believe, in my first or second visit with him, that I thought that the findings (MRI) were disproportional to [Claimant's] reported mechanism of injury. The findings were so extensive that they were end stage. Basically his knee was totally worn out.
>
> I was also in disagreement with his conclusion that these were acute findings, because an insufficiency chondral injury is a result of repetitive type of trauma. So the repetitive trauma, as a result of the torn meniscus, puts additional stress on the bone.

[2] Dr. Polanco admittedly reviewed and relied on the MRI report rather than conducting an independent review of the actual images obtained during the study. (Depo. Dr. Polanco, p. 20, ll. 1-3).

> So [Claimant] didn't actually have a fracture of bone. It's more of what we call a stress fracture, a repetitive type of trauma to the bone, resulting in the extensive edema that was seen in the MRI.
>
> So I disagree with – with Dr. Castrejon that this was necessarily an acute finding[3]. It was more consistent with the insufficiency chondral injury and the torn meniscus that he had.
>
> So basically, I dis – I disagree not only with the mechanism of the injury; I disagreed with the diagnostic findings that –he reported.

(Depo. Dr. Polanco, p. 10, ll. 19-25 and pp. 11-12, ll. 1-4).

19. Although Dr. Polanco pointedly disagrees with the diagnostic opinions of Dr. Castrejon, both Dr. McCollum and Dr. Simpson reached similar impressions in concluding that Claimant likely suffered acute injuries to the left knee. Indeed, Dr. McCollum, the radiologist interpreting the results of Claimant's October 18, 2021 MRI clearly indicated that Claimant had a "[l]arge acute appearing bony contusion involving the entire medial femoral condyle". He also noted that Claimant had a "large amount of soft tissue edema, consistent with a recent injury". While he noted that the complex meniscal tear could be acute or chronic, Dr. McCollum concluded, based upon the MOI described, that the bony contusions noted over the medial femoral condyle and medial tibial plateau along with the osteochondral defect along the articular surface of the medial femoral condyle were "most likely" secondary to a traumatic impaction injury, which the ALJ finds consistent with Claimant's report of landing hard on the left leg/knee after stepping off the truck in question. Moreover, Dr. Simpson noted that the observed bone marrow edema in the medial femoral condyle", in combination with Claimant's reported tenderness over this area, was "consistent" with a subchondral insufficiency type fracture that was "posttraumatic" in nature and which occurred in the presence of pre-existing osteoarthritis.

20. Because the evidence presented supports a finding that Dr. Castrejon relied, in part, upon the reports of Drs. McCollum and Simpson as support for his diagnostic impressions and these records support a finding that Claimant suffered acute bony changes to the left knee consistent with an impaction injury, the ALJ finds Dr. Polanco's cynicism regarding Claimant's reported MOI unpersuasive. Indeed, the ALJ finds Dr. Polanco's belief that Claimant's MRI findings (based upon his disagreement with Dr. Castrejon's opinions) were not acute and that Claimant may have had a previous injury aside from his reported work injury contrary to the reports of Drs. McCollum and Simpson, speculative in nature and without evidentiary support.[4]

[3] Here the ALJ finds that Dr. Polanco is probably referencing Dr. Castrejon's opinion that the complex tear in the medial meniscus was acute and "consistent with the impact force that involved the 'entire' medial femoral condyle" as those are the only MRI findings that Dr. Castrejon concluded were "acute".

[4] Respondents also seemingly reject Dr. Polanco's suggestion that Claimant's knee injury was caused by anything other than his work duties on September 18, 2021 as evidenced by their decision to admit liability and pay temporary total disability (TTD) benefits beginning December 9, 2021 following

Accordingly, the ALJ finds Dr. Polanco's tacit suggestion that Dr. Castrejon erred in regard to causality, including his diagnostic impressions unconvincing.

21. Regarding Dr. Castrejon's opinion that Claimant's need for a TKA was directly related to Claimant's industrial event because the incident resulted in an aggravation of a previously asymptomatic degenerative condition giving rise to symptoms and the need for treatment, Dr. Polanco opined that Claimant suffered what he termed a "ubiquitous or common injury" and that because of the advanced level of degeneration and meniscal tearing present in the left knee, Claimant would have required a TKA regardless of the incident involving stepping down from the truck. (Depo. Dr. Polanco, p. 13, ll. 13-24; p. 15, ll. 13-18).

22. During cross-examination, Dr. Polanco admitted that he had no idea of when Claimant would require a TKA in the future given the condition of his knee. Instead, he simply testified that based upon the level of degenerative change present in the left knee, a "total knee replacement" would be required "at some point in time". (Depo. Dr. Polanco, p. 15, ll. 8-18). Dr. Polanco also admitted that Claimant denied any left knee pain or loss of work due to knee pain prior to the September 18, 2021 incident. *Id*. at p. 17, ll. 1-2. Finally, Dr. Polanco admitted that there was a dearth of medical documentation to substantiate that prior treatment had been directed to the left knee. *Id*. at p. 17, ll. 5-14.

23. Regarding the onset of Claimant's left knee pain, Dr. Polanco agreed that the act of stepping down from the truck was seemingly the trigger causing that pain. (Depo. Dr. Polanco, p. 21, ll. 6-11; p. 23, ll. 6-10). Nonetheless, Dr. Polanco testified that because the act of stepping down from the truck did not result in "significant trauma", Claimant's symptoms appeared to arise, not from the act of stepping down from the truck, but rather coincidentally, at that point in time, from the extensive pre-existing pathology in the left knee. *Id*. at p. 22, ll. 17-25; p. 23, l. 1. Dr. Polanco then reiterated his opinion that Claimant suffered a "ubiquitous" injury "meaning [that] in the normal course of time, it would have happened regardless of whatever". *Id*. at p. 23, ll. 2-5. The ALJ interprets this statement to mean that Dr. Polanco believes that Claimant would have developed symptoms and a need for treatment, including a TKA based simply upon the passage of time and the natural progression of his pre-existing pathology.

The Testimony of [Redacted, hereinafter RB]

24. RB[Redacted] testified as Employer's equipment manager and Claimant's supervisor while he worked for [Redacted, hereinafter ST]. RB[Redacted] testified that he was aware that Claimant injured his knee while exiting a truck. RB[Redacted] testified that after being off work for a period of time, Claimant was released to return to work and he worked full duty for 4-5 months before an incident resulted in him having to leave work again. That incident, according to RB[Redacted], involved a report by

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Claimant's surgery with Dr. Simpson. (See Resp. Ex. L). Thus, the ALJ is convinced that Claimant established that he suffered a compensable industrial injury to his left knee on September 18, 2021.

Claimant that he reinjured his knee while grocery shopping. Indeed, RB[Redacted] testified that on or about July 11, 2022, he observed Claimant limping heavily about the shop and grimacing as if he were in significant pain. He then approached Claimant and asked him what was going on to which Claimant reportedly responded: "Well, I -- I think I -- I believe I hurt my knee at the -- at the grocery store this weekend or some, you know, and -- and it's hard for me to walk."

25. RB[Redacted] testified that upon hearing that Claimant was having a hard time walking he considered the nature of Claimant's job duties and informed him that he didn't know if he wanted Claimant working and climbing in and out of trucks until it was known what was going on with Claimant's knee. Accordingly, RB[Redacted] contacted Employer's safety coordinator ([Redacted, hereainfter FE]) and an attempt to contact Employer's Human Resources (HR) office in Detroit was made to determine the most appropriate course of action. Because of the time difference between Colorado and Michigan, Employer's HR office was closed. Consequently, RB[Redacted] testified that he and FE[Redacted] made the decision to allow Claimant to complete his shift that evening in a limited capacity.

26. RB[Redacted] testified that he and FE[Redacted] contacted HR the following morning and it was decided that Claimant would be asked to take time off and secure a release to return to unrestricted duty before he was allowed to resume work. According to RB[Redacted], it was at this time that Employer learned that Claimant was scheduled to undergo a second surgery.

Claimant's Hearing Testimony

27. Claimant testified that prior to September 18, 2021, he had no problems with or pain in his left knee while performing his job duties. Moreover, Claimant testified that prior to September 18, 2021, he had no work restrictions related to his left knee. Following his September 18, 2021 injury, Claimant testified that the condition of his knee did not improve. Indeed, Claimant testified that even after the surgery performed by Dr. Simpson on December 9, 2021, the condition of his left knee "stayed the same" and it continued to bother him despite physical therapy (PT) and a post-surgical injection. The ALJ credits Claimant's testimony regarding the condition and function of his left knee pre and post injury to find that prior to September 18, 2021, Claimant's left knee was probably asymptomatic and that he was able to work full duty without limitation caused by his pre-existing osteoarthritis.

28. Claimant testified that Dr. Simpson referred him to Dr. Adams for consideration of a total knee replacement and that Dr. Adams performed that surgery. According to Claimant, he elected to move forward with the TKA surgery despite a denial by Insurer because he could not walk. Claimant testified that the cost of the procedure was paid for by his health insurance.

29. Claimant conceded that he told RB[Redacted] that he reinjured his knee while grocery shopping. Claimant testified that he told RB[Redacted] that he injured his

left knee at the supermarket because he was being harassed by his supervisor. Claimant testified that he ultimately had to file a HR complaint against his supervisor due to the harassment and submitted that he only reported that he injured his knee at the supermarket so he could stop his supervisor's constant harassment and work without distraction. It is noted, that as of November 17, 2021, Claimant reported that he was having difficulty handling stress at work. Accordingly he requested counseling. (Resp. Ex. K, p. 40). Although the exact cause of Claimant's stress is unknown, because neither party presented any counseling or mental health records, Claimant appeared stressed when testifying about the harassment he was subjected to and he screened positive for distress depression on November 17, 2021. *Id.* Claimant testified that contrary to what he told RB[Redacted] on July 111, 2022, he never injured his knee at the supermarket. He also testified that he never told any his providers about being hurt at the grocery store because it never happened.

30. Based upon the totality of the evidence presented, the ALJ credits Claimant's testimony to find that he probably lied about injuring his knee while shopping in order to keep his supervisor at bay, assuming that because this alleged supermarket injury was not connected to his work, his supervisor would back off and he could work in relative peace.

31. As noted above, Claimant testified that he never reported suffering any injury at the supermarket to his medical providers. Careful review of the medical record supports this testimony. Indeed, there is no convincing indication in the records submitted that the condition of Claimant's knee worsened after July 11, 2022. Rather, the medical records substantiate that as of July 6, 2022, five days before Claimant allegedly injured his knee while shopping, he described sharp, aching, 8/10 left knee pain to Dr. Simpson[5]. (Resp. Ex. H, p. 25). During this encounter, Claimant reported "a lot" of medial sided pain, over the area where he was noted to have medial compartment arthritis. *Id*. at p. 24. Dr. Simpson noted that the previously mentioned PRP injection did not help and that Claimant was struggling with <u>continued</u> pain and difficulty completing his ADLs (activities of daily living). *Id.* at pp. 24-25 (emphasis added). The content of this report persuades the ALJ that as of July 6, 2022, Claimant's left knee was significantly symptomatic and functionally limiting.

32. Although it appears that Claimant saw Dr. Adams on August 8, 2022[6], approximately one month after the alleged intervening injury at the supermarket, neither party provided that record to the ALJ for review. Nonetheless, as summarized by Dr. Castrejon, the record from Claimant's August 8, 2022 appointment with Dr. Adams fails to support a finding that Claimant was suffering from a worsened condition due to an intervening injury. (Resp. Ex. K, p. 41). Moreover, the August 15, 2022 report of Dr. Polanco supports a finding that the condition of Claimant's left knee was similar to that he reported on July 6, 2022. In fact, the August 15, 2022 report of Dr. Polanco notes

[5] Prior to July 6, 2022, Claimant reported slightly better pain levels, i.e. 7/10 on October 20, 2021 during an appointment with Dr. Polanco (Resp. Ex. D, p. 5) and 7/10 during an appointment with Dr. Simpson on November 8, 2021. (Resp. Ex. E, p. 13).

[6] Per the DIME report of Dr. Castrejon. (Resp. Ex. K, p. 41).

that Claimant described a slightly better level of residual left knee pain (7/10) than he had during the July 6, 2022 appointment with Dr. Simpson. (Resp. Ex. J, p. 34). Nonetheless, Claimant demonstrated an antalgic gait, i.e. a limp[7] and impaired range of motion in the left knee when compared to the right. As presented, the medical record evidence fails to convince the ALJ that the condition of Claimant's knee was worse after July 11, 2022 than it had been before this date. Rather, the ALJ credits the content of the medical records to find Claimant's testimony credible that the condition of his knee was relatively unchanged after his December 9, 2021 surgery.

The Testimony of Dr. Castrejon

33. Dr. Castrejon testified at hearing as a board certified, Level II accredited expert with a specialty in Physical Medicine and Rehabilitation (PM&R). Dr. Castrejon reiterated his opinion that Claimant's MOI aggravated and accelerated his underlying degenerative left knee arthritis hastening his need for a total knee replacement. Indeed, Dr. Castrejon testified that in reviewing the MRI report of Dr. McCollum and comparing the operative reports, including the findings of Dr. Simpson and Dr. Adams, there was objective evidence that in the 10 months following Claimant's first surgical procedure at the hands of Dr. Simpson to the second TKA surgery with Dr. Adams, there was an acceleration/worsening of the degenerative findings in the left knee, including changes involving the patella femoral and lateral compartments of the knee that were previously "quite" limited as noted on the October 18, 2021 MRI. According to Dr. Castrejon, such a rapid acceleration would be atypical and contrary to the natural progression of a pre-existing condition, which would much longer to cause the same degree of change.

34. Dr. Castrejon attributed the aggravation/acceleration of Claimant's degenerative osteoarthritis to the MOI associated with stepping down hard on his diseased left knee. According to Dr. Castrejon, the MOI caused a tearing of the meniscus and an impaction injury to the cartilage of the femur and tibia (as outlined on the October 18, 2021 MRI) leading Dr. Simpson to perform a partial meniscectomy and a subchondroplasty, which in turn worsened/accelerated the degenerative arthritis in the knee hastening Claimant's need for a total knee replacement.

35. Dr. Castrejon testified that he did not account for any subsequent injuries after September 18, 2021, because none were reported to him. Regardless, Dr. Castrejon testified that he would need to see the radiological and clinical data to be able to determine whether any alleged intervening injury contributed to Claimant's need for a TKA.

CONCLUSIONS OF LAW

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

[7] According to Dr. Castrejon's hearing testimony.

Generally

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

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

C. 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 Bodensecki v. ICAO*, 183 P.3d 684 (Colo. App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). As noted elsewhere, the ALJ credits Claimant's testimony regarding the condition of his knee after his December 9, 2021 surgery and the fact that he fabricated the story regarding a second injury at the supermarket. Based upon the totality of the evidence, the ALJ also concludes that the opinions expressed by Dr. Castrejon are supported by the record and are more persuasive than the opinions expressed by Dr. Polanco and Dr. Simpson.

Claimant's Alleged Intervening Injury

D. It is well settled that the natural development of an intervening, nonindustrial injury, which is separate from and uninfluenced by an earlier industrial injury, is not compensated as part of the original industrial injury. *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). Respondents contend that such an injury occurred in this case while Claimant was grocery shopping on or

about July 11, 2022. Respondents argue that the effects of this second intervening injury were sufficient to sever the causal relationship between Claimant's admitted September 18, 2021 work injury and his need for a left total knee replacement procedure. Indeed, Respondents assert that Claimant's need for a left total knee replacement procedure is rooted in a worsening of condition connected to this intervening injury. Accordingly, Respondents insist that Dr. Castrejon erred in concluding that Claimant was not at MMI despite his opinion that Claimant's need for a left total knee replacement was related to and necessitated by an aggravation and acceleration of his pre-existing osteoarthritis, which aggravation/acceleration, he concluded, was caused by Claimant's September 18, 2021 injury.

E. The question of whether a particular condition is the natural and proximate result of an industrial injury or the result of an intervening event is one of fact for the ALJ. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002); *Lutgen v. Teller County School District No. 2*, W.C. No. 3-846-454 (June 12, 1996), aff'd., *Teller County School District No. 2 v. Industrial Claim Appeals Office*, (Colo. App. No. 96CA1194, December 27, 1996) (not selected for publication). Here, Respondents contend that the combined testimony of RB[Redacted] and Dr. Castrejon establishes that Claimant suffered a subsequent intervening injury which lead directly to his total knee arthroplasty. Accordingly, Respondents contend that this alleged injury was sufficient to severe any causal connection between Claimant's September 18, 2021 work injury and his need for a TKA. The ALJ is not convinced.

F. As found, the ALJ is persuaded that Claimant, as part of a misguided effort to dissuade his supervisor from harassing him, simply lied when he told RB[Redacted] that he was injured while grocery shopping, as he limped about at work. Outside of this declared injury, which Claimant readily admits he fabricated, Respondents presented no convincing evidence, such as a medical record or a first-hand witness to the incident to corroborate Claimant's alleged knee injury while grocery shopping on July 11, 2022. Thus, while Claimant foolishly lied about being injured while grocery shopping, the ALJ resolves the conflict between his prior statement to RB[Redacted] and his subsequent sworn hearing testimony to conclude that the injury he reported occurred while grocery shopping probably never happened.

G. In addition to RB's[Redacted] testimony as support for their contention that Claimant suffered an intervening injury, which severed the causal connection between his admitted industrial injury and his need for a TKA, Respondents assert that Dr. Castrejon himself "acknowledged that the condition of the joint at the point of the first surgery was significantly worse in the second event and far worse than one would have expected in a 10-month period between the surgeries." While it is true that Dr. Castrejon recognized that the condition of Claimant's left knee had worsened between his first surgery and his subsequent TKA procedure, he in no way attributed that worsening to an intervening event. Rather, Dr. Castrejon clearly ascribed the worsening to an aggravation/acceleration of the pre-existing degenerative changes within Claimant's left knee, which he concluded was caused by the September 18, 2021 injury and Claimant's subsequent December 9, 2021 surgery.

H. In this case, the evidence presented supports Dr. Castrejon's conclusion that Claimant sustained a compensable aggravation/acceleration of his previously asymptomatic left knee osteoarthritis and that this aggravation/acceleration is the proximate cause of Claimant's need for a total left knee arthroplasty. Taken in its entirety, the ALJ finds that the evidentiary record contains substantial evidence to support a conclusion that Claimant's September 18, 2021 work injury was a "significant" cause[8] of his need for a TKA in the sense that there is a direct relationship between the precipitating event, i.e. the September 18, 2021 injury and the need for this treatment. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986); see also *Reynolds v. U.S. Airways, Inc.*, W. C. Nos. 4-352-256, 4-391-859, 4-521-484 (May 20, 2003). For these reasons, the ALJ concludes that Respondents have failed to prove that the fictitious July 11, 2022, grocery shopping incident constitutes an intervening event that broke the chain of causation between Claimant's September 18, 2021 injury and his subsequent TKA.

Overcoming Dr. Castrejon's MMI Determination

I. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995). To overcome a DIME physician's opinion regarding MMI, permanency or the cause of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians' determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

J. The question of whether the Respondents have overcome Dr. Castrejon's findings regarding MMI and/or causality, is one of fact for determination by the ALJ. *Metro Moving and Storage Co. v. Gussert*, *supra*. Because the question of whether Claimant attained MMI inherently requires a determination regarding the cause of Claimant's need for medical treatment, the ALJ concludes that an analysis of the cause of Claimant's September 29, 2022 TKA and its relationship to the September 18, 2021 industrial injury is fundamental to answering the question of whether he is at MMI. As outlined above, the totality of the evidence supports a conclusion that Claimant suffered

[8] To prove causation, it is not necessary to establish that the industrial injury was the sole cause of the resulting disability and need for treatment. Rather, it is sufficient if the injury is a "significant" cause in the sense that there is a direct relationship between the precipitating event, Claimant's disability and his need for treatment. See *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

from latent osteoarthritis in the left knee, which manifested itself after he stepped down from an elevation of approximately 1 ½ feet while performing his work duties. As found, Claimant landed hard on the left leg causing an impaction injury to the left knee, as well as a probable complex tear in the body of the medial meniscus. Following this injury, Claimant experienced persistent pain and functional decline despite conservative treatment. Consequently, Dr. Simpson directed specific surgical treatment to the left knee which also failed to relieve Claimant's activated arthritic pain and which, according to Dr. Castrejon, likely accelerated the natural degenerative course of Claimant's pre-existing condition leading to his TKA. Such injuries are compensable. See, *Subsequent Injury Fund v. Devore*, 780 P.2d 39 (Colo. App. 1989); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986); see also, *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990)(industrial injuries which aggravate, accelerate, or combine with preexisting conditions so as to produce disability and a need for treatment are compensable).

K. Indeed, a pre-existing condition does not disqualify a claimant from receiving workers compensation benefits if his or her work "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004); *H & H Warehouse v. Vicory*, supra. Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

L. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Here, the evidence presented establishes that Dr. Castrejon opined that Claimant was not at MMI because he requires additional physical rehabilitation to maximize his function following a surgery which both he and Dr. Adams concluded are related to Claimant's September 18, 2021 industrial injury. As found above, the record evidence supports Dr. Castrejon's opinion regarding the cause of Claimant's persistent knee symptoms and his need for a TKA. In so concluding the undersigned finds Drs. Polanco and Simpson's contrary opinions unconvincing.

M. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. A finding of MMI is premature if a course of treatment has "a reasonable

prospect of success" and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-82 (Colo. App. 1990). Because Dr. Castrejon's recommended treatment represents a reasonable prospect for curing and relieving Claimant of the ongoing symptoms/disability caused by his industrial injury and Claimant wants to pursue this treatment, he is not at MMI. See *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (February 14, 2001), *aff'd. Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, (Colo.App. No. 01CA0401, February 14, 2002)(*not selected for publication)* (citing PDM *Molding v. Stanberg*, 898 P.2d 542 (Colo. App. 1995) *and Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995)]; *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (August 11, 2000).

N. After considering the totality of the evidence presented, the ALJ concludes that Respondents have failed to produce unmistakable evidence establishing that Dr. Castrejon's determination regarding MMI is highly probably incorrect. As determined above, the persuasive medical evidence establishes that Claimant likely suffered a compensable aggravation and acceleration of his pre-existing left knee osteoarthritis hastening his need for a TKA. Accordingly, the ALJ finds/concludes that Claimant's need for a TKA is causally related to Claimant's September 18, 2021 industrial injury and he is not yet at MMI, having not participated in sufficient physical rehabilitation to maximize his function. While Dr. Polanco and Dr. Simpson have contrary sentiments, a professional difference of opinion between medical experts does not rise to the level of clear and convincing evidence that is required to overcome Dr. Castrejon's opinions concerning causality and MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents have failed to meet their required legal burden to set the MMI determination aside. Because Claimant is not at MMI, this order does not address whether Dr. Castrejon erred in calculating the impairment associated with Claimant's September 18, 2021 impairment rating.

ORDER

It is therefore ordered that:

1. Respondents request to set the causality and MMI opinions of Dr. Castrejon aside is denied and dismissed.

2. Respondents shall authorize the care recommended by Dr. Castrejon and upon completion of that care, return Claimant to Dr. Castrejon for a follow-up DIME to reassess whether he has reached MMI.

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

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

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

DATED: September 21, 2023

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant established by a preponderance of the evidence that medial branch blocks requested by Karen Knight, M.D., are reasonable and necessary to cure or relieve the effects of Claimant's January 4, 2021 industrial injury.

FINDINGS OF FACT

1. Claimant is a 51-year-old concrete finisher who has been employed by Employer for approximately 17 years. On January 4, 2021, Claimant sustained an admitted injury arising out of the course of his employment when he slipped and fell on ice, injuring his lower back.

2. On January 12, 2021, Claimant saw Joan Mankowski., M.D., at Denver Health Occupational Clinic for lower back pain. Claimant was assigned temporary work restrictions, and instructed to follow up with Jennifer Pula, M.D.[1] (Ex. 6). Dr. Mankowski's record indicates that Claimant had not yet begun physical therapy or massage, and notes a prior visit with Dr. Pula on January 5, 2021. From this, the ALJ infers that Dr. Pula is an authorized treating physician (ATP), and referred for physical therapy and massage therapy on January 5, 2021. (Ex. 6, p. 93-94).

3. Over the following months, Claimant continued to treat with Dr. Pula at Denver Health for lower back pain and right shoulder pain. In her February 2, 2021 report, Dr. Pula indicated that she considered Claimant's back injury to be work related, and that the history and mechanism of injury were consistent with the objective findings on examination. (Ex. 6). After a lumbar MRI demonstrated multilevel disc herniations, possible irritation of the left L4 nerve root, multilevel facet arthropathy, facet joint effusions, Dr. Pula referred Claimant for an orthopedic evaluation at Panorama Orthopedics on June 7, 2022. (Ex. 6 & F).

4. On July 1, 2022, Claimant saw Karen Knight, M.D., at Panorama for evaluation of his lower back pain. Dr. Knight is an ATP in the chain of referral from Dr. Pula. Dr. Knight noted that Claimant had received an epidural steroid injection on January 27, 2021 which provided six months of relief, but that a second injection in December 2021 provided no relief. After Dr. Knight reviewed Claimant's MRI, she indicated there were two explanations for Claimant's lower back pain: facet fusions, and "significant modic changes." She opined that Claimant's condition was consistent with his mechanism of injury, that he would be a good candidate for vertebral nerve ablation, and that she

[1] Claimant's January 12, 2021 Denver Health record states that the appointment was a follow-up visit, and references a prior visit with Dr. Pula on January 5, 2021. No record from the January 5, 2021 visit was offered or admitted into evidence.

recommended bilateral L4-5 and L5-S1 facet injections before performing any ablation. (Ex. E).

5. On August 25, 2022, Dr. Knight performed the L4-5 and L5-S1 facet injections. After two weeks, Dr. Knight noted that Claimant reported 100% symptomatic relief , and that Claimant remained below his baseline pain level, despite recently experiencing a recurrence of his lower back pain. Dr. Knight indicated Claimant's response to the facet injections was diagnostic for his facet joints being the source of his pain. She recommended Claimant return if his back pain started to worsen, and she would order two sets of bilateral medial branch blocks (MBB) at L3, L4 and L5, to determine if Claimant was an appropriate candidate for radiofrequency ablation (RFA) at those spinal levels. (Ex. E).

6. Approximately two months later, on November 7, 2022, Claimant returned to Dr. Knight reporting that his lower back pain was steadily returning. Dr. Knight requested authorization of bilateral MBB at L3, L4, and L5, noting that if Claimant had a good response, she would proceed with the RFA procedure. (Ex. 7). On December 14, 2022, Respondent authorized performance of the requested MBB. (Ex. 7, p. 205).

7. On December 29, 2022, Dr. Knight performed the first MBB procedure. (Ex. E). Claimant saw Dr. Pula on January 17, 2023, reporting he had temporary relief with the MBB. He also reported that his lower back pain was getting worse, and was exacerbated by shoveling snow on December 29, 2022. (Ex. 6).

8. On January 31, 2023, John Burris, M.D., performed an independent medical examination (IME) at Respondent's request. Based on his examination and review of records, Dr. Burris opined that Claimant had "nonspecific low back pain with nonphysiologic presentation." Dr. Burris opined that there was no documentation to support a diagnostic response to any of the injections Claimant had received, and there was no reasonable expectation that Claimant would benefit from further treatment. He opined that Claimant's lumbar spine condition was stationary and had plateaued. He opined that Claimant was at maximum medical improvement as of October 11, 2022. (Ex. C).

9. On February 22, 2023, Dr. Knight noted that Claimant's pain diary following the December 29, 2022 MBB showed his pain was reduced from a 6/10 to 1-2/10 for four hours. She stated that this reduction in pain qualified Claimant for a repeat MBB. (Ex. G).

10. On February 28, 2023, Respondent filed a General Admission of Liability, admitting for medical benefits and temporary disability benefits. (Ex. 3).

11. On March 8, 2023, Dr. Burris issued a second report in which he opined that the second set of MBB requested by Dr. Knight was not reasonable, necessary, or work related. He indicated that because there was no functional assessment performed after the first set of MBB, there was no support that Claimant's response was diagnostic. (Ex. D).

12. On April 21, 2023, Claimant returned to Dr. Pula, who noted that authorization for the repeat MBB had been denied based on Dr. Burris' opinion. In response, Dr. Pula stated that Claimant "[h]ad MBB on 12/29.22 with a single day response. Per the procedure note for that day, only Marcaine was injected as this was a diagnostic [MBB]. The fact that he had only a single day response was appropriate given only Marcaine and no steroid. This was considered a positive response and therefore subsequent request for [MBB] was submitted." (Ex. 6).

13. On June 21, 2023, Claimant underwent a 24-month Division IME with Kathy McCranie, M.D. Dr. McCranie diagnosed Claimant with a work-related lower back strain, and opined that Claimant was at maximum medical improvement as of March 23, 2023. She also indicated that Claimant's report to her that he had complete or near-complete resolution of symptoms following facet and MBB was not consistent with the records she reviewed. (Ex. 4).

14. On July 7, 2023, Respondents filed a Final Admission of Liability consistent with Dr. McCranie's 24-month DIME. (Ex. 4). The parties agreed that Claimant has not challenged the FAL, and that any further treatment Claimant may receive, if warranted, would be considered medical maintenance benefits.

15. At hearing, Claimant testified that he did receive temporary relief from the December 29, 2022 MBB performed by Dr. Knight, and that he wishes to receive the second set of injections. Claimant's testimony was credible, and supported by the medical records.

CONCLUSIONS OF LAW

Generally

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

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

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

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

SPECIFIC MEDICAL MAINTENANCE BENEFITS

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). There is no bright line test to distinguish treatment designed to cure an injury from treatment designed to relieve the effects of the injury. Surgery may be designed to cure an injury or may be maintenance treatment designed to relieve the effects or symptoms of the injury. Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

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,* 759 P.2d at 710-13; *Stollmeyer v. Indus. 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 Dist. No.11*, WC No. 3-979-487, (ICAO Jan. 11, 2012). 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 Ctr.,* 919 P.2d at 704.

Claimant has established by a preponderance of the evidence that the repeat MBB recommended by Dr. Knight are reasonable, necessary, and causally related to his industrial injury. Dr. Pula, Dr. Knight, and Dr. McCranie each opined that Claimant sustained a work-related lumbar injury. Dr. Knight's opinion that Claimant's mechanism

of injury was consistent with facet injury and modic changes is credible. Dr. Knight reasonably recommended facet injections to determine the source of Claimant's pain, which demonstrated Claimant's facet joints as the pain generator. When Claimant's lumbar pain returned, Dr. Knight ordered diagnostic MBB injections as a precursor to a potential RFA. Claimant had a diagnostic response to the December 29, 2022 MBB, reporting relief lasting approximately four hours. The ALJ credits the opinions of Drs. Pula and Knight that Claimant's response was diagnostic. The opinions of Dr. McCranie and Dr. Burris, Claimant's medical records do no document a diagnostic response to the December 29, 2022 MBB are not persuasive. The ALJ also finds credible Dr. Knight's opinion that the diagnostic response to the first MBB justifies performing a repeat set of MBB to determine whether Claimant is an appropriate candidate for an RFA procedure. The ALJ concludes that the evidence establishes it more likely than not that repeat MBB injections are reasonable and necessary to relieve or prevent further deterioration of Claimant's work-related lower back injury. Claimant's request for authorization of repeat MBB injections as recommended by Dr. Knight is granted. The determination of whether an RFA would be reasonable, necessary, and related is premature, as no provider has currently recommended the procedure, and any such recommendation is contingent, at least in part, on the results of future MBBs. The ALJ makes no conclusion on the compensability of a potential RFA in the future.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of repeat medial branch blocks recommended by ATP Karen Knight, M.D., is granted.

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

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

DATED: September 22, 2023

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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that dental treatment recommended by Benjamin Tobler, DDS, {specifically crowns on teeth #13 and #15; a nightguard; and a followup dental appointment), constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted December 18, 2020 work injury?

FINDINGS OF FACT

1. On December 18, 2020, Claimant was working for Employer as a cross utilized agent at the [Redacted, hereinafter MA]. Claimant's job duties included all aspects of preparing passengers and bags for departing and arriving flights.

2. On December 18, 2020, Claimant injured her right shoulder while lifting a heavy bag. Respondent has admitted liability for Claimant's work injury. Since her injury, Claimant has undergone two right shoulder surgeries. During the second surgery, Claimant's phrenic nerve was paralyzed. Since that time, Claimant has experienced pulmonary and cardiac complications.

3. Claimant testified that as a result of her paralyzed phrenic nerve, she has a partially deflated lung and the right side of her diaphragm does not function properly. Due to these complications, Claimant has breathing difficulties and has been referred to pulmonologists at National Jewish Hospital.

4. On November 28, 2022, Claimant was seen by pulmonologist Dr. Hilda Metjian at National Jewish Hospital. On that date, Dr. Metjian recommended Claimant use a BiPAP machine at night. A request for authorization for the machine was made on that same date. Unfortunately, Claimant experienced a delay in beginning that recommended treatment because of limited BiPAP machine availability.

5. On February 13, 2023, Claimant was seen by her authorized treating physician (ATP) Dr. Randal Shelton. At that time, Claimant reported that she had received her BiPAP machine and had begun using it at night. Claimant also reported that she was having a difficult time tolerating the BiPAP's pressure.

6. Claimant testified that the BiPAP machine is necessary because her diaphragm does not expel air from her lungs. Claimant uses the BiPAP machine every night. This machine forces air into Claimant's lungs through her nose. The machine then allows the air to be released. Therefore, the machine assists with both breathing in and breathing out.

7. Claimant testified that when she is using the BiPAP machine, she clenches her jaw and forces her tongue to the roof of her mouth. Claimant explained that this is necessary to keep her mouth closed so that the air does not escape. Claimant further testified that as a result of clenching her jaw in this way, she has experienced pain in the left side of her jaw. Claimant testified that she began to notice this pain two to three weeks after beginning the BiPAP treatment. It is Claimant's belief that the action of clenching her jaw while using the BiPAP machine has resulted in two cracked teeth; specifically tooth #13 and tooth #15.

8. On March 24, 2023, Claimant was seen at National Jewish Hospital by Dr. Nancy Lin. On that date, Claimant reported that she had begun using the BiPAP machine and that she was sleeping better as a result. Claimant also reported that "when using her BiPAP she clenched her teeth so hard that it broke a tooth." In the medical record of that date, Dr. Lin noted that Claimant's broken tooth was "due to BiPAP therapy which was consequential of the work related paralyzed right hemidiaphragm." Dr. Lin recommended Claimant see a dentist and obtain a mouth guard to prevent further damage to her teeth.

9. Claimant has seen dentist Dr. Benjamin Tobler for many years. On April 11, 2023, Claimant reported to Dr. Tobler that she was continuing to experience breathing issues and had pain in her upper left teeth. In addition, Dr. Tobler noted that "ever since her diaphragm was paralyzed she had been clenching and grinding her teeth significantly." Claimant stated that she was experiencing pain and was "concerned she would break teeth." X-rays taken on that date showed large cracks in both tooth #13 and tooth #15. Dr. Tobler noted that Claimant has cracked tooth syndrome and recommended crowns on both tooth #13 and tooth #15. He also recommended the use of a night guard to protect all of her teeth "due to heavy forces placed on them when she clenches and grinds."

10. On May 4, 2023, Claimant returned to Dr. Shelton and reported that she was continuing to use the BiPAP machine. Dr. Shelton noted that Claimant "has new broken teeth from bruxism since [BiPAP]. Documented by her dentist no such issues until she started [BiPAP], now needing crowns."

11. On May 16, 2023, Dr. Shelton replied to questions posed to him by Claimant's counsel. In his response Dr. Shelton stated his opinion that Claimant's dental issues are "a new [and] related problem secondary to her [BiPAP] treatments". Dr. Shelton further noted that the BiPAP machine is necessary to treat Claimant's phrenic nerve paralysis.

12. On June 12, 2023, Dr. Tobler authored a letter in response to questions posed to him by Claimant's counsel. In that letter, Dr. Tobler stated that Claimant did not have symptoms in tooth #13 and tooth #15 prior to the April 11, 2023 appointment. Dr. Tobler opined that placing crowns on both of these teeth and the use of a night guard would be reasonable and necessary treatment of Claimant's dental issues. With regard to causation, Dr. Tobler responded in the affirmative to the question of whether

Claimant's work injury exacerbated her dental condition. Dr. Tobler also stated "only after prolonged breathing issues from her nerve damage did she develop the need for a [BiPAPJ and a significant clenching habit."

13. In a medical record dated June 29, 2023, Dr. Lin stated "[f]rom the information I have, it does appear that [Claimant's] broken teeth/dental issues are largely due to her bipap use and [as such] should be compensable under [workers'] compensation."

14. Claimant's dental records dating back to July 1, 2014 were admitted into evidence. On July 1, 2014, Dr. Tobler noted a crack in tooth #30. He recommended a root canal at that time. On July 22, 2014, Claimant returned to Dr. Tobler to undergo the root canal on tooth #30. At that time, Dr. Tobler explained that due to the depth of the crack, the root canal might not be successful.

15. On July 10, 2018, Claimant reported to Dr. Tobler that teeth on her right side had been painful for approximately one week. Dr. Tobler noted that he informed Claimant that" sometimes clenching and grinding teeth can cause teeth to get sore." Dr. Tobler opined that this "may be what caused her issues [because] she had a very hectic and stressful week last week."

16. On July 24, 2018, Claimant returned to Dr. Tobler complaining of pain in tooth #5. On examination, Dr. Tobler noted that the tooth was split in two and would require extraction. The recommended extraction was performed on that date.

17. On September 5, 2018, Dr. Tobler noted large cracks down teeth #2 and #3. He also noted noncarious cervical lesions (NCCL) on teeth #19, #20, and #21. Dr. Tobler noted "we have been discussing several of these areas for years, but she had chosen to wait on all of them." Dr. Tobler also recorded "heavy wear facets [and] abfractions due to clenching."

18. On November 9, 2020, Dr. Tobler again raised concerns about Claimant's teeth #2 and #3. On May 10, 2021, Dr. Tobler recommended fillings on teeth #4, #3, #12. He also noted thinning on teeth #8 and #9 and recommended watching those teeth. Dr. Tobler also encouraged Claimant to pursue treatment of teeth #20, #21, and #28 which were "areas we have discussed in the past".

19. Claimant testified that prior to using the BiPAP machine, she did not have issues with her teeth. Claimant further testified that she was seen by Dr. Tobler for basic dental work. Claimant does not recall prior discussions with Dr. Tobler about clenching her jaw or grinding her teeth. Claimant also testified that although she was aware of other cracks in her teeth prior to her using the BiPAP machine, those cracked teeth did not cause her pain.

20. At the request of Respondent, Dr. Lawrence Lesnak performed a review of Claimant's medical records. In a report dated June 23, 2023, Dr. Lesnak stated his opinions regarding the relatedness of the dental treatment recommended by Dr. Tobler. Specifically, Dr. Lesnak opined that there is no medical evidence to support that the cracks in tooth #13 and tooth #15 were related to the work injury. Dr. Lesnak specifically noted that the use of a BiPAP device would not cause or aggravate Claimant's chronic history of bruxism/teeth clenching. In support of these opinions Dr. Lesnak noted that Claimant has a history of numerous cracked teeth. Specifically, Dr. Lesknak noted that on July 10, 2018. Dr. Tobler made note of his discussion with Claimant that "sometimes clenching and grinding can cause teeth to get sore." Dr. Lesnak also referred to a record dated September 5, 2018, in which Dr. Tobler noted that that there were large cracks in Claimant's tooth #19 and evidence of "heavy wear facets and abfractions due to clenching."

21. On July 7, 2023, Dr. Tobler authored a letter in which he responded to Dr. Lesnak's June 23, 2023 report. In that letter, Dr. Tobler reiterated his opinion that Claimant's work injury exacerbated and accelerated the need for crowns on teeth #13 and #15. Dr. Tobler stated that there were no prior concerns with these two teeth. He further stated that "(o]ver the past couple of years these teeth have shown moderate crack propagation to the point where we were worried about them splitting." Dr. Tobler agreed that Claimant has a history of worn and cracked teeth. However, he believes this condition has worsened since Claimant's work injury.

22. Dr. Lesnak's deposition testimony was consistent with his written report. Dr. Lesnak reiterated his opinion that Claimant's need for the recommended dental treatment is not related to the work injury. In support of his opinion Dr. Lesnak noted Claimant's long history of cracked teeth and bruxism. Dr. Lesnak also testified that the use of the BiPAP machine would not have led to the cracked condition of Claimant's teeth.

23. The ALJ is not persuaded by Claimant's testimony regarding the nature and onset of her dental issues. The ALJ credits the dental records and the opinions of Dr. Lesnak over the contrary opinions of Drs. Shelton and Lin. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the need for dental treatment (including crowns on teeth #13 and #15, a night guard, and a follow-up appointment) was caused by the use of the BiPAP machine. The ALJ specifically credits Dr. Lesnak's opinion that the use of the BiPAP machine did not cause damage to Claimant's teeth. The ALJ notes that Claimant has a history of cracked teeth and has been diagnosed with cracked tooth syndrome. The ALJ specifically finds that the use of the BiPAP machine did not aggravate the pre-existing condition of Claimant's teeth.

CONCLUSIONS OF LAW

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

8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201,
C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306,592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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

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

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

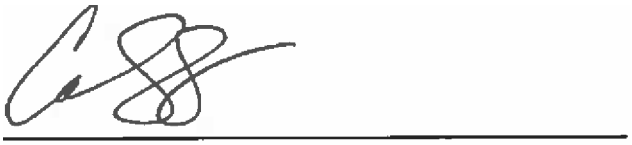
5. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *H* & *H Warehouse v. Vicory,* 805
P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund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

6. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that the dental treatment recommended by Dr. Tobler is related to the work injury. As found, the use of the BiPAP machine neither caused damage to Claimant's teeth, nor aggravated the pre-existing condition of Claimant's teeth. As found, the dental records and the opinions of Dr. Lesnak are credible and persuasive on this issue.

ORDER

It is therefore ordered that Claimant's request for dental treatment, (including crowns on tooth #13 and tooth #15; a night guard; and a follow-up appointment with Dr. Tobler), is denied and dismissed.

Dated September 25, 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.$. and OACRP 27. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-228-905-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered compensable industrial injuries during the course and scope of her employment with Employer on December 22, 2022.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her December 22, 2022 industrial injuries.

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

4. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period March 4, 2023 until terminated by statute.

FINDINGS OF FACT

1. Claimant worked for Employer as a Delivery Associate. Her job duties involved driving and delivering packages to customers. Claimant remarked that she earned approximately $800.00 each week from Employer.

2. Claimant testified that on December 22, 2022 she was delivering a package to a house that had 12-15 stairs. The stairs were icy. When Claimant was descending the stairs after delivering the package, she slipped and fell. Claimant specified that she injured her head, back, and left shoulder.

3. Claimant recounted that she immediately called Employer's dispatcher to report her fall. She remarked she was directed to drive back to Employer's warehouse and then go home.

4. In contrast to Claimant's contention, Owner of Employer [Redacted, hereinafter CS] and Manager [Redacted, hereinafter AL] described that it is Employer's policy for employees not to drive work vehicles after suffering injuries. They both emphasized that an employee who fell and injured her head would not be told to return to Employer's warehouse without assistance. Instead, Employer's policy is to send an individual to assist the injured worker and drive the employee back to the warehouse. The injured employee would then complete an injury report and receive a designated provider list unless emergency medical treatment was necessary.

5. AL[Redacted] testified that he was the dispatcher during Claimant's work shift on December 22, 2022. He denied that Claimant reported an injury or a fall to him on December 22, 2022.

6. On December 23, 2022 Claimant sent a text message to Employer's dispatch phone. The message stated the following:

> I not feeling well I feel really dizzy and my throat all swollen my chest is very tight and small fever 102 and my throats so bad it hurts to talk or swallow anything. I took meds for it. I can come in but I don't want to get in trouble for being slow. I think [Redacted, hereinafter NN] and [Redacted, hereinafter CH] finally gave me COVID or flu or both.

Although the preceding text message did not mention her work injuries on the previous day, Claimant testified that being "dizzy" referred to her work accident.

7. On December 24, 2022 Claimant visited the Emergency Department at Sky Ridge Medical Center. She presented with multiple concerns including a fever up to 105 degrees for the past three days, chills, a sore throat, nasal congestion, a cough, nausea, vomiting, diarrhea, dysuria, and chronic back pain. Claimant had also developed left-sided chest pain on the night before her visit. She commented that her son was currently sick with "COVID and flu." Claimant exhibited back pain, but no neck or extremity pain. She also did not have a headache or numbness/tingling. During a physical examination, Claimant demonstrated "full range of motion of 4 extremities" and no midline cervical, thoracic, or paraspinal tenderness. Her speech and mood were also normal. Claimant noted her back symptoms felt like her "usual back pain" for which she was on "chronic oxycodone." Testing for COVID-19, influenza, and strep were all negative. Medical providers assessed Claimant with a viral illness and back pain. Claimant did not mention any fall down stairs, a concussion, or shoulder issues during the Emergency Department visit.

8. Claimant testified that she has suffered consistent shoulder pain since her fall at work. She has also experienced headaches, dizziness, cloudiness, and memory loss since December 22, 2022. However, Claimant's testimony is not consistent with her medical or employment records.

9. Claimant worked seven additional shifts for Employer from December 27, 2023 through January 7, 2023 after her alleged fall on December 22, 2023. She specifically worked full duty including loading packages, unloading packages, and driving a delivery vehicle. AL[Redacted] testified that he saw Claimant at the beginning of her shifts and she did not display any visible signs of injuries while working. Claimant's ability to work full duty as a delivery driver is inconsistent with her interrogatory response #6 that stated she has been unable to lift anything and folding laundry is "very tough" with her left arm "out of commission" since suffering her work injuries.

10. Employer's Manager [Redacted, hereinafter RL] testified he met with Claimant on January 20, 2023 to obtain her First Report of Injury. Claimant commented that her fall occurred on Christmas Eve or December 24, 2022. She acknowledged that January 20, 2023 was the first time she reported the accident to Employer.

11. The First Report of Injury is dated January 23, 2022 and was prepared by

CS[Redacted]. Notably, the document specifies that Claimant could not remember any of the details about the location or area where she was injured. Although Claimant stated she was delivering packages during her work accident, she was unable to specify how she fell. Nevertheless, in her Answers to interrogatories, Claimant provided a very detailed explanation of the circumstances and location surrounding her work accident.

12. On January 20, 2023 Claimant began treatment under the present claim at OnPoint Urgent Care. She presented with neck pain, shoulder pain, and other possible concussive symptoms since a work injury on December 24, 2022. Claimant detailed that she slipped down approximately 12-15 icy steps and struck her "butt, back and then head." She denied a history of prior back pain. Cynthia Chavoustie, PA noted limited range of motion in Claimant's left shoulder and tightness in her neck. PA Chavoustie assessed Claimant with a closed head injury, left shoulder injury, post-concussion syndrome, paresthesia of her lower extremity, and a neck injury/strain.

13. On February 14, 2023 Claimant began receiving treatment from Authorized Treating Provider (ATP) Philip Stull, M.D. Claimant reported a left shoulder injury that occurred at work on December 24, 2022. Dr. Stull noted a left shoulder MRI had been completed on February 8, 2023. The imaging revealed a posterior superior labral tear. Dr. Stull found a painful arc of motion with limited range of motion on examination. He recommended a surgical labral repair.

14. On February 15, 2023 Insurer filed a Notice of Contest in the present claim stating that Claimant's injury was not work-related. Claimant testified she spoke with [Redacted, hereinafter AH], a representative from Insurer, around the same time. AH[Redacted] informed Claimant she did not work on December 24, 2022. Furthermore, Claimant's timecard reflects that she was not at work on December 24, 2022. Claimant testified that she provided the incorrect date of injury of December 24, 2022 because she was suffering from a concussion and COVID-19. She subsequently advised her medical providers she slipped and fell while delivering packages at work on December 22, 2022.

15. Claimant has failed to establish it is more probably true than not that she suffered compensable left shoulder, head, and back injuries during the course and scope of her employment with Employer on December 22, 2022. Initially, Claimant explained that while working for Employer on December 22, 2022, she fell down icy stairs while delivering a package. She testified she immediately reported the fall to a dispatcher who directed her to drive back to the warehouse then go home. Despite Claimant's assertions, the record reveals numerous internal inconsistencies and conflicts with other witnesses that cast doubt on the veracity of her account. Owner CS[Redacted] and Manager AL[Redacted] emphasized that an employee who fell and injured her head would not be told to return to Employer's warehouse without assistance. Furthermore, AL[Redacted] explained that he was the dispatcher during Claimant's work shift on December 22, 2022 and she did not report a fall. Finally, on December 23, 2022 Claimant sent a text message to Employer stating that she was suffering from dizziness, a fever, a sore throat and chest tightness. However, she did not mention a slip and fall at work on the preceding day.

16. The medical report from the Sky Ridge Medical Center Emergency Department

dated December 24, 2022 reflects Claimant was not suffering from any work injuries. She presented with multiple concerns including a fever up to 105 degrees for the past three days, chills, a sore throat, nasal congestion, a cough, nausea, vomiting, diarrhea, dysuria, and chronic back pain. Testing for COVID-19, influenza, and strep were all negative. Medical providers assessed Claimant with a viral illness and back pain. Notably, Claimant did not mention any fall down stairs, a concussion, or shoulder concerns during the Emergency Department visit just two days after the work accident.

17. Claimant's description of her accident is internally inconsistent. The record reveals that Claimant worked seven additional shifts for Employer from December 27, 2023 through January 7, 2023 after her alleged fall on December 22, 2023. She specifically worked full duty including loading packages, unloading packages, and driving a delivery vehicle. AL[Redacted] testified that he saw Claimant at the beginning of her shifts and she did not display any visible signs of injuries while working. Claimant's ability to work full duty as a delivery driver is also inconsistent with her Interrogatory response #6 that stated she has been unable to lift anything and folding laundry is "very tough" with her left arm "out of commission" since suffering work injuries.

18. Claimant acknowledged that January 20, 2023 was the first time she reported her injuries to Employer. She noted that her fall occurred on Christmas Eve or December 24, 2022. The First Report of Injury is dated January 23, 2022 and was prepared by CS[Redacted]. Notably, the document specifies that Claimant could not remember any of the details about the location or area where she was injured. Although Claimant stated she was delivering packages during her work accident, she was unable to specify how she fell. Nevertheless, in her Answers to interrogatories, Claimant provided a very detailed explanation of the circumstances and location of her work accident.

19. Claimant initially alleged a December 24, 2022 date of injury. However, she did not work on the preceding date. Claimant only changed the date of the fall to December 22, 2022 after she was informed by Insurer's representative AH[Redacted] that she did not work on December 24, 2022. Claimant's explanation, about suffering from a concussion and COVID-19 is not credible based on her ability to clearly recall other events around that time as well as her negative COVID-19 test on December 24, 2022. Based on the credible testimony of Employer witnesses, the medical records and Claimant's employment records, it is unlikely that Claimant suffered injuries while working for Employer on December 22, 2022. Claimant has specifically failed to demonstrate a causal nexus between her work activities and injuries to her left shoulder, head, and back. Claimant's work activities on December 22, 2022 thus did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by

a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. 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. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a pre-existing condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to establish by a preponderance of the evidence

that she suffered compensable left shoulder, head, and back injuries during the course and scope of her employment with Employer on December 22, 2022. Initially, Claimant explained that while working for Employer on December 22, 2022, she fell down icy stairs while delivering a package. She testified she immediately reported the fall to a dispatcher who directed her to drive back to the warehouse then go home. Despite Claimant's assertions, the record reveals numerous internal inconsistencies and conflicts with other witnesses that cast doubt on the veracity of her account. Owner CS[Redacted] and Manager AL[Redacted] emphasized that an employee who fell and injured her head would not be told to return to Employer's warehouse without assistance. Furthermore, AL[Redacted] explained that he was the dispatcher during Claimant's work shift on December 22, 2022 and she did not report a fall. Finally, on December 23, 2022 Claimant sent a text message to Employer stating that she was suffering from dizziness, a fever, a sore throat and chest tightness. However, she did not mention a slip and fall at work on the preceding day.

8. As found, the medical report from the Sky Ridge Medical Center Emergency Department dated December 24, 2022 reflects Claimant was not suffering from any work injuries. She presented with multiple concerns including a fever up to 105 degrees for the past three days, chills, a sore throat, nasal congestion, a cough, nausea, vomiting, diarrhea, dysuria, and chronic back pain. Testing for COVID-19, influenza, and strep were all negative. Medical providers assessed Claimant with a viral illness and back pain. Notably, Claimant did not mention any fall down stairs, a concussion, or shoulder concerns during the Emergency Department visit just two days after the work accident.

9. As found, Claimant's description of her accident is internally inconsistent. The record reveals that Claimant worked seven additional shifts for Employer from December 27, 2023 through January 7, 2023 after her alleged fall on December 22, 2023. She specifically worked full duty including loading packages, unloading packages, and driving a delivery vehicle. AL[Redacted] testified that he saw Claimant at the beginning of her shifts and she did not display any visible signs of injuries while working. Claimant's ability to work full duty as a delivery driver is also inconsistent with her Interrogatory response #6 that stated she has been unable to lift anything and folding laundry is "very tough" with her left arm "out of commission" since suffering work injuries.

10. As found, Claimant acknowledged that January 20, 2023 was the first time she reported her injuries to Employer. She noted that her fall occurred on Christmas Eve or December 24, 2022. The First Report of Injury is dated January 23, 2022 and was prepared by CS[Redacted]. Notably, the document specifies that Claimant could not remember any of the details about the location or area where she was injured. Although Claimant stated she was delivering packages during her work accident, she was unable to specify how she fell. Nevertheless, in her Answers to interrogatories, Claimant provided a very detailed explanation of the circumstances and location of her work accident.

11. As found, Claimant initially alleged a December 24, 2022 date of injury. However, she did not work on the preceding date. Claimant only changed the date of the fall to December 22, 2022 after she was informed by Insurer's representative AH[Redacted] that she did not work on December 24, 2022. Claimant's explanation, about suffering from a concussion and COVID-19 is not credible based on her ability to clearly recall other events around that time as well as

her negative COVID-19 test on December 24, 2022. Based on the credible testimony of Employer witnesses, the medical records and Claimant's employment records, it is unlikely that Claimant suffered injuries while working for Employer on December 22, 2022. Claimant has specifically failed to demonstrate a causal nexus between her work activities and injuries to her left shoulder, head, and back. Claimant's work activities on December 22, 2022 thus did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

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

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, 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: September 25, 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 5-142-174-004

ISSUES

- Did Respondents overcome the Division IME determination that the Claimant is not at MMI?
- If so, did Respondents overcome the DIME determination that the Claimant has 27% whole person impairment?

FINDINGS OF FACT

1. Claimant works for Employer as a mechanic. He sustained an admitted low back injury on February 24, 2020. He injured himself using a 3' pipe lever to straighten a bent snowplow mount.

2. A hearing was previously held in the matter before the undersigned Administrative Law Judge. In an order issued on November 22, 2022, the ALJ denied medical treatment for Claimant's hip and groin as unrelated. That order was not appealed. Following that order, Claimant's ATP, Dr. Johnson placed the Claimant at MMI on December 9, 2022 and issued a 30% whole person impairment rating.

3. Respondents requested a Division sponsored IME. On the Application for Division IME, Respondents only checked Region 4, the lumbar spine, as the body part at issue. Claimant did not request by motion that any other regions/body parts be added. Presumably, other body parts, including the hip (Region 2) or psychological (Region 3) could have been added by motion and order from an ALJ or PALJ. However, there is no specific mechanism in Rule 11 to add regions.

4. The DIME was performed by Dr. Ogden on April 12, 2023. Since Dr. Ogden was not familiar with complications from hip replacements, he conducted medical literature research including research with "UpToDate". Dr. Ogden determined Claimant has not reached MMI and he issued an advisory 27% whole person impairment rating.

5. Specifically, Dr. Ogden determined that Claimant could benefit from chronic pain evaluation and treatment. In accordance with the Chronic Pain Disorder Medical treatment Guideline, he suggested an evaluation by a psychologist or a psychiatrist. He also determined that the pain in Claimant's left hip needs to be addressed. He recommended an evaluation to provide a diagnosis and definitive care. After review of the medical literature, Dr. Ogden determined that the Claimant's L5-S1 fusion caused changes in the hip dynamics. Due to that change, he related the hip to the work injury.

6. Dr. Ogden was unaware that the ALJ had previously determined that the hip was unrelated to the work injury after a hearing on the matter. Dr. Ogden became aware of the Order after the DIME was completed and he was asked about it in his deposition.

7. Respondents filed an Application for Hearing on May 12, 2023 to challenge the determinations of the DIME that the Claimant is not at MMI and the 27% impairment rating.

8. Respondents obtained an IME with Dr. Wallace Larson. In his September 28, 2022 report, Dr. Larson stated that "(a)t this time his left groin pain has not been definitely diagnosed, but is most likely iliopsoas tendinitis either as an idiopathic condition or related to his total hip arthroplasty. . . it is not likely related to his anterior lumbar fusion." Exhibit E, p. 12. Additionally, Dr. Larson opined that Claimant was at MMI for his work related injury. Exhibit E, p. 13.

9. Dr. Larson also testified at hearing. He opined that the iliopsoas tendonitis is not related to the spine surgery that Claimant underwent. He also provided a peer review article (Exhibit G) which is a comprehensive article on iliopsoas tendonitis. It demonstrates that if the acetabular component of the hip replacement extends too far out, it will rub against the iliopsoas tendon causing tendonitis. This suggests that this would be a likely cause of hip pain following a total hip replacement as opposed to back surgery.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101,*et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S.

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

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

E. A DIME's findings may only be overcome by clear and convincing evidence. Clear and convincing evidence has been defined as evidence which demonstrates that it is 'highly probable' the DIME's opinion is incorrect. See Qual-Med, Inc., v. ICAO, 961 P.2d 590 (Colo. App. 1998); Metro Moving & Storage Co. v. Gussert, 914 P. 2d 411 (Colo. App. 1995). However, prior to consideration of the DIME's findings, it is necessary to determine the scope of the DIME as requested by the parties. Here, the only body part selected by Respondents for consideration by the DIME is the lumbar spine. Since no other body part was selected, the DIME doctor's inclusion of hip and psychological are beyond the scope of the DIME. As such, the doctor's opinions that the Claimant is not at MMI for hip and psychological issues for chronic pain cannot be considered under C.R.S. §8-42-107.2(2)(b). That statute provides that "the authorized treating physician's findings and determination shall be binding on all parties and the division" if not made the subject of the DIME review. *See, Rodriguez v. Aarons, Inc*., W.C. No. 5-119-986 (March 8, 2023). (Since the 3% mental impairment rating was not an issue for consideration by the DIME, it is binding on the parties and the Division and the ALJ cannot consider it).

F. Having determined that the only body part that the DIME could consider is the lumbar spine, it is somewhat unclear to me as to whether the DIME doctor determined that the Claimant is at MMI for the spine alone. However, based on the fact that the DIME doctor did not include the spine in his determination that the Claimant was not at MMI, I conclude that it is his opinion that Claimant is at MMI for the spine alone. I reach this conclusion based on the fact that the Doctor mentions only two reasons that the Claimant is not at MMI, namely the hip and chronic pain. Additionally, to the extent that Dr. Ogden is opining that Claimant is not at MMI due to his lumbar spine, I conclude that Respondents have overcome that determination based on the opinions of Dr. Larson, whom I find to be credible and

persuasive. I am also persuaded by Dr. Larson's opinion that Claimant's hip pain is likely due to iliopsoas tendonitis rather than Claimant's lumbar surgery. The DIME doctor clearly erred when he opined that Claimant is not at MMI.

G. Respondents also challenge the impairment rating for the spine in their proposed order. They maintain that the correct impairment rating is 20% whole person as opined by Dr. Larson. They offer this rating utilizing preponderance of the evidence standard instead of providing evidence that Dr. Ogden's impairment rating is clearing incorrect. In reviewing the evidence I conclude that Respondents have failed to overcome the impairment rating of Dr. Ogden of 27% whole person.

ORDER

1. The parties are bound by the authorized treating physician's determination that the Claimant is at MMI for all work related conditions except for the lumbar spine.

2. The Claimant is at MMI for the lumbar spine.

3. The Respondents failed to overcome the Division IME determination that the Claimant has a 27% impairment rating.

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

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

DATED: September 26, 2023

/s/ Michael A. Perales

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

ISSUES

I. Whether Claimant has proven by clear and convincing evidence that Claimant is not at maximum medical improvement (MMI), as found by Division Independent Medical Examining (DIME) physician Caroline Gellrick, M.D.

II. If Claimant is found not at MMI, whether Claimant has shown which body parts are related to the July 30, 2021 admitted claim, including a mild traumatic brain (mTBI) injury, psychological condition, left hip and left shoulder injuries, as well as cervical, thoracic, and lumbar spine,.

III. If Claimant is found to be at MMI, what is the correct impairment, including whether Claimant proved conversion.

IV. If Claimant is found not at MMI, whether Claimant has shown by a preponderance of the evidence she is entitled to temporary total disability (TTD) benefits from March 21, 2022 through the present and continued until terminated by law.

PROCEDURAL HISTORY

Respondents filed a First Report of Injury (FROI) on August 3, 2021 noting that Claimant had been "scrubbing and stripping Floor (sic.) with stripper and walked slightly to move the plug to the scrubbing machine and slipped on wet floor with stripper and water. Fell on buttock, back and hit head on floor." The Head Building Engineer IV reported that Claimant sustained injuries when she slipped on wet floor with chemical and hurt her back, hip and head, and when mentioning the body parts affected included the upper back as well.

Insurer filed a General Admission of Liability on September 3, 2021 admitting for medical benefits and temporary disability benefits at the rate of $700.69 per week from August 19, 2021. The admitted average weekly wage was $1,051.04.

Respondents filed a Final Admission of Liability (FAL) on November 15, 2022 based on a date of maximum medical improvement of March 21, 2022 in the DIME physician's report (Dr. Caroline Gellrick) dated November 7, 2022, admitting for impairment of 7% of the lower extremity, 14% of the upper extremity and 7% whole person of the cervical spine. The FAL also admitted to reasonable, necessary and related medical treatment and/or medications after MMI.

On December 20, 2022 the Office of Administrative Courts issued an Order Granting the Unopposed Motion to Withdraw Application for Hearing and Hold Issues in Abeyance. The order specified, if the parties were unable to resolve the issues, that Claimant must refile an AFH within 30 days of the settlement conference.

On March 23, 2023 Claimant filed an Application for Hearing on issues of overcoming the DIME physician's opinions with regard to MMI and impairment as well as conversion, temporary disability benefits and disfigurement, among other issues.

Respondents filed a Response to AFH on April 21, 2023 on similar issues but additionally on causation, preexisting condition, relatedness, credits and apportionment, among other issues.

STIPULATIONS OF THE PARTIES

The parties made the following stipulations:

1. The parties stipulated that the issue of permanent total disability (PTD) benefits and disfigurement would be held in abeyance.

2. The parties further agreed that the issue of permanent partial disability (PPD) benefits and maintenance medical benefits (Grover benefits) are not ripe unless this ALJ determines that Claimant has reached MMI.

3. Lastly, the parties agree that, if this ALJ determines Claimant is not at MMI, TTD benefits should be reinstated as of the last date Claimant was previously placed at MMI.

The stipulations of the parties is accepted and becomes part of this order.

FINDINGS OF FACT

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

A. Generally:

1. Claimant was 56 years old at the time of the hearing. Claimant worked as a custodian and housekeeper for Employer for approximately 19 years prior to the admitted work injury of July 30, 2021.

2. On July 30, 2021 Claimant was working, stripping and shining floors with a machine called a side-side or buffer, when she slipped and fell, hitting her head, injuring her head, neck, left shoulder, back and left hip.

3. Claimant does not know if she lost consciousness, and had never told any of her providers that she lost consciousness, only that she recalls being upright and her whole body was trembling. She also remembered disconnecting the machine and then walking on the chemical wax stripper on the floor, then slipping and falling directly onto her back, hitting her head. For several minutes she was not able to concentrate but then went in search of her supervisor to let her know about the fall, then she continued her shift.

4. Claimant had a prior low back injury approximately 25 years before her work injury. She did not have the problems she currently has with her back in the years leading

up to her work injury. She would take oxycodone for pain when her doctor prescribed it but not for some time. She had been prescribed oxycodone for her leg pain as she would walk extensive amounts while working.

B. Claimant's Testimony:

5. Claimant was first evaluated by Dr. Beach on August 3, 2021. At that time she complained of feeling dazed, a symptom which she has been having since then to the time of the hearing. She also stated, despite whether Dr. Beach documented it or not, that she was limping when she first saw him. She had never experienced any of these kind of symptoms before her admitted work related accident. She had also been experiencing problems with forgetfulness, loss of focus, concentration, crying a lot, not able to tolerate lights or bear noise very well. At the time she fell and hit her head, the pain was intolerable in both her head and her neck, which has caused difficulties with turning her head since then. The pain in her left shoulder caused a sense of dislocation that felt like her arm was unhooked or separated, including a burning sensation. She also felt a burning sensation in her low back and left hip and as if she was sitting on a pointy rock, with pain going down her leg. This has caused problems with sitting for long periods of time and she has to shift and sit on her right buttock. She stated that she got along well with Dr. Beach and did not understand why he would have documented somethings and not others.

6. Her symptoms were so bad that on August 11, 2021 she ended up going to the emergency room. She was having balance problems and felt very dizzy. Dr. Beach referred Claimant to Dr. Olsen first for the low back problems, for which she did not receive long term relief. Dr. Beach also referred Claimant to Dr. Hammerberg, a neurologist, and Dr. Ledezma who treated her for depression. Claimant testified that she had never had problems with depression previously and those symptoms began approximately five days following the July 30, 2021 work injury because she could not be around many people and could not endure loud noises. Further, while the dizziness was not occurring all the time, she continued to have dizziness. Sometimes the dizziness caused her imbalance but her pain in her left hip does as well.

7. Claimant stated that she used to be an extremely independent person that now has had to rely on others to most things for her. For example, she has had to stop cooking for herself because she has burned herself and would forget the stove on, causing the alarm to go off. She has had to stop going to the store by herself because she would get lost and have panic attacks or just starts crying.

8. Claimant stated that when Dr. Beach discharged her she continued having the same problems, including problems with her neck, head, left shoulder, back, left hip, with burning sensations going down her arm and her leg, and problems with depressive thoughts, all of which have continued through the time Claimant was seen by the DIME physician.

9. After Claimant was discharged by Dr. Beach on March 21, 2022, and evaluated by the DIME physician, Claimant was returned for treatment of her left shoulder. She saw Dr. Olsen who referred her for an MRI, which she understood showed a tear in her left shoulder tendons. Claimant was sent for physical therapy for her left

shoulder. She also was evaluated by the orthopedic specialist who discussed possible surgery of the left shoulder if the physical therapy did not work. Claimant stated that she would like the surgery if it was offered to her.

10. Dr. Olsen also referred her for an MRI of the left hip and advised Claimant that she did not require any surgery for the left hip.

11. Claimant conveyed that she did not get along with Dr. Ledezma but that if she was offered a different psychologist, she would be willing to continue treating her depression and anxiety.

12. Claimant disagreed with Dr. D'Angelo that she had not had left shoulder pain for some time before MMI as the pain had always been there and she reported as much to her providers. Lastly, she stated that, if she was offered treatment that would improve her condition, she would proceed with the treatment. She agreed that she had not improved much in the two years since her injury. She stated that she only recalls the injections helping temporarily and the limited physical therapy for the left shoulder has been limited to hot patches on her shoulder and a little massage without improvement, she has not had therapy that involved exercises to improve function.

13. Further, there were multiple things Claimant did not recall telling her providers or remembered them telling her, such as Dr. Ledezma instructing her on coping strategies for pain or handling anxiety or Claimant telling Dr. Ledezma than she did not think the instructions would help. She stated that sometimes her memory is fine but at other times it is not, especially if she is going into a panic attack. She stated that she did not remember a lot of things since her accident, including doctors, people, faces, appointments, and she has to rely on her son for many things.

C. Medical Records:

14. Claimant was initially examined by Dr. Dee Jay Beach on August 3, 2021 with a history of slipping and falling on a wet floor, striking her head, back, bilateral buttocks and had a left arm extended when she fell. She denied loss of consciousness but felt dazed for several seconds. She continued to work, stating her pain had decreased since the accident but she continued to have problems with concentration, occasional dizziness, headaches (HAs), pain in her neck, back, left shoulder and left hip. She provided a prior history of injury to her low back when she was approximately 35 to 36 years old, when she had physical therapy for three years, had difficulty walking but regained normal function slowly with no restriction or impairment. She reported that she had had intermittent back pain since. Dr. Beach noted Claimant had oxycodone two to three times a month for back pain for 20 years. Dr. Beach noted Claimant had headaches, head injury, muscle and joint pain, stiffness, back pain and neck pain. On exam he noted that Claimant was not tender on the head and he did not perceive any signs of trauma to the head, had a 3 cm by 3 cm bruise on her inferior right buttock, was tender to palpation over the paraspinal muscles from C3-T8 and L3-L5, left scapular muscles, left elbow, and left hip. He noted, under patient counseling, that claimant had normal balance, memory, coordination, speech, calculation and Romberg. He diagnosed concussion, neck pain, thoracic pain, lumbar pain, left hip pain, left shoulder sprain/strain and head pain. He recommended gentle stretching and heat and returned her to regular duty with no

climbing ladders. Claimant was to return to consult on August 16, 2021 or sooner if symptoms changed.

15. On August 11, 2021 Claimant was seen at the emergency room at UCHealth Anschutz due to headaches and altered mental status. Nurse Brittney Drapal noted Claimant had a concussion, with worsening memory, altered feelings, continual headache with neck pain and ear pain. Claimant reported her balance was off and had light sensitivity. Claimant's family members reported that Claimant had been confused and forgetful since the accident. Claimant mentioned her supervisor had also noticed these problems. Dr. Marianne Wallis had a working diagnosis of headaches and altered mental status. Dr. Wallis ordered a CT of the brain, which was read as normal, with no acute findings of intracranial abnormality.

16. Claimant was again evaluated by Dr. Beach on August 12, 2021, before her scheduled appointment with reports of feeling worse, with persistent headaches, nausea, dizziness, confusion, fatigue, pain in her neck, back and left hip. Dr. Beach noted a slow guarded gait, guarded trunk movements, mild dizziness while standing with eyes closed and turning head, positive Romberg, tender to palpation over the paraspinal muscles from C3-T4 and L3-L5, and SI joint on the left, left scapular muscles, left elbow, left hip. Dr. Beach ordered physical therapy at Select Physical Therapy for four weeks including exercise, joint mobilization, spine stabilization, ultrasound, electrical stimulation and concussion management. He decreased her hours to 4 hours a day, with a mostly seated restriction.

17. On August 19, 2021 Claimant reported to Dr. Beach that she continued with symptoms of headaches, dizziness, blurred vision, nausea, fatigue, memory loss, pain in her neck, back, left hip, and left shoulder, and was having difficulty working. On exam Dr. Beach noted that Claimant was anxious, fearful, tearful, and had an unsteady slow gait, improving memory but continued with tenderness to palpation of neck, back, left hip and left shoulder with guarded range of motion (ROM). Considering the continuing symptoms, Dr. Beach referred Claimant to a neurologist, Dr. Eric Hammerberg for management of the diagnosed post-concussive syndrome. He also kept Claimant off work, recommending brain rest, a bland diet and quiet environments.

18. Claimant had an MRI of the Head/Brain performed at Health Images at Church Ranch on August 25, 2021. Dr. Benjamin Aronovitz noted that there was minimal chronic small vessel ischemic disease but no acute findings.

19. Dr. Beach evaluated Claimant on August 30, 2021, four and one half weeks post slip and fall with multiple injuries, including a head injury. Claimant continued with post concussive syndrome with persistent headaches, nausea, dizziness, lethargy, brain fog, and pain in her left hip, left shoulder, neck and back. Claimant had a slow unsteady gait, poor balance with eyes closed and moderate swaying. Dr. Beach noted Claimant was in moderate distress, had tenderness to palpation (TTP) over the C3-T6, L3-L5, left lateral hip, left SI joint, left lateral shoulder, and left scapula area with guarded ROM. Claimant continued with a positive Romberg sign but normal speech. He discussed the normal MRI of the brain with Claimant, except for chronic mild ischemia. Dr. Beach ordered a MRIs of the lumbar spine and left hip, continued physical therapy and home

exercise program, continued use of heat and cold on neck, back and left hip, continued brain rest, bland diet and no work duties.

20. Claimant had an MRI of the lumbar spine performed at Health Images at Church Ranch on August 31, 2021. Dr. David Goodbee read the results noting that Claimant had multilevel degenerative changes with mild facet hypertrophy at L3-5, showing mild canal and left foraminal narrowing at L2-3 and L4-5. It also showed moderate bilateral foraminal narrowing at L5-S1 with subtle effect upon the exiting right L5 nerve root and a small broad-based disc. The left hip MRI showed left gluteus minimus tendinopathy and low-grade partial tearing as read by Dr. Seth Andrews.

21. Claimant returned to see Dr. Beach on September 7, 2021 with continued post concussive symptoms as well has continued issues with her neck, lumbar spine, left lateral and posterior hip, and SI joint as well as her left shoulder. He reviewed the findings on the lumbar spine MRI including the multilevel degenerative changes and foraminal narrowing. The MRI of the left hip showed gluteus minimus tendinopathy and low grade partial tearing. Claimant continued with daily headaches, dizziness, nausea, fatigue, and photophobia with reports of pain of 6/10 in the left shoulder and neck and 8/10 in the lumbar spine and left hip, which improved with rest. Dr. Beach noted that Claimant was walking slowly, was depressed, somber, and uncomfortable and had the same TTP points.

22. Dr. Eric Hammerberg evaluated Claimant on September 8, 2021 concerning her head trauma. He obtained a history consistent with that provided at hearing and to Dr. Beach, with the exception that when listing symptoms, he also listed significant sleep issues, and both short term and long term memory loss. On exam, he noted a grossly normal exam but did not test cognition, found decrease pin and touch sensation over the left face, increased neck pain with extension and left rotation, TTP over the posterior cervical muscles bilaterally, the superior trapezius muscle bilaterally and the left shoulder, markedly impaired tandem gait, decreased sensation over the left upper extremity and lower extremity with vibration and position sensation. He diagnosed postconsussion syndrome, dizziness and giddiness, adjustment reaction with mixed disturbance of emotion and posttraumatic headaches. He prescribed Claimant sertraline (Zoloft).

23. Claimant missed an appointment as she had tested positive for COVID-19 with household also in quarantine. Claimant did not have any symptoms though. She had been diagnosed with COVID-19 the previous April 2020, according to her son.[1]

24. By 9 weeks post injury, on October 4, 2021, Claimant reported to Dr. Beach she had improved concentration and balance but persistent headaches, nausea, photophobia and insomnia. She resumed driving short distances. On exam, Dr. Beach continued to note guarded gait with unsteady balance, was positive for photophobia and sonophobia. He noted that Dr. Hammerberg had prescribed Zoloft. Dr. Beach prescribed Amitriptyline as well. He also referred Claimant to Dr. Olsen for evaluation and treatment of left hip and low back pain.

[1] See November 9, 2021 report by Dr. Beach.

25. Dr. Nicholas Olsen evaluated Claimant on October 7, 2021 taking a history consistent with Claimant's testimony at hearing. She complained of pain in her left shoulder and left hip at 8/10, with depression, anxiety and irritability as well as moderate pain behaviors during exam. She provided a past history of back injury and motor vehicle accidents, though was performing her regular job at the time of the accident. He noted moderate axial back pain with palpation, positive facet loading on the left, limited ROM, negative for radicular features in the lower extremities. Neurologic exam showed light loss of strength on the left lower extremity, no focal motor loss, generalized give-away weakness, decrease in sensation to pinprick in the left L4, L5 and S1 dermatomes and absent long tract signs. He diagnosed L4-5, L5-S1 spondylosis with radiculopathy, left shoulder sprain and MRI of the left hip demonstrating left gluteus medius tendinopathy and low grade partial tearing. Dr. Olsen recommended bilateral L4-5 and L5-S1 facet injection.

26. On October 18, 2021 Claimant's symptoms had not improved. She had just started with Zoloft medication prescribed by Dr. Hammerberg and continued with headaches, photophobia, and brain fog as well as anxiety and depressed mood. Dr. Beach referred Claimant to Dr. Lupe Ledezma, a Spanish speaking psychologist for treatment of depression. Claimant was also to proceed with L4-5 and L5-S1 lumbar facet injections with Dr. Olsen.

27. On October 19, 2021 Dr. Hammerberg continued to document claimant's phonophobia, depression, crying spells, and headaches described as her "head is on fire." He prescribed divalproex sodium ER (Depakote ER) and increased her sertraline.

28. On November 1, 2021 Claimant was initially evaluated by Dr. Lupe Ledezma, a psychologist. Dr. Ledezma took a history consistent with Claimant's testimony noting that Claimant slipped and fell back onto her back, hitting her head on the ground. She remarked that Claimant felt dazed, immediate lower back, left shoulder, left hip pain and a strong headache. In the days following the July 30, 2021 accident, Claimant continued to feel increasingly mentally fuzzy and confused, with difficulty tolerating noise and bright lights. She felt frequent postconsussion nausea and cried at work almost daily. She was making mistakes while driving and one day ran into the wall of her garage. Her supervisor also had remarked that she was making mistakes at work, leaving equipment in the incorrect places, forgetting to perform tasks, not remembering instructions and her supervisor recommended she seek medical attention because of her symptoms. Claimant reported symptoms of depression and anxiety which included sadness, tearfulness, crying for no reason, isolation, lethargic, lack of motivation, difficulty around people, poor sleep, decreased appetite, loss of interest in hygiene, felt pessimistic, had decreased self-confidence, was not independent, and was uncomfortable in social situations. Dr. Ledezma diagnosed moderate major depression, mild anxiety and mild neurocognitive disorder. She prescribed psychotherapy to provided coping skills, pain control, cognitive compensatory strategies and mood stabilization, as well as neuropsychological testing with Dr. Laura Rieffel, and recommended continued antidepressant medication, and medical intervention.

29. Dr. Olsen proceeded with the bilateral L4-5, L5-S1 facet injections on November 2, 2021. Preinjection VAS score was 8/10 and a 6/10 post injection score.

30. Dr. Beach noted on November 9, 2021 that Claimant had been taking Depakote ER for three weeks pursuant to Dr. Hammerberg. Claimant continued with symptoms of headaches, irritability, anxiety, photophobia, and sonophobia. She reported some improvement with low back pain following injections. Symptoms with regard to the left hip, left shoulder and neck continued. Claimant was still unable to work.

31. Dr. Hammerberg conducted a telehealth visit on November 10, 2021 noting symptoms continued as before with severe generalized headaches, which began occipitally and then spread forward, with daily crying spells and occasional panic attacks. Dr. Hammerberg suggested that her headaches may be cervicogenic in etiology; that they should consider facet injections in the upper cervical spine and recommended she continue to be followed by Dr. Ledezma, with coordination of proper dose and choice of antidepressant medication.

32. Dr. Ledezma noted on November 22, 2021 that Claimant continued to have headaches, dizziness, neck pain, back pain, and general fatigue, as well as being overwhelmed by lights, sound and activities around her, and night panic, ruminations and negative thoughts. She focused on cognitive behavioral strategies, relaxation strategies, desensitization strategies as well as rehearsing the strategies to block negative thoughts, and utilize more proactive approaches, such as self-soothing instead of depending on others.

33. Claimant returned to Dr. Olsen on December 1, 2021 and reported that the facet injection provided 80% reduced pain with five days of relief following the procedure. He noted a diagnostic response to the anesthetic phase and stated she may be a candidate for radiofrequency neurotomy but would need to complete medial branch block series. He recommended a bilateral L3, L4 medial branch and L5 dorsal primary ramus block.

34. On December 1, 2021 Dr. Beach noted that Claimant's postconcussive symptoms were exacerbated by depression and a generalized anxiety disorder. Claimant continued with treatment with Dr. Ledezma. Due to continued back symptoms, Dr. Olsen recommended a medial branch block. Claimant was provided with mostly seated duty work restrictions. By December 6, 2021 Claimant returned to see Dr. Beach because she could not tolerate the modified duty work. She continued to be on Sertraline and Zoloft, she was fearful, nervous, and depressed, still exhibiting photophobia/sonophobia and spoke very little, having her son speak on her behalf. Dr. Beach increased her sertraline and took her off work again.

35. Claimant returned to Dr. Ledezma on December 9, 2021 with similar symptoms. They worked on strategies to avoid increased anxiety in social situations. Claimant also reported that she would become fearful and anxious when she was left alone. Dr. Ledezma encouraged Claimant to become more active. They discussed Claimant's continued problems with short-term memory, attention and concentration as her children became frustrated by her forgetting food burning, leaving water on or being unsafe in the household. Dr. Ledezma stated that Claimant was resistant to the idea that she could have a positive effect on her own function and she needed to be more proactive in managing and improving her symptoms without relying on medical providers to solve

her problems. She diagnosed major depression, generalized anxiety disorder and stated that a neurocognitive disorder needed to be ruled out.

36. Dr. Beach saw Claimant again on December 30, 2021 with continued postconcussive symptoms. She continued to appear anxious and depressed. He increased her Zoloft to 100 mg per day and recommended continued counselling as well as the medial branch block with Dr. Olsen.

37. On January 3, 2022 Claimant continued to report similar symptoms, including that she continued to isolate due to problems with lights and sound, especially around the holiday gatherings with her family. During the session, Claimant had a panic attack, and Dr. Ledezma had to assist her with breathing techniques.

38. On January 4, 2022 Dr. Olsen proceeded with the bilateral L3, L4 medial branch and L5 dorsal primary ramus block. Pre-injection VAS was 8/10 and post injection VAS was 0/10, with a change in ROM, facet loading, and iliac compression tests. Claimant reported a 1/10 VAS score after eight hours.

39. On January 6, 2022 Claimant reported to Dr. Olsen complete relief after the injection but only up to 30% relief after two days. Dr. Olsen recommended the second medial branch block for a double confirmation.

40. Dr. Olsen performed the second medial branch block at Belmar ASC on January 18, 2022, injecting only the lidocaine and not the corticosteroids, with a pre-injection VAS score of 9/10 and a post injection score of 2/10 and one exam noted improved testing. However, the second control MBB was not diagnostic. Dr. Olsen advised Claimant she was not a candidate for radiofrequency neurotomy. He offered her consideration of L4-5, L5-S1 transforaminal epidural steroid injection instead due to her continued low back pain.

41. Claimant returned to see Dr. Beach on January 20, 2022 with continued postconcussive syndrome, depression and anxiety, with symptoms of nervousness, irritability, depression, photophobia/sonophobia, speaking very little, and persistent HAs. She also exhibited continued TTP over L3-L5 and C3-C6. He ordered a cervical MRI to further evaluate Claimant's ongoing neck pain and possible cause of the chronic HAs.

42. The cervical MRI taken at Health Images North Denver on January 20, 2022 showed trilevel intervertebral disc space height loss and decreased signal as well as multilevel facet arthropathy. Dr. Fatemah Kadivar noted that Claimant had mild disc protrusions at C2-C3 and C3-C4; disc osteophyte complex with facet arthropathy and uncovertebral hypertrophy resulting in mild spinal canal stenosis and moderate right, severe left neural foraminal stenosis at C4-C5; disc osteophyte complex with facet arthropathy and uncovertebral hypertrophy resulting in mild spinal canal stenosis and mild right, moderate left neural foraminal stenosis at C5-C6; disc osteophyte complex with superimposed central disc protrusion effacing the ventral thecal sac and indenting the ventral spinal cord with mild spinal canal stenosis and facet arthropathy and uncovertebral hypertrophy with moderate to severe left neural foraminal stenosis at C6-C7.

43. Claimant returned to see Dr. Ledezma on February 3, 2022. Claimant continued to use pain coping strategies but was frequently overwhelmed by her symptoms, pain and external stimuli. Claimant indicated she attempted to try the

proffered strategies but Dr. Ledezma noted she had a negative outlook that exacerbated and interfered with her physical issues. She made suggestions of ways to build her sense of optimism about getting better rather than only focusing on her ongoing problems and she was encouraged to slowly build her sense of independence in not only managing her symptoms, but also in doing things at home.

44. Dr. Olsen performed the left L4-5, L5-S1 TESIs on February 21, 2022, with a pre-injection VAS score of 8/10 and a post-injection VAS of 3/10.

45. On February 28, 2022 Dr. Beach reported that Claimant had her left sided L4-5 and L5-S1 TFESI with Dr. Olsen. Claimant reported the injection only helped for up to four hours and then went back to baseline. The MRI of the cervical spine showed multilevel degenerative changes with foraminal stenosis and spinal canal stenosis. Claimant was ambulating with a guarded gait, needing her son for support. This was not the first time Dr. Beach noted this in his records. She continued to appear depressed but somewhat improved as she was making eye contact and answered some questions. She stated that lights and noise bothered her. He noted she should follow up with Dr. Olsen, Dr. Ledezma and should remain off work. He continued her medications.

46. Dr. Beach attended Claimant on March 21, 2022 and documented that Claimant had decided she did not wish to pursue treatment with Dr. Ledezma or with Dr. Olsen. She informed Dr. Beach that she was ready to be discharged from care. He stated that she was not a surgical candidate at that time. Claimant indicated that she did not wish to return to work unless she made progress. Dr. Beach continued to note Claimant ambulated slowly, with a guarded gait, holding on to her son for support. She was nervous, anxious with limited eye contact, wearing earplugs due to sonophobia/phonophobia. She had normal strength in her upper extremities and functional ROM in her neck and back. He stated that performed an impairment rating pursuant to the *AMA Guides,* 3rd Edition (*Revised*) and noted Claimant had a 25% whole person impairment due to the TBI. He assessed that impairment was based on Table 1, Spinal Cord and Brain Impairment. He limited her to return to work in an office setting only, 4 hours a day and stated she required no maintenance care. He placed Claimant at MMI and discharged her.[2]

47. Claimant was evaluated for a Division of Workers' Compensation Independent Medical Examination by DIME physician Caroline Gellrick, M.D. on September 27, 2022. Dr. Gellrick took a history consistent with Claimant's testimony at hearing. Dr. Gellrick documented Claimant had symptoms of pain in her left shoulder, headaches, left hip, neck (but none in the low back or thoracic spine), dizziness, balance, depression, anxiety and problems sleeping with occasionally getting nausea and feeling she had a sensation of being drunk every day. She stated Claimant did not get along with Dr. Ledezma. She confirmed that Claimant had asked her case be closed because she was not receiving benefit from the treatment offered by her medical providers. On exam she noted tenderness and spasms in the occipital area, complained of loud noises, crepitus of the left shoulder, positive impingement signs, loss of range of motion of the

[2] While Dr. Beach stated Claimant had functional ROM there were no range of motion measurements in accordance with the *AMA Guides* or *Impairment rating Rules*, nor were there any explanations why Dr. Beach did not rate the physical injuries.

shoulder, left hip and neck, a positive Patrick's and FABER's on the left, limping, could not do tandem walking or heel-to-toe walking, problems with balance. Otherwise, her exam was benign. Dr. Gellrick failed perform a psychological evaluation (despite knowing Claimant had depression and anxiety and not having Dr. Ledezma's psychological evaluation or reports). Dr. Gellrick found that Claimant's work related conditions included injuries to the cervical spine, the left shoulder and the left hip.

48. Dr. Gellrick noted that Claimant required further psychological evaluation and treatment with a different Spanish speaking psychologist. Potentially a psychiatric evaluation for administration of medicine to treat the depression and anxiety. She stated that Claimant required a left shoulder MRI, and an evaluation by an orthopedic specialist for both the left shoulder and left hip. She further stated that Claimant may need injections to treat the cervical spine. Dr. Gellrick noted that Claimant remained at MMI as found by Dr. Beach unless Claimant required surgical intervention. Dr. Gellrick provided an addendum report dated November 7, 2022. She assigned a 17% whole person impairment, after correcting her original report, which included a 14% left upper extremity that converted to an 8% whole person impairment, a 7% whole person for the cervical spine and a 7% left lower extremity impairment that converted to a 3% whole person impairment.

49. Claimant returned to see Dr. Olsen on February 9, 2023 who noted Claimant had moderate success with TESIs. He recommended repeat TESIs at the left L4-5, L5-S1 levels. On March 7, 2023 he proceeded with the TESIs, which again showed a pre-injection VAS score of 8/10 and a post-injection VAS of 0/10, with an improving physical exam. However, by April 6, 2023 Claimant returned with pain of 8/10 of the left hip. He reviewed the left hip MRI noting that surgery would likely help her findings but recommended pool therapy three times a week for two months and, if after that time, she still wished to see an orthopedic surgeon, that he would make the referral. He expressed that he was doubtful that orthopedic surgery would be particularly beneficial for the low grade partial tear of the gluteus medius. Dr. Olsen noted that the previous lumbar spine injection had the effect of breaking [Redacted, hereinafter EP]'s pain cycle and reduced her pain from an 8 to a three. Dr. Olsen recommended repeat L4-5, L5-S1 TFESI, but not injections for the left hip.

50. On April 14, 2022 Dr. Beach responded to correspondence from Insurer that there was no apportionment as he did not rate Claimant's lumbar spine.

51. Claimant proceeded with a left shoulder MRI on April 25, 2023 at Health Images North Denver. Dr. Steven Ross read the images as showing a moderate to high-grade partial thickness tear of the supraspinatus tendon, a low grade partial thickness tear of the infraspinatus tendon with secondary findings consistent with internal impingement (mild supraspinatus muscle atrophy), moderate subcoracoid bursitis as well as near complete circumferential labral tear. There was also osteoarthritis of the acromioclavicular joint.

52. Dr. Olsen examined Claimant again on May 3, 2023, who reviewed the MRI of the shoulder, recommending surgical consultation. With regard to the left hip pathology he stated that they would "put this on the back burner until her shoulder had been

addressed" and encouraged her to continue her exercise program which she was performing daily.

53. On May 31, 2023 Dr. William Ciccone of Orthopedic Centers of Colorado examined Claimant for the left shoulder problems. He noted Claimant had a deep ache, shooting, burning, cramping, sharp and stabbing pain of the left shoulder that occurred constantly. Following review of the MRI he stated that Claimant had "some pretty significant partial-thickness rotator cuff pathology." He recommended starting with physical therapy since Claimant did not have much conservative care for this problem. He noted that she had an antalgic gait due to a hip injury as well. He emphasized that, should Claimant require hip surgery it would have to be performed first, before addressing the shoulder pathology due to the need for crutches. Dr. Ciccone discussed the possibilities for shoulder arthroscopy with RCT repair and possible biceps tenodesis.

54. Claimant returned to see Dr. Olsen on June 1, 2023 who scheduled Claimant for physical therapy pursuant to Dr. Ciccone's recommendations for the left shoulder before considering surgical intervention.

55. On June 30, 2023 Claimant was evaluated by David Yamamoto, M.D. for an IME at Claimant's request. Claimant provided a history consistent with Claimant's testimony at hearing and in the medical records. He reviewed the medical records and examined Claimant. Claimant reported she had struck her head, her back, buttock, left arm extended, denied any loss of consciousness, but felt dazed, and had occasional continuing dizziness. She had problems with headaches, concentrating, had neck pain, back pain, left shoulder pain, arm pain, and left hip pain. She also had depression, anxiety, felt sad, helpless, and had crying spells and panic attacks as well as difficulty sleeping. She reported her prior workers' compensation injury in 1999. He commented that before her work injury, Claimant enjoyed working, going to church, dancing, doing exercise, going on long drives and cooking, reporting that she was no longer doing all of these activities.

56. On exam, Dr. Yamamoto remarked that Claimant appeared in some discomfort but had appropriate behavior, had tenderness in the cervical spine at the midline and over the paraspinal muscles, tenderness over the lumbar spine midline and over the left paraspinal muscles with mild spasm and decreased range of motion. She exhibited loss of ROM of the cervical spine, lumbar spine, left shoulder and lip. She had a positive Hawkins and Neer signs of the shoulder, and a positive impingement sign of the left hip. He noted she had balance problems and used a cane for support. He diagnosed the following:

> l. Cervical sprain/strain with ongoing symptoms and lack of function.
> 2. Cervical multilevel degenerative changes at C6-7 with a superimposed central disc protrusion impinging the ventral spinal cord with mild spinal canal stenosis.
> 3. Lumbar sprain/strain with ongoing symptoms and lack of function.
> 4. L5-S1 moderate loss of disc space with a small broad-based disc and moderate foraminal narrowing with subtle effect upon the exiting right L5 nerve root.
> 5. Traumatic brain injury and postconcussion syndrome with ongoing symptomatology and significant loss of balance.

6. Left shoulder strain with likely rotator cuff pathology. No MRI was performed.[3]
7. Left hip strain with left gluteus minimus tendinopathy and low-grade partial tearing.
8. Recurrent moderate major depression secondary to the injury of 07/30/2021.
9. Generalized anxiety disorder, mild, secondary to the injury of 07/30/2021.

57. Dr. Yamamoto opined that Claimant had not reached MMI at the time of his evaluation. He further opined that Dr. Gellrick was incorrect in failing to assign an impairment for the mTBI, depression and lumbar spine, in addition to the neck, left shoulder and left hip. Dr. Yamamoto agreed with Dr. Gellrick's recommendation for a left shoulder MRI and orthopedic evaluation, and potential surgery of the left shoulder RCT. He stated that injections into the left hip or shoulder as well as injections into the suboccipital cervical spine. He opined that Claimant should be afforded a different Spanish speaking psychological evaluation.

58. Dr. Yamamoto provided a provisional impairment of 43% whole person impairment. This included a 12% whole person impairment due to the cervical spine, 14% whole person due to the lumbar spine, a 10% for the mTBI due to complex integrated cerebral function disturbances, a 14% impairment for the left upper extremity which converted to an 8% whole person impairment, a 13% lower extremity impairment that converted to a 5% whole person impairment and a 6% whole person impairment due to the ongoing depression. He mentioned he did not apportion the 1999 lumbar spine injury because he did not have the records. He agreed with Dr. Beach's modified duty restrictions which included mostly seated duty.

59. On July 12, 2023 Dr. Ciccone examined Claimant again. He noted that Claimant remained nonoperative at that time and she would continue with physical therapy, including stretching and strengthening. He remarked that there was "[p]otential for shoulder arthroscopy with capsular release and rotator cuff repair."

60. Claimant was evaluated by Dr. Kathleen D'Angelo of Advanced Medical & Forensic Consultants on July 17, 2023, for an IME performed at Respondents' request. Dr. D'Angelo took a history, which was consistent with Claimant's testimony at hearing. She also performed a medical records review and examined Claimant. Claimant complained of headaches, neck pain, buttock pain, left leg pain, leg weakness, left arm pain, memory loss problems thinking, insomnia and stress, with ongoing complaints of HAs, memory, thinking and noise problems, hip, buttock and leg problems, shoulder, insomnia and stress problems. The pain diagrams were consistent with the complaints listed. Claimant advised Dr. D'Angelo that she continued to have panic attacks, which were triggered by loud noises, she did not know if she had depression because she liked being alone now but continued with anxiety. Dr. D'Angelo also noticed Claimant's limp, which Claimant reported she had since the accident. Claimant complained of neck pain and headaches, problems with light bothering her, crying and depression. Claimant conveyed she had burning sensations into her lateral thigh and buttock. Dr. D'Angelo documented Claimant had joint pain, loss of balance and coordination, anxiety, difficulty thinking and loss of memory. She shared that Claimant had a normal mental status exam, diffuse pain behaviors, loss of ROM, tenderness to the suboccipital musculature, shoulder

[3] Dr. Yamamoto testified he had not been provided the April 25, 2023 MRI report at the time of his evaluation.

diffusely, midline cervical spine, lower sacral area on the left, buttock region worse with palpation. Dr. D'Angelo noted that the only claim related diagnosis were buttock contusion, and lumbar and cervical myofascial irritation, which were temporary conditions.

61. Dr. D'Angelo remarked that "[I]n the two years since her injury … her physicians were either not effective in treating her complaints or ignored her pain." She opined that Claimant's two years post injury treatment course was marked by changing symptoms, worsening displays of pain behaviors, decreasing range of motion, increasing pain complaints and lack of improvement, multiple interventions and a decline in functional capacity. She opined that Claimant had increasing dependence upon her children and a lack of engagement with Dr. Ledezma. Dr. D'Angelo suspected secondary gain and a somatic symptom disorder (SSD) though could not point to malingering. She opined that Claimant was an unreliable historian. She opined that the shoulder pathology was not related to the work injury nor were any complaints regarding the left hip pathology. She opined that Claimant did not have any impairment related to her work related injuries or accident, should be released to return to full duty work and should not be afforded any maintenance care.

D. Dr. Yamamoto's Testimony:

62. David Yamamoto, M.D. testified as an expert in family and occupational medicine as well as a Level II accredited physician. Dr. Yamamoto indicated he had performed DIMEs and continues to be on the DIME panel. Dr. Yamamoto stated that he was familiar with Claimant as he had reviewed her records, took a history, examined Claimant and issued a report dated June 30, 2023. He stated that the only records he had not been able to review were the most recent records from Dr. Ciccone, Dr. Olsen and the MRI of the shoulder. He took a history that was consistent with Claimant's account at hearing including that she was using a stripper on the floor, slipped and fell, landing on her back and hitting her head. He noted that the original symptoms documented by Dr. Beach, including the head, back, buttock and left arm pain were all consistent with the mechanism of injury of July 30, 2021. He agreed with Dr. Beach's diagnosis of concussion, neck pain, thoracic pain, lumbar pain, left hip pain, and left shoulder sprain and strain, all of which were related to the July 30, 2021 admitted work related claim.

63. Dr. Yamamoto remarked that:

> She fell on her back and struck her head and -- simultaneously struck her head and her back and injured her shoulder. As a reflex, she fell back and extended her left arm, and it would be very difficult to suppress that reflex.
>
> And the -- although she did not have loss of consciousness, she has had ongoing central nervous system or brain and head symptoms since that fall. And so she had a clinical diagnosis of a concussion.

64. Dr. Yamamoto stated that the lumbar spine imaging showed degenerative changes and a small disc herniation but that Claimant also reported symptoms immediately following the accident, which were significant for radicular symptoms, back pain, neck pain, shoulder pain and the central nervous system symptoms or headaches,

which he considered in his causation analysis. He noted that Claimant had a diagnostic response to her first lumbar spine injection of eighty percent (80%) relief though it was not lasting and supported a diagnosis and impairment of the lumbar spine.

65. He noted that Claimant was not at MMI with regard to the left hip and she required further evaluation as the MRI showed a left gluteus minimus tendinopathy and low-grade partial tearing. Dr. Yamamoto opined that, since Claimant required further diagnostic and specialty evaluations with regard to the left shoulder, Claimant was not yet at MMI pursuant to Level II accreditation training. He opined that Dr. Gellrick was incorrect in placing Claimant at MMI. The MRI of the left shoulder taken after Dr. Gellrick's evaluation showed moderate to high-grade supraspinatus and low-grade partial thickness tear infraspinatus tendons with secondary findings consistent with internal impingement and a near circumferential labral tear, all of which are abnormal findings. Dr. Yamamoto opined that Claimant would likely require surgery. He stated that if Dr. Ciccone opined that Claimant was not a surgical candidate, that he disagreed with Dr. Ciccone and that Claimant would require a second surgical opinion.

66. Dr. Yamamoto recognized that Claimant had degenerative changes in the cervical spine as well as a disc protrusion that indented the ventral spinal cord with mild canal stenosis, which were significant findings justifying a Table 53IIB rating per the *AMA Guides*.

67. Claimant was evaluated by Dr. Hammerberg, a neurologist, who opined that Claimant had sustained a concussion and post-concussion symptoms and Dr. Yamamoto agreed with this diagnosis. Dr. Yamamoto opined that Dr. Gellrick was incorrect and was not accurate in her determination not to rate Claimant's post-concussive injury. Dr. Yamamoto opined that Claimant's headaches were a direct cause of the work injury blow to the head and was not just radiating pain from the neck. He opined that even though Claimant was not knocked out, that she had a head injury. He explained that while some patients heal from their head injuries, others do not. The fact that Dr. Gellrick stated that Claimant needed treatment from a different psychologist, and that she had not completed neuropsychological testing with Dr. Laura Rieffel were indications that Claimant was not at MMI. When a physician states that they cannot make a determination of impairment with the information they have that is an indication that the Claimant is not at MMI. He opined that Dr. Gellrick had committed an error because it would have been more proper for her to state that Claimant was not at MMI. He opined that Dr. Gellrick was incorrect because she did not have all the information she required in order to make an assessment of impairment, especially since she did not have the records from the treating psychologist. Dr. Yamamoto opined that Claimant continued to be symptomatic from the traumatic brain injury, which was supported by the ATP. Dr. Ledezma noted that the patient had requested another Spanish speaking psychologist to treat her as they were not communicating well. This was also recommended by Dr. Gellrick. This was a reasonable request and until she completes her treatment, Claimant is not deemed to be at MMI.

68. Dr. Yamamoto noted that Claimant had denied any problems with depression prior to sustaining the head injury and related the depression and anxiety to the July 30, 2021 work injury.

69. Dr. Yamamoto indicated that he had looked up the PDMP finding that Claimant had been prescribed oxycodone right before her injury but that the PDMP did not show for what condition Claimant was taking the medication. He also found that the medication was only sporadically obtained by Claimant prior to the injury. Following the July 30, 2021 injury she no longer took any oxycodone but was prescribed Tramadol by the workers' compensation providers. He was not provided with any provider records that indicated that the medication prior to the injury was for back pain.

70. Dr. Yamamoto opined, because Claimant provided a history of being quite functional prior to her injury of July 30, 2021 and performing he job without difficulties, and then following the work injury, she became functionally quite disabled, that she clearly had incurred a head injury.

71. Dr. Yamamoto also noted that both the ATP and the DIME physicians committed errors, the first because he only rated the TBI and the second because she only rated the physical complaint of the left shoulder, left hip and cervical spine. Dr. Yamamoto opined that, if Claimant was determined to be at MMI, that she had the following impairments in accordance with the *AMA Guides*:

a. Claimant should appropriately have at least a 10% whole person impairment related to the mTBI as caused by the concussion and post-concussive syndrome, for which she was not at MMI due to the need for more treatment. Further, she should have an additional 6% whole person related to her psychiatric depression and anxiety.

b. Claimant was entitled to a 12% whole person impairment for the cervical spine based on clear documentation that she injured her neck when she fell and is documented by the cervical spine MRI, and continued symptoms for a Table 53IIB plus loss of range of motion, for which she was at MMI.

c. Claimant was entitled to a lumbar spine impairment of 14% whole person rating, based on documented injury, documented treatment and continued symptoms based on Table 53IIB plus loss of range of motion, for which she is at MMI. He stated it was error not to rate this body part.

d. Claimant was entitled to an impairment of the left hip as it was part of the original injury and she had not fully recovered. Claimant was entitled to a 5% whole person impairment for the lower extremity, converted from 13% extremity impairment for loss of range of motion.

e. While Claimant is not at MMI for the left shoulder, Claimant was entitled to a 14% scheduled upper extremity impairment related to the left shoulder for loss of range of motion, which converts to 8% whole person impairment.

f. The total combined preliminary impairment in accordance with the AMA Guides was 43% whole person impairment.

72. Dr. Yamamoto did not believe that, after examining Claimant, her pain complaints were out of proportion to the objective findings in this case. He did agree that an individual could have post MMI diagnostic testing and physical therapy as a maintenance treatment. He agreed that Claimant's findings on exam documented by Dr. Beach on August 3, 2021 were not that significant but the objective findings on exam of

August 12, 2021 were significant and consistent with a mild TBI. He agreed that normally 75 to 90 percent of mTBI patients recovered within 90 days and that 3-10 percent of TBI patients recover within a year. He further agreed that ongoing improvement with eventual stability of symptoms was the general and accepted progress for TBIs. He stated that worsening over time was uncommon for mTBI patients. However, Dr. Yamamoto stated that there was a small percentage of patients that did not recover. He stated that Claimant had other problems that delayed her recovery, including depression and stress, anxiety and lack of coping skills, which needed to be addressed by having a therapist Claimant could identify with and trust during the treatment as recommended by Dr. Gellrick.

73. Dr. Yamamoto also noted that he did not have to have evidence that there was radiographic or diagnostic findings that showed Claimant's condition had been aggravated or accelerated, as Claimant met the criteria for Table 53IIB of minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with a none-to-minimal degenerative changes on structural tests.

E. Conclusory Findings:

74. Claimant has shown by clear and convincing evidence that Dr. Gellrick, the DIME physician was incorrect in her assessment that Claimant was a MMI on March 21, 2022 and with regard to the impairments she has assessed in this matter, including her causation determinations.

75. As found, one of the most striking problems in this case is that Claimant's ATP failed to address all of Claimant's work related injuries initially, when he diagnosed concussion, neck pain, thoracic pain, lumbar pain, left hip pain, left shoulder sprain/strain and head pain and decided to only recommend gentle stretching and heat and returned her to regular duty with no climbing ladders. He took them piecemeal. This ALJ interprets the sequence of treatment as part of the problem and one of the reasons why Claimant is not at MMI. Dr. Beach identified all the injuries, but he concentrated on two issues primarily. The first, the mTBI sending her to Dr. Hammerberg and Dr. Ledezma. Secondly the low back, sending Claimant to Dr. Olsen who provided injections. While the referral may have been made for the left hip as well, Dr. Olsen failed to make any recommendations regarding the hip condition.

76. As found, from the first August 3, 2021 evaluation by Dr. Beach, Claimant complained of low back, buttock and radiating pain in the lateral left leg. This ALJ infers from the records that Dr. Beach made a proper causation analysis and made appropriate referrals, first to physical therapy, then for an MRI of the lumbar spine and lastly to Dr. Olsen for treatment of the lumbar spine. Claimant credibly stated at hearing that she continued to have lumbar spine problems including low back pain with referral pain down the side of her leg. Dr. Yamamoto credibly and persuasively testified that, while Claimant does have a left hip condition, she also has a lumbar spine condition. This was identified on MRI findings and on objective testing and exams by her ATPs., including an antalgic gait, decreased sensation to pinprick, absent long tract sign, positive SLR causing bilateral buttock pain, positive iliac compression, multiple findings of MRI, impingement of the L5 nerve root, muscle spasm, focal motor loss and loss of range of motion. What is patently clear is that the treatment for the low back was effective, though temporary.

This indicates to this ALJ that Claimant clearly had an aggravation of a preexisting condition of her low back. Prior to the work injury, Claimant was able to perform her full activities, including heavy work buffing floors, as well as social activities such as exercise and dancing. After the accident, she was quite functionally disabled as credibly noted by Dr. Yamamoto and from Claimant's testimony. As found, Claimant has shown by clear and convincing evidence that Dr. Gellrick was incorrect in her assessment that Claimant did not have a lumbar spine condition which was aggravated by the July 30, 2021 work related injury and was entitled to an impairment for the same.

77. As found, the DIME physician considered only the cervical spine, left shoulder, and left hip for impairment. Even though Claimant had low back pain and diagnostic confirmatory response to TESIs, she dismissed the condition as part of the hip referred pain. This does not make sense as Claimant not only had hip pain but had pain in the low back and buttock with radiating pain on her lateral left leg also consistent with the objective findings on MRI. D.O.W.C. Rule 11-3(K) specifically states that "[f]or each DIME assigned, make all relevant findings regarding MMI, permanent impairment and apportionment of impairment, unless otherwise ordered by an ALJ." The Division also propounded Desk Aid #11 -- Impairment Rating Tips. Under General Principles, No. 2 it states that the rating physician should keep in mind the AMA Guides, 3rd Edition (rev.) definition for impairment: "The loss of, loss of use of, or derangement of any body part, system, or function." Given this definition, one may assume any patient who has undergone an invasive procedure that has permanently changed any body part has suffered a derangement. Therefore, the patient should be evaluated for an impairment by a Level II Accredited Physician. Although the rating provided may be zero percent, it is essential that the physician perform the necessary tests, as outlined in the AMA Guides, 3rd Edition (rev.) for the condition treated, in order to justify the zero percent rating. As found, Dr. Gellrick failed to do so. As found Dr. Yamamoto's testimony that Dr. Gellrick was in error for failing to follow these directives is credible and persuasive. As found, at the very least, Dr. Gellrick should have done range of motion measurements and then explained why she opined that Claimant had a zero percent impairment. As found, Claimant has shown that the DIME physician's opinion regarding lumbar spine impairment has been overcome by clear and convincing evidence.

78. As found, Dr. Gellrick recommended treatment of Claimant's psychological condition. She stated that Claimant required further evaluation and treatment from a different Spanish speaking psychologist. She stated this without having any of Dr. Ledezma's treatment notes, diagnosis or assessments. Nor did she know the extent of treatment Claimant had received under Dr. Ledezma other than what Claimant was able to recall at the time of the appointment and which was not documented in her report. Dr. Gellrick explicitly discerned that, as a DIME physician, she was asked to address both TBI and the psychological system. As found, Dr. Gellrick failed to comply with the requirements of the DIME rules, specifically noting that she did not make any assessments regarding the psychological condition, despite the multiple provider noting Claimant suffered from depression and anxiety, including Dr. Beach, Dr. Hammerberg and Dr. Ledezma. Further, D.O.W.C. Rule 12-5(A)(3) states in, pertinent part, that the physician must complete a full psychiatric assessment following the principles of the AMA Guides and complete a history of impairments, associated stressors, treatment, attempts at rehabilitation and premorbid history so that a discussion of causality and apportionment

can occur. Rule 12-5(C) also requires the use of the mental evaluation and worksheet. One of the impairment rating responsibilities is for the physician to assess whether the patient has returned to her pre-injury state, physically and/or mentally, and determined the impairment in accordance with Rule 12.

79. As found, Dr. Gellrick's failure to address the psychological conditions was in error. First by failure to consider the multiple notes and the Claimant's reports of psychological problems, including depression and anxiety as well as panic attacks listed by Dr. Beach. Secondly, as Claimant reported to Dr. Gellrick continuing dizziness, balance problems, depression, anxiety and problems sleeping with occasionally getting nausea and feeling she had a sensation of being drunk every day. This was a significant error and departure from the rules established for Level II accredited providers. Specifically, Desk Aid #11 under DIME Panel Physician Notes, Section 1, it states that "[A]lthough an impairment rating may not be provided for a condition listed on the DIME application, all issues and/ or body parts listed must be acknowledged and addressed in the narrative section of the DIME report." It goes on to instruct that "[F]or most conditions that have been treated under the claim, an impairment evaluation must be performed even if you do not believe the condition is work related." Dr. Gellrick failed to do so coming a significant error.

80. Dr. Ledezma, as early as November 1, 2021, recommended neuropsychological testing with Dr. Laura Reiffel, a neuropsychologist. This was to address symptoms that included dizziness, being mentally fuzzy, confusion, difficulty tolerating noises and bright lights, nausea, daily crying spells, difficulty tolerating people, loss of interest in hygiene, difficulty sleeping, isolation, making mistakes while driving, among other issues, night panics and panic attacks, leaving water or stoves on, and difficulty with memory. Dr. Gellrick does address the issue of mTBI, stating that Claimant just did not suffer from a TBI or post concussive syndrome as diagnosed initially by Dr. Beach, or Dr. Hammerberg. Clearly, throughout the medical records, Dr. Beach and Dr. Hammerberg both acknowledge the cervical spine pain Claimant reported from the beginning of her injury on August 3, 2021 and September 8, 2021, but they also acknowledge that Claimant has depression and anxiety. Further, on November 10, 2021 Dr. Hammerberg does not give a new diagnosis, he just simply notes that the headaches might be cervicogenic and should be evaluated and treated with injections. He also discussed Claimant's crying spells and panic attacks, noting those should be treated by Dr. Ledezma or another provider for proper antidepressant therapy. As found, Dr. Gellrick committed error in not requesting the missing reports in order to figure out whether Claimant was or not at MMI or had impairment for her psychological conditions.

81. As found, from the totality of evidence, Claimant continued to have symptoms that had either not been addressed at all, or required further evaluation, diagnosis, and curative care and treatment. This is inconsistent with a finding of MMI. If Claimant required a new therapist, this ALJ infers it is for purposes of further functional gains, as Claimant is continuing to suffer significant symptoms as noted above. While Claimant either lost faith in or never developed trust with Dr. Ledezma, regardless of whether Dr. Ledezma attempted to provide Claimant with multiple treatment tools that Claimant did not fully understand how to implement or was unable to appreciate their potential benefit, it is clear her depression was affecting her multiple physical problems

that had not yet been addressed either, such as her cervicogenic pain, or her rotator cuff tears, or her left hip tendon tear and tendinosis.

82. Pursuant to the Division's Medical Treatment Guidelines, Rule 17, Exhibit 2A, Mild Traumatic Brain Injury, Section F.1, post-traumatic headaches or cervicogenic headaches are the most common type of post-injury headache. There are multiple recommendations for treatment in the MTGs regarding cervicogenic headaches including manipulation, pharmaceuticals, Botulinum toxin injections (Botox), steroid injections, vestibular rehabilitation, proprioceptive retraining, manual therapy, physical therapy in order to maintain balance, or posture, equilibrium and adequate strength. Of all these treatments recommended, the only mention in the record was regarding vestibular therapy, which was suspended for an unknown reason.[4] Nothing in Dr. Beach's or Dr. Hammerberg's records show an actual referral for this treatment. As found, Dr. Yamamoto was credible and persuasive in his recommendation that further treatment for the ongoing headaches was necessary. As found, from the totality of the evidence, Claimant has not had specific treatment as recommended by the MTGs for cervicogenic headaches, which Claimant continues to experience. Dr. Gellrick is persuasive that Claimant may require further treatment for the cervicogenic headaches. Claimant is also credible and persuasive that she continues to have the problems and would accept further care, just not under Dr. Olsen. As found, Claimant has shown by clear and convincing evidence that she is not at MMI with regard to this condition.

83. From August 3, 2021 when Claimant was initially seen by Dr. Beach, Claimant complained of ongoing pain in her shoulder. Dr. Beach documented that Claimant's pain was so intense she had a sense of dislocation of the shoulder including a burning sensation into the arm. This was documented multiple times on August 12, 19, 30, September 7, October 7, November 1, 9, 2021, among other dates. Dr. Gellrick noted that, based on objective exam of the shoulder, Claimant required a left shoulder MRI and full orthopedic examination. As of the date Dr. Beach placed Claimant at MMI Claimant clearly had not received any treatment for the shoulder, not even basic diagnostic evaluations or therapy. The MTGs for the shoulder, under Rule 17, Exhibit 4, Section E.9-10 discuss treatments such as initial diagnostic evaluation, physical therapy, strengthening, modalities, medications, steroid injections, all of which may be appropriate treatments. When Claimant was placed at MMI, the shoulder condition had been identified (shoulder pain) but not fully diagnosed (RCT) by MRI or an orthopedic specialist. None of the treatment recommendations had been instituted. It was not until after Claimant was placed at MMI that the left shoulder condition was specifically identified as related to the July 30, 2021 work injury. Dr. Ciccone just started with conservative measures, which the MTGs recommend, and if Claimant does not recover function with conservative care, then surgical repair of the torn tendons may be appropriate. As found, since the treatment contemplated by Dr. Ciccone was intended to cure Claimant of the effects of the injury, including progressing with functional gains in the left shoulder or repairing the rotator cuff tears, Dr. Gellrick was incorrect and in error in finding Claimant at MMI for the left shoulder. Desk Aid # 11, Section 6 states that "[I]f there is a reasonable possibility that the results of a diagnostic test (such as an MRI or EMG) will change the patient's MMI status, then in most instances, the patient will not be at MMI." Here, we

[4] Respondents' Exhibit L, bate 115 (Treatment history).

have confirmation from the MRI, which took place after Dr. Gellrick evaluated Claimant, showed significant pathology including a near complete tendon tear. Claimant continues to be in physical therapy for the purpose of progressing with the function of her left shoulder injury. The treatment recommendations made by Dr. Gellrick, Dr. Ciccone and Dr. Yamamoto are inconsistent with MMI. Claimant has proven by clear and convincing evidence that the DIME physician was incorrect in her assessment of MMI.

84. Dr. Gellrick also recommended that Claimant be evaluated for further treatment of the left hip. This included an orthopedic evaluation to further investigate and assess what further care may be provided to cure Claimant of her left hip injury. Since Dr. Beach first diagnosed a hip injury, he ordered an MRI but no treatment was provided for the left hip specifically. While Dr. Ciccone casually made statements with regard to Claimant's left hip MRI findings and need for treatment, his only treatment recommendations were that Claimant needed to proceed with left hip surgery before embarking on the left shoulder surgery due to the need to use crutches that might affect the upper extremity. Dr. Beach did make a referral to Dr. Olsen for the left hip, however, Dr. Olsen concentrated on providing treatment for the lumbar spine and not the left hip. As Claimant requires care that may further her functional gains, Dr. Gellrick's findings and recommendations regarding the left hip condition is inconsistent with a finding of MMI. As found, Dr. Gellrick's opinion with regard to MMI was overcome by clear and convincing evidence.

85. Claimant clearly has continuing problems with headaches, neck pain, buttock pain, left leg pain, leg weakness, loss of balance and coordination, left arm pain, memory loss problems, thinking, insomnia and stress, ongoing complaints memory, thinking and noise problems, hip, buttock and leg problems, shoulder, light bothering her, crying and depression, insomnia and stress problems, and she continued to have panic attacks, which were triggered by loud noises, and anxiety. Claimant continued to have a limp, which Claimant insisted she had since the accident. These are all symptoms that Claimant reported to Dr. D'Angelo, which continued up to the day of hearing. This ALJ found Dr. D'Angelo unpersuasive in her opinions with regard to causation and MMI, especially considering the diverging opinions in the record. Dr. D'Angelo opined that Claimant had two injuries, the first to the cervical spine, and the second to the lumbar spine. She opined that both of the injuries were only temporary strains that resolved and that Claimant had no permanent impairment, which is unpersuasive.

86. As found, Claimant is not yet at MMI and requires treatment for her work related conditions, in order to cure and relieve her of those conditions that have yet to been fully evaluated and treated, and are found causally related to the July 30, 2021 work related slip and fall, including injuries to the head, depression, anxiety, panic attacks, neck injury, left shoulder and left hip conditions, and her low back. Since Claimant is not at MMI, an assessment of impairment is premature. Impairment should be determined after the authorized treating physicians provides the appropriate care for Claimant's conditions to become stable. Claimant has shown by clear and convincing evidence that she is not yet at MMI and that Dr. Gellrick erred in multiple of her determinations. These findings rise to the level of clear and convincing evidence that is unmistakable and fee from serious or substantial doubts and are sufficient to show that it is highly probable the DIME physician's opinion on MMI is incorrect.

87. This ALJ also observed Claimant during the hearing. Claimant was not comfortable, would change positions frequently, shifting from side to side or would get up from her chair at multiple intervals. Claimant had a flat effect but was emotional at times. These are signs of an individual that was not handling the challenges of her multiple conditions and injuries.

88. Further, Claimant's testimony was credible, despite some minor discrepancies in her memory. The medical records show Claimant reporting multiple times that she had memory problems from the very beginning and this ALJ does not assign the same importance to those *de minimus* differences in her testimony or in the record.

89. Dr. Ledezma, Dr. Yamamoto, Dr. Gellrick and Dr. Ciccone as well as Dr. Olsen all made assessments regarding the causality of the Claimant's multiple conditions. Each one of these providers are found to be credible. In order to reach the above conclusion, this ALJ found only parts of each of the providers' opinions to be persuasive as stated above. Those opinions that are not expressed above or were not highlighted as particularly persuasive are specifically found not to be persuasive. No one provider's opinions were fully persuasive.

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

CONCLUSIONS OF LAW

A. Generally

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

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

condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

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

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

B. Whether Claimant Overcame DIME Determination of MMI

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. It represents the optimal point at which the permanency of a disability can be discerned, and the extent of any resulting impairment can be measured. *Paint Connection Pul v. ICAO*, 240 P.3d 429 (Colo. App. 2010). MMI exists when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Golden Age Manor v. Industrial Commission*, 716 P.2d 153 (Colo.App.1985).

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Sec. 8-42-107(8)(b)(III), C.R.S. The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. ICAO*, 961 P.2d 590 (Colo. App. 1998); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence means evidence which is stronger than a mere preponderance.

It is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The DIME process necessarily requires a physician to ascertain the cause or causes of the claimant's condition in order to decide whether the claimant warrants additional treatment for any work-related problem. Consequently, the issues of whether all work-related conditions are stable and do not require additional treatment are an inherent part of the DIME process, and the DIME physician's opinion on causation must be overcome by clear and convincing evidence. See *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 189-190 (Colo. App. 2002); see also *Qual-Med, Inc., v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo.App. 1998); see also *Egan v. Industrial Claim Appeals Office,* 971 P.2d 664 (Colo.App. 1998); *In re Claim of Robbins v. Qwest Corporation*, WC 5-113-544, ICAO (December 12, 2022).

A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. ICAO,* 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. E.g., *Robbins v. Qwest Corp*., WC 5-588-918-010, I.C.A.O (December 19, 2022); *Gutierrez v. Startek USA, Inc.,* W.C. No. 4-842-550-01, *ICAO,* (March 18, 2016); *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523- 097, ICAO, (July 19, 2004); *Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). Causation is the issue of fact to be determined by the ALJ based on an examination of the totality of the circumstances. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Such causality can even be inferred if the claimant presents evidence of circumstances indicating that the industrial injury necessitated medical treatment with reasonable probability. *Indus. Comm'n v. Riley*, 441 P.2d 3 (Colo. 1968).

A finding that the claimant needs additional medical treatment (including diagnostic evaluations) to improve her injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). That means that a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of

determining MMI. *Cordova v. Industrial Claim Appeals Office, supra.* Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. See *Cordova v. Industrial Claim Appeals Office, supra.*

Permanent impairment cannot be ascertained until all compensable components of the injury have stabilized. *Nunnally v. Wal-Mart Stores, Inc*., 943 P.2d. 26 (Colo. App. 1996). Thus, where a single industrial injury has multiple components, the claimant's permanent disability cannot be ascertained until the claimant has reached MMI for all components of the injury. MMI is a status that a Claimant is either at or is not at, and particular body parts are not divisible and cannot be parceled out among the various components of a multi-faceted industrial injury. See *Paint Connection Plus v. ICAO,* 240 P.3d 429 (Colo. App. 2010); *Fitzsimmons v. Lincoln Surgery Center,* WC 4-995-913, ICAO (December 16, 2020); *In re Claim of Burren,* ICAO, WC 4-962-740-06 (March 15, 2019).

If a DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*, (if DIME physician offers ambiguous or conflicting opinions on MMI, it is for ALJ to resolve such ambiguity and conflicts and determine the DIME physician's true opinion). A DIME physician's finding of MMI consists not only of the initial report, but also any subsequent opinion given by the physician. See *Andrade v. ICAO*, 121 P.3d 328 (Colo. App. 2005). Thus, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. ICAO*, 984 P.2d 656, 659 (Colo. App. 1998); *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion regarding MMI. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *134 P.3d 475 (Colo. App. 2005);* and *Magnetic Engineering, Inc. v*. ICAO, *supra*; *In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016); *Fera v. Resources One, LLC, D/B/A Terra Firma,* W. C. No. 4-589-175, ICAO, (May 25, 2005) [aff'd, *Resources One, LLC v. Industrial Claim Appeals Office* 148 P.3d 287 (Colo. App. 2006)]. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. ICAO, supra*. Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. ICAO, supra.* In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination [and true opinion] is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

In the case at bench, it was Claimant's burden to overcome Dr. Gellrick's opinions on MMI and impairment as well as causation. Claimant relied on the opinions of Dr.

Yamamoto as well as other medical reports and Claimant's testimony, to support her contentions. The conclusory findings will not be repeated in these conclusions of law. As found, Claimant is not yet at MMI and requires treatment for her work related conditions, in order to cure and relieve her of those conditions that have yet to been fully evaluated and treated, and were found causally related to the July 30, 2021 work related slip and fall, including the head, depression, anxiety, panic attacks, neck injury, left shoulder and left hip condition and her low back, an assessment of impairment is premature. Impairment should be determined after the authorized treating physicians provides the appropriate care for Claimant's conditions to become stable. Claimant has shown by clear and convincing evidence that she is not yet at MMI and that Dr. Gellrick erred in multiple of her determinations. These findings rise to the level of clear and convincing evidence that is unmistakable and fee from serious or substantial doubts and are sufficient to show that it is highly probable the DIME physician's opinion on MMI is incorrect. See *In re Claim of Tomsha*, W.C. No. 5-088-642-002 (I.C.A.O. March 18, 2021).

Dr. Ledezma, Dr. Hammerberg, Dr. Yamamoto, Dr. Gellrick and Dr. Ciccone as well as Dr. Olsen all made assessments regarding the causality of the Claimant's multiple conditions. Each one of these providers are found to be credible. In order to reach the above conclusions, this ALJ found only parts of each of the providers' opinions to be persuasive as stated above. Those opinions that are not expressed above in the conclusory findings or were not highlighted as particularly persuasive are specifically found not to be persuasive. No one provider's opinions were fully persuasive.

C. Whether Claimant Overcame DIME Determination of Impairment

The Workers' Compensation Act requires all physical impairment ratings be conducted in accordance with the *AMA Guides*. Section 8-42-101(3)(a)(I) & 8-42-101(3.7), C.R.S.; *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997). Further, pursuant to Sec. 8-42-101 (3.5)(II), C.R.S. the director promulgated rules establishing a system for the determination of medical treatment guidelines, utilization standards and medical impairment rating guidelines for impairment ratings based on the *AMA Guides*. Whether the DIME physician properly applied the AMA Guides, a rating physician has complied with the *AMA Guides* and whether the rating itself has been overcome are questions of fact for determination by the ALJ. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2004); *McLane W., Inc. v. Indus. Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999); *In re Claim of Pulliam*, WC 5-078-454-001, ICAO (July 12, 2021); *In Re Goffinett*, W.C. No. 4-677-750 (ICAP, Apr. 16, 2008). Inherent in this rule is the concept that a deviation from the *AMA Guides* rating protocols does not automatically mean the DIME physician's rating has been overcome as a matter of law, because these issues are factual in nature. *Id.*; *Claim of Griggs v. A & R Construction LLC*., WC 5-146-595, ICAO (June 5, 2023). An ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Wilson, supra; Metro Moving and Storage, supra.*

Where a physician has failed to follow established medical guidelines for rating a claimant's impairment in a DIME, the DIME's opinion has been successfully overcome by clear and convincing evidence. See, e.g., *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973,

981 (Colo. App. 2004) (DIME physician's deviation from medical standards in rating the claimant's injury constituted error sufficient to overcome the DIME); *Mosley v. Indus. Claim Appeals Office*, 78 P.3d 1150, 1153 (Colo. App. 2003) (DIME physician's impairment rating overcome by clear and convincing evidence where DIME physician failed to rate a work related impairment). Lastly, where an ALJ finds a claimant's description of his present symptoms credible, this is sufficient to overcome the DIME physician's opinion. *In re Claim of Conger*, WC 4-981-806-001, ICAO (October 21, 2021).

Once the ALJ determines that the DIME's rating has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *In re Claim of Serena*, WC 4-922-344-01, ICAO (December 1, 2015); *Paredes v. ABM Industries*, W.C. No. 4-862-312 (April 14, 2014); *Kamakele V. Boulder Toyota-Scion*, WC 4-732-992, ICAO (2010); *DeLeon v. Whole Foods Market*, W.C. No 4-600-477 (November 16, 2006); *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). The claimant's correct medical impairment rating becomes a question of fact for the ALJ's resolution based on a preponderance of the evidence. *Garlets v. Memorial Hospital*, supra.

It is Claimant's burden to overcome the DIME physician's findings with regard to causation and impairment by clear and convincing evidence. Here, Claimant proved by clear and convincing evidence that the DIME physician was incorrect with regard to MMI. Claimant was not at MMI as March 21, 2022 for more than one causally related work injury, caused by the July 30, 2021 slip and fall. As Claimant was found not to be at MMI, a finding regarding permanent partial disability benefits is premature.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has overcome the opinions of the DIME physician by clear and convincing evidence. Claimant is not at MMI.

2. Respondents shall reinstate Claimant's TTD benefits beginning March 21, 2022, pursuant to the stipulation of the parties.

3. Respondents shall pay interest of eight percent (8%) on all benefits which were not paid when due.

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

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

address for the **Denver Office of Administrative Courts** or email the Petition to Review to **oac-ptr@state.co.us**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a Petition to Review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 28th day of September, 2023.

DIGITAL SIGNATURE

By: _____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-174-047-003

STIPULATION

The parties stipulate that the requested respiratory therapy treatments are authorized by Respondent.

ISSUE

- Did Claimant prove entitlement to medical benefits for a torn meniscus including a referral to an orthopedic surgeon.

FINDINGS OF FACT

1. Claimant works for Employer as a mill tech. He suffered multiple injuries on May 29, 2021 when a steel mill furnace explosion occurred.

2. Claimant was taken by ambulance to Parkview Medical Center. He was treated by Dr. Shapiro for burns. Claimant was also experiencing burning in his throat. He was emergently intubated. He was then transferred to ICU where they took multiple CT scans of Claimant's neck, chest, abdomen and pelvis. Claimant was hospitalized for three days. The diagnoses included blast injury with multiple contusions and abrasions and airway edema.

3. Claimant came under the care of Dr. Centi at Southern Colorado Occupational Medicine. Dr. Centi first saw the Claimant on June 24, 2021. He diagnosed Claimant with inhalation injury, lumbar strain and face laceration. Also at that visit a physical exam was performed which showed, amongst other things "Bilateral hips – no edema, FROM Bilateral lower legs – no edema, normal sensory and normal motor function" This exam is essentially normal for the lower extremities, which includes the Claimant's knees. Additionally, the Claimant filled out a pain diagram for that day which indicates achiness in the calf and numbness in the back of the knee. There was nothing noted on the front of the knee.

4. Claimant continued to receive conservative care for his inhalation injury and his lumbar spine symptoms.

5. Claimant first reported issues of his right knee when he was seen on November 10, 2022, which was approximately 17 months after the date of injury. This is corroborated by Dr. Centi's additional entry on the list of problems of "Pain of right knee joint – Onset 11/10/2023. Claimant testified that Dr. Centi ordered a MRI of the knee at the request of Claimant.

6. Dr. Centi referred the Claimant to orthopedic surgeon, Dr. Walden on December 15, 2022 for tear of lateral meniscus of the right knee. In Dr. Centi's chart note he states "MRI – right knee – effusion, lateral meniscus tear". Exhibit 8, p. 264.

7. Following the orthopedic referral, Claimant was seen by Dr. Paz at the request of Respondent. The IME occurred on January 25, 2023. Dr. Paz opined "Considering the direct history provided by Mr. Henschel during this IME, the findings of the physical examination completed during this IME, and a review of the records provided based on reasonable medical probability, it is not medically probable that the right knee lateral meniscal tear is causally related to the May 29, 2021, referenced incident". He further commented that the right knee degenerative joint disease is also not related to the work injury. Exhibit I, p. 29.

CONCLUSIONS OF LAW

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

Generally

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

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

D. Once a claimant has established the compensable nature of his work injury, he is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the

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

E. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). In this case, the Claimant has failed to sustain his burden of proof that his right knee symptoms including the torn lateral meniscus are related to his admitted work injury. I am persuaded by the opinions of Dr. Paz, whom I find to be credible, that these symptoms are not related to the Claimant's work injury.

ORDER

1. The Claimant's request for medical treatment for his knee, including the referral to Dr. Walden is denied and dismissed.

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

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

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

DATED: September 28, 2023

/s/ Michael A. Perales

Michael A. Perales
Administrative Law Judge
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