OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-753-985

ISSUES

The sole issues determined herein are temporary total disability ("TTD") and permanent partial disability ("PPD") benefits. At hearing, the parties stipulated to some of the TTD benefits.

FINDINGS OF FACT

1. Claimant has worked in the same capacity as a press operator for the Employer since 1984. Claimant works four ten-hour days per week. In August 2006, the employer installed a new, smaller press, which required claimant to engage in more bending to operate. Claimant's job requires him to be on his feet for his entire shift alternating between reaching, crawling, twisting, bending, and stretching as necessary to feed paper into the press, extract paper from the press, and maintain the press.

2. Claimant began experiencing pain in his low back at work in July 2007.

3. Employer sent Claimant to Centura Centers for Occupational Medicine ("CCOM"), the authorized treating provider, for an initial evaluation on September 4, 2007. Dr. Dickson noted that over the last several months, claimant has been gradually and progressively developing low back pain and radicular symptoms with some numbness and pain on the right side of his back with some symptoms in the left calf. Dr. Dickson further noted on physical examination some mild pain on palpation over the right sacroiliac ("SI") joint and that Claimant got on and off the exam table without difficulty. Dr. Dickson's diagnosis was low back pain with intermittent numbness of the left calf. Dr. Dickson noted that no permanent impairment was anticipated. Claimant was released to work without any restrictions.

4. Claimant is still employed by Employer and has continued to work in the same capacity, reaching, crawling, twisting, bending, and stretching since July 2007.

5. Respondents filed a General Admission of Liability on April 8, 2008 admitting to TTD benefits for January 8, 2008, February 11, 2008, and February 12, 2008.

6. Claimant received conservative treatment for his injury from September 4, 2007 through April 21, 2008 including, but not limited to, physical therapy, chiropractic treatment, prescription medications, and injections, all without benefit.

7. A September 14, 2007, magnetic resonance image ("MRI") showed moderate degenerative changes at L5-S1.

8. On October 19, 2007, Dr. Jenks examined claimant and diagnosed probable L5-S1 discogenic pain.

9. On November 5, 2007, Dr. Jenks administered an epidural steroid injection on the right side at L5-S1. Dr. Jenks excused claimant from work for November 5 and 6, 2007. The injection provided no symptom relief.

10. On January 7, 2008, Dr. Jenks administered a second right-sided L5 epidural steroid injection, which again provided no relief. The record evidence did not contain a written excuse from work for January 7 and 8, 2008. Nevertheless, claimant was unable to work for those two days due to the effects of his treatment for the work injury.

11. On January 22, 2008, Dr. Jenks recommended a trial of a SI joint injection.

12. On January 23, 2008, Dr. Sung evaluated claimant and diagnosed L5-S! degenerative disc disease, retrolisthesis and neuroforaminal stenosis. He recommended the trial of the SI injection and a discogram. Claimant did not want to consider surgery, so the discogram was not performed.

13. On February 11, 2008, Dr. Jenks administered the right SI joint injection, which provided no relief.

14. On April 18, 2008, Dr. Dickson determined that claimant reached maximum medical improvement ("MMI"). Claimant underwent range of motion testing with a physical therapist. The physical therapist documented maximum lumbar flexion of 20°, maximum lumbar extension of 10°, maximum lumbar right lateral flexion of 15°, and maximum lumbar left lateral flexion of 20° for a 16% whole person impairment rating for loss of range of motion.

15. On April 21, 2008, Dr. Dickson completed an impairment rating and determined 7% whole person impairment rating pursuant to Table 53 of the *American Medical Association Guides to Evaluation of Permanent Impairment, Third Edition Revised.* Dr. Dickson also determined 16% rating for loss of range of motion. These ratings combined for a total whole person impairment rating of 22%. Dr. Dickson continued to release Claimant to work, without restrictions.

16. Claimant underwent a Division Independent Medical Examination ("DIME") on July 23, 2008 with Brian E. H. Reiss, M.D. Dr. Reiss agreed that claimant was at MMI. On physical examination, Dr. Reiss noted that claimant "very much limits his motion". Dr. Reiss noted that claimant flexes "extremely minimally" and extends "extremely minimally" with "obvious complaints of pain with change in position." Dr. Reiss documented maximum lumbar flexion of 7°, maximum lumbar extension of 6°, maximum lumbar right lateral flexion of 14°, and maximum lumbar left lateral flexion of 14° for a 21% whole person impairment rating for loss of range of motion.

17. Dr. Reiss further noted the following concern:

> Problem here is his range of motion is way out of proportion to what one would see in this situation like this on average, and I think even though it is internally consistent, I do not think it is appropriate to give a rating of 24% for a younger person such as this gentleman with single lift degenerative change, no herniated disk and just back pain….perhaps the situation should be taken under further consideration as far as validity.

18. Nevertheless, Dr. Reiss completed the DIME Examiner's Summary Sheet assigning Claimant a 7% whole person impairment rating pursuant to Table 53 and a 21% impairment rating for loss of range of motion. These ratings combined for a total whole person impairment rating of 27%. Dr. Reiss authored a letter to the DIME Unit along with the DIME Examiner's Summary Sheet further expressing his concerns regarding the validity of Claimant's range of motion. Dr. Reiss wrote, in relevant part, as follows:

> According to the measurements today, my rating was 27%, but this seems to be way out of proportion to what one would expect with simple degenerative change at one level in a young fellow such as this and therefore I suggested that even though the numbers were internally consistent, I believe this was not consistent with his underlying pathological process, which is simple degenerative change at one level in his lumbar spine with no particular injury and there would be suspect with his range of motions being so out of proportion to what one would expect in someone that is otherwise functional.

Dr. Reiss added, "I think at this point given this gentleman's range of motion rating of 21% is absurd".

19. On November 13, 2008, Dr. Allison M. Fall, M.D. performed an IME for respondents. Dr. Fall opined that there is no objective evidence, on physical examination, of a low back injury. Dr. Fall further opined that Claimant's range of motion measurements were not well-grounded, justifiable, and logically correct.

Dr. Fall noted that Claimant's range of motion was not supported by objective findings or anatomic correlation. Dr. Fall stated that under the *AMA Guides*, impairment should only be assigned based on objective findings and that clinical judgment needs to be used. Dr. Fall documented maximum lumbar flexion of 10°, maximum lumbar extension of 4°, maximum lumbar right lateral flexion of 10°, and maximum lumbar left lateral flexion of 6° and noted that Claimant's range of motion "was even more limited than that obtained by Dr. Reiss and Dr. Dickson. That is further evidence of a self-limitation, and not consistent with true functional limitation." Dr. Fall assigned Claimant 0% impairment rating for loss of range of motion.

20. Dr. Reiss testified via deposition that Claimant's range of motion measurements "are exceedingly small and don't seem to make sense with the underlying pathology that is going on with this gentleman". Dr. Reiss further testified that Claimant's "range of motion was way out of proportion to what one would expect with the objective findings of a little bit of degenerative change in his type of problem, so I would invalidate his range of motion on the basis of it being nonsensical." It was Dr. Reiss' professional medical opinion that if Claimant's injury was deemed work related, the only appropriate rating would be a 7% whole person impairment rating under Table 53 of the AMA Guides.

21. It is specifically found that Dr. Reiss determined 7% whole person impairment rating due to claimant's admitted work injury.

22. Dr. Dickson testified by deposition that claimant's range of motion measurements were not nonsensical in light of his moderate to severe degenerative disc disease. She would not perform any range of motion testing in the absence of objective findings, but she believed the MRI results showed objective findings. She noted that claimant's range of motion measurements satisfied internal consistency and validity measurements of the *AMA Guides*.

23. Dr. Fall credibly and persuasively testified that the *AMA Guides* allow physicians to take into account their clinical judgment and that it is appropriate to invalidate range of motion testing for nonphysiologic reasons. It was Dr. Fall's professional medical opinion that the only appropriate rating for Claimant is 7% whole person impairment rating under Table 53 of the *AMA Guides.*

24. No clear and convincing evidence demonstrates that the medical impairment determination by the DIME is incorrect. Claimant's testimony was credible. He was a hard-working employee, who gradually started having low back pain while at work. He gave what he believed to be full effort on all range of motion testing. Nevertheless, the physician is required to use clinical judgment about the validity of the range of motion testing. Although Dr. Dickson believes that the measurements reflect claimant's impairment, Dr. Reiss and Dr. Fall disagree. Dr. Dickson's contrary judgment does not demonstrate that it is highly

probable that Dr. Reiss is incorrect. Consequently, claimant is limited to 7% whole person impairment as a result of the work injury.

CONCLUSIONS OF LAW

1. As found, claimant was unable to return to the usual job due to the effects of the work injury on November 5 and 6, 2007, January 7 and 8 and February 11 and 12, 2008. Consequently, claimant was "disabled" within the meaning of section 8-42-105, C.R.S. and is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Claimant is entitled to TTD benefits if the injury caused a disability, the disability caused claimant to leave work, and claimant missed more than three regular working days. TTD benefits continue until the occurrence of one of the four terminating events specified in section 8-42-105(3), C.R.S. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

2. The medical impairment determination of the DIME is binding unless overcome by clear and convincing evidence. Section 8-42-107(8), C.R.S.; *see Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186, 189-190 (Colo. App. 2002); *Sholund v. John Elway Dodge Arapahoe,* W.C. No. 4-522-173 (ICAO October 22, 2004); *Kreps v. United Airlines,* W.C. Nos. 4-565-545 and 4-618-577 (ICAO January 13, 2005). *Cudo v. Blue Mountain Energy Inc.*, W.C. No. 4-375-278 (Industrial Claim Appeals Office, October 29, 1999). All of the reports and testimony of the DIME are to be considered in deciding what is the determination of the DIME. Then, the party who seeks to overcome that opinion faces a clear and convincing burden of proof. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005); *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998). As found, the DIME determined that claimant suffered 7% whole person impairment. Claimant has a clear and convincing burden of proof to overcome the medical impairment rating determination of the DIME. A fact or proposition has been proved by "clear and convincing evidence" if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, claimant has failed to prove by clear and convincing evidence that the medical impairment determination by the DIME is incorrect. Consequently, claimant is entitled to PPD benefits based upon 7% whole person impairment, as admitted by respondents.

ORDER

It is therefore ordered that:

1. The insurer shall pay claimant TTD benefits at the admitted rate of $620.43 per week for the periods November 5 and 6, 2007, January 7 and 8, and February 11 and 12, 2008.

2. Claimant's claim for additional PPD benefits is denied and dismissed.

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

DATED: February 2, 2009

Martin D. Stuber
Administrative Law Judge

O F F I C E O F A D M I N I S T R A T I V E COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. 4-659-097, 4-715-150 & 4-726-900

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she is entitled to reopen her July 19, 2005 admitted worker's compensation claim in case number W.C. 4-659-097 based on a change in condition pursuant to §8-43-303(1), C.R.S.

2. Whether Claimant has proven by a preponderance of the evidence that she suffered compensable industrial injuries to her lower back during the course and scope of her employment with Employer on November 6, 2006 (case no. W.C. 4-715-150) and April 4, 2007 (case no. W.C. 4-726-900).

3. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury.

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

5. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits.

6. Whether Respondents have established by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because she was responsible for her termination from employment under §8-42-105(4) C.R.S. and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

FINDINGS OF FACT

1. Claimant is a 57 year-old female who began working for Employer on May 14, 2003 as an overnight stocker. Her job duties primarily included stocking groceries, toys, house wares, cosmetics and stationary on store shelves. In completing her duties she engaged in repetitive lifting, bending, stooping, reaching and climbing during her eight-hour shift.

2. On July 19, 2005 Claimant suffered an admitted industrial injury to her lower back during the course and scope of her employment with Employer. The claim was designated as case number W.C. 4-659-097. Employer referred Claimant to Rosalinda Pineiro, M.D. for medical treatment. Dr. Pineiro determined that Claimant had suffered back pain with a lumbar strain. She assigned Claimant work restrictions and recommended physical therapy.

3. On August 5, 2005 Claimant returned to Dr. Pineiro for an evaluation. Dr. Pineiro determined that Claimant had reached Maximum Medical Improvement (MMI), suffered no permanent impairment and did not require medical maintenance treatment. She thus permitted Claimant to resume her regular job duties. Nevertheless, Dr. Pineiro referred Claimant to her family practitioner because of high blood sugar levels associated with diabetes.

4. On August 16, 2005 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Pineiro's MMI and impairment determinations. Claimant did not object to the FAL within 30 days and case number W.C. 4-659-097 closed by operation of law.

5. On December 15, 2005 Claimant again visited Dr. Pineiro and explained that her lower back condition had not improved. Dr. Pineiro commented that Claimant had been receiving medical treatment for systemic issues from her personal physician. She referred Claimant for physical therapy treatment. Dr. Pineiro stated that if physical therapy failed to improve Claimant's condition, she should visit physiatrist John Bender, D.O.

6. On March 1, 2006 Claimant visited Dr. Bender for an evaluation of her back pain. Dr. Bender remarked that, although Claimant had not worked for the previous four months, her symptoms had not improved. He explained that her lower back pain was not related to her employment for Employer. Dr. Bender thus concluded that Claimant had reached MMI with no impairment.

7. On March 8, 2006 Dr. Pineiro agreed with Dr. Bender that Claimant had returned to MMI. Dr. Pineiro released Claimant from care and

advised Claimant to return to her personal physician regarding a non-work related condition.

8. On July 13, 2006 Claimant requested a medical leave of absence from employment because she was experiencing continued back pain. She believed that her condition would improve with some time off from work. On August 18, 2006 Claimant resumed her regular job duties with Employer.

9. On October 3, 2006 Claimant visited personal physician Michael Hajek, M.D. for an evaluation of her lower back and probable sciatica. Claimant advised Dr. Hajek that she had been experiencing increasing right leg and buttock pain. Dr. Hajek also commented that Claimant had felt cramping in her right calf and was having difficulty maneuvering up and down ladders. Dr. Hajek referred Claimant for a lumbar MRI scan.

10. On October 5, 2006 Claimant underwent a lumbar MRI. The MRI revealed a broad-based bulging disc at L4-L5.

11. On October 16, 2006 Claimant was examined by personal physician Valdon G. Landes, D.O. Claimant reported that she had been experiencing lower back pain for the past two years and that her job duties had aggravated her condition. He diagnosed Claimant with a bulging lumbar disc at L4-L5. Dr. Landes subsequently performed epidural steroid injections at the location of Claimant's bulging disc but she obtained only minimal relief.

12. On November 6, 2006 Claimant requested a second leave of absence from Employer based on back pain. Dr. Landes certified the request.

13. Claimant continued to obtain medical treatment from Dr. Landes for continuing back pain. She underwent facet injections and radiofrequency ablation on her back.

14. On January 8, 2007 Claimant resumed her full-time job duties with Employer.

15. On February 15, 2007 Claimant filed a Workers' Claim For Compensation. She asserted that she had suffered an occupational injury on November 6, 2006 during the course and scope of her employment with Employer. Respondents subsequently filed a Notice of Contest.

16. On March 26, 2007 Claimant underwent an annual review with Employer. She received a salary raise from $10.60 to $11.00 per hour because she achieved Employer's job expectations. An AWW of $440.00

thus constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

17. On April 2, 2007 Employer referred Claimant to Gregory Denzel, D.O. of Greeley Quick Care for treatment of her continued lower back pain. He noted that Claimant had a history of lower back pain since 2005 and had received medical treatment for her condition. Dr. Denzel diagnosed Claimant with "lower back pain/sciatica/right hip bursitis."

18. Claimant testified that on April 4, 2007 she lifted a box of computer paper as part of her job duties. She experienced back pain and immediately reported her injury to Employer.

19. On April 4, 2007 Claimant returned to Greeley Quick Care and was evaluated by Jeremy Grover, PA-C. PA-C Grover diagnosed Claimant with a lumbar strain and returned Claimant to work with restrictions that included no lifting in excess of 10 pounds and no bending or stooping.

20. On April 15, 2007 Employer terminated Claimant from employment. Employer's Assistant Manager testified through an evidentiary deposition in this matter about Employer's disciplinary procedures. He explained that Claimant had 12 unapproved absences over a six-month period and was required to take a "decision day" on March 19, 2007. The Assistant Manager commented that, in order to avoid termination after her decision day, Claimant could not be absent from work even if she was sick and produced medical documentation.

21. Claimant failed to report to work on April 10, 11, and 12, 2007. However, she contacted Employer on each day and stated that she would be unable to report to work because she was suffering from flu symptoms. Claimant also produced medical documentation to support her absences. Nevertheless, when Claimant returned to work on April 15, 2007, she was terminated for violating Employer's attendance policy.

22. On May 3, 2007 Dr. Denzel determined that Claimant had reached MMI for her April 4, 2007 industrial injury and suffered no permanent impairment. He released her to full duty employment. Dr. Denzel did not recommend medical maintenance treatment.

23. On June 13, 2007 Claimant underwent an independent medical examination with Jeffrey A. Wunder, M.D. Dr. Wunder concluded that Claimant's lower back problems were related to her job duties for Employer. He explained:

With respect to low back complaints prior to [Claimant's] reported injury in July 2005, there was no history of any back pain. Her medical records as noted previously do suggest a history of cervical disc disease and issues.

> The patient reported that her back pain started at work. She admitted that she could not describe a specific incident, but did report that she was stocking shelves, going up and down ladders and lifting boxes. Of note also, the patient is quite deconditioned and would be subject to a higher risk of lumbar injury doing repetitive physical activities. In all likelihood, my opinion is that the patient reported no non-occupational activities that would have contributed to her back pain. Based on her poor conditioning and probable use of poor biomechanics and the work activities, therefore, in my opinion within a reasonable degree of medical probability, she has a right sacroiliac joint dysfunction, which would be related to her work activities.

Dr. Wunder also recommended additional medical care that included injections for both therapeutic and diagnostic purposes. He also assigned Claimant work restrictions that included no lifting in excess of 45 pounds and occasional bending.

24. On September 22, 2008 Claimant underwent an independent medical examination with David W. Yamamoto, M.D. Dr. Yamamoto conducted an extensive review of Claimant's medical history and concluded that Claimant's condition had deteriorated since she reached MMI on August 5, 2005. He explained that, after Claimant reached MMI, she returned to work but again began experiencing lower back pain. Although Claimant subsequently received additional treatment, she continued to suffer from lower back pain. Dr. Yamamoto noted that Claimant "was able to return to work when released by Dr. Pineiro and now she clearly is not doing as well as she was in August of 2005."

25. In addressing whether Claimant's physical condition was related to her work injuries Dr. Yamamoto explained:

> [Claimant] started having problems with her back approximately two years after starting her work at [Employer] as a stocker. There were no other activities that she was doing that would likely have caused the lower back condition. It appears to me that it is obvious that the work she was doing is the cause of her lower back injury. Although there was not a clear identifiable event, she does have to do frequent lifting and bending and there is not another good explanation for her back condition. It would be, in my opinion, unreasonable to state that her back condition was merely a result of aging.

Dr. Yamamoto also concluded that Claimant warranted a repeat lumbar MRI and additional treatment with a physiatrist. He also noted that Claimant's medical care through Mountain Vista Orthopedics for her lumbar spine should have been covered through the workers' compensation system.

26. On November 11, 2008 Dr. Yamamoto testified through an evidentiary deposition in this matter. He maintained his opinion that Claimant had sustained a compensable, occupational lower back injury as a result of her work activities for Employer. Dr. Yamamoto also reiterated his opinion that Claimant had sustained a worsening of condition since reaching MMI in August 2005 for her July 19, 2005 industrial injury.

27. Claimant testified at the hearing in this matter. She credibly explained that her November 6, 2006 injury and her April 4, 2007 injury constituted aggravations of her admitted July 19, 2005 lumbar spine injury. She also stated that she has not worked since her termination from employment on April 15, 2007 and has received unemployment insurance compensation.

28. Claimant has demonstrated that it is more probably true than not that she suffered a change in condition since Dr. Pineiro placed her at MMI for a second time on December 15, 2005. The medical records reveal that Claimant continued to experience a gradual worsening of her lower back condition that was causally related to her admitted July 19, 2005 industrial injury. Claimant's continued lower back problems caused her to request leaves of absence from her employment with Employer. The credible testimony of Dr. Wunder reveals that Claimant's lower back condition was related to her job duties for Employer. Moreover, Dr. Yamamoto persuasively explained that Claimant's condition deteriorated after she reached MMI. In his deposition he reiterated that Claimant had suffered a worsening of condition since she reached MMI in 2005.

29. Claimant has demonstrated that it is more probably true than not that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure and relieve the effects of her July 19, 2005 admitted industrial injury. On April 2, 2007 Employer referred Claimant to Dr. Denzel for her continuing lower back pain. Dr. Denzel was thus Claimant's Authorized Treating Physician (ATP). Dr. Wunder credibly determined that Claimant required additional medical care including injections for both therapeutic and diagnostic purposes. Furthermore, the persuasive testimony of Dr. Yamamoto reveals that Claimant requires a repeat lumbar MRI and additional treatment with a physiatrist. Therefore, Dr. Denzel shall serve as Claimant's ATP and refer Claimant for reasonable and necessary medical treatment as recommended by doctors Wunder and Yamamoto.

30. Respondents have failed to demonstrate that it is more probably true than not that Claimant committed a volitional act or exercised some control over her April 15, 2007 termination. Employer's Assistant Manager explained that Claimant had 12 unapproved absences over a six-month period and was required to take a "decision day" on March 19, 2007. He commented that, in order to avoid termination after her decision day, Claimant could not be absent from work even if she was sick and produced medical documentation. Claimant subsequently failed to report to work on April 10, 11, and 12, 2007. However, she

contacted Employer on each day and stated that she would be unable to report to work because she was suffering from flu symptoms. Claimant also produced medical documentation to support her absences. Although Claimant violated Employer's attendance policy because she was absent subsequent to her decision day, the absences were caused by health problems that did not arise from a volitional act. Claimant thus did not exercise some control over her termination under the totality of the circumstances. Claimant is therefore entitled to receive TTD benefits for the following time periods: (1) July 14, 2006 through August 18, 2006; (2) November 18, 2006 through January 7, 2007; and (3) April 15, 2007 until terminated by statute. The award of TTD benefits is subject to any applicable offsets as a result of unemployment insurance compensation that Claimant has received.

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 (2005).

Reopening

4. Section 8-43-303(1), C.R.S. provides that a workers' compensation award may be reopened based on a change in condition. A "change in condition" refers to a "change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally

connected to the original compensable injury." *Cordova v. Industrial Claims Comm'n.,* 55 P.3d 186, 189 (2002); *In re Caraveo,* W.C. No. 4-358-465 (ICAP, Oct. 25, 2006). Reopening is appropriate when the claimant's degree of permanent disability has changed since MMI or where the claimant is entitled to additional medical or temporary disability benefits that are causally connected to the compensable injury. *See In re Duarte,* W.C. No. 4-521-453 (ICAP, June 8, 2007). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004).

5. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered a change in condition since Dr. Pineiro placed her at MMI for a second time on December 15, 2005. The medical records reveal that Claimant continued to experience a gradual worsening of her lower back condition that was causally related to her admitted July 19, 2005 industrial injury. Claimant's continued lower back problems caused her to request leaves of absence from her employment with Employer. The credible testimony of Dr. Wunder reveals that Claimant's lower back condition was related to her job duties for Employer. Moreover, Dr. Yamamoto persuasively explained that Claimant's condition deteriorated after she reached MMI. In his deposition he reiterated that Claimant had suffered a worsening of condition since she reached MMI in 2005.

Medical Benefits

6. Respondents are liable for authorized 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.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P. 2d 251, 252 (Colo. App. 1999).

7. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure and relieve the effects of her July 19, 2005 admitted industrial injury. On April 2, 2007 Employer referred Claimant to Dr. Denzel for her continuing lower back pain. Dr. Denzel was thus Claimant's Authorized Treating Physician (ATP). Dr. Wunder credibly determined that Claimant required additional medical care including injections for both therapeutic and diagnostic purposes. Furthermore, the persuasive testimony of Dr. Yamamoto reveals that Claimant requires a repeat lumbar MRI and additional treatment with a physiatrist. Therefore, Dr. Denzel shall serve as Claimant's ATP and refer Claimant for reasonable and necessary medical treatment as recommended by doctors Wunder and Yamamoto.

Average Weekly Wage

8. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). As found, an AWW of $440.00 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits and Termination for Cause

9. To obtain TTD benefits, a claimant must establish a causal connection between a work-related injury and a subsequent wage loss. §8-42-103(1)(a), C.R.S. To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when she has a complete inability to work or there are restrictions that impair her ability to effectively and properly perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

10. Respondents assert that Claimant is precluded from receiving TTD benefits subsequent to April 15, 2007 because she was responsible for her termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes"). Under the termination statutes a claimant who is responsible for her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and the wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006); *see Anderson,* 102 P.3d at 330. The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of*

Eskridge, W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, Respondents must demonstrate by a preponderance of the evidence that she committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994).

11. As found, Respondents have failed to demonstrate by a preponderance of the evidence that Claimant committed a volitional act or exercised some control over her April 15, 2007 termination. Employer's Assistant Manager explained that Claimant had 12 unapproved absences over a six-month period and was required to take a "decision day" on March 19, 2007. He commented that, in order to avoid termination after her decision day, Claimant could not be absent from work even if she was sick and produced medical documentation. Claimant subsequently failed to report to work on April 10, 11, and 12, 2007. However, she contacted Employer on each day and stated that she would be unable to report to work because she was suffering from flu symptoms. Claimant also produced medical documentation to support her absences. Although Claimant violated Employer's attendance policy because she was absent subsequent to her decision day, the absences were caused by health problems that did not arise from a volitional act. Claimant thus did not exercise some control over her termination under the totality of the circumstances. Claimant is therefore entitled to receive TTD benefits for the following time periods: (1) July 14, 2006 through August 18, 2006; (2) November 18, 2006 through January 7, 2007; and (3) April 15, 2007 until terminated by statute. The award of TTD benefits is subject to any applicable offsets as a result of unemployment insurance compensation that Claimant has received.

ORDER

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

1. Claimant's claim in case number W.C. 4-659-097 is reopened. Because her claim has been reopened, it unnecessary to address whether she suffered compensable injuries to her lower back in case numbers W.C. 4-715-150 and W.C. 4-726-900.

2. Dr. Denzel is Claimant's ATP. Dr. Denzel shall refer Claimant for reasonable and necessary medical treatment as recommended by doctors Wunder and Yamamoto. Respondents shall pay for all of Claimant's authorized medical treatment that is reasonable and necessary to cure and relieve the effects of her July 19, 2005 industrial injury.

3. Claimant's AWW is $440.00.

4. Claimant is entitled to receive TTD benefits for the following time periods: (1) July 14, 2006 through August 18, 2006; (2) November 18, 2006 through January 7, 2007; and (3) April 15, 2007 until terminated by statute. The award of TTD benefits is subject to any applicable offsets as a result of unemployment insurance compensation that Claimant has received.

5. Any issues not resolved by this Order are reserved for future determination.

DATED: February 2, 2008.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-766-609

ISSUES

- Did the respondents prove by a preponderance of the evidence that the claimant was an "independent contractor" so as to disqualify the claimant from the receipt of workers' compensation benefits?

FINDINGS OF FACT

1.At hearing, the parties stipulated that the sole issue for determination by the ALJ is whether the claimant was an employee of the employer or an independent contractor when he was injured on July 11, 2008. The parties further stipulated that if the ALJ finds the claimant was an employee, then the respondents are liable for the claimant's injury and agree to pay for a specific medical expense described as a "flight for life" helicopter transport. The respondents also agreed that if the claimant is found to be an employee the ALJ should enter a general order requiring them to pay other reasonable and necessary medical benefits, and a general order awarding temporary total disability benefits.

2.The employer is a general contractor engaged in the building and remodeling of residential structures. The employer deals in "high end" projects, and often uses expensive materials and construction techniques. The employer specializes in constructing buildings that are "friendly" to the environment.

3.The employer entered into a written contract with a homeowner to remodel a house located at 125 Ash Street (Ash project). This was a major

remodeling project that included, among other things, construction of an additional story on an existing structure.

4.The claimant testified credibly concerning his background and employment history. The claimant is twenty-three years of age and is from Mexico. He has an elementary school education and worked in agriculture as teenager. The claimant moved to Colorado in December 2005. The claimant worked with his brother who began to teach the claimant carpentry skills. Prior to the job with the employer, the claimant worked for two construction companies performing labor and carpentry jobs. The claimant was always paid by the hour when working for these firms. These firms withheld federal taxes from the claimant's payment. The claimant has never owned his own business or operated under a trade name.

5.Sometime in the Spring of 2008, the employer sought bids from carpenters to install the soffits and siding on the Ash project. The employer received bids from some independent carpentry firms, but the employer's chief executive officer (CEO) considered the bids to be too high for the work required. Specifically, the CEO believed the bidders were overestimating the length of time needed to install the soffits and siding. The CEO decided to hire a carpenter or carpenters and offer them an hourly wage to complete the work. The CEO explained the employer sometimes enters into arrangements with "independent contractors" to complete certain aspects of construction projects on a "time plus materials" basis. These arrangements are common if it is difficult to predict how long it will take the independent contractor to complete a particular aspect of an assigned project. Such unpredictability is typical where the original structure is quite old and it is difficult to determine the amount of work and type of modifications that will be necessary to bring the building up to contemporary standards and codes.

6.In the late spring of 2008 the employer placed a help wanted advertisement in the Aspen Daily News. The advertisement read: "Laborers & Carpenters needed for… Construction Company – amount of pay = amount of experience."

7.The claimant and another person responded to the advertisement. The CEO and the employer's president interviewed the claimant and his companion.

8.The employer representatives explained to the claimant that they needed someone to install soffits and siding, and the claimant represented that he could do the required work. The employer agreed to pay $22 per hour for the claimant's work, but no written contract was signed between the employer and the claimant. The employer also advised the claimant that he would need to purchase general liability insurance in order to work on the Ash project.

9.While working at the Ash project the claimant submitted weekly time sheets to the employer setting forth the hours he worked each day. The time

sheets used by the claimant were on the employer's letterhead and were available at the job site.

10.The claimant commenced working at the end of May 2008.

11.On July 11, 2008, the claimant was electrocuted while working at the Ash project. The claimant's metal tape measure came in contact with an electric power line while he was performing carpentry work.

12.The employer paid the claimant by check on a weekly basis. No taxes were deducted from the checks issued to the claimant. The checks were made out to the claimant personally. No checks given to the claimant were made out in the name of any trade or business.

13.The claimant purchased a commercial general liability insurance policy soon after he began work on the Ash project. The claimant selected an insurer recommended by other workers at the job site. The claimant waited to purchase the policy until after he received his first check from the employer. On June 3, 2008, the insurer issued a certificate of insurance listing the claimant as the insured and the employer as the certificate holder.

14.When the claimant commenced work at the Ash project he was shown a small section of soffit that was already finished in the manner desired by the employer. After seeing this example the claimant was able to assemble and install the soffits according to the employer's design. The employer did not provide any other type of training to the claimant.

15.The employer's president credibly testified that the claimant was hired to do exterior work, that his skills as a carpenter were middle to lower level, and that he did not have the high skills of a finish carpenter. The president further admitted that the employer had regular employees with carpentry skills equivalent to or better than those of the claimant. The ALJ infers from this evidence that the claimant's carpentry skills were not at the high end of the spectrum, and that exceptional carpentry skills were not needed to install the soffits and siding at the Ash project.

16.Installation of the soffits at the Ash project often required the claimant to work on a scaffold as high as 18 feet above the ground.

17.The claimant typically worked 40 to 50 hours per week at the Ash project. Although the employer did not require the claimant to work exclusively for the employer, the claimant credibly testified that it is unlikely any other employer would have hired him considering the amount of time he was spending on the Ash project.

18.The claimant credibly testified that the employer, through its foreman, established the hours of work. The claimant testified that the employer's foreman

was always present when he was working and that the foreman established the time for the commencement of and the conclusion of the day's work. The claimant's testimony is generally corroborated by that of the foreman who stated that he generally does not allow "subcontractors" to remain on the employer's job site after he leaves.

19.The employer imposed a "quality standard" on the claimant and the employer's foreman provided close oversight of the claimant's work. The claimant credibly testified that the foreman would ask him to redo work if the foreman was not satisfied, and that the foreman would sometimes tell him to change tasks. For instance, the foreman would sometimes tell him to stop his carpentry work and carry wood.

20.The claimant's testimony that the employer's foreman enforced the employer's quality standards was significantly corroborated by the testimony of the foreman himself. The foreman stated that he made sure the claimant was performing the tasks assigned by the employer. The foreman further stated that he believed he had the right to direct the claimant to change his actions if he perceived that the claimant was "doing something wrong." The foreman stated that he did not recall the claimant doing anything wrong on the Ash project. However, the foreman admitted testifying in his deposition that he occasionally exercised quality control over persons working on the job site because the employer was "not paying them to build something wrong."

21.While on the Ash job the claimant used some of his own tools including two types of saws and a nail gun. However, the claimant credibly testified that the employer also provided some tools that he used to do his work. Tools provided by the employer included a table saw, a "finishing gun," a compressor and a power drill. The employer also provided the scaffold used to install the soffits and the "pump jack" used to elevate the scaffold.

22.The ALJ finds that the employer could have terminated the claimant's services at any time for any reason. There was no written contract establishing a period of time for the claimant to accomplish the installation of the soffits and siding, nor was there any written description setting forth the particular tasks to be accomplished. The claimant credibly testified that he believed the employer had the right to discharge him at any time. The employer's CEO admitted in his deposition that he believed he had the right to fire the claimant if he believed the claimant was not "doing the job as he wanted" it done. During this testimony at hearing the CEO testified that he could have fired the claimant if he thought the claimant was taking too long to complete the job or "wasn't showing up." The ALJ infers that under the arrangement that existed between the claimant and the employer that the employer had a right to control the claimant's activities and could have fired the claimant without further liability if the employer determined the claimant was not meeting its expectations.

23.The claimant proved it is more probably true than not that he was performing services for pay for the employer. The claimant's testimony in this regard is supported by his own testimony, and is not actually disputed by the employer.

24.The respondents failed to prove it is more probably true than not that the claimant was free from direction and control in the performance of his service for the employer. The also employer failed to prove the claimant was engaged in and independent trade, occupation or profession related to the services performed. Therefore, the employer failed to prove it is more probably true than not that the claimant was an "independent contractor" at the time he was injured.

25.In finding the respondents failed to prove the claimant was an independent contractor, the ALJ has evaluated and considered the nine factors listed in Section 8-40-202(2)(b)(II), C.R.S. The respondents failed to prove the existence of six of the criteria relevant to determining the claimant's status as an employee or independent contractor. The ALJ finds as follows: (1) The employer established a quality standard for the claimant's work, oversaw the claimant's work through its on-site foreman, and occasionally provided specific directions to the claimant concerning the work to be performed. (2) The employer paid the claimant an hourly rate for his services rather than a contract rate. The ALJ is not persuaded that the claimant's duties were comparable to independent contractors performing service on a "time plus materials" basis. The employer itself admitted that the soffit and siding work was not particularly complex and that the claimant's carpentry skills were only moderate. Moreover, the employer apparently did not think it was particularly difficult to predict the amount of time required to complete the work since it declined to accept bids by independent carpenters based on its determination that the contractors were overestimating the amount of time necessary to complete the job. (3) The ALJ is persuaded the employer could terminate the claimant's employment at any time without further liability. There was no written contract establishing the parameters of the claimant's responsibilities and standards of performance, or the employer's liability if it did terminate the claimant's work on the project. (4) The ALJ is persuaded that the employer provided tools for the claimant's use on the job site. Although the claimant provided some of his own tools, the employer also provided important tools including saws, drills and the scaffold used to reach the soffits. (5) The ALJ is persuaded the employer, through its foreman, dictated the time of the claimant's performance. The foreman dictated when work would begin, and did not permit persons to stay on the job after he left the site. This is not a case in which the employer set a general completion date or schedule, or in which the parties "negotiated" mutually agreeable work hours. Indeed, the employer admitted that if it did not think the claimant was "showing up" regularly enough, he would have been subject to termination. (6) The employer paid the claimant personally, not in the name of any trade or business. Indeed, there is no credible or persuasive evidence that the claimant ever operated as an independent tradesman or business. The claimant had no trade or business name, he had only worked for other employers, and he

did not have all of the tools necessary to operate as a carpenter installing soffits and siding.

26.The respondents proved it is more probably true than not that the claimant was not required to work exclusively for the employer. However, the ALJ does not give this factor significant weight considering that the employer's expectations concerning the claimant's performance required him to average 40 to 50 hours per week. There was little time for the claimant to work another job if he wanted to. The respondents proved it is more probably true than not that the claimant received minimal if any training from the employer. However, the ALJ does not give this factor significant weight since the carpentry work required of the claimant was not particularly sophisticated. Finally, there is no credible or persuasive evidence that the claimant and the employer combined business operations. However, the ALJ does not consider this factor particularly significant since he finds the claimant was not actually operating any independent business that could be combined with that of the employer.

27.The factors tending to establish that the claimant was an employee outweigh and are more persuasive than the factors tending to support an inference the claimant was an independent contractor. Evidence and inferences inconsistent with these findings are not persuasive.

CONCLUSIONS OF LAW

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

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. Section 8-40-102(1), C.R.S. Except as specifically described below, 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. Section 8-43-201.

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). A Workers' Compensation case is decided on its merits. Section 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 Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

EMPLOYEE VERSUS INDEPENDENT CONTRACTOR ANALYSIS

The respondents contend that the evidence establishes the claimant was an independent contractor when he was injured on July 11, 2008. The ALJ disagrees with the respondents' contention.

In order to be eligible for benefits under the Act, the claimant must be an "employee" of the alleged employer. Section 8-41-301(1)(a), C.R.S. Section 8-40-202(2)(a), C.R.S., provides as follows:

> Notwithstanding any other provision of this section, any individual who performs services for pay for another shall be deemed to be an employee, irrespective of whether the common-law relationship of master and servant exists, unless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.

The claimant bears the burden of proof to establish that he was performing services for another for pay. If the claimant meets this burden, the statute creates a presumption that the claimant was an employee, and the putative employer has the burden of proof to establish that the presumption of employment has been overcome. *Frank C. Klein v. Colorado Compensation Insurance Authority,* 859 P.2d 323 (Colo. App. 1993); *Bencomo v. Chernoff,* W.C. No. 4-663-598 (ICAO July 13, 2007).

Section 8-40-202(2)(b)(II), C.R.S., sets forth nine factors that must be balanced when determining if the claimant is an employee or an independent contractor. *See Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. App. 1998); *Bencomo v. Chernoff, supra*. A document may satisfy the requirement to prove independence, but a document is not required. Section 8-40-202(2)(b)(III), C.R.S., provides that the existence of any one of those factors is not conclusive evidence that the individual is an employee. Consequently, the statute does not require satisfaction of all nine criteria in Section 8-40-202(2)(b)(II) in order to prove by a preponderance of the evidence that the individual is not an employee. Rather, the question of whether the respondents have overcome the presumption and established that the claimant was an independent contractor is one of fact for the ALJ. *Nelson v. Industrial Claim Appeals Office, supra.*

As determined in Finding of Fact 23, the claimant proved that on July 11, 2008, he was performing carpentry services for pay. The employer had agreed to pay the claimant $22 per hour to install soffits and siding at the Ash project. Thus, under § 8-40-202(2)(a), the claimant must be deemed to be an employee unless the respondents can prove by a preponderance of the evidence that the claimant was an independent contractor.

The ALJ concludes the respondents failed to prove it is more probably true than not that the claimant was an independent contractor. The ALJ has considered and balanced the nine factors listed in § 8-40-202(2)(b)(II). As specifically determined in Findings of Fact 25, 26 and 27, the ALJ finds that, on the balance, the statutory factors support the conclusion that the claimant was an employee of the employer rather than an independent contractor. For the reasons stated in those findings, the ALJ is not persuaded that the claimant was free from direction and control in the performance of his work as a carpenter, or that he was engaged in any independent business or trade at the time of the injury.

The ALJ concludes that, for purposes of the Act, the claimant was an employee of the employer at the time of injury.

ORDER

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

1. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. In accordance with the parties' stipulation at hearing, the insurer shall pay for the flight for life transport as a reasonable and necessary medical benefit.

3. In accordance with the parties' stipulation at hearing, the respondents are liable for other reasonable, necessary and authorized medical treatment and services. Specific disputes concerning particular medical expenses other than the flight for life are reserved for future determination.

4. In accordance with the parties' stipulation, the respondents are liable for temporary total disability benefits. However, issues including but not limited to the average weekly wage, the specific periods of disability, and possible termination of temporary benefits are reserved for future determination.

5. Issues not specifically resolved by this order are reserved for future determination.

DATED: February 3, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-737-975

ISSUES

The issues for determination are: compensability, medical benefits, and temporary total disability benefits from September 9, 2007 and ongoing. The parties stipulated to an average weekly wage (AWW) of $563.12.

FINDINGS OF FACT

1. Claimant is a 30-year-old employee working for Employer in Loveland, Colorado, where he unloads freight from semi tractor-trailers. Claimant was hired by Employer on August 22, 2001.

2. The Claimant worked three twelve-hour shifts per week; on Saturdays, Sundays and Mondays, from 6:00 a.m. to 6:30 p.m. Claimant worked on September 8, 9 and 10, 2007, unloading trailers filled with Steralite plastic storage containers. Claimant sustained a compensable work-related injury on or about September 9, 2007, while in the course and scope of his work duties. Claimant's testimony concerning his injury is credible and persuasive.

3. On Tuesday morning on September 11, 2007, Claimant was experiencing significant pain in the middle of his back. He sought treatment with his primary care physician on Saturday, September 15, 2007. He was seen by Dr. Kasenberg, at First Care Physicians in Loveland, Colorado on that day. Dr. Kasenberg noted symptomatology at T-12 to L3. He diagnosed an acute lumbar strain and prescribed medication for the Claimant's symptoms.

4. Claimant reported to work as scheduled on Saturday, September 22, 2007 and reported his work injury to his supervisor, Mr. Coleman. Respondent referred Claimant to Dr. Basow, who is an authorized treating physician. On September 24, 2007, Dr. Basow opined that Claimant's condition was not work-related and referred Claimant to his personal physician for care and treatment.

5. Claimant sought treatment with Dr. Risenhoover at First Care Physicians on October 1, 2007. Dr. Risenhoover obtained a history from the

Claimant and diagnosed a work-related thoracic strain. He recommended physical therapy and continuing medications for the Claimant's symptoms. The physician also prepared a note for the Employer that indicated that the Claimant had suffered a thoracic strain which he found work-related and that the Claimant would be unable to perform his work duties at the distribution center. Dr. Risenhoover's opinions as to causation and treatment are credible and persuasive.

6. The Claimant's symptoms did not improve and on October 6, 2007, Dr. Risenhoover referred him to Dr. Robert J. Benz, an orthopedic surgeon at the Orthopaedic Center of the Rockies. Dr. Benz saw the Claimant on October 19, 2007 and noted that the Claimant was suffering from "non-specific thoracolumbar pain" which could be coming from a ligamentous strain or possibly an annular tear. Dr. Benz found that the injury was work related and caused by the Claimant's repetitive lifting at work. He recommended an MRI scan if the thoracic symptoms did not improve and restricted the Claimant's lifting to 25 pounds. Dr. Benz's opinions as to causation and treatment are credible and persuasive.

7. Dr. Risenhoover requested a MRI exam that was performed at the McKee Medical Center by Dr. Jeffrey R. Weissman on December 4, 2007. Dr. Weissman diagnosed small central disc bulges at the L3-4 and L4-5 levels of the lumbar spine, mild central stenosis at the L4-5 level and a central and right paracentral disc protrusion at the T11-12 level associated with an annular tear.

8. The Claimant was seen by Dr. Risenhoover on December 28, 2007. The doctor reviewed the MRI results with the Claimant and opined that the MRI showed a small central bulge at the T11-12 level of the thoracic spine. His opinion was that the disc bulge probably occurred at the onset of the Claimant's symptoms. He released Claimant to return to work, full duty, on January 3, 2008.

9. Claimant returned to work the weekend of January 12, 13, and 14, 2008, but could not tolerate his symptoms. Dr. Risenhoover removed him from work on January 15, 2008, and referred him once again to Dr. Benz. The doctor also recommended additional physical therapy.

10. Dr. Benz stated at his October 27, 2008, deposition that he saw the Claimant on January 25, 2008, and had the opportunity to view the "actual pictures" of the MRI. Dr. Benz stated, "At the point after I reviewed it I felt that he had a disk bulge at T11-12 with an annular tear." He opined, "I would say over all the MRI findings are consistent with the symptoms that Mr. Stark has."

11. The treatment Claimant received from Drs. Basow, Risenhoover, and Benz and their referrals is reasonable and necessary and related to the compensable injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of providing 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 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. 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 (ICAP, 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. Industrial Claim Appeals Office*, 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.

4. 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).

5. Section 8-41-301 (1)(b), C.R.S., provides that,

> The right to the compensation provided for in articles 40 to 47 of the title … shall obtain in all cases… where, at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment.

6. Section 8-42-101 (1)(a), C.R.S. requires that,

> Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical dental, nursing, and hospital treatment, medical hospital and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury.

7. Section 8-42-105 (1), C.R.S. provides as follows:

> In case of temporary total disability of more than three regular working days duration, the employee shall receive sixty six and two-thirds percent of said employee's average weekly wages so long as such disability is total…

8. As found, Claimant suffered a work-related injury on September 9, 2007 while performing services arising out of and in the course and scope of his employment with Employer. Respondents are liable for authorized 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.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999).

9. Respondent referred Claimant to Dr. Basow, who is an authorized treating physician. On September 24, 2007, Dr. Basow opined that Claimant's condition was not work-related and referred Claimant to his personal physician for care and treatment. Claimant sought treatment with Dr. Risenhoover who referred him to Dr. Benz. Therefore, beginning on September 24, 2007, Dr. Risenhoover and Dr. Benz are authorized treating physicians. See *Cabela v. Industrial Claim Appeals Office*, W. C. No. 4-701-794 (07CA2528) (Ct.App. Nov. 13, 2008).

10. To obtain TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 639 (Colo. App. 1997). A claimant must establish a causal connection between a work-related injury and a subsequent wage loss. §8-42-103(1)(a), C.R.S.: *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 546, 546 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earnings capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The "impairment of earning capacity" element of disability may

be evidenced by a complete inability to work or by restrictions that impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998).

11. As found Claimant was temporarily totally disabled from October 1, 2007, when he was provided work restrictions by Dr. Risenhoover, until January 3, 2008, when he was released to return to work. Claimant was again temporarily totally disabled from January 15, 2008 and continuing until terminated pursuant to statute or further order.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the medical expenses provided by Dr. Basow. Respondents shall pay for the medical expenses provided by Drs. Risenhoover and Benz and for their referrals from September 24, 2007 and forward.

2. Respondents shall pay to Claimant TTD from October 1, 2007 until January 3, 2008. Respondents shall pay Claimant TTD from January 15, 2008 and continuing until terminated pursuant to statute or further order. The parties stipulated that Claimant's AWW is $563.12. His TTD rate is therefore $375.41.

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

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

DATED: February 3, 2009

Barbara S. Henk
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-633-289 & WC 4-736-073

ISSUES

The issues determined herein are medical benefits, specifically liability for treatment for the left shoulder.

FINDINGS OF FACT

1.On November 2, 2004, while working for the first employer, claimant suffered an admitted industrial injury to his low back and left leg in WC No. 4-633-289. Travelers admitted liability for benefits. Dr. Walia and then Dr. Lund provided treatment. Claimant underwent surgery on his low back, but he continued to have low back and leg symptoms. In February 2006, claimant fell due to his leg symptoms, injuring his right ankle.

2.On March 28, 2006, Dr. Regan performed a Division Independent Medical Examination ("DIME"). He determined maximum medical improvement ("MMI") for the low back, but recommended continuing treatment for the right ankle.

3.On July 27, 2006, claimant's left leg again "gave out" and he fell, injuring his left shoulder.

4.On August 18, 2006, Dr. Lund examined claimant, noting that he suffered left shoulder pain due to the July 27 fall.

5.An October 13, 2006, magnetic resonance image ("MRI") of the left shoulder showed degeneration of the acromioclavicular ("AC") joint with osteophyte formation and rotator cuff tendinosis.

6.Dr. Lund referred claimant to Dr. Sanchez, an orthopedist. On January 15, 2007, Dr. Sanchez examined claimant, who reported a history of left shoulder pain for two months since the fall. Dr. Sanchez diagnosed possible impingement syndrome or rotator cuff tendinosis.

7.On February 23, 2007, Dr. Shank injected the left shoulder. Claimant had about 30% improvement in symptoms. Dr. Shank wanted claimant to be examined again by Dr. Sanchez, but that examination never occurred.

8.In spring 2007, Dr. Shank performed surgery on claimant's right ankle. The left shoulder treatment was delayed due to the right ankle.

9.On August 29, 2007, Dr. Jenks performed electromyography and nerve conduction studies ("EMG"), which showed mild left carpal tunnel syndrome. He administered an injection, which provided temporary relief.

10.On September 13, 2007, Dr. Castrejon examined claimant, who reported persistent shoulder and ankle pain, which had stabilized. Dr. Castrejon noted tenderness over the AC joint and anterior capsule with positive impingement signs. Dr. Castrejon noted that Dr. Sanchez needed to make final recommendations for treatment of the left shoulder before MMI.

11.On September 17, 2007, claimant suffered an admitted industrial injury in a motor vehicle accident while working for the second employer. Claimant's car was side-swiped and he then ran into trees and yard signs. He suffered neck and low back pain in the injury. Pinnacol admitted liability for benefits for that injury in WC 4-736-073.

12.On October 11, 2007, Dr. Sanchez examined claimant, who reported that his left shoulder pain has been present for several months and might have been exacerbated by the recent motor vehicle accident. X-rays showed no change. Dr. Sanchez indicated that he wanted to follow up in two to three weeks to discuss treatment of the left shoulder.

13.On October 25, 2007, Dr. Castrejon determined that claimant was at MMI for the 2004 injury. Dr. Castrejon noted that the left shoulder was stable after the motor vehicle accident. He diagnosed left shoulder contusion and strain with mild impingement. He recommended post-MMI medical benefits, including an injection of the left shoulder and expert followup.

14.Travelers filed a final admission of liability for permanent benefits and post-MMI medical benefits.

15.On February 21, 2008, Dr. Regan performed a repeat DIME. Dr. Regan determined that claimant was not at MMI due to need for additional treatment of the left shoulder. He noted significant pain behavior overlay obscuring the left shoulder examination. He concluded that the left shoulder problems were a consequence of the fall in 2006 due to the admitted low back injury. Dr. Regan recommended reevaluation by the orthopedist, physical therapy, and possible repeat MRI.

16.On September 26, 2008, Dr. Scott performed an IME for Pinnacol, focusing only on a right wrist cyst.

17.On October 21, 2008, Dr. Lambden performed an IME for Pinnacol. He concluded that claimant's left shoulder problems were due to the 2004 work injury and not to the motor vehicle accident.

18.On October 23, 2008, Dr. Primack performed an IME for Travelers. Dr. Primack understood that claimant's history was of an increase in left shoulder pain after the motor vehicle accident. He noted significant pain behaviors. He concluded that the left shoulder symptoms at that time were a consequence of the motor vehicle accident rather than the original 2004 injury.

19.Dr. Lambden testified at hearing that he would not recommend surgery for claimant's left shoulder in light of the minimal MRI findings, history of pain disorder, and two failed surgeries. If claimant needed surgery, Dr. Lambden concluded that the surgery was caused by the fall in 2006 as a result of the 2004 work injury. He noted that the October 2006 MRI showed tendinosis with

degeneration and he noted that such conditions typically increase over time. He noted that the motor vehicle accident caused no change in symptoms and no structural changes. He also noted that Dr. Sanchez considered surgery even before the motor vehicle accident.

20.Dr. Sanchez testified by deposition the left shoulder pain was still present from the first injury and had increased over months, most recently by the motor vehicle accident. He testified persuasively that the reason for a subacromial decompression surgery existed in January 2007, long before the motor vehicle accident. He noted that claimant's 30% improvement after the February 23, 2007, shoulder injection was a diagnostic tool. He would have recommended shoulder surgery at that time if he had reexamined claimant

21.Dr. Regan testified by deposition. He had not been able to review the medical records from Dr. Sanchez and he had ignored the motor vehicle accident in his DIME determination. He testified that claimant could develop frozen shoulder from chronic pain from the July 2006 fall without the motor vehicle accident. He was not sure that claimant's shoulder was objectively worse in October 2007. He did not change his conclusion that claimant was not at MMI for the 2004 work injury.

22.No clear and convincing evidence demonstrates that the determination by Dr. Regan is incorrect. Claimant is not at MMI for the 2004 work injury because he needs additional treatment by Dr. Sanchez for his left shoulder injury. The contrary causation opinion by Dr. Primack does not demonstrate that it is highly probable that Dr. Regan is incorrect regarding the causation of the left shoulder problems. The causation determination by Dr. Regan is also supported by the testimony of claimant and Dr. Lambden and by portions of the testimony of Dr. Sanchez. Claimant reasonably needed additional left shoulder treatment by Dr. Sanchez even before the motor vehicle accident.

23.At hearing, claimant agreed that Dr. Sanchez needed to reevaluate claimant to determine whether to proceed with surgery, a repeat MRI, or other treatment. Consequently, determination of the reasonable necessity of surgery is premature at this time.

CONCLUSIONS OF LAW

1. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

2. Section 8-42-107(8)(b)(III), C.R.S., provides that the determination of the DIME with regard to MMI shall only be overcome by clear and convincing evidence. A fact or proposition has been proved by "clear and convincing evidence" if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage*

Co. v. Gussert, 914 P.2d 411 (Colo. App. 1995). The determination of a Division-sponsored Independent Medical Examiner (IME) concerning the cause of the claimant's impairment is binding unless overcome by clear and convincing evidence. *See Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Cudo v. Blue Mountain Energy Inc.*, W.C. No. 4-375-278 (Industrial Claim Appeals Office, October 29, 1999). In this case, the Travelers respondents conceded that they had a clear and convincing burden to overcome the determination by the DIME that claimant was not at MMI for the admitted November 2, 2004, work injury.

3. "Maximum medical improvement" is defined in Section 8-40-201 (11.5), C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

Reasonable and necessary treatment and diagnostic procedures are a prerequisite to MMI. MMI is largely a medical determination heavily dependent on the opinions of medical experts. *Villela v. Excel Corporation*, W.C. Nos. 4-400-281, 4-410-547, 4-410-548, & 4-410-551 (Industrial Claim Appeals Office, February 1, 2001). As found, the Travelers respondents have failed to prove by clear and convincing evidence that the determinations by Dr. Regan were incorrect. Consequently, claimant is not at MMI for the admitted November 2, 2004, work injury and needs additional treatment for his left shoulder. As found, claimant agreed that Dr. Sanchez needed to reevaluate claimant to determine whether to proceed with surgery, a repeat MRI, or other treatment. Consequently, determination of the reasonable necessity of surgery is premature.

ORDER

It is therefore ordered that:

1. In WC 4-633-289, Travelers shall pay for the additional treatment of the left shoulder by Dr. Sanchez and his referrals.

2. In WC 4-736-073, claimant's claim against Pinnacol for treatment of the left shoulder is denied and dismissed.

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

DATED: February 4, 2009

Martin D. Stuber
Administrative Law Judge

O F F I C E O F A D M I N I S T R A T I V E COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-744-693

ISSUE

Whether Claimant has established by a preponderance of the evidence that her 17% right upper extremity impairment rating should be converted to a 10% whole person impairment rating.

FINDINGS OF FACT

1. On September 11, 2007 Claimant suffered an admitted industrial injury to her right arm and shoulder area during the course and scope of her employment with Employer. The injury occurred when a fellow employee gave her a "low five" and flexed her arm in an unnatural position against her chair.

2. On September 24, 2007 an MR Arthrogram of Claimant's right shoulder revealed an "apparent small partial rim rent tear within anterior footprint of supraspinatus tendon" and "supraspinatus and subscapularis tendinosis."

3. On September 25, 2007 Claimant visited Authorized Treating Physician (ATP) John Nordin, M.D. for an evaluation. Dr. Nordin determined that Claimant had suffered a shoulder strain with a "partial tear of the rotator cuff, bursitis, and tendinitis." He referred Claimant to an orthopedist for an additional shoulder evaluation.

4. On December 7, 2007 Claimant visited Timothy J. Pater, M.D. for an evaluation of her right shoulder. He commented that Claimant suffered from a partial thickness rotator cuff tear as reflected on her MRI. Dr. Pater noted that Claimant had the option of surgical intervention but had a history of "malignant hyperthermia" and prolonged recovery from a previous surgery. He thus recommended conservative measures to improve Claimant's range of motion and reserved the option of surgery for future consideration.

5. On January 22, 2008 Dr. Nordin determined that Claimant had reached Maximum Medical Improvement (MMI). Based on range of motion

deficits in Claimant's right shoulder, Dr. Nordin assigned Claimant a 17% upper extremity impairment rating. Dr. Nordin noted that the 17% upper extremity rating could be converted to a 10% whole person impairment. He imposed permanent work restrictions and stated that Claimant was entitled to future medical maintenance treatment including physical therapy and injections.

6. On June 25, 2008 Claimant underwent a Division Independent Medical Examination (DIME) with Gregory Reichhardt, M.D. Claimant reported that she suffered from pain over the anterior aspect of her right shoulder and along the upper trapezius area that extended into her neck. She also commented that, when her shoulder pain flares up, she experiences discomfort that extends into her lower back area. Claimant explained that housework, extended sitting, prolonged driving and computer use aggravate her left shoulder pain.

7. Dr. Reichhardt agreed with ATP Nordin that Claimant had reached MMI on January 22, 2008. He determined that Claimant had suffered a 17% right upper extremity impairment that converted to a 10% whole person rating. Dr. Reichhardt also assigned Claimant a 1% impairment for depression. He did not assign any additional impairment for Claimant's back and neck pain because it was unlikely that the pain was related to her September 11, 2007 industrial injury. Finally, Dr. Reichhardt recommended a two-year period of medical maintenance treatment.

8. On October 17, 2008 Claimant returned to Dr. Nordin for a maintenance visit because she was experiencing increased shoulder pain and decreased range of motion. Dr. Nordin commented that Claimant's right shoulder "reveals tenderness over the anterior shoulder groove, the subacromial space, the AC joint, and to some extent the shoulder girdle muscles including trapezius, infraspinatus, and supraspinatus." He also reported that Claimant's range of motion was "markedly restricted."

9. Claimant testified at the hearing in this matter. She credibly commented that she still has a right rotator cuff tear. She explained that she suffers from a condition known as "malignant hypothermia." The condition causes a severe reaction to anesthesia and is characterized by elevated blood pressure, increased body temperatures of up to 105 degrees and possible cardiac problems. Claimant thus stated that her rotator cuff tear cannot be repaired.

10. Claimant recounted that she experiences pain that begins in her right shoulder and spreads into her chest, clavicle, arm, neck, back and shoulder blade. She also experiences difficulty in performing her job duties because she cannot undertake continuous computer work for greater than 30 minutes. Moreover, Claimant has difficulties with household activities including cooking, laundry and vacuuming. She finally commented that she has to drive with her left

arm, including shifting in an awkward position across the steering wheel, and must support her right arm on a console.

11. Based on Claimant's persuasive testimony, she experiences pain that limits her ability to perform various functions with her right shoulder. Claimant has produced substantial evidence that she suffers functional impairment proximal to, or above, the arm at the shoulder as a result of her September 11, 2007 industrial injury. Claimant credibly stated that she experiences pain that begins in her right shoulder and spreads into her chest, clavicle, arm, neck, back and shoulder blade. She also has difficulty in performing her job duties and household activities because of her right shoulder limitations. Claimant further explained that her right shoulder condition requires her to drive and shift with her left arm. Moreover, the medical records reveal that Claimant suffers right shoulder stiffness, tenderness in her shoulder girdle muscles and decreased range of motion. Claimant has thus established that it is more probably true than not that the situs of her functional impairment is proximal to the glenohumoral joint and is not on the schedule of impairments.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in § 8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." See § 8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Maree v. Jefferson County Sheriff's Department*, W.C. No. 4-260-536 (ICAP, Aug. 6, 1998); *Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAP, June 11, 1998). When an injury results in a permanent medical impairment not set forth on the schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* § 8-42-107(8)(c), C.R.S.

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

6. The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAP Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *Id.* Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *Eidy v. Pioneer Freightways*, W.C. No. 4-291-940 (ICAP, Aug. 4, 1998).

7. The claimant bears the burden of proof by a preponderance of the evidence to establish a functional impairment beyond the arm at the shoulder and the consequent right to Permanent Partial Disability benefits awarded under §8-42-107(8)(c), C.R.S. Whether the claimant has met her burden of proof is an issue of fact for determination by the ALJ. *Delaney,* 30 P.3d at 693; *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAP, June 20, 2005).

8. As found, based on Claimant's persuasive testimony, she experiences pain that limits her ability to perform various functions with her right shoulder. Claimant has produced substantial evidence that she suffers functional impairment proximal to, or above, the arm at the shoulder as a result of her September 11, 2007 industrial injury. Claimant credibly stated that she experiences pain that begins in her right shoulder and spreads into her chest, clavicle, arm, neck, back and shoulder blade. She also has difficulty in performing her job duties and household activities because of her right shoulder limitations. Claimant further explained that her right shoulder condition requires her to drive and shift with her left arm. Moreover, the medical records reveal that Claimant suffers right shoulder stiffness, tenderness in her shoulder girdle

muscles and decreased range of motion. Claimant has thus established by a preponderance of the evidence that the situs of her functional impairment is proximal to the glenohumoral joint and is not on the schedule of impairments.

ORDER

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

1. Claimant has sustained a 10% whole person impairment to her right shoulder. Respondents' payments to Claimant shall be calculated based on the formula in §8-42-107(8), C.R.S.

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

3. Any issues not resolved by this Order are reserved for future determination.

DATED: February 4, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-738-501

ISSUES

The issues presented for determination where:

Compensability/causation, including whether Respondents may withdraw their admission of liability that Claimant sustained a compensable injury on December 1, 2006.

Whether Claimant is entitled to TPD benefits for the period from December 1, 2006 through January 17, 2007.

Whether Claimant is entitled to TTD benefits for the period from January 18 through March 22, 2007.

Determination of Claimant's AWW including the cost of health insurance benefits provided by Employer.

PPD benefits, including conversion from scheduled to whole person impairment.

Whether Claimant is permanently totally disabled and entitled to PTD benefits.

Offsets and/or application of the statutory cap on combined TTD/PPD benefits under Section 8-42-107.5, C.R.S.

Medical benefits, including whether Claimant is entitled to a general award of medical benefits to maintain her condition after MMI.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. Claimant was employed as an Environmental Services Aide with Employer. Claimant's job duties included cleaning patient rooms, changing bed linens, mopping floors, cleaning bathrooms and disposing of the used linens into a laundry chute. The bags of used linens were heavy and hard to lift into the chute. Additionally, the chute had a heavy door over the opening. Claimant's job required her to left up to 50 pounds.

2. On December 1, 2006 Claimant was told that there were 2 rooms that needed cleaning and they were needed quickly. Claimant filled 5 or 6 bags of used linens from these rooms. Claimant drug the bags to the chute and as she was putting one of the bags into the chute she experienced a sudden onset of pain, described as a "lightening bolt" sensation, in her left wrist.

3. Claimant reported the injury to the Occupational Health department at Employer on December 5, 2006. Claimant reported that she didn't think anything of the pain initially but later that same night awakened with pain from her left shoulder to her left wrist with swelling and numbness on the medial side of the wrist.

4. Claimant was referred by Employer to Dr. William Woo, M.D. for treatment. Dr. Woo initially examined Claimant on December 5, 2006. Claimant presented with complaints of left wrist pain from pushing a linen bag into the shoot (sic). Dr. Woo noted that Claimant had stabbing pain in the distal radial area of the left wrist and diffuse tingling in the posterior left elbow and pain at the left trapezius. The elbow and shoulder pain had started over the weekend. On physical examination, Dr. Woo noted swelling over the distal radius and extensor tendons of the thumb and pain with radial deviation. Dr. Woo also noted a positive Finkelstein's test. Dr. Woo's diagnosis was left wrist strain, probable de Quervain's type tendonitis. Dr. Woo placed Claimant on physical restrictions of no lift over 10 pounds with the left upper extremity.

5 After being placed on restrictions by Dr. Woo Claimant continued to work performing her regular duties, except for mopping, until January 17, 2007. Claimant had difficulty performing her regular duties under the restrictions given by Dr. Woo.

6. At the time Claimant last worked for Employer on January 17, 2007 she continued to be under restrictions of no lifting over 10 pounds with the left upper extremity.

7. Dr. Woo's December 28, 2006 report notes that Claimant has seen her private provider for the left shoulder and low back complaints but was not satisfied with the visit and may be changing providers. Claimant saw her personal physician, Dr. Juventino Saavedra, M.D. on January 19, 2007 complaining of left shoulder and left low back pain. Claimant described to this physician a burning sensation over her shoulder that radiated down her arm with numbness and tingling in the arm. Claimant did not return to work after seeing Dr. Saavedra on January 19, 2007. Dr. Saavedra placed Claimant on restrictions of no lifting or pushing/pulling over 20 pounds.

8. Claimant was referred by Dr. Woo to Dr. Thomas G. Mordick, M.D., a hand surgeon, for consultation. Claimant was initially seen by Dr. Mordick on January 11, 2007. Dr. Mordick noted pain radiating from the thumb up the arm to the shoulder. Dr. Mordick noted a markedly positive Finklestein's test on the left with exquisitely tenderness over the first extensor compartment of the left wrist. Dr. Mordick recommended an injection to the wrist.

9. Dr. Mordick evaluated Claimant on February 23, 2007 and noted that her condition was unchanged by the injection. On physical examination Dr. Mordick noted that Claimant had diffuse tenderness which was nonspecific in nature. Dr. Mordick was to arrange for an MRI. Claimant was unable to tolerate an MRI and a CT scan of the wrist was done on February 28, 2007 that showed a small bony density adjacent to the base of the first metacarpal and some degenerative changes at the first carpometacarpal joint.

10. Dr. Mordick evaluated Claimant on March 15, 2007. Dr. Mordick felt the initial inflammation over the first extensor compartment had resolved with injection and that at this point there were no objective findings clinically.

11. Dr. Woo placed Claimant at MMI for a left wrist strain on March 22, 2007. Dr. Woo opined that Claimant did not have any measurable impairment and no work restrictions were assigned for the left wrist.

12. Also on March 22, 2007, Dr. Juventino Saavedra noted that Claimant had persistent left scapular, shoulder, arm and hand pain which had been present for three months. He noted that Claimant felt that the problems started at the same time as the carpal tunnel, for which she was seen by workers' compensation. He noted that Claimant was frustrated with the lack of

resolution. Dr. Saavedra reported that Claimant was tender in the bilateral trapezii and left scapular area.

13. On April 13, 2007 Dr. Juventino Saavedra noted that Claimant had persistent left neck, upper back, shoulder, and arm pain. He reported that Claimant was feeling frustrated and depressed regarding lack of improvement. Upon examination, Dr. Saavedra reported that Claimant had tender left trapezius, medial scapula, shoulder and wrist.

14. Claimant returned to Dr. Woo on June 21, 2007 for complaints of increased left wrist pain. Dr. Woo felt that Claimant's complaints of left shoulder and neck pain were not related to the work injury. Dr. Woo recommended further evaluation of the left wrist by Dr. Mordick.

15. On August 27, 2007 Dr. Woo assigned Claimant physical restrictions of no lifting over 20 pounds, no pushing/pulling over 50 pounds. No restrictions were given for reaching or repetitive motion.

16. Dr. Mordick evaluated Claimant on September 11, 2007 after an MRI was performed on the left wrist. Dr. Mordick noted diffuse complaints of right and left arm and wrist pain from the elbow to the wrist. Dr. Mordick stated he was unable to explain the symptoms and that Claimant had nonspecific findings that did not correlate with radiographic studies or to any anatomic structure.

17. Claimant was seen by Dr. L. Barton Goldman M.D. for a DIME on February 8, 2008. A pain diagram completed with the assistance of Claimant noted pain in all areas of the body, excepting the right leg. Claimant stated to Dr. Goldman that she did not feel she could return to work until her pain was gone.

18. Dr. Goldman's impression was left fifth phalanx fracture, left wrist strain with de Quervain's tenosynovitis and left shoulder girdle strain as a result of the December 1, 2006 work injury. Dr. Goldman opined, and it is found, that the mechanism of injury was consistent with a left shoulder soft tissue injury. Dr. Goldman agreed that Claimant reached MMI as of March 22, 2007 for the work related left wrist and shoulder injuries.

19. The ALJ finds persuasive the opinions and testimony of Dr. Goldman that the Claimant injured her left wrist and left shoulder at work with Employer on December 1, 2006. Dr. Goldman's opinion that the Claimant's low back, neck, lower extremity and psychological symptoms/depression are not related to the December 1, 2006 injury are credible, persuasive and are found as fact.

20. Claimant was also seen by Dr. Woo on December 5, 2006 complaining of an injury to her left pinkie finger that had happened one month before when it was smashed between hard surfaces. Claimant testified at hearing, and it is found, that this injury occurred when she was holding a door

and the door closed on her hand. This mechanism of injury is separate and distinct from the injury of December 1, 2006. Dr. Goldman was in error to include the left fifth phalanx fracture as part of the Claimant's December 1, 2006 injury.

21. On October 9, 2007 Dr. Saavedra gave Claimant restrictions of no lifting over 40 pounds, no push/pull over 40 pounds, and limitations on overhead work or reaching, climbing ladders or stairs and repetitive wrist/hand motion. Dr. Saavedra' work restrictions included consideration of Claimant's work related left wrist and shoulder conditions as well as Claimant's unrelated low back, neck and lower extremity conditions.

22. At the time Claimant was evaluated by Dr. Goldman, Claimant presented to the physician as being unable to move her left arm. Dr. Goldman testified, and it is found, that Claimant's left arm muscle tone and reflexes were normal and did not correlate with lack of use of the arm.

23. Dr. Goldman assigned Claimant a 4% impairment of the left upper extremity for loss of left fifth digit range of motion, 4% impairment of the upper extremity for loss of left wrist range of motion and 14% impairment of the upper extremity for loss of left shoulder range of motion for a total upper extremity impairment of 20%. Dr. Goldman converted this upper extremity impairment to 12% whole person impairment.

24. As found above, Dr. Goldman was in error in including impairment for the left fifth finger lost range of motion in the impairments related to the December 1, 2006 injury as that injury is not related to the December 1, 2006 injury. The ALJ finds that Claimant has sustained permanent impairment related to the December 1, 2006 injury of 4% of the upper extremity for left wrist range of motion and 14% of the upper extremity for left shoulder range of motion. The ALJ further takes administrative notice of Table 3 AMA Guides to the Evaluation of Permanent Impairment, Third Edition, Revised found on page 16 of the Guides. Based upon this Table 3, a 14% impairment of the upper extremity converts to 8% whole person impairment.

25. Dr. Goldman testified, and it is found, that his range of motion testing of Claimant's upper extremity and shoulder involved muscle tissue that was proximal to the glenohumeral joint and that Claimant has lost range of motion that includes these muscle groups. As testified by Dr. Goldman, Claimant's primary loss of function relating to lost range of motion of the left shoulder is in the deep shoulder muscles proximal to the glenohumeral joint and which attach to the shoulder blade. Claimant has suffered a functional impairment above the level of the arm at the shoulder. Claimant's 14% impairment of the upper extremity for the left shoulder injury should be converted to 8% whole person impairment.

26. Dr. Goldman opined that Claimant would have restrictions related to the work injury of difficulty with any repetitive or continuous use of the left upper

limb but that she would be able to lift 5 to 10 pounds on an occasional basis with the left upper limb. Dr. Goldman also opined that Claimant would be precluded from prolonged reaching or repetitive pushing and pulling or prolonged work overhead with the left upper limb due to the shoulder complaints. Dr. Goldman opined, and it is found, that only Claimant's left upper extremity restrictions are related to the December 1, 2006 injury.

27. Claimant's pain description and pain drawing at the time of evaluation by Dr. Goldman were substantially non-focal and non-physiologic. Claimant's pain behaviors and function was substantially non-specific and out of proportion to the type of injury described and the objective physical findings obtained by Dr. Goldman on his examination of Claimant. Claimant's presentation to Dr. Goldman was a "low point" compared to her presentation to other examiners.

28. Symptom magnification and embellishment by Claimant are definitely present as assessed by Dr. Goldman. There are not only specific medical, but also primary and secondary gain issues present in Claimant's representation of her symptoms and lack of function. Dr. Goldman's opinion on these issues is supported by the opinions of Dr. Roth who found that Claimant presented with a somatoform disorder, that is, a psychological condition manifesting physical symptoms. As found by Dr. Kleinman in his report of June 20, 2008, Claimant reacts physically as an expression of her psychological distress from the recurrent nature of Claimant's pre-existing depressive disorder unrelated to the work injury.

29. As opined by Dr. Roth, medical restrictions should not be assigned simply to accommodate behaviors or symptoms associated with behaviors. Both Dr. Roth and Dr. Goldman have opined, and it is found, that there is no physiologic explanation for Claimant's inability to use her left arm.

30. Dr. Goldman testified that he relied placed much of his objective emphasis on the physical examination results, objective physical diagnosis and Claimant's body habitus in assigning work restrictions. Dr. Goldman, as found, acknowledges that Claimant's physical examination was non-specific and non-physiologic and not supported by objective physical findings. Dr. Goldman's restriction of no repetitive or continuous use of the left arm is not supported by his physical examination or other objective findings and is not considered persuasive.

31. Lee White, a disability evaluator with experience in vocational rehabilitaton, performed a disability evaluation on behalf of the Claimant. Mr. White opined that Claimant is permanently totally disabled. Mr. White bases his opinion on his interpretation of Dr. Goldman's restrictions and that as a result of Dr. Goldman's restrictions Claimant is essentially a one-armed worker who is unable to bilaterally use her upper extremities in a sustained or repetitive manner. Mr. White opined that if Claimant is able to lift 5 to 10 pounds with her

left arm and up to 20 to 25 pounds with both arms on a sustained basis throughout the workday and to bilaterially repetitively use her upper extremities for work activities on a sustained basis, Claimant remains employable and able to earn a wage.

32. Lawrence Montoya, a qualified rehabilitation consultant, performed a vocational evaluation of Claimant on behalf of Respondents. Mr. White opined that based upon his interpretation of Dr. Goldman's restriction, Claimant remains employable and able to earn a wage in a number of occupations including fast food crew worker, parking lot attendant, parking lot cashier, vehicle fare collector, table worker, small parts assembly or electronics assembler. In reaching his opinion, Mr. Montoya was aware of Claimant's limited English language skills and that Claimant has not been able to learn or understand English. Mr. Montoya also considered Claimant's educational level, her past work experience and Claimant's age. In reaching his opinion on Claimant's ability to be employed and earn a wage, Mr. Montoya considered the results of a labor market survey of employers with respect to a worker with Claimant's qualifications that revealed the availability of jobs for Claimant.

33. As found above, Claimant does not have restrictions on the repetitive or continuous use of her left arm or on her ability to bilaterally use her upper extremities for work activities on a sustained basis. Based upon the opinions of both Mr. White and Mr. Montoya, Claimant therefore remains employable and able to earn a wage. Claimant has failed to prove, by a preponderance of the evidence, that she is permanently and totally disabled.

34. Claimant receives $1,323.00 per month in long-term disability benefits from a disability plan fully funded by Employer. Claimant's receipt of these benefits began in approximately May 2007.

35. Prior to the injury of December 1, 2006, Claimant earned a total of $14,373.60 during the 14 biweekly pay periods preceding her injury. Claimant's AWW is found to be $513.34.

36. Claimant had health insurance through Employer. Neither party provided evidence to the ALJ of the specific cost of continuing Employer's health insurance coverage for Claimant.

37. Dr. Goldman recommended 6 to 8 occupational therapy visits and continued use of anti-inflammatory and muscle relaxant medications to maintain Claimant's condition. Claimant has proven, by a preponderance of the evidence, that further medical treatment is necessary to maintain her condition after the date of MMI.

38. Claimant reached MMI as of March 22, 2007 as found by Dr. Woo and Dr. Goldman.

39. Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her left wrist and left shoulder on December 1, 2006. The left fifth phalanx fracture is not causally related to this injury.

40. Insurer filed a Final Admission of Liability dated October 24, 2007 based upon Dr. Woo's March 22, 2007 report placing the Claimant at MMI as of that date, without permanent impairment. The Final Admission admitted for medical benefits only and denied any TTD/TPD, PPD or other benefits.

CONCLUSIONS OF LAW

Based on the preceding Findings of Fact, the ALJ makes the following Conclusions of Law:

41. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), 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), *supra*. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, *supra*. 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 claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

42. 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).

43. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. 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. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

I. Compensability and Respondent's request to withdraw their Admission of Liability

44. As found, Respondents admitted liability for the December 1, 2006 injury. Respondents now seek to withdraw that admission. Respondents rely upon the opinions expressed in the report and testimony of Dr. Roth. Dr. Roth provides a retrospective analysis of the medical findings and treatment and

expresses the opinion that Claimant did not sustain any injury as a result of the December 1, 2006 work activity of placing a heavy bag of used linens into a laundry chute. The ALJ does not find this opinion of Dr. Roth to be persuasive. While it is correct that both Dr. Woo and Dr. Mordick eventually felt that Claimant's symptom presentation was out of proportion to objective findings, both of these physicians diagnosed Claimant with de Quervain's or tendonitis of the left wrist. Neither of these physicians has specifically opined that this condition was not related to or caused by the history given by Claimant at the time of their evaluations of her and as credibly testified to by Claimant at hearing.

45. Although Dr. Woo, along with Dr. Saavedra, noted left shoulder complaints contemporaneous with Claimant's December 1, 2006 injury, Dr. Woo did not specifically treat or evaluate this condition. Dr. Woo felt that the left shoulder problem was not work related, but does not provide a basis for this opinion. Dr. Goldman opined that the mechanism of injury was consistent with a soft tissue type injury to the shoulder muscles. The medical evidence presented, while showing that Claimant had pre-existing back, right wrist and psychological conditions, does not show a pre-existing left shoulder injury that would explain Claimant's left shoulder complaints on a basis other than related to the December 1, 2006 injury. The ALJ finds Dr. Goldman's opinion that Claimant's left shoulder condition is related to the December 1, 2006 injury to be more credible and persuasive than the opinion of Dr. Woo.

46. Respondents may not retroactively withdraw an admission of liability except upon the basis of fraud. Respondents may prospectively withdraw an admission on the basis that is was erroneous or improvidently filed. *HLJ Management Group v. Kim*, 804 P.2d 250 (Colo. App. 1990). The burden of proof to establish compensability remains on the claimant even when an employer or insurance carrier is seeking to withdraw an admission of liability. "It is well-established that claimant must prove the existence of a compensable injury." Pacesetter Corporation v. Collett, 33 P.3d 1230, 1232 (Colo. App. 2001). Claimant has the burden to prove by a preponderance of evidence that his injury arose out of and in the course of his employment. C.R.S. 8-43-201; City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985). A "preponderance of the evidence" is that which leads the trier-of-fact, after considering all of the evidence, to find that a material fact is more probably true than not. Page v. Clark, 592 P.2d 792 (1979).

47. As found, Claimant has proven by a preponderance of the evidence that she sustained injuries to her left wrist and left shoulder arising out of and in the course of her employment with employer on December 1, 2006. Claimant has failed to prove that her injury to her left fifth finger was causally related to the December 1, 2006 injury. Respondents have not proven that Claimant did not sustain an injury on December 1, 2006 sufficient to allow Respondents to withdraw their previously filed admission of liability.

II. Claimant's claim for TPD and TTD benefits

48. To establish entitlement to temporary disability benefit, Claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss which, "to some degree," is the result of the industrial disability. C.R.S. §8-42-103(1). Generally, the industrial injury need not be the sole cause of the Claimant's temporary wage loss as long as the injury is "to some degree" the cause of the wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," as used in workers' compensation cases, connotes two elements. The first element is "medical incapacity" evidenced by loss or restriction of bodily function. There is no statutory requirement that the Claimant present evidence To establish entitlement to temporary disability benefits, the Claimant must prove of a medical opinion of an attending physician to establish her physical disability. See *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone could be sufficient to establish a temporary "disability." *Lymburn v. Symbios Logic*, *supra.* The second element is loss of wage earning capacity. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of "disability" may be evidenced by a complete inability to work, or physical restrictions which preclude the Claimant from securing employment. *Barnes v. Anheuser-Busch Sales Co. of Denver*, I.C.A.O., W.C. No. 4-548-535, February 24, 2004.

49. Claimant was placed on restrictions following the December 1, 2006 injury that were sufficient to preclude Claimant from performing her regular employment. Claimant continued working from the date of the injury until January 17, 2007. While Claimant could not perform the full range of the functions required of her job, Claimant has not proven that she suffered any wage loss as a result of her work restrictions from the work injury during this period. The ALJ concludes that Claimant has failed to prove an entitlement to TPD benefits for the period from December 1, 2006 to January 17, 2007.

50. Claimant is not "responsible" for her separation from the employer when the Claimant was unable to work or impaired due to the physical problems caused by the industrial injury, and her absence was outside the Claimant's control. *Pace v. Commercial Design Engineering,* I.C.A.O., W.C. No. 4-451-277, May 15, 2001. Claimant credibly testified that she did not return to work after January 17, 2007 because of increased pain in her left wrist. As found above, Claimant's work restrictions prevented her from performing her regular work. Respondents did not present evidence of a qualifying offer of modified employment made to Claimant after January 17, 2007. Respondents have argued that Claimant's absence from work after January 17, 2007 was due to treatment for an unrelated medical condition. However, as concluded above, so long as the wage loss is to some degree attributable to the effects of the work injury, Claimant is entitled to TTD benefits. The ALJ finds and concludes that Claimant has established an

entitlement to TTD benefits for the period from January 18, 2007 to March 22, 2007 when Claimant reached MMI and TTD benefits terminated by the provisions of Section 8-42-105(3)(a), C.R.S.

III. Claimant's claim for permanent partial benefits

51. As found, based upon the credible opinion of Dr. Goldman, Claimant sustained a 4% impairment of the upper extremity on account of her left wrist injury.

52. Claimant argues that her impairment for the left shoulder injury should be converted to whole person impairment because the situs of the functional impairment is above the level of the arm at the shoulder. The ALJ agrees. The issue is whether the Claimant sustained a functional impairment to the portion of the body that is not listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Claimant clearly had an injury that affected claimant's arm at the shoulder. However, the greater part of her injuries involve parts of the body which are proximal to the glenohumeral (shoulder) joint, extending from the upper shoulder area and her shoulder blade. Whether a Claimant has suffered the loss of an arm at the shoulder within the meaning of section 8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under section 8-42-107(8)(c), C.R.S., is for determination by the Administrative Law Judge. *Delaney v. I.C.A.O.,* 30 P.3d 691 (Colo. App. 2000). The site of functional impairment is not necessarily the site of the physical injury itself. Where there is substantial evidence, the ALJ is authorized to find that the Claimant suffered a functional impairment beyond, or above, the arm at the shoulder. Thus, where a Claimant has suffered loss of range of motion and function of the muscles beyond the arm at the shoulder, a whole person award may be given. See *Brown v. City of Aurora*, I.C.A.O., W.C. No. 4-452-408, October 9, 2002; see also *Smith v. Neoplan USA Corp.,* I.C.A.O., W.C. No. 4-421-202, October 1, 2002; *Colton v. Tire World Inc.*, I.C.A.O., W.C. No. 4-449-005, April 11, 2002; *Guillotte v. Pinnacle Glass Co.*, I.C.A.O., W.C. No. 4-443-878, November 20, 2001; *Gonzales v. City and County of Denver*, I.C.A.O., W.C. No. 4-296-588, September 10, 1998.

53. As found, Claimant has proven by a preponderance of the evidence that she sustained a functional impairment above the level of the arm at the left shoulder. Dr. Goldman's testimony supports this finding and conclusion as found above. Claimant's primary loss of function is to the deep shoulder muscles proximal to the glenohumeral joint and that attach to the shoulder blade. Claimant's 14% impairment of the upper extremity for the left shoulder is 8% whole person impairment based upon the conversion chart found at Table 3 of the AMA Guides and as found above. The ALJ concludes that in addition to the 4% impairment of the upper extremity for the left wrist injury, Claimant has 8% whole person impairment on account of the left shoulder injury.

IV. Claimant's claim for permanent total disability benefits

54. Permanent total disability is defined as the inability to earn "any wages in the same or other employment." Christie v. Coors Transportation Co., 933 P.2d 1330 (Colo. 1997). A claimant is not permanently and totally disabled if she is able to earn some wages in modified, sedentary or part-time employment. McKinney v. Industrial Claim Appeals Office, 894 P.2d 42 (Colo.App. 1995). The industrial injury must be a "significant" causative factor in the claimant's permanent total disability in that it must bear a direct causal relationship between the precipitating event and the resulting disability. Seifried v. Industrial Commission, 736 P.2d 1262 (Colo.App. 1986). The determination of permanent total disability is based on "human factors" including claimant's physical condition, mental ability, age, employment history, education and "availability of work" the claimant can perform. The test for determining the "availability of work" is whether employment exists "that is reasonably available to the claimant under his or her particular circumstances." Christie, supra; Weld County School District RE-12 v. Bymer, 955 P.2d 550 (Colo. 1998). The crux of the inquiry is whether employment exists that is reasonably available to the claimant given her circumstances. This inquiry can only be answered on a case-by-case basis, and will necessarily vary according to the particular abilities and surroundings of the Claimant. The factors to be considered may include consideration of the Claimant's commutable labor market or other analogous concept which depends upon the existence of employment that is reasonably available to the Claimant under her particular circumstances. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

55. Consistent with the above cited principles, the determination of the Claimant's work restrictions is a question of fact to be resolved by the ALJ upon conflicting evidence. The ALJ resolves the conflicts in the evidence concerning the Claimant's work restrictions in favor of the opinion of Dr. Goldman, with the exception of Dr. Goldman's opinion that Claimant has restrictions on the repetitive or continuous use of her left upper extremity. As found, that restriction is not credible or persuasive on an objective basis. In the absence of a restriction from bilateral repetitive use of her upper extremities for work activities, both Mr. White and Mr. Montoya conclude that Claimant remains employable and able to earn a wage. As found, Claimant has failed to prove, by a preponderance of the evidence, that she is permanently and totally disabled.

V. Determination of Average Weekly Wage

56. As found, Claimant's AWW was $513.34. Claimant argues that this figure should be increased to include the cost of continuation of Claimant's health insurance benefits provided by Employer and lost by Claimant after the injury. Section 8-40-201(19)(b), C.R.S. However, neither party presented persuasive evidence of the cost of "continuation" of Claimant's health insurance once it was lost. It is that cost that is determinative of the amount to be included in

Claimant's AWW. See, Avalanche Industries, Inc. v. Indus. Claim Appeals Office, ___ P.3d ___, 07SC255 (Colo. 2008), Indus. Claim Appeals Office v. Ray, 145 P. 3d 661 (Colo. 2006). The evidence of the amounts deducted from Claimant's pay for her portion of the health insurance and evidence of Employer's contribution towards the insurance is not sufficient evidence of the cost of continuation of the coverage once it was terminated. Because of the lack of sufficient evidence of the Claimant's cost of continuation of Employer's health insurance coverage, the ALJ declines to decide this issue and reserves determination for a later date when additional evidence can be provided.

VI. Claimant's claim for medical benefits after maximum medical improvement

57. The respondents are liable for all authorized medical treatment which is reasonably necessary to cure or relieve the effects of the industrial injury. Sims v. Industrial Claim Appeals Office, 797 P.2d 777 (Colo. App. 1990). Where an injured worker reaches maximum medical improvement but requires medical care to prevent her condition from deteriorating, medical benefits may be left open. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Where Claimant has shown a need for medical treatment after the determination of MMI, a general award on ongoing medical benefits, subject to Respondents' right to challenge the reasonableness and necessity of particular treatment, is provided. Stollmeyer v. Indus. Claim Appeals Office, 916 P.2d 609 (Colo. App. 1995).

58. As found, based upon the opinion of Dr. Goldman, Claimant has proven a need for medical treatment after MMI in order to maintain her condition. Because no specific medical treatment was requested or at issue, Claimant is entitled to a general award of ongoing medical benefits subject to Respondents right to challenge the reasonableness, necessity or causal relationship of any requested treatment.

59. Claimant has not proven that Dr. Woo refused her treatment for non-medical reasons allowing Claimant to select Dr. Saavedra as the authorized provider. As found above, Dr. Woo noted on December 28, 2006 that Claimant was seeing her personal physician for left shoulder and low back complaints and may be changing providers because she was unhappy with the visit. The credible evidence does not establish that Dr. Woo refused to treat Claimant for non-medical reasons.

VII. Offsets

60. As found, Claimant receives long-term disability benefits from a disability plan fully funded by Employer. Those benefits began in May 2007. Respondents are entitled to offset these benefits against any TTD or PPD benefits paid during the same time period as Claimant's receipt of long-term disability benefits under the provisions of Section 8-42-103 (1)(d)(I), C.R.S

ORDER

It is therefore ordered that:

Claimant's claim for compensation and medical benefits, as specifically determined herein, for an injury of December 1, 2006 is granted. Respondents request to withdraw their admission of liability as to the December 1, 2006 injury is denied.

Respondents shall pay TTD benefits to Claimant at the rate of $342.23 for the period from January 18, 2007 to March 22, 2007, inclusive, less any applicable offset.

Claimant's claim for TPD benefits from December 1, 2006 to January 17, 2007 is denied and dismissed.

Respondents shall pay Claimant permanent partial benefits for a 4% impairment of the upper extremity and for an 8% whole person impairment, less any applicable offset.

Claimant's claim for permanent total disability benefits is denied and dismissed.

Claimant is entitled to a general award of medical benefits, from authorized providers, to maintain her condition after the date of MMI, subject to Respondents' right to dispute the reasonableness, necessity or causal relationship of any such requested treatment.

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

All matters not determined herein are reserved for future determination.

DATED: February 4, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-608-292

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 20, 2008, November 17, 2008, and January 12, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 10/20/08, Courtroom 4, beginning at 8:30 AM, and ending a 4:50 PM; 11/17/08, Courtroom 4, beginning at 8:30 AM, and ending at 4:00 PM; and, 1/12/09, Courtroom 3, beginning at 10:13 AM, and ending at 11:42 AM).

At the conclusion of the last session of the hearing, the ALJ established a post-hearing briefing schedule, briefs to be filed electronically. Claimant's opening brief was due within 5 working days of the conclusion of the last session of the hearing. Respondent's answer brief was due within 5 working days of the opening brief; and, Claimant's reply brief was due within 3 working days of the answer brief. Claimant's opening brief was filed on January 22, 2009. Respondent's answer brief was filed on January 29, 2009. Claimant's reply brief was filed on February 3, 2009. No timely reply brief was filed. The matter was deemed submitted for decision on February 4, 2009.

ISSUES

The issues to be determined by this decision concern permanent total disability (PTD) benefits or, in the alternative, permanent partial disability (PPD) benefits; date of maximum medical improvement (MMI); whether Marc Steinmentz, M.D., performed a valid 18-month Division Independent Medical Examiner (DIME) pursuant to Sections 8-42-107(8)(b)(II) and 8-42-107.2, C.R.S. (2008); overpayment and offsets for temporary total disability (TTD) benefits from June 6, 2007 until February 13, 2008, depending on the MMI date; continuing

(*Grover)* medical benefits after MMI; Respondent's entitlement to applicable Social Security Disability (SSDI) offsets; and, whether Claimant is entitled to additional temporary TTD benefits from June 6, 2007 to February 12, 2008.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. On February 7, 2004, Claimant sustained an admitted injury during the course and scope of her employment when she stepped off a floor mat and rolled her
right-ankle.

2. Respondent filed a Final Admission of Liability (FAL), dated April 17, 2008, admitting for temporary disability benefits through June 5, 2007; for permanent partial disability (PPD) benefits of 10% whole person and 24% right lower extremity, admitting for zero because the $60,000 statutory cap had been reached on aggregate temporary disability benefits as of June 5, 2007. Respondents continued paying Claimant TTD benefits from June 6, 2007 through February 13, 2008, and Respondent now argues that it is entitled to an overpayment credit on the theory that the DIME date of MMI, June 6, 2007, has not been overcome by clear and convincing evidence. As found hereinbelow, it has been overcome and the date of MMI is February 13, 2008.

Medical in 2004 - 2006

3. On March 4, 2004, an MRI (magnetic resonance imaging) of Claimant's right ankle revealed obvious abnormality involving the body of the talus extending up to the medial corner dome of the talus at the ankle joint. It was reported that this most likely was an intraosseous ganglion cyst secondary to a focal chondral defect on the medial edge dome of the talus. There was also tendinosis and low-grade tenosynovitis involving the more distal aspect of an intact tibialis posterior tendon. The ALJ finds that the injury of February 7, 2004 aggravated Claimant's right ankle and set this process in motion.

4. On April 16, 2004, Sydney L. Stevens, M.D., compared the March 4, 2004 MRI with a CT Scan dated April 16, 2004, and stated that the findings were consistent with an intraosseous ganglion cyst and probably a subtle osteochondral defect along the medial corner dome of the talus. Whether the cyst was an underlying condition or not, it combined with the admitted injury to make the Claimant's overall condition worse.

5. On April 21, 2004, Alan Ng, D.PM., reported performing an allograft osteochondral autograft transplant system in the right ankle with 10 x 15 mm osteochondral graft. The ALJ infers and finds that this procedure was necessitated by the admitted aggravating injury of February 7, 2004.

6. On June 21, 2004, Elizabeth Bisgard, M.D., [one of Claimant's authorized treating physicians (ATP) at the time] noted that since Claimant's right foot injury and the immobilization and non-weight bearing of right foot, Claimant had been putting all of her weight on the left foot, which had gradual increased pain. Dr. Bisgard was of the opinion that Claimant's left leg symptoms were secondary to this work injury.

7. On October 19, 2004, Dr. Bisgard noted her concern regarding Claimant's profound depression and suicidal ideation. Dr. Bisgard stated, "I agree with Dr. LaCerte that this depression is primarily as a result of her work injury." Dr. Bisgard stated that although there were other factors that were outside of the realm of her work injury, the majority of the problem with Claimant's depression were directly associated with her work injury and "needed to be addressed accordingly under her work comp insurance. " The ALJ finds that Dr. Bisgard's opinion in this regard is one factor that makes it highly likely, and free from serious and substantial doubt, that Dr. Steinmetz's opinion in this regard is **erroneous.**

8. On November 4, 2004, Lance LaCerte, Psy.D., a clinical psychologist, diagnosed Claimant with major depressive episode, moderate to severe. Dr. LaCerte reported that Claimant was clear that he would not be addressing any non-claims related pain issues or psychological issues unrelated to her injury. The ALJ infers and finds that the combined opinions of Dr. Bisgard, ATP, and Dr. LaCerte, Psychologist contribute significantly to overcoming the DIME opinion in this regard by clear and convincing evidence.

9. On November 16, 2004, Dr. Ng reported injecting Claimant's ankle with Kenalog and local anesthetic to see if that decreased some of the scar tissue.

10. On November 30, 2004, Dr. Ng again injected Claimant's ankle with Kenalog and local anesthetic to help decrease the scar tissue.

11. On December 23, 2004, Dr. Bisgard reported reviewing videotapes of Claimant. She stated, "As [Claimant] has indicated to me on her visits, there are some days when her pain is worse than others, and she does not have to utilize the cane at all times."

12. On May 9, 2005, Dr. Ng reported performing an ankle arthroscopy, extensive, with debridement of loose cartilaginous fragments and anterior medial and anterior lateral impingement syndromes of the right ankle. He also removed

Claimant's symptomatic hardware from the medial malleolus.

13. On September 12, 2005, David Hahn, M.D., was of the opinion that at least 50% of Claimant's discomfort was due to the mechanical problem of her ankle joint and the previous talar dome injury, and the other 50% was due to neuropathic pain and probably complex regional pain syndrome (CRPS). Dr. Hahn stated, "I suggested to her that, prior to dealing with the mechanical problem of the talar dome and post traumatic ankle joint arthritis, she will need extensive pain management treatment for the complex regional pain syndrome." Dr. Hahn noted that once this was "under control," then certainly one could better address the ankle joint symptomatology. There is no persuasive evidence that the neuropathic pain and "probable" CRPS pre-existed the admitted right ankle injury of February 7, 2004. The ALJ infers and finds that it is highly probable and free from serious and substantial doubt that these conditions were aggravated and/or directly and causally related to the admitted injury of February 7, 2004.

14. On November 2, 2005, Richard Stieg, M.D., who was one of the Claimant's authorized treating physicians (ATPs) reported that inspection of Claimant's right lower extremity (RLE) revealed discoloration and swelling on both the lateral and medial surface of the right ankle, with dependent rubor developing in the forefoot after sitting for five minutes with her leg dangling, and after assuming a weight bearing position. Dr. Stieg noted that Claimant had marked allodynia to light touch, vibration, cold, and pinprick over the medial ankle and distal 10-15cm of the foreleg, extending onto the medial dorsal area of the foot. Dr. Stieg reported that range of motion of the ankle was severely limited by pain. Dr. Stieg's impression was that Claimant had probable CRPS Type-I, rule out CRPS Type-II. Dr. Stieg was of the opinion that Claimant may well have CRPS, which in about 30% of cases, may not be associated with vasomotor or pseudomotor changes. Dr. Stieg stated that Claimant's spread of burning pain since May, to regions both proximal and distal to the ankle, is suggestive of this diagnosis, as is the present pattern of allodynia. The ALJ infers and finds that it is highly probable, and free from serious and substantial doubt, that the conditions diagnosed by Dr. Stieg causally flowed from the admitted injury of February 7, 2004.

15. On November 10, 2005, Claimant had a high-resolution functional infrared study of the lower body, which was abnormal. This was visualized by abnormal quantitative and qualitative hyperthermia of the right symptomatic foot associated with disruption of the distal thermal gradient lines. These abnormal findings were highly suggestive of Sympathetically Mediated Pain Syndrome (SMP) secondary to a peripheral pain generator. Claimant also had abnormal thermal emission (hyperthermia) of the right foot. This hyperthermia was thought to maybe represent a small caliber fiber distal neuropathy of the distal branches of the tibial nerve. Dr. Timothy D. Conwell, D.C., stated, "I cannot entirely exclude the possibility of right lower extremity Complex Regional Pain Syndrome,

Type I (RSD) or Type II (causalgia)."

16. On November 15, 2005, L. Barton Goldman, M.D., performed a nerve conduction study on Claimant. He concluded that it was an abnormal study, and the Claimant's electrodiagnostic findings were most consistent with distal tibial nerve entrapment mononeuropathy at the right tarsal tunnel. Dr. Goldman stated, "In conjunction with today's physical examination and TMG results, today's electrodiagnostic findings are most consistent with an entrapment mononeuropathy of the right lateral (hypesthesia) and medial (hyperesthesia) plantar nerves at the mid to distal tarsal tunnel now beginning to progress into sympathetically mediated CRPS II." The ALJ infers and finds that it is highly probable, and free from serious and substantial doubt, that Dr. Goldman's findings are based on conditions causally flowing from the admitted February 7, 2004 injury.

17. On November 21, 2005, George Schakaraschwili, M.D., interpreted laboratory evidence as being consistent with the high probability for the presence of dysautonomia. He also stated that it was consistent with the high probability for the presence of CRPS. Dr. Schakaraschwili stated, "Taking into consideration recent electrodiagnostic findings of entrapment at the right tarsal tunnel, these findings would be most consistent with Complex Regional Pain Syndrome, Type II, also known as causalgia. The patient likely has sympathetically mediated pain and might respond to a sympathetic block. However, the patient's symptoms will likely not resolve unless the underlying pain generator is treated. If any surgical treatment is contemplated in the right lower extremity, this should be done under a perioperative sympathetic blockade." The ALJ infers and finds that it is highly probable, and free from serious and substantial doubt, that Dr. Scakaraschwili's findings arise from conditions causally flowing from the admitted February 7, 2004 injury.

18. On December 22, 2005, Dr. Stieg noted that Claimant's examination remained unchanged since he first saw her on November 2, 2005. He reported that she was still showing considerable allodynia in the distal right lower extremity, coldness to touch, and mottling of the skin, as well as considerable distal weakness and loss of range of motion at the ankle and foot. He noted that Claimant's skin looked a little bit shinier than before. Dr. Stieg's impression was neuropathic pain secondary to right tibial nerve entrapment, with evidence of vasomotor and pseudomotor instability. Dr. Stieg stated, "In my view this fits the criteria for Complex Regional Pain Syndrome (CRPS) Type-II and not simply sympathetically maintained pain in association with her entrapment neuropathy." The ALJ infers and finds that it is highly probable, and free from serious and substantial doubt, that Claimant's CRPS causally flows from the admitted February 7, 2004 injury.

19. On January 9, 2006, Floyd O. Ring, M.D., reported performing a right posterior tibial nerve block with local anesthetic and corticosteroid.

20. On January 26, 2006, Dr. Stieg reported that on examination, there were no changes in Claimant's musculoskeletal or neurological exam. He stated that their working diagnosis remained CRPS Type-II.

21. On February 20, 2006, Dr. Ring reported performing a right lumbar sympathetic block.

22 .On April 13, 2006, Kevin O. Lillehei, M.D., a neurosurgeon, stated, "I do feel that she has a component of her pain resulting from posterior tibial nerve entrapment in the region of the tarsal tunnel. The ALJ infers and finds that it is highly probable that Dr. Lillehei's findings arise from conditions that causally flow from the admitted February 7, 2004 injury.

23. On June 9, 2006, Claimant underwent surgery on her tarsal tunnel.

24. On October 10, 2006, Dr. Stieg noted that Claimant continued to exhibit marked allodynia to light touch, vibration, cold and pinprick over the medial ankle and distal portion of the foreleg. This extended on to the medial dorsal area of the foot, with maximum sensitivity over the heel. In addition, Claimant now had a positive Tinel's sign over her well-healed scar from the tarsal tunnel surgery.

25. Also on October 10, 2006, Dr. Stieg wrote a referral letter to Brian Cicuto, M.D., in Pennsylvania, requesting that he take over Claimant's care. Dr. Cicuto became, and presently is, Claimant's authorized treating physician (ATP).

26. On February 13, 2008, Dr. Cicuto stated, "In my opinion, she does meet the criteria for the use of opioids and nonmalignant pain. Specifically, she has an organic cause for her pain. She has both neuropathic and somatic pain generators. She has been treated with other modalities passively including injection therapy and surgery as well as other attempts at rehab besides participation in the Pain Rehab Program." Dr. Cicuto noted that he planned on seeing Claimant back about every six months. He also noted that a psychologist would be of benefit. The ALJ infers and finds that it is highly probable, and free from serious and substantial doubt, that all of Dr. Cicuto's prescribed treatment is causally related, and flows from, the admitted injury of February 7, 2004.

27. Also on February 13, 2008, Dr. Cicuto filled out a work restriction report that stated that Claimant was unable to work.

The 18-Month DIME History

28. On September 24, 2007, Respondent filed an Application for a DIME pursuant to Section 8-42-107 (8)(b)(II)(A), C.R.S. (2008), because18 months had passed since the date of injury and that no ATP had placed claimant at MMI. On October 22, 2007, Respondent filed an Unopposed Motion to Withdraw Application for DIME. The Motion was subsequently granted.

29. Respondent subsequently filed a Notice and Proposal for DIME and a second Application for 18-month DIME. Counsel for the Claimant acknowledged receipt of the Notice and Proposal for DIME on December 20, 2007 via letter to Respondent's counsel and did not object at that time to Respondent pursuing the 18-month DIME and in fact suggested three physicians to conduct the DIME.

30. Following the issuance of the DIME panel, Claimant filed a Motion to Strike Respondent's Application for DIME and Reinstate Original DIME panel from Respondent's first Application for DIME filed on September 24, 2007. Claimant did not object to proceeding with the 18-month DIME at this time but instead argued that Respondent's first Application for 18-month DIME and panel should be reinstated. Pre-Hearing Administrative Law Judge (PALJ) Carolyn Sue Purdie denied Claimant's motion on February 20, 2008, and ordered that the 18-month DIME proceed on Respondent's second Application for DIME.

31. Marc Steinmetz, M.D., performed the DIME on April 7, 2008 and the Division of Workers' Compensation (DOWC) DIME Unit subsequently accepted it.

32. On April 7, 2008, Dr. Steinmetz, the 18-month DIME, determined that Claimant had 13% right leg range of motion combined with 13% right leg neuropathy rating for a total of 24% right lower extremity (RLE) impairment, which converted to 10% whole person impairment. Dr. Steinmetz reported Claimant's permanent restrictions as: (1) Limited/minimal stairs as tolerated; (2) No ladders or unprotected heights; (3) No frequent standing or walking (no more than half time standing or walking per shift); (4) No frequent operating foot pedals (including motor vehicle operation); and, (5) 20 pounds lifting occasionally and 10 pound lifting frequently.

33. In the present case, all statutory conditions were present which permitted Respondent to pursue the 18-month DIME with Dr. Steinmetz. First, it is undisputed that Respondent pursued its Application for DIME 18 months after Claimant's February 2004 work injury, given that both of its applications were filed in September and December 2007. Second, it is undisputed that Respondent sent a letter to Dr. Cicuto, the ATP in Pennsylvania, on August 3, 2007. In that August 3, 2007 letter, counsel for Respondent specifically requested Dr. Cicuto to address whether or not he agreed with the attached June 6, 2007 opinion from Dr. Cosgrove that Claimant had reached MMI. Also, Dr. Cicuto testified at hearing that his office received the August 3, 2007 letter given

that it was in his file. Consequently, Respondent met both the second and fourth requirements of Section 8-42-107(8)(b)(II), C.R.S. (2008). Finally, the third condition was also met because Dr. Cicuto admitted that he did not respond to the letter after his office received it and therefore at the time of September or December 2007 Applications Dr. Cicuto had not determined that Claimant reached MMI.

The DIME

34. Dr. Steinmetz conducted the Division IME on April 7, 2008. He did a once-only 2-hour examination of the Claimant. He spent more time critiquing and disagreeing with the Claimant's treating physicians than he did examining and evaluating the Claimant. Indeed, in the final analysis, according to Dr. Steinmetz, none of the Claimant's present severe medical conditions are work-related. Dr. Steinmetz diagnosed a right ankle sprain post-op, with associated tarsal tunnel syndrome and was of the opinion that Claimant had reached MMI on June 6, 2007. Considering the totality of Dr. Steinmetz's opinions on lack of causal relatedness of Claimant's present conditions, measured against the totality of the other medical and lay evidence, the ALJ finds that it is highly likely, and free from serious and substantial doubt that Dr. Steinmetz's opinion on MMI is **erroneous.** He was of the opinion that Claimant does not suffer from chronic regional pain syndrome (CRPS) as part of the February 2004 work injury because such a diagnosis is not supported the physical findings upon his examination, nor is it supported by the thermogram diagnostic findings. Considering the overwhelming weight of other medical evidence in the record, plus the Claimant's present status vis a vis her RLE, it is highly likely and free from serious and substantial doubt that Dr. Steinmetz's opinion in this regard is flat out **wrong**. Dr. Steinmetz further renders the opinion that there is no ratable or treatable evidence of CRPS. Again, it is highly likely and free from serious and substantial doubt that Dr. Steinmetz's opinion in this regard is in **error**. Dr. Steinmetz, although Level 2 accredited, has no credentials in psychiatry or psychology. He expressed the opinion that Claimant did not suffer a substantial aggravation (a legal concept) from her pre-existing depression as a result of the February 2004 right ankle injury. Instead, he opined that Claimant's right ankle injury only temporarily impacted her pre-existing depression previously existing from unrelated martial stressors and divorce, in addition to her daughter's miscarriage in 2004. There is no persuasive evidence elsewhere in the record to support Dr. Steinmetz's opinion in this regard other than the fact that Claimant was taking Elavil, an anti-depressant at the time of the 2004 work injury. Dr. Steinmetz does not explain how Claimant functioned at a relatively high level before the admitted injury. Dr. Steinmetz was also of the opinion that Claimant also suffers from diabetes, fibromyalgia, pancreatitis, and low back/left leg symptomatology that are all unrelated to the February 2004 right ankle injury. His testimony in this regard supports the fact that Claimant suffered from a multitude of medical conditions, yet she was able to work at a fairly high level prior to her admitted injury. There is no persuasive indication, either in Dr. Steinmetz's report

of hearing testimony that he used a goniometer in measuring Claimant's range of motion, as required by the *AMA Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev. Claimant never observed Dr. Steinmetz using an instrument to measure her range of motion.

35. Dr. Steinmetz also stated the opinion that no maintenance treatment is required with regard to the February 2004 right ankle injury. In a refreshing burst of generosity, Dr. Steinmetz stated the opinion that Claimant would likely benefit from ongoing medications and/or treatments associated with the unrelated chronic back/left leg pains, fibromyalgia and preexisting depression. He rated the Claimant with a 13% right leg range of motion impairment and a 13% right leg impairment for the posterior tibial nerve (Tarsal tunnel/neuropathy), which combined for a 24% right lower extremity (RLE) impairment. The ALJ infers and finds that Dr. Steinmetz's categorical opinions maintain that Claimant suffered a minor event, which temporarily aggravated Claimant's pre-existing back and depression. Indeed, his opinions are too ideal to support the proposition that nothing in Claimant's present condition is related to the admitted injury of February 7, 2004. This is but one factor that detracts from Dr. Steinmetz's overall persuasiveness and credibility. Indeed, his 24% RLE rating is inconsistent with his overall view of causal relatedness of Claimant's conditions to the February 7, 2004 admitted injury.

36. Dr. Steinmetz gave the Claimant permanent restrictions for the 2004 right ankle injury, including limited to minimal stair usage, no ladders or unprotected heights, no more than half the shift walking or standing, no more than 3 hours per day of foot pedal use inclusive of automobile driving, and 20 pound lifting occasionally and 10 pound lifting frequently. Dr. Steinmetz's opinions on medical restrictions are on the level playing field of "preponderance of the evidence." Indeed, Claimant's current ATP's are in a better position to give Claimant meaningful medical restrictions. For this reason, the ALJ finds Dr. Cicuto's present restrictions more persuasive than those of Dr. Steinmetz.

37. The ALJ finds that it is highly likely, and free from serious and substantial doubt, that Dr. Steinmetz's opinions on causality, including his opinion that Claimant does not have CRPS, are refuted by the aggregate medical and lay evidence to the extent of rendering Dr. Steinmetz's opinions in this regard **erroneous**. Consequently, Claimant has overcome Dr. Steinmetz's opinions on causality by clear and convincing evidence.

Dr. Bisgard and Dr. Cicuto, Later ATPs

38. On July 10, 2008, Dr. Cicuto reported that Claimant was unable to work.

39. On July 15, 2008, Dr. Bisgard reported Claimant's restrictions as no ladder or stair climbing, no pole climbing, no prolonged walking or standing, no exposure to weather extremes, no work in cold under 40°. Claimant was restricted to sedentary work with standing no more than 1-2 hours, sitting between 5-8 hours, and driving 1-3 hours.

40. On July 15, 2008, Dr. Bisgard stated, "I had the opportunity to review Dr. Steinmetz's report. I respectfully disagree with the conclusions he came up with as far as her impairment. I specifically disagree with the range of motion measurements. [Claimant], in fact, tells me that he did not use a goniometer to take her measurements so I am not sure how he got those measurements, but none the less [Claimant] had marked limitations with her motion today at 10 degrees in any plane." Dr. Bisgard determined that Claimant had 21% lower extremity impairment for loss of range of motion and 13% impairment of the peripheral nervous system. These combined to equal 31% lower extremity impairment, which converted to 12% whole person impairment. Dr. Bisgard also disagreed with Dr. Steinmetz that Claimant had no psychological impairment. Dr. Bisgard determined that Claimant has an additional 3% whole person impairment for her psychological issues totaling 16% whole person impairment. Dr. Bisgard stated, "As far as her work restrictions, I would limit her to sedentary work for her foot injury." Coupled with the aggregate medical and lay evidence, Dr. Bisgard's opinions further contribute to making it highly likely, and free from serious and substantial doubt, that Dr. Steinmetz's opinions are **erroneous**. It is more than a mere difference of opinion. Among other things, Dr. Bisgard's opinions have some corroboration in the medical and lay evidence.

Dr. Cicuto and 2008 IME Opinions

41. On September 23, 2008, Dr. Cicuto stated that Claimant continues to require maintenance medical benefits, including medications and follow up.

42. Dr. Cicuto testified by telephone. He expressed the opinion that all of the medications Claimant is on, unfortunately, can cause her to be sedated, which can make her lose concentration.

43. Dr. Cicuto was of the opinion that Claimant was at MMI as of February 13, 2008. He stated that Claimant needs maintenance treatment in the form of medications, which are reasonably necessary to maintain her at MMI. Based on the totality of the evidence, Dr. Steinmetz's DIME opinion on MMI having been overcome by clear and convincing evidence, the ALJ finds that Claimant reached MMI on February 13, 2008.

44. Dr. Cicuto was of the opinion that as of May 2007 Claimant could work in a sedentary capacity for five hours per day, two days a week.

45. Dr. Cicuto expressed the opinion that lower extremity injuries affect a person's back because of the limp or altered gait cycle, which tends to affect not just the lower back, but the sacroiliac, the hip and sometimes the other extremities.

46. Dr. Cicuto was of the opinion that the Claimant's RLE has been the primary focus of her pain complaints. The left leg is really not that significant, and the lower back was not the major focus.

47. Dr. Cicuto stated that as far as he knew, Claimant has no restriction with regard to the pancreatitis or the diabetes.

48. Neil Pitzer, M.D., an IME examiner for Respondent, expressed the opinion that an appropriate MMI date for the February 2004 right ankle injury was approximately three months after Kevin Lillehei, M.D., neurosurgeon, performed the tarsal tunnel release on June 9, 2006. As a result, Dr. Pitzer assigned an MMI date of June 6, 2007, the same MMI date expressed by Dr. Steinmetz. Dr. Pitzer's opinion supports the need for monitoring Claimant's narcotic medications after MMI. The ALJ does **not** find Dr. Pitzer's opinion on MMI for reasons similar to finding Dr. Steinmetz's opinion on MMI clearly **erroneous.** As for permanent restrictions, Dr. Pitzer would restrict the Claimant as follows: not stand or walk beyond 30 minutes per hour, be limited to not lifting more than 20 pounds, avoid the use of ladders, and that right foot pedal controls should not be conducted on a constant basis but that Claimant could drive with her right foot for three hours per day. Dr. Pitzer expressed the opinion that Claimant would have no restrictions for driving with her left foot because Claimant reported to him that she had the ability to drive on the left foot. He did not dwell on safety concerns about Claimant using her left foot to drive in the U.S. The same concerns would not exist in the United Kingdom, where people drive on the lefty side of the road and the steering wheel and foot controls are on the right side of the vehicle. Dr. Pitzer stated that reasonable alternatives exist such as hired transportation or adaptive conversions for an automobile. Dr. Pitzer was of the opinion that Claimant would at a minimum be able to perform sedentary work restrictions. Dr. Pitzer, who has no vocational expertise credentials, offered the opinion that from a medical standpoint, claimant is capable of working. The ALJ finds the ATPs' opinions on restrictions more persuasive than those of Dr. Pitzer, a one-time IME examiner

49. James L. Cosgrove, M.D., a Pennsylvania Independent Medical Examiner (IME) at Respondent's request, testified by telephone from the airport in Albuquerque, New Mexico that by definition, Claimant has chronic pain related to her RLE problems. She has had it for quite some time and had a number of treatments for it. The ALJ infers and finds that this opinion supports the causally related severity of Claimant's present condition.

50. Dr. Cosgrove observed that Claimant was working with her low back problems and left leg problems full-time, and very long hours, prior to her injury.

51. Dr. Cosgrove was of the opinion that the largest and most significant part of Claimant's inability to function is related to her RLE problems.

52. Dr. Cosgrove did not evaluate the Claimant until June 6, 2007, only on one occasion, yet he found the Claimant to be at MMI on the day he evaluated her. It is clear from Dr. Cicuto's November 2007 dictation, that Dr. Cicuto was still significantly adjusting Claimant's medication. The ALJ does not find Dr. Cosgrove's opinion in this regard credible.

53. Respondent had Dr. Cosgrove's report as of July 24, 2007 and requested an 18- month DIME as of September 24, 2007 and withdrew their Application. Dr. Cicuto testified that he had never seen the request to address the issue of maximum medical improvement. Respondent did not communicate with him personally in this regard though he did find in his file a copy of respondents' letter dated August 3, 2007 that he had never looked at before the date he testified at hearing. The ALJ finds that Respondent timely sent the request for Dr. Cicuto to address MMI, and just because Dr. Cicuto did not look at it does not vitiate the validity of the 18-Month DIME.

54. Claimant relied on this withdrawal and Respondent agreed that they would continue paying TTD benefits until Claimant's **treating** (not the DIME examiner) physician placed her at MMI. Respondents waited until January 2008 (6 months) to apply for an DIME through the Division of Worker's Compensation.

The Claimant

55. Following her 2004 work-related injury, the Claimant participated in a medical assistant degree program while in Colorado at Parks College. The program was a nine-month program that took place in either 2005 or 2006. The program required students to participate in both classroom education and externship studies. Claimant completed the nine-month program receiving a 4.0 grade point average. As part of her externship requirements, Claimant worked for Dr. Ng's office answering telephones and taking patients back to the medical rooms. Claimant completed all the coursework and externship program in order to receive her degree but she didn't have enough money to make the final tuition payments to Parks College in order to receive her diploma. After 2006, Claimant's physical condition went from bad to worse, as illustrated hereinbelow.

56. At hearing, Claimant credibly testified that she had to move to Mahaffey, Pennsylvania because the daughter that was living with her in Denver

was moving back to Mahaffey where her brothers and sisters were, and then she wouldn't have any help in Denver. Claimant needed help to do her activities of daily living (ADLs). Members of Claimant's family that remained in Colorado weren't willing to help her. When she first moved back to Mahaffey, she moved into her ex-husband's house, from whom she had been divorced for fifteen years, for financial reasons as well as the help.

57. The town of Mahaffey, Pennsylvania is very small, and the closest larger town is Punxsutawney, which Claimant thinks has approximately 2,000 people. Punxsutawney is 18 miles from Claimant's hometown and it takes approximately 20 to 25 minutes to get there. The next larger town is DuBois, which is about 45 to 50 minutes from Mahaffey.

58. Claimant has difficulty driving to DuBois because the foot that's hurt is her driving foot (the right foot), so she has to drive with her left leg, which she does not feel is safe. Claimant stated that if she has to go somewhere, her kids drive. She does not drive. Claimant does not even drive within her community when she has to get around. Claimant could probably drive 15 minutes, then would have to put the vehicle on cruise control, which she does not feel is safe in her area of the country. Claimant does not have very much motion to do the up and down motion of her foot to operate the pedals of a car. Also, when she has to leave her foot on the pedal, her ankle locks up. Claimant cannot control her ankle or foot for a long period of time and has to use her other (left) foot. Claimant's medications affect her driving because the medicines make her go to sleep.

59. According to the Claimant, the 20-minute driving restriction given to her by Dr. Cicuto is enough to get her to the nearest town where she can buy milk and groceries. The town of Mahaffey has a small store, but they run out of milk.

60. The Claimant is currently living with her youngest daughter. Her daughter does all of the cooking and cleaning. Before her daughter moved in with her, Claimant's children would take turns coming to care for her. One daughter would come over once a week. She would cook dinner. Another daughter would do the major cleaning. Claimant stays mostly in her room.

61. If Claimant does not elevate her leg, as recommended by Dr. Cicuto, it swells to almost twice its regular size. Claimant typically elevates her leg twenty-five to forty minutes out of an hour. The pain increases when Claimant is not able to elevate her foot.

62. Claimant takes Opana, which is a Dilaudid morphone, or hydromorphone. She takes 60 milligrams in the morning, and 80 milligrams at night. She takes 15 milligrams of morphine, twice a day. She takes Zanaflex, which is a muscle relaxer, three times a day. At night, Claimant takes 300

milligrams of Seroquel, which is a sleeping medication. She also takes the sleeping medication Ambien CR, 12.5 milligrams. Claimant takes the psychotropic medication Lexapro, 30 milligrams at night. When Claimant is not able to take these medications, she cannot sleep and will be up for days, and the pain is so bad she cries. The medications make Claimant tired, they make her hand-eye coordination "not so great," and she is dizzy a lot. Claimant is unable to read or concentrate on reading while taking the medications. She takes the medicine and lies down.

63. Claimant's right foot cannot stand the heat, yet she also has difficulty withstanding cold temperatures because of her leg. She has problems climbing stairs. She knows when it is going to be a bad day when the foot starts out swollen, and when she steps on her foot and it starts burning from the middle of her foot up, and she wants to have it amputated. Claimant has discussed with her physicians having her foot amputated. Claimant is sure to have a bad day at least once a month.

64. Claimant stated that she first had problems with her back in 1994. Since that time, however, while having problems she was able to continue working. Claimant still has problems with her back, but she has lived with it since 1994. She has been able to work, and she's done what she has to do and has been able to do it. When she returned to work there weren't any duties that she **did not** do because of her back. Even though she had left leg problems as a result of her back injury, she still went to the movies, went shopping, and was continually doing other things. Claimant's back problems and left leg problems never prevented her from traveling.

65. According to the Claimant, there is nothing in Mahaffey that she could do.

66. According to the Claimant, there were several mistakes in Dr. Steinmetz' report. Claimant's observations are partially corroborated by the four corners of Dr. Steinmetz's report and by Dr. Bisgard's assessment thereof.

67. The ALJ finds that Claimant's testimony concerning her present physical condition and her inability to commute to the nearest proposed job at Sears in Dubois and corroborated by the other lay testimony, by the opinion of her ATP, Dr. Cicuto. The ALJ finds the Claimant's testimony highly persuasive, credible, and the ALJ places considerable weight on her testimony.

Other Lay Testimony

68. Sherry Bates, a co-worker at Safeway and friend, testified that before Claimant's February, 2004 accident she never noticed Claimant having any problems with her back, leg, or any other problems while working. Bates stated that she has noticed changes in Claimant, including that she is now very

depressed. Bates and the Claimant used to go shopping, go to Blackhawk to gamble, go watch cheerleading competitions, go out to dinner, go play bingo, and do a lot of things together. Now Claimant can't do very much, according to Bates. Walking causes Claimant's ankle to swell. Bates and the Claimant have actually had to turn around and come back home from different things because Claimant had sweat pouring off her hair, her ankle was swollen and she was in pain. Claimant shows outward appearances of pain that include her facial expressions, clinching, sweatiness, swelling of the ankle to twice the size it was before, and limping.

69. Brandy Turner, Claimant's daughter, testified under oath that before Claimant's injury, they would go shopping and Claimant could walk around the store for long periods of time. Claimant always wanted to do something. Now, if they walk around for more than 10 minutes, Claimant's ankle swells up like a grapefruit and she starts sweating. Claimant does not even want to leave the house because it hurts too bad to walk on her foot.

70. Turner takes Claimant's garbage out, takes her clothes downstairs to be washed, drives her to appointments, and regular daily stuff. Turner cleans the house. Before Claimant was hurt, Claimant was able to do her own housework. Turner takes Claimant to the grocery store. Claimant is able to get around the grocery store for about five to ten minutes, then the back of her head is sweating and her ankle is swelled up.

71. Turner observes that Claimant is depressed a lot lately and it didn't used to be that way. Claimant used to want to go out of the house. She wanted to do stuff and she was happy. It is not like that anymore. Claimant doesn't want to leave and she is very depressed. Turner sees the Claimant crying quite frequently. Turner stated that if Claimant had problems with depression before, Claimant never displayed it in front of her. According to Turner, Claimant gets really tired very easily after being out, and she falls asleep frequently.

72. Danielle Barger, Claimant's daughter, stated that she, her sister and her two brothers all sat down and decided that it would be best for her to move in with the Claimant because she (Barger) is a stay at home mother, and Claimant needed help with her daily living. Barger does all the cooking and cleaning. She takes Claimant to doctor's appointments. She does everything. Before the injury, Barger did not have to help Claimant. Claimant was independent.

73. According to Barger, although Claimant has also experienced back pains and left leg pains, they are not as bad as her right ankle. Her ankle swells up like a balloon.

74. The Claimant has a significant permanent impairment for her physical condition as reported by ATP Dr. Bisgard, who provided Claimant a 31%

lower extremity impairment and an additional 3% whole person impairment for her psychological issues. Dr. Bisgard provided sedentary work restrictions. Dr. Cicuto, Claimant's current ATP, is of the opinion that the Claimant cannot work given her physical and psychological problems and she cannot not drive for greater than 20 to 30 minutes. Claimant's daughters corroborated Claimant's testimony and credibly stated that Claimant rarely leaves the house; that they must drive her and when she does leave the home, she is unable to walk more than 10 minutes without breaking out in a sweat due to the pain or her right foot significantly swelling. They also stated that Claimant had difficulty with all household tasks, walking and getting around. Lee White, Claimant's vocational expert, provided a credible and convincing report that, given the medical restrictions, there are no jobs Claimant would be able to locate, obtain and retain because there are other factors that impede Claimant, including significant problems with medication side effects. White's opinions are more persuasive and credible in this regard than the opinions of Katie Montoya.

Vocational Opinions

Katie Montoya

75. On September 11, 2008, Katie Montoya, vocational specialist, stated, "Dr. Cicuto has identified that he feels [Claimant] is not capable of returning to work at this point and I am not in a position to dispute his medical opinion." Montoya also stated that the town of Mahaffey, Pennsylvania, as of 2006, was noted to have a population of 381 individuals. The town of Dubois is noted to have a population of 8,100 and is noted to be 23 miles away.

76. Montoya stated that a job opportunity was made available by Sears located in Dubois, Pennsylvania. According to Montoya, her labor and market research revealed that the Sears position was a sedentary office clerical position that would require Claimant to process paper work concerning daily sales and register receipts, filing papers and overseeing cash deposits. Montoya stated that Sears had no other physical demands for this position other than "occasional" walking requirements that were less than 1/3 of the total shift time. Montoya stated that Sears provided Claimant the job opportunity for the office clerical position and Claimant in response informed Sears of the need to review the position with her physician. Considering Claimant's overall physical condition at the time, the ALJ infers and finds that this was certainly reasonable on the Claimant's part. Montoya stated that Sears did not request a release from any physician. Claimant did, in fact, check with Dr. Cicuto and Claimant stated that going to and coming from the Sears store in Dubois would exceed her 20-minute driving restriction, each way, imposed by Dr. Cicuto.

77. Montoya also stated that her labor and market research also revealed that Dubois was located approximately 27-35 miles from Mahaffey, Pennsylvania. Based on this distance, the ALJ infers and finds that going one-way to Dubois would exceed Claimant's 20-minute driving restriction imposed by her ATP, Dr. Cicuto.

78. Claimant testified that she owns and possesses a computer at home. In a valiant effort to suggest that Claimant is employable, Respondent mentioned AlpineAccess, a work-at-home computer customer service operation. Montoya did not persuasively pursue this option. Vocational rehabilitation has neither been offered, accepted, nor is it an issue in this case.

79. The ALJ finds the opinions of Lee White on Claimant's un-employability more persuasive than those of Katie Montoya. Indeed, the ALJ infers and finds that Montoya's opinion on employability is quite limited under the circumstances and refuted by White's opinion, which the ALJ finds to be more credible and persuasive.

Lee White

80. On September 22, 2008, Lee White, vocational rehabilitation counselor and disability evaluator, noted that Claimant is limited to sedentary duty work as a result of her work injury. White noted that Claimant must to elevate her leg routinely. He stated that it is the combination of [Claimant's] sedentary duty limitations, and her ongoing need for pain and depression medications disables her. White noted that Claimant is not able to return to sustained work activities at a level appropriate to wage employment. White was of the opinion that it is unlikely that any employer would view Claimant as an appropriate candidate for employment in cashiering, clerical, or customer service occupations. White concluded that Claimant is, in all likelihood, permanently and totally disabled.

81. White testified on November 17, 2008, stating that since he had issued his written report and considering information that he reviewed subsequent to his report, in his opinion the Claimant remains unable to work due to Claimant's considerable pain and side effects of medication. These side effects include, blurred vision, sedation, drowsiness, sweating and dry mouth. These impact her ability to drive.

82. In rendering this later opinion, White relied on Dr. Cicuto's records and testimony, Claimant's interview and reports of side effects, Claimant's sedentary restrictions and the medication effects to come to the conclusion that Claimant is permanently and totally disabled from working. He stated that she would not be hired nor could find herself to be employable. Claimant would have problems with concentration, staying on task and duration.

White stated that motor vehicle safety was a concern for Claimant driving with her left foot on the accelerator or brake for more than negligible periods.

83. White was specifically of the opinion that Claimant was not wage employable, regardless of her remaining skills. In his opinion, the Claimant is not able to perform the jobs identified by Respondent's vocational expert, as they exceed Claimant's permanent restrictions including driving, standing and walking. White was of the opinion that Claimant is not capable of any level of work. He further stated the opinion that it was unlikely that any employer would view Claimant as an appropriate candidate for employment. Claimant would not be able to pursue the job at the Dubois Sears because of her driving restriction of no more than 20-minutes.

Temporary Disability From June 6, 2007 Through February 12, 2008

84. The FAL admits for an average weekly wage (AWW) of $1,045.50, and temporary disability benefits through June 5, 2007, reciting that the statutory cap of $60,000 had been reached on TTD benefits and that there was an overpayment of $67,123.57, based on the payment of TTD from June 6, 2007 through February 13, 2008, on Respondent's theory that the DIME date of MMI of June 6, 2007 would prevail. The FAL admitted for an MMI date of June 6, 2007. The FAL recites that it is based on DIME Dr. Steinmetz's opinions. The ALJ finds that Claimant had been paid aggregate TTD benefits of 60,000 as of June 6, 2007, as illustrated by adding the sums therefore in the FAL. The $60,000 statutory cap on combined temporary and permanent impairment benefits had been reached on June 6, 2007, yet Respondent agreed to continue paying Claimant TTD benefits until February 13, 2008, in the aggregate amount of $67, 123.57, which Respondent now claims as an overpayment for which they should receive a credit against PTD benefits. This theory rings odd in light of Claimant's agreement to continue paying TTD until the ATP (not the DIME examiner) placed the Claimant at MMI.

85. The Claimant has not actually worked or earned wages since June 6, 2007, nor has her ATP, Dr. Cicuto, released her to return to work without restrictions. Also, as previously found, she reached MMI on February 13, 2008. Therefore, the Claimant was TTD from June 6, 2007 through February 12, 2008, both dates inclusive. Claimant reached the statutory cap of $60,000 in combined temporary and permanent impairment benefits (in this case, the combined benefits consisted of temporary disability benefits) as of June 6, 2007, yet Respondent voluntarily agreed to continue paying Claimant TTD benefits during a period of time when she was clearly entitled to TTD benefits, in the aggregate amount of $67,123.57.

Overpayment and Social Security Benefits

86. Respondent submitted a payment history of the indemnity benefits on this case, and this is not disputed. Because of the Respondent's theory of MMI, June 6, 2007, Respondent argues that it is entitled to a credit for an overpayment for the indemnity benefits paid to Claimant between June 7, 2007 and the date of the filing of the Final Admission of Liability, April 17, 2008. Claimant received TTD benefits from June 6, 2007 until the date of filing of the FAL on April 17, 2008. Respondent identified on its Final Admission: (1) Claimant had reached the statutory cap of $60,000.00 for payment of temporary disability thereby eliminating available PPD for scheduled impairment provided by Dr. Steinmetz; and, (2) a resulting overpayment on this claim in the amount of $67,123.57 based on temporary disability benefits paid. The face of the FAL illustrates that a grand total of $60,000 in combined temporary disability benefits had been paid to the Claimant as of June 5, 2007. The FAL recites that zero PPD was paid.

87. Claimant received an initial award of a monthly Social Security Disability (SSDI) benefit of $1,098.00 and has received this benefit, with escalating cost-of-living adjustments (COLAs) since September 2004. Under the Workers' Compensation Act, this calculates to $253.38 per week, which would yield a statutory offset of 50% thereof, or $126.69 per week.

Ultimate Findings

88. Claimant has failed to prove that the 18-Month DIME of Dr. Steinmetz was invalid because of an alleged failure to give the present ATP, Dr. Cicuto, an opportunity to declare the Claimant at MMI and rate her. A timely report of Dr. Steinmetz was sent to Dr. Cicuto, and Dr. Cicuto, in his telephone testimony, conceded that it was in his file and he just failed to read it.

89. Claimant has overcome the DIME of Dr. Steinmetz with respect to causality on Claimant's present condition, including the CRPS, MMI, and degree of permanent impairment, by clear and convincing evidence. As found, Claimant date of MMI is February 13, 2008.

90. Claimant has proven, by clear and convincing evidence, that she was TTD from June 6, 2007, through February 12, 2008. Respondent voluntarily agreed to continue paying the Claimant TTD benefits despite the statutory cap of $60,000 having been reached on June 6, 2007, agreeing to continue paying until the ATP placed the Claimant at MMI. The ATP, Dr. Cicuto, placed the Claimant at MMI on February 13, 2008.

91. Claimant has proven, by a preponderance of the evidence, that her present condition causally flows from the admitted injury of February 7, 2004, including the causally related CRPS, and it renders her incapable of earning

wages in the competitive job market on a reasonably sustainable basis. Therefore, Claimant has proven that she is permanently and totally disabled.

92. Respondent has proven, by a preponderance of the evidence, that it is entitled to a statutory offset, representing ½ of the initial award of SSDI benefits, or $126.69 per week from the date of the initial payment of workers' compensation indemnity benefits and continuing through the payment of PTD benefits.

93. Respondent has failed to prove, by a preponderance of the evidence that its voluntary agreement to continue paying the Claimant TTD benefits until her ATP (in this case Dr. Cicuto) placed her at MMI (February 13, 2008), in excess of the statutory cap of $60,000, during a period of time that the Claimant was actually TTD, was void as contrary to law. By voluntarily paying TTD until the ATP declared the Claimant to be at MMI (February 13, 2008), Respondent waived any claims for overpayment, and in equity and good conscience should not be allowed to exact an overpayment out of PTD benefits, a measure that would run counter to the public policy of ensuring that permanently and totally disabled individuals receive adequate PTD benefits in order to keep them off the welfare rolls.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker 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 Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (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). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a 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 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284

(1959). As found, the opinions of Dr. Steinmetz and Dr. Pitzer are not credible. They are outweighed by the aggregate medical and lay evidence contained in the record. For instance, Dr. Steinmetz's opinion that Claimant does not have CRPS is inadequately explained and it flies in the face of more precise expertise, *e.g.,* the opinion of Dr. Schakarashwili, who is of the opinion that Claimant meets most of the tests for CRPS. Additionally, the Claimant's testimony concerning her present physical condition and inabilities is highly persuasive and credible. As found, the ALJ places considerable weight on the Claimant's and the lay witnesses' testimony.

Validity of the 18-Month DIME

b. Section 8-42-107 (8) (b) (II) (A) – (D), C.R.S. (2008), sets forth four prerequisites for the 18-Month DIME: (A) 18 months have passed since the date of injury; (B) a party has requested in writing that an ATP determine whether an employee has reached MMI; (C) such ATP has not determined that the employee has reached MMI; and, (D) a physician other than such ATP has determined that the employee has reached MMI. As found, all four of these prerequisites with respect to Dr. Steinmetz's 18-Month DIME have been met. Therefore, Dr. Steinmetz's DIME is a valid 18-Month DIME.

Burden of Proof on DIME

c. A DIME opinion on the causal relatedness of a condition to permanent impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 86 (Colo. App. 2002). As found, Claimant has established that it is highly likely, and free from serious and substantial doubt, that Dr. Steinmetz's opinion that Claimant's present severe condition is not causally related to the admitted injury of February 7, 2004 is **erroneous.** Therefore, Claimant has overcome the DIME opinion in this regard by clear and convincing evidence.

d. The party seeking to overcome a DIME physician's opinionson MMI and permanent impairment bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); Section 8-42-107(b)-(c), C.R.S. (2008). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra.* In other words, a DIME physician's finding may not be

overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). The question of whether the DIME physician has placed a claimant at MMI or not, and whether that determination has been overcome is a factual determination for resolution by the ALJ. *Metro Moving & Storage Co. v. Gussert*, supra. As found, the Claimant has sustained her burden of clear and convincing evidence with respect to MMI and the permanent impairment rating. The burden on restrictions imposed by a DIME is a preponderance of the evidence.

Burden of Proof on PTD, Causal Relatedness of PTD, Medical Restrictions, Medical and Affirmative Defenses

e. Once a DIME has been overcome, as is the case herein, the injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A “preponderance of the evidence” is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has sustained her burden with respect to PTD; TTD from June 7, 2007 through February 12, 2008; MMI on February 13, 2008; and, the authorization, causal relatedness and reasonable necessity of medical treatment for her present condition arising out of the February 7, 2004 admitted injury. Her entitlement to TTD benefits is academic because of the $60,000 cap having been reached as of June 6, 2007.

f. Expert opinion or testimony is neither necessary nor conclusive in proving a period of disability, the extent of permanent total disability, or a worsening of condition. *Ringsby Truck Lines, Inc. v. Industrial Commission,* 30 Colo. App. 224, 491 P.2d 106 (1971); *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Don Ward and Co. v. Henry,* 502 P.2d 429 (Colo. App. 1972); *Casa Bonita Restaurant v. Industrial Commission,* 624 P.2d 1340 (Colo. App. 1981); *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1943). As found, Claimant's lay testimony concerning her present abilities and inabilities is highly persuasive and the ALJ accords it great weight. Overlaid on Claimant's physical restrictions, her lay view of her abilities and inabilities adds up to overall un-employability.

g. Claimant must prove that the admitted injury herein is a significant causative factor in her PTD. *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). As found, Claimant has sustained this burden. Respondent argues, by implication, that the original right ankle injury of February 7, 2004 must be the sole cause of Claimant's PTD. This is not accurate. The Claimant is not required to prove that the admitted injury is the sole cause of her PTD. *Climax Molybdenum Co. v. Walter,* 812 P.2d 1168 (Colo. 1991); *Colorado Fuel & Iron Corp. v. Industrial Commission,* 151 Colo. 18, 379 P.2d 153 (1962) [if personal factors combine with the work-related injury to render a worker PTD, the worker is entitled to PTD benefits]. As found, any of Claimant's other non-work related mental and physical conditions combined with the admitted injury herein to render the Claimant unemployable.

h. Congenital conditions, uninfluenced by intervening causes or injuries are not subject to apportionment. In *Absolute Employment Services v. Industrial Claim Appeals Office,* 997 P.2d 1229 (Colo. App. 1999), the respondents argued that PTD benefits should be reduced because the claimant was legally blind from birth and had a low IQ. Respondents' vocational expert in *Absolute Employment* testified that these two conditions reduced claimant's access to 85% of the labor market. In denying apportionment, the Court of Appeals held that these two conditions represented the claimant's innate, baseline capacity to meet personal, social or occupational demands, not an alteration in the capacity to meet these demands. Although the facts in *Absolute Employment* are extreme, there is a compelling lesson for the present case. Because there was no persuasive evidence of an injuries or diseases subsequent to Claimant's admitted injury herein, the ALJ inferred that the any of Claimant's non-work related conditions represented her other innate non-work related conditions and her innate reactions to pain, which contributed to her inability to earn wages in the competitive labor market on a reasonably sustainable basis. For this reason, the "full responsibility" rule should apply in this case.

<u>Temporary Total Benefits and the $60,000 Statutory Cap</u>

i. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S. (2008); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). A medically restricted injured employee presumably cannot do the pre-injury work unless the employer modifies the job or makes accommodations. This is true because the employee's restrictions presumably impair her opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973, (ICAO, December 18, 2000). In this case, Claimant could not return to her former job, she was receiving TTD benefits and her ATP had not released her to return to un-restricted work.

j. Once the prerequisites for TPD and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), TPD and TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, Claimant meets all of the conditions for TTD FROM June 7, 2007 through February 12, 2008. Therefore, the ALJ finds that she was TTD during this period of time. As further found, Respondent voluntarily continued paying the Claimant TTD benefits until the ATP, Dr. Cicuto, determined that she had reached MMI as of February 13, 2008, thus, waiving any claims to credits for an overpayment for exceeding the $60,000 statutory cap. There is nothing in the Workers' Compensation Act that provides that an employer **cannot** voluntarily waive the cap, which it did by its actions.

k. Pursuant to § 8-42-107.5, C.R.S. (**2005)**, the controlling provision at the time, "[n]o claimant whose impairment rating is twenty-five percent or less may receive more than sixty thousand dollars from combined temporary disability payments and permanent partial disability payments." For impairments over 25%, the cap was $120,000. As determined in *Donald B. Murphy Contractors, Inc. v. Indust. Claim Appeals Office*, 916 P.2d 611, 614 (Colo. App. 1995) *cert. denied* (April 29, 1996), once PPD impairment is established, Respondent is entitled to take any overpayments for indemnity payments paid out that exceed the $60,000 cap and apply such overpayments to the remaining PPD benefits, if any. The *Donald* court determined that the plain language of Section 8-42-107.5 requires the application of the statutory cap after an impairment rating had been issued. Similarly, in *Leprino Foods Co. v. Indust. Claim Appeals Office*, 134 P.3d 475, 480 (Colo. App. 2005), the Court of Appeals determined that employers must continue to pay temporary disability benefits until placement of MMI and thus application of the statutory cap is premature until such time. As found, MMI was reached on February 13, 2008. In retrospect, the Claimant's permanent impairment is 100% since she is PTD. The case law dictates a retrospective application of the cap. Consequently, the applicable cap, as of the date of injury,

on combined temporary and permanent benefits was $120,000. Respondent paid $67, 123.57 as of MMI, which is under the $120,000 cap. Any argument that the cap should be applied as of the time a physician rates medical impairment may be well taken when an employee is ultimately determined to be PPD. It would make no sense, and run counter to public policy, when an employee is ultimately determined to be PTD.

Permanent Total Disability

l. An employee is permanently and totally disabled if she is unable to earn any wages in the same or other employment. Section 8-40-201(16.5)(a) C.R.S. (2008). In determining whether a claimant is permanently and totally disabled, an ALJ may consider the claimant's "human factors," including the claimant's age, work history, general physical condition, education, and prior training and experience. *Weld County School District RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998*); Joslin's Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P. 3d 866 (Colo. App. 2001). The test for permanent total disability is whether employment exists that is reasonably available to the claimant under her particular circumstances. *Id.* This means whether employment is available in the competitive job market, which a claimant can perform on a reasonably sustainable basis. As found, Claimant has proven that she is incapable of earning wages in the competitive labor market, on a reasonably sustainable basis, and there is no work reasonably available to her within the medical restrictions prescribed by her ATP, Dr. Cicuto.

m. A claimant is permanently and totally disabled if she is unable "to earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. (2008). Under this statute, a claimant is not permanently and totally disabled if she is able to earn some wages in modified, sedentary, or part-time employment. *McKinney v. Industrial Claim Appeals Office*, 894 P.2d 42 (Colo. App.1995). As found, Claimant is not even able to earn wages at the limited Sears job in Dubois, Pennsylvania because it is 27 miles away and driving there would violate laimant's 20-minute driving restriction. Although Dr. Pitzer suggested a chauffeur or driver for the Claimant, none has been offered.

n. In determining whether a claimant is unable to earn any wages, the ALJ may consider a number of "human factors." *Christie v. Coors Transportation Co.*, 933 P.2d 1330 (Colo. 1997). These factors include the claimant's physical condition, mental ability, age, employment history, education and the availability of work the claimant can perform. *Weld County School District RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998). Another human factor is the claimant's ability to obtain employment within her physical abilities. *See Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). This is because the ability to earn wages inherently includes consideration of whether a claimant is capable of

getting hired and sustaining employment. *See Christie v. Coors Transportation Co., supra; Cotton v. Econ. Lube N Tune*, W.C. No. 4-220-395 (January 16, 1997), *aff'd, Econ. Lube N Tune v. Cotton* (Colo. App. No. 97CA0193, July 17, 1997). As found, Claimant is capable of getting hired at the Dubois Sears but she is incapable of getting there without violating her ATP's physical restrictions.

o. The overall objective of this standard is to determine whether, in view of all of these factors, employment is "reasonably available to the claimant under his or her particular circumstances." *Weld County School District RE-12 v. Bymer*, 955 P.2d at 558. In order for an industrial injury to be the cause of a PTD the injury must be "significant" in the sense that there is a **direct causal relationship** between the work injury and the resulting disability. *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1987). As found, the DIME opinion on lack of causal relatedness of Claimant's present overall physical condition has been overcome by clear and convincing evidence, and the aggregate other medical evidence, with the exception of Dr. Pitzer's opinion, that Claimant's present condition, including the CRPS, flows from the admitted injury of February 7, 2004, borders on being overwhelming.

Post-MMI Medical Maintenace (*Grover)* Benefits

p. A claimant is entitled to medical benefits after MMI where there is substantial evidence in the record to support a determination that future medical treatment will be reasonable and necessary to relieve the effects of an industrial injury or prevent further deterioration of the claimant's condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). Clamant must prove an entitlement to *Grover* medical benefits by a preponderance of evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App 2002). An ALJ's factual findings must be supported by substantial evidence in the record. *Brownson-Rausin v. Industrial Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). "Substantial evidence" is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Respondent's implied argument confuses the existence of "conflicting evidence" with an absence of "substantial evidence." This argument is not well taken. Dr. Cicuto, the ATP, supports the need for continuous medical monitoring. Even Dr. Pitzer's opinion supports the need for monitoring Claimant's narcotic medications after MMI. Therefore, the Claimant has proven, by a preponderance of the evidence that she is in need of *Grover* medical benefits under the auspices of her ATP, Dr. Cicuto.

Overpayment / Offsets

q. The statutory definition of an "overpayment" is that it is "money received by a claimant that exceeds the amount **that should** (emphasis

supplied) have been paid, or which the claimant **was not entitled to receive, or which results in duplicate benefits** (emphasis supplied) because of offsets that reduce disability or death benefits payable under said articles." Section 8-40-201 (15.5), C.R.S. (2008). The statute also provides that subsequent or ensuing events may create the "overpayment": "For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles."

r. An employer attempted to recoup an overpayment, after a re-opening, based on a claimant's lower impairment rating. The Court of Appeals determined that an employer was not entitled to recoup an overpayment, partly on the implied rationale that Claimant had received what she was entitled to receive before the re-opening. *See City and County of Denver v. Industrial Claim Appeals Office and Felix,* 58 P. 3d 1162 (Colo. App. 2002). More on point, insofar as temporary disability benefits are owing as a matter of law until an ALJ's order grants prospective relief from an alleged overpayment, the alleged "overpayment" does not constitute an "overpayment" under the Workers' Compensation Act. *See Rocky Mountain Cardiology v. Industrial Claim Appeals Office and Armbruster,* 94 P.3d 1182 (Colo. App. 2004). Under Section 8-42-105 (3), C.R.S. (2008), Respondent was obliged to continue paying the Claimant TTD benefits, during TTD and before MMI, until an ALJ relieved Respondent from this obligation. Consequently, Respondent's payment of TTD benefits from June 6, 2007 through February 13, 2008 does **not** constitute an "overpayment" as contemplated by the applicable case law.

s. Respondent is entitled to an offset for the SSDI benefits that Claimant has been receiving since September 2004. "In cases where it is determined that periodic disability benefits granted by the federal old-age, survivors and disability insurance act are payable to an individual…the aggregate benefits payable for…permanent partial disability, and permanent total disability…shall be reduced, but not below zero, by an amount equal as nearly as practical to one-half such federal periodic benefits…." Section 8-42-103(1)(c)(I), C.R.S. (2008). As found, Claimant has received SSDI benefits since September 2004 and the initial award before COLAs was $1.098.00 per month. Consequently, in light of the fact that Claimant is permanently and totally disabled, Respondent is entitled to the statutory offset in of 50% Claimant's $1098.00 benefit, or $126.69 per week, retroactively to the date of the receipt initial SSDI benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondent shall pay all of the costs of Claimant post-maximum medical improvement medical care and treatment for all of her causally related (to the February 7, 2004 admitted injury) medical conditions as determined

herein, according to the Medical Fee Schedule of the Division of Workers' Compensation.

B. Temporary total disability benefits having been voluntarily paid by Respondent from June 7, 2007 through February 12, 2008, despite the statutory cap of $60,000, any and all claims of Respondent for a credit for overpayment of temporary disability benefits through the date of MMI, February 13, 2008, are hereby denied and dismissed.

C. Respondent shall pay the Claimant permanent total disability benefits of $658.84 per week, which is less than 2/3rds of her average weekly wage but the statutorily capped rate for FY 03/04, from February 13, 2008, the date of maximum medical improvement, and continuing for the rest of the Claimant's natural life. Respondent is entitled to a statutory offset of $126.69 per week for Federal Social Security Disability Income, against the $658.84 weekly permanent total benefit, for net permanent total disability benefits of $532.15 per week. This entitlement to offset ceases when the Federal Social Security Disability Income is converted to straight Social Security Retirement benefits when the Claimant reaches 65 years of age.

D. Respondent is entitled to recoup any overpayments of temporary disability benefits prior to June 6, 2007, because of not taking the Federal Social Security Disability offset of $126.69 per week against any temporary disability benefits paid without the offset.

E. Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

F. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of February 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-728-253

ISSUES

- Whether Respondents have established that the claim or final admission of liability should be reopened due to a mistake of fact;
- Whether Respondents have overcome the DIME physicians' opinion regarding causation by clear and convincing evidence; and
- Whether Claimant is entitled to permanent partial disability benefits (PPD) based upon the impairment rating assigned by the Division Independent Medical Examination (DIME) physician.

FINDINGS OF FACT

1. On June 25, 2007, while working as a "Pre-loader" for Employer, Claimant was carrying a parcel that weighed between five and ten pounds. He stepped up with his left leg and as he placed his right foot down, he felt pain in his right knee and heard a pop.

2. Claimant testified that when he began his work shift at approximately 3:30 a.m. on June 25, his knee felt okay. It was not until about an hour into his shift that he felt significant pain and heard a pop in his right knee as he placed his right foot down while carrying a parcel. Claimant testified that the pain was different and worse on June 25 compared to the pain he felt on June 22 and June 24.

3. Claimant reported the right knee injury to Employer on June 25, 2007, and was referred to Dr. Matt Miller. Respondents admitted liability for this injury.

4. Claimant had experienced pain and popping in his right knee on June 22, 2007, while he was carrying his thirty-pound son. Claimant also felt pain in right knee on June 24, 2007 when he was playing with his son.

5. Claimant worked his full shift on June 23, 2007, as a Saturday Air Driver, without difficulty. No description of the job title "Saturday Air Driver" was provided.

6. After Claimant reported the injury to his Employer, he saw Dr. Miller on June 25, 2007. Claimant testified that he gave Dr. Miller an accurate history of events, which were fresh on his mind on June 25, 2007.

7. According to Dr. Miller's June 25, 2007 report, "Claimant's problems started Friday [June 22, 2007], when he was at home. He was carrying his 30 pound child and as he was walking, he felt a significant pop in his knee. He worked on Saturday without any significant problems. He was off Sunday, but return [sic] to work this morning. He says he was okay when he started, but developed increasing pain and discomfort and popping in his

knee. At one point, he stepped forward with a package in his hand, and had a significant pop in his knee." Dr. Miller referred Claimant to Dr. Hewitt.

8. Claimant saw Dr. Hewitt on June 29, 2007. Dr. Hewitt noted that Claimant reported that symptoms began on June 22, 2007, while running after his son. The report further states that Claimant "noted a catch and a pop within the anterior aspect of his knee and the onset of pain. He iced the knee and elevated it over the weekend and noted increasing pain while working the following week. He had been using a crutch for ambulation."

9. Dr. Hewitt recommended an MRI, and then, he performed surgery on Claimant's right knee on September 18, 2007, after conservative treatment failed. The operative report stated that, during the surgery Dr. Hewitt found an 8 x 8-mm loose chondral fragment in the posterior aspect of the joint. Dr. Hewitt also found a 1 cm x 8- mm defect with loose chondral flaps surrounding the edge upon inspecting he medial femoral condyle.

10. On October 23, 2007, Dr. Miller released Claimant from treatment based on his opinion that Claimant's injury was not work-related and placed Claimant at maximum medical improvement (MMI). In his report, Dr. Miller opined as follows:

> The patient did not have a firm diagnosis until the time of his surgery. His MRI did not reveal the pathology. In retrospect, with his findings at surgery, as well as history, I do not think this is a work-related problem. His mechanism of injury was stepping forward. This clearly did not cause the chondral defect. He was most likely symptomatic from a loose body, but this loose body was not a result of any activity he performed at work . . . I cannot link the chondral defect or his subsequent symptoms in a causal fashion to his work duties.

11. Thereafter, Respondents filed a Final Admission of Liability (FAL) on October 25, 2007, wherein they admitted for zero percent impairment, per Dr. Miller's October 23, 2007 report and findings that Claimant's injury was not work-related.

12. Claimant timely objected to the Final Admission of Liability and sought a Division Independent Medical Examination (DIME).

13. On February 20, 2008, Claimant underwent a DIME with Jeffrey Kesten, M.D. Dr. Kesten agreed with Dr. Miller's MMI date of October 23, 2007, and provided an impairment rating of 15 percent of the lower extremity, based on an 11 percent rating for Claimant's range of motion, and a 5 percent rating for arthritis. Dr. Kesten noted that the whole person impairment would be 6 percent.

14. Dr. Kesten acknowledged that Claimant had a right knee pop while walking with his son three days prior to the claimed work injury. Dr. Kesten also noted that Claimant reported a significant pop with terrible pain while stepping forward onto a loading platform on the date of the work injury. Dr. Kesten opined, within a reasonable degree of medical probability that Claimant's right knee injury was caused by the work-related incident.

15. Dr. Kesten did not provide an opinion about how the mechanism of injury (stepping forward onto a platform to meet the weight bearing left leg) could have caused a chondral defect or loose chondral fragment in the right knee. Dr. Kesten's opinion that Claimant's knee injury is work-related appears to be based in large part on the Respondents' admission of liability.

16. Respondents requested that I. Stephen Davis, M.D. conduct a record review and provided a causation analysis. In a report dated May 6, 2008, Dr. Davis disagreed with Dr. Kesten's opinion regarding causation. Dr. Davis opined that, to a reasonable degree of medical probability, that Claimant "sustained an articular surface fragmentation, with a loose chondral fragment, arising from the medial femoral condyle, related to his activities of daily living."

17. In addition, Dr. Davis opined that the loosening of the articular fragment would probably follow a traumatic event and that the event could have happened at any point in the past. Dr. Davis did not interpret the stepping forward as a sufficient traumatic event to explain the damage to the articular surface.

18. On October 17, 2008, Dr. Hewitt wrote to Respondents' counsel and opined that Claimant's right knee injury most likely happened at home on June 22, 2007. Dr. Hewitt further opined that the symptoms Claimant reported at work, "appear to be more of an exacerbation of his preexisting injury." Dr. Hewitt felt that the osteochondral defect discovered at the time of surgery was preexisting.

19. Based on the opinions of Dr. Miller, Dr. Hewitt and Dr. Davis that Claimant's symptoms and need for surgery were caused by events which took place prior to the June 25, 2007 incident at work, Respondents filed an Application for Hearing, seeking to reopen this matter based on a mutual mistake of fact and to overcome the DIME opinion. Respondents did not endorse withdrawing the admissions of liability as an issue for hearing.

20. The FAL filed on October 25, 2007, did not operate to close the claim because the Claimant sought a DIME. Once the DIME report was issued on March 18 2008, the Respondents were required to either file an application for hearing or file an amended FAL consistent with the DIME report. Based

on a review of the OAC electronic file, it appears that Respondents filed an Application for Hearing on April 24, 2008; however, the issues endorsed therein are unknown.

21. On April 23, 2008, Respondents filed a General Admission of Liability. This General Admission admits for temporary partial disability pursuant to stipulation of the parties in addition to other benefits. Based on the procedural record, it appears that Respondents filed this General Admission of Liability in error. In any event, Claimant's claim has never closed.

22. Based on the foregoing, clear and convincing evidence demonstrates that Dr. Kesten's opinion that Claimant's knee injury was causally related to his work activities is incorrect. Drs. Miller and Davis credibly explained that it takes a force greater than stepping onto a platform to cause a loose chondral fragment in the knee. Dr. Hewitt also opined that Claimant's knee condition preexisted the work incident on June 25, 2007. In addition, it is undisputed that Claimant experienced knee pain and popping sensations a few days prior to June 25, 2007. Finally, Dr. Kesten's opinion does not contain a medical explanation for how the act of stepping onto a platform could have caused a loose chondral fragment in Claimant's right knee. Dr. Kesten's opinion is not persuasive.

23. Claimant has not established that he is entitled to permanent partial disability benefits based on the impairment ratings assigned by Dr. Kesten. Dr. Kesten's impairment ratings are based upon his opinion that Claimant's knee condition and resulting surgery were caused by a work-related incident. Because Dr. Kesten's opinion on causation has been overcome by clear and convincing evidence, his opinion regarding permanent impairment is not persuasive.

CONCLUSIONS OF LAW

1. 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. ICAO,* 5 P. 3d 385 (Colo. App. 2000).

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 actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Reopening

3. As found, Claimant's claim has not closed as no final award has been entered. The Final Admission of Liability was contested by virtue of Claimant's request for a DIME. Accordingly, Respondents' request to reopen the claim or admission of liability is denied and dismissed as unripe.

Overcoming the DIME Opinion

4. Sections 8-42-107(8)(b)(III) and (c), C.R.S., provide that the finding of a DIME selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004).

5. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *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 (Nov. 17, 2000).

6. 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 Appeals Office*, 961 P.2d 590 (Colo. App. 1998). 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. Industrial Claim Appeals Office*, *supra.*

7. As found, clear and convincing evidence demonstrates that Dr. Kesten's opinion that Claimant's knee injury was causally related to his work activities is incorrect. Drs. Miller and Davis credibly explained that it takes a force greater than stepping onto a platform to cause a loose chondral fragment in the knee. Dr. Hewitt also opined that Claimant's knee condition preexisted the work incident on June 25, 2007. In addition, it is undisputed

that Claimant experienced knee pain and popping sensations a few days prior to June 25, 2007. Finally, Dr. Kesten's opinion does not contain a medical explanation for how the act of stepping onto a platform could have caused a loose chondral fragment in Claimant's right knee. Dr. Kesten's opinion is not persuasive.

Permanent Partial Disability

8. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case may not be interpreted liberally in favor of either claimant or respondents. Section 8-43-201, *supra*. 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 (1979).

9. Here, Claimant seeks permanent partial disability benefits based on the impairment rating assigned by Dr. Kesten pursuant to § 8-42-107(2(w), C.R.S. Dr. Kesten's impairment ratings are based upon his opinion that Claimant's knee condition and resulting surgery were caused by a work-related incident. Because Dr. Kesten's opinion on causation has been overcome by clear and convincing evidence, his opinion regarding permanent impairment is not persuasive. Accordingly, Claimant has not established entitlement to permanent partial disability benefits associated with his right knee condition.

ORDER

It is therefore ordered that:

A. Respondent's petition to reopen the claim or Final Admission of Liability is denied and dismissed.

B. Respondents have overcome, by clear and convincing evidence, the DIME physician's opinion as to the cause of Claimant's right knee condition and need for surgery. Accordingly, Claimant's right knee condition was not caused by his work activities.

C. Claimant's request for permanent partial disability benefits is denied and dismissed.

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

DATED: February 5, 2009

Laura A. Broniak

Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-645-139

ISSUES

1. WHETHER THE EVERGREEN BOZEMAN HEALTH AND REHABILITATION CENTER IS AN APPROPRIATE PLACEMENT FOR CLAIMANT.

2. IF THE EVERGREEN BOZEMAN HEALTH AND REHABILITATION CENTER IS NOT AN APPROPRIATE PLACEMENT, WHAT TYPE OF HOME MODIFICATIONS SHALL BE PROVIDED BY RESPONDENTS?

3. WHETHER RESPONDENTS ARE ENTITLED TO A CREDIT AGAINST FUTURE BENEFITS DUE TO THE PURCHASE OF A WHEELCHAIR ACCESSIBLE VAN.

4. IF RESPONDENTS ARE RESPONSIBLE FOR MODIFICATION OF CLAIMANT'S HOME, WHAT TYPE OF MODIFICATIONS ARE REASONABLE AND NECESSARY?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following Findings of Fact:

1. The Claimant sustained compensable industrial injuries on March 11, 2005 while working in and residing in the State of Colorado.

2. Claimant has a cervical radicular myelopathy with secondary Asia D C2 Brown-Sequard spinal cord injury that has left her wheelchair bound with limited awareness of bowel and bladder function.

3. Claimant moved to the State of Montana on or about June 1, 2007. While in Colorado, she was under the care of William Shaw, M.D. who had provided a prescription for home healthcare for eight hours per day.

4. Claimant's home healthcare has been provided by her ex-husband, John Lingenfelter. Mr. Lingenfelter is paid $15.00 per hour to provide these services.

5. After Claimant's move to Montana, she came under the care of Kathryn Borgenicht, M.D. who continued the medications prescribed by Dr. Shaw as well as the home healthcare prescription.

6. When Claimant moved to Montana, the Respondents provided and paid for an assisted living facility at the rate of $35,000.00 per year where Claimant resides at the present time. Claimant requested that, in lieu of the assisted living facility, that the Respondents provide modifications to a home that she owns in Montana. Her ex-husband presently resides in such home.

7. While in Colorado, the Claimant underwent an evaluation at Craig Hospital. At that time Claimant was able to transfer herself and perform many things independently. At that point in time, Craig Hospital was discussing with Claimant that she would like to be able to drive. Craig indicated that the Claimant "does have a 60x80 space which is in the lower level of her home in Montana that has not yet been built out. We discussed the possibility of making the space accessible to her so she could be more independent. Although it is a lower level, it is a "walk out" basement that can be made accessible to her as long as there is a ramp that she can use to get down a small hill to the entrance…Recommendations were made for Pam to pursue getting the lower level of her house in Montana built out so that it is accessible to her." (Respondents' Exhibit pp. 71-72).

8. In addition to providing the Claimant with the assisted living home, Respondents also purchased a pool lift so that the Claimant could attend pool therapy in Montana. In addition, Respondents purchased a van for Claimant in April of 2007 in the amount of $50,847.50 so that her home healthcare individual could drive her to and from medical appointments. Such van is now being utilized by Mr. Lingenfelter to provide such transportation.

9. Since moving to Montana, the Claimant's physical condition has worsened and she has become less functional. In July of 2007, Dr. Borgenicht increased the prescription for home healthcare to twelve hours per day. (Respondents' Exhibit p. 34).

10. In February of 2008, due to Claimant becoming less and less functional, Dr. Borgenicht increased the home healthcare prescription to eighteen hours per day. (Respondents' Exhibit p. 26). All of the home healthcare is being paid to Mr. Lingenfelter. At the time of hearing Claimant indicated that, although payment was being made to Mr. Lingenfelter, some of the care was being provided by her daughter and her granddaughter.

11. At the present time, home healthcare is being provided to the Claimant from 6:00 a.m. to 9:00 p.m. seven days per week and payment is being made to Mr. Lingenfelter in the amount of $81,900.00 per year. (Respondents' Exhibit B).

12. At the time of the Claimant's injury she owned and drove a 2004 Jeep that is presently being used by her daughter since Claimant is unable to drive such vehicle. Claimant does not believe that she will be able to drive in the future due to her medical condition.

13. Evergreen Bozeman Health and Rehabilitation Center is located in Bozeman, Montana where Claimant's treating physicians, Dr. Deming and Dr. Borgenicht are located. The facility provides licensed nursing care twenty-four hours per day, seven days per week and also offers transportation for residents as well as therapy. Testimony was taken from a registered nurse, Aimee Hope, who toured the facility and met with the Director, Stephanie Palmer. Ms. Hope also met with approximately fifteen residents of the facility.

14. If Claimant were to be moved to Evergreen Bozeman Health and Rehabilitation Center, she would be provided with a private room at a cost of approximately $5,493.55 per month or $65,922.60 per year. (Hope Depo. p. 23). This would include the cost of Claimant's meals and twenty-four hour nursing care.

15. Kathryn Borgenicht, M.D. confirmed in her testimony that she has not made any significant changes in the Claimant's treatment regimen since she took over Claimant's care in June of 2007 except for slowly increasing her home healthcare services to eighteen hours per day. However she could not testify as to what type of home healthcare the Claimant required eighteen hours per day because she indicated this would depend on the individual patient. Dr. Borgenicht has never met with Mr. Lingenfelter or spoken to him regarding the home healthcare services he provides. Dr. Borgenicht is unaware if Claimant was still even seeing Dr. Deming. (Borgenicht Depo, p. 9).

16. Dr. Borgenicht does not feel that the Claimant should be moved to Evergreen Nursing Home but should be allowed to move to her home. She testified that if the Claimant were in a "handicapped setting" at her own home that her home healthcare needs with Mr. Lingenfelter would "go down." (Tr. p. 16). The ALJ finds the testimony of Dr. Borgenicht to be credible in that the Evergreen Bozeman Health and Rehabilitation Center is not an appropriate placement for the Claimant.

17. Dr. Borgenicht acknowledged that the Respondents did purchase a pool lift for the Claimant that could be used at either of two handicapped accessible therapy pools in the Bozeman area. Although Dr. Borgenicht indicated that neither of those pools had "worked" she could not testify as to why

those pools did not work. (Borgenicht Depo. p. 17). The ALJ does not find the testimony of Dr. Borgenicht to be persuasive in that the Claimant should be provided with a home pool. Respondents have purchased a pool lift for Claimant to use at the pools in the Bozeman area and the ALJ finds that there are pools available for Claimant's use in her area.

18. According to Dr. Borgenicht, she has not made any input on what the Claimant would need in order to modify her home in Bozeman as this was "not an area of my expertise." She issued a letter indicating that the Claimant need a full basement renovation, an elevator, modification so the second floor is accessible, enclosed pool, enlarging the garage and modifications for access to the yard simply because that was what Claimant had told her were "her needs." (Borgenicht Depo. p. 22). She indicated that this was simply a "quality of life issue." Dr. Borgenicht indicated she was unable to state that Claimant would need access to the yard or the second floor for purposes of medical care. (Borgenicht Depo. p. 23). The ALJ does not find the testimony of Dr. Borgenicht persuasive in that the Claimant needs to have access to the second floor or to the yard. Claimant has failed to show that having access to the upper floor is for purposes of medical necessity or medical treatment.

19. Dr. Borgenicht did testify that, although she had not read the Craig Hospital report she would defer to Craig Hospital's recommendations as to the modifications of Claimant's home. (Borgenicht Depo. p. 37). Finally Dr. Borgenicht indicated that, in her opinion, that it was the carrier's responsibility to modify the "whole home" although she also indicated that she would "rely on what Craig Hospital has recommended…" (Borgenicht Depo. pp. 41-41). Dr. Borgenicht felt that the Claimant should be provided with whatever she wanted to maximize her quality of life and her independence. The ALJ finds that the recommendations from Craig Hospital that the Claimant's basement be modified is persuasive and are sufficient to satisfy the Claimant's medical needs.

20. The Claimant's psychologist, James Deming, Ed.D., is familiar with the Evergreen Bozeman facility as he works at the facility. He indicated that the behavioral intervention that he recommends is carried out by the rehabilitation staff and he finds them to be very receptive to therapeutic direction and to be very capable and conscientious with regard to their application of their skills. (Deming Depo. p. 11). However, he did not feel that the Evergreen Bozeman facility would be appropriate for Claimant because if she were at home "she will feel better." (Deming Depo. p. 20). However, Dr. Deming could not testify as to what modifications at the home would be best for the Claimant. He did testify that if there was a choice of placing the Claimant at the Evergreen Bozeman facility of modifying the lower part of the Claimant's home, that "there is no question that the modification of the lower area of the home would be more appropriate." (Deming Depo. pp. 36-38). The ALJ finds the testimony of Dr. Deming to be persuasive in that the Evergreen Bozeman facility is an inappropriate facility for Claimant.

21. Claimant does not wish to be moved to the Evergreen Bozeman Health and Rehabilitation Center. She has not seen this facility. She wants the carrier to pay for modifications to her total house so that she could be in "familiar surroundings."

22. Claimant acknowledged that in her present condition, she is unable to drive, unable to bathe herself and unable to cook. However, she wanted to have access to the upper level of her house so that she could have access to the kitchen. Although the Claimant has not lived in this house since 2004, she has owned the house since 1979 and her ex-husband lives there at the present time. She wishes to have her ex-husband continue as her home healthcare provider.

23. Claimant acknowledged that there is an unfinished walk out basement that could be modified. Such basement could be made wheelchair accessible. However, she would like to have access to the first floor to have access to the kitchen, living room and dining room.

24. According to the Claimant she feels that she should be provided with an opportunity to access the main floor because this would be "familiar space". It would be "where I would be the happiest." She also indicated that this would provide her with a "warm fuzzy feeling" and decrease her depression. The ALJ has taken into consideration the Claimant's feelings, but finds that Claimant has failed to show that having access to the upper floor is for purposes of medical necessity or medical treatment. Respondents shall modify Claimant's unfinished basement to provide an appropriate living area that is also wheelchair accessible.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

a. The purpose of the Workers' Compensation Act of Colorado (Act) Section 8-40-101, et seq. C.R.S. (2004), 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), supra. Claimant shoulders the burden of proving by a preponderance of the evidence that his injury arose out of the course and scope of his employment. Section 8-41-301 (1), C.R.S. (2004); See City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985). 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 Claimant nor in favor of the rights of Respondents. Section 8-43-201, supra.

b. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses' 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 interests. See Prudential Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. Section 8-43-201, supra. The ALJs 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. ICAO, 5 P.3d 385 (Colo. App. 2000).

c. The Claimant bears the burden of proof to establish her right to specific medical benefits by a preponderance of the relevant evidence. Section 8-43-201, C.R.S. 2008; see *Valley Tree Services v. Jimenez*, 78 P.2d 658 (Colo. App. 1990); *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); *Upchurch v. Industrial Commission*, 703 P.2d 628 (Colo. App. 1985).

d. Section 8-42-101(1)(a) provides that an insurer must provide such medical treatment, supplies and apparatus as may be reasonably needed to cure and relieve the effects of the injury. To be a compensable medical benefit, the services must be medical in nature or incidental to obtaining such medical or nursing treatment. *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). Under the Colorado Workers' Compensation Act, the question of whether a proposed medical expense is reasonable and necessary is one of fact or determination by the Administrative Law Judge. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). Again, the question of whether the services in question are medically necessary is one of fact for determination by the Administrative Law Judge. *Sue Track v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995); *Atencio v. Quality Care, Inc.*, 791 P.2d 7 (Colo. App. 1990).

e. The ALJ finds that the Claimant is clearly in need of the home healthcare services which the Respondents are paying for at the present time at the rate of $81,900.00 per year. In addition, at the time home modifications were originally discussed when the Claimant moved to Montana, she only required services eight hours per day and the purpose of moving her into her own home was to make her more functional. Although that situation has changed, the ALJ finds that it would be inappropriate for Claimant to be placed at the Evergreen Bozeman Health and Rehabilitation Center. The ALJ relies upon the testimony given, not only from the Claimant, but also from Dr. Deming and Dr. Borgenicht in finding that this would not be an appropriate placement for the Claimant. The ALJ finds that Respondents are responsible for providing home modifications so that the Claimant can move into her home in the State of Montana. In addition, the ALJ accepts the testimony of Dr. Borgenicht that the move to the Claimant's

home will decrease the amount of home healthcare being required and will therefore lessen the rate being paid to Mr. Lingenfelter.

f. Although the ALJ finds that the Respondents are responsible for modification of the Claimant's home, the ALJ does not find that the Claimant should be entitled to an elevator, swimming pool and access to the upper part of the home. It is clear that the prescription from Dr. Borgenicht was based simply on what Claimant requested her to order. Dr. Borgenicht has not even been to Claimant's home. In addition, the ALJ relies upon the report of Craig Rehabilitation Hospital recommending that the basement of the Claimant's home be modified.

g. The ALJ has taken into consideration the Claimant's testimony that she would feel better if she were allowed to have access to the upper part of the house. However, there was insufficient persuasive evidence presented by the Claimant that there is any medical purpose or medical necessity in requiring the Respondents to modify the upper floor of the house. The case law is clear that, in order to be a compensable medical benefit, medical treatment or service must be medical in nature or incidental to obtaining such medical or nursing treatment. The ALJ finds that Claimant has failed to show that having access to the upper floor is for purposes of medical necessity or medical treatment.

h. The ALJ also finds that the Claimant's request for a home pool is denied. Respondents purchased a pool lift after Claimant moved to Montana so that she could attend pool therapy in Montana. Claimant has failed to sustain her burden of proof in showing that she is entitled to have a pool built at her home.

i. The ALJ finds that the Respondents' request for credit against future benefits due to the purchase of a wheelchair accessible van in the amount of $50,847.50 is denied. Respondents have failed to provide any legal basis for such request and the purchase of the van was a necessary medical apparatus for which Respondents were responsible.

ORDER

It is therefore ordered that:

A. Respondents request for a credit against future benefits due to the purchase of a wheelchair accessible van in the amount of $50,847.50 is denied.

B. The Evergreen Bozeman Health and Rehabilitation Center is not an appropriate placement for Claimant. Respondents shall modify Claimant's unfinished basement to provide an appropriate living area that is also wheelchair accessible, all of which is outlined in the November 21, 2006 Craig Hospital Group

Evaluation “recommendations” section and Craig Hospital “Accessible Living” document.

C. Claimant’s request that her entire house be renovated for her access and use is denied.

D. Claimant’s request for a home pool is denied.

E. Any and all issues not determined herein are reserved for future decision.

DATED: February 5, 2009

Barbara S. Henk
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-688-075

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER UPON REMAND

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

No further hearings in the above-captioned matter. On December 18, 2008, the Industrial Claim Appeals Office (ICAO) issued an Order of Remand in the above-captioned matter, affirming the ALJ’s Corrected Order of August 14, 2008 as to “change of physician,” and remanding as to the determination that

Respondents were liable for all of the Claimant's right upper extremity (RUE) conditions, plus this determination's role in the ALJ's decision to find the Claimant permanently and totally disabled PTD). Mandate was issued and the remand was referred to the ALJ on January 22, 2009.

After the issuance of the Full Findings of Fact, Conclusions of Law and Order, dated July 31, 2008, Claimant filed a Motion for Corrected Order on August 8, 2008, indicating that the Order portion of the decision did not reflect an order granting a change of physician to David Yamamoto, M.D., as requested by the Claimant. The Motion is well taken and the herein decision is corrected accordingly.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 13, 2008, in Denver, Colorado. The hearing was digitally recorded (reference: 6/13/08, Courtroom 4, beginning at 8:32 AM, and ending at 4:48 PM). The official Spanish/English interpreters were Maria Fernanda Bravo and Ismael Mendoza. A written transcript of the hearing was filed on June 27, 2008. After the filing of briefs on Respondents' Petition to Review, the ALJ referred ther matter to ICAO.

The ALJ has reviewed the record as constituted for purposes of complying with the remand, and hereby determines that additional evidence will not be required. A record review, including a review of the transcripts of the hearing will suffice. Therefore, the ALJ hereby issues the following decision on remand.

ISSUES

The issues to be determined on remand concern the extent of Claimant's RUE injuries and their bearing on Respondents' liability therefore; and, whether Claimant is permanent and totally disabled (PTD) as a result thereof; or, in the alternative, permanent partial disability (PPD) benefits; causation and extent of Claimant's RUE condition; and, medical benefits (post maximum medical improvement (MMI) [*Grover* medical benefits], attributable to the admitted injury. Claimant bears the burden of proof, by a preponderance of the evidence, on these issues. Respondents raised the affirmative defense of apportionment for which they bear the burden of proof by preponderant evidence.

FINDINGS OF FACT UPON REMAND

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary

1. On November 19, 2004, Claimant sustained admitted injuries during the course and scope of her employment when she tripped over a cart while holding a tray of bread.

2. On November 23, 2004, Greg Smith, D.O., of OccMed Colorado saw the Claimant. He became the Claimant's authorized treating physician (ATP). Claimant's chief complaint was right knee pain, right wrist pain, and right forearm pain. Dr. Smith noted a history of Claimant lifting pans and tripping over a small cart. According to the Claimant, she fell forward and struck her right knee and her right upper arm on the floor. Dr. Smith assessed Claimant as having right knee contusion, right wrist strain and right forearm strain. At this time, Dr. Smith noted that Claimant was able to work full duty.

3. In a progress note, dated December 13, 2004, Dr. Smith noted: "She (Claimant) does state that she is able to work full duty at this point in time." On January 10, 2005, Dr. Smith noted that Claimant was "essentially working full duty…."

4. On March 28, 2005, Dr. Smith placed Claimant at MMI, and discharged her from care with no permanent impairment. Dr. Smith noted: "the pain is minimal in both her knee and her elbow. She is able to perform her job duties without difficulty."

5. An MRI (magnetic resonance imaging) of Claimant's right knee, taken on May 8, 2006, revealed tearing of the posterior horn of the medial meniscus with inferior articular communication and fragmentation of the posterior peripheral meniscocapsular margin attachment. There was also fibrosynovial proliferation along the medial joint line deep to the MCL, and joint effusion. The evidence of Pedro Diaz, M.D., that this tear was triggered by the compensable injury of November 19, 2004 is not persuasive.

6. On May 18, 2006, George Schakaraschwili, M.D., performed electrodiagnostic testing of Claimant's right upper extremity (RUE). Dr. Schakaraschwili reported that it was an abnormal study. There was electrophysiologic evidence of a median neuropathy at the right wrist (*i.e.*, carpal tunnel syndrome), sensory more than motor, demyelinating. The DIME physician, Allison Fall, M.D., was of the opinion that Claimant's carpal tunnel syndrome was **not** work related, "historically or by the mechanism of injury." There is no persuasive evidence that it is highly probable and free from serious and substantial doubt that Dr. Fall's opinion in this regard is erroneous.

7. On May 23, 2006, Dr. Smith reported placing Claimant in a splint for the carpal tunnel syndrome, and he also prescribed occupational therapy for the carpal tunnel syndrome. Dr. Smith also noted that he ordered a proper epicondylar splint for Claimant.

8. On August 24, 2006, Mark Failinger, M.D., reported performing a right knee arthroscopic significant medial meniscectomy, and chondroplasty lateral tibial plateau.

9. On August 31, 2006, Dr. Failinger stated "She [Claimant] had a fairly significant meniscus resection, so, she has some increased risk for arthritis. She knows that over the years she may develop arthritis, but, hopefully, not."

10. On September 19, 2006, Dr. Smith noted that he discussed Claimant's right wrist with Claimant. Claimant was having occasional pain, especially when she was crutching. Dr. Smith noted that Claimant was complaining that her left knee was bothering her. He stated that this was most likely due to overuse putting most of the pressure on the left knee instead of the right knee. Dr. Fall, the DIME physician, indicated: "In my opinion, there is no indication of work-related injury to the left knee, bilateral shoulders, left upper extremity, mid-back, peripheral nervous system, sleep disorder, or depression. Carpal tunnel syndrome is not related to the fall she sustained historically or by mechanism of injury."

11. On October 3, 2006, Dr. Smith noted that Claimant's right arm was hurting from her elbow up into her shoulder. He noted that Claimant was still crutching for two to three hours per day. He stated, "I feel that she is putting excessive weight in this region and that is why she is still having difficulty." Dr. Smith reported that Claimant had tenderness in the muscle belly of the triceps and biceps. He reiterated that he felt this was secondary to her crutching and should resolve as her crutching diminished.

12. On November 22, 2006, Dr. Failinger recommended a cortisone injection for the knee. Dr. Failinger reported performing the injection. He stated, "I am not sure that there is a lot else to offer her, other than possibly viscosupplementation."

13. On January 18, 2007, Claimant participated in a functional capacity evaluation (FCE) at OccMed, upon referral from Dr. Smith. The results of the FCE indicated that Claimant could work at the sedentary level. Claimant was unable to demonstrate kneeling or squatting for safe ground level lifting. The FCE determined that Claimant could lift 10 pounds from knuckle to shoulder, 10 pounds from shoulder to overhead, and 5 pounds waist height lifting. Claimant could push and pull 15 pounds, bilateral carry 10 pounds, right carry 3 pounds, and left carry 5 pounds. Claimant was unable to lift any weight frequently. Claimant was able to stand/walk in 10 to 15 minute interval on an occasional basis. Claimant exhibited impaired manipulative abilities with her right hand. Based on the effort profile used, Claimant put forth consistent effort; therefore, the values in the report were to be considered her maximal capabilities. Regardless of the causal relationship of Claimant's multi-faceted condition, the FCE limits the Claimant's work to "sedentary." Overall, the FCE determined that

Claimant put forth consistent effort and there were no indications of any failure to cooperate on Claimant's part. The FCE corroborates Claimant's testimony about her present inabilities.

14. On January 25, 2007, J. Raschbacher, M.D., of OccMed placed Claimant at MMI, with permanent restrictions. Claimant was advised to spend most of the time seated, avoid lifting from a squatting position, avoid crawling, kneeling, and squatting, and limit climbing to one-half hour a day. The ALJ infers and finds that these restrictions flowed from the Claimant's admitted right knee injury. Claimant specifically requested that Dr. Raschbacher address her increasing complaints related to her lower extremity injury without result. Regardless of the causal relationship of Claimant's multi-faceted condition, complaints and restrictions, the fact remains that Dr. Raschbacher placed significant restrictions on the Claimant.

15. On February 23, 2007, the Employer sent Claimant a letter stating, "As I informed you, unfortunately, you are unable to return to your position within the Food and Nutrition Services due to your permanent work restrictions and the inability to meet the essential functions of your job as a Food Service Worker." The ALJ finds that the Employer's determination that Claimant could not do her former job outweighs other opinions in this regard, and it establishes that Claimant could no longer do her regular job.

16. An MRI (magnetic resonance imaging) of Claimant's right elbow and wrist, taken on February 26, 2007, revealed lateral epicondylitis with changes in the common extensor tendon.

17. On March 1, 2007, Pedro J. Díaz, M.D., stated the opinion that Dr. Smith's management of Claimant's right knee condition was not up to Colorado medical community standards. Dr. Díaz was of the opinion that it was more than medically probable that Claimant's carpal tunnel syndrome findings and dysfunction are 100% related to her November 19, 2004 fall (the admitted compensable injury herein). Dr. Diaz's opinion in this regard does not prove that DIME Dr. Fall's opinion that Claimant's carpal tunnel syndrome was not work related was highly improbable. Dr. Díaz also was of the opinion that Claimant's right arm neuropathy, starting at the supraclavicular fossae, down her arm, and including the aforementioned median nerve inflammation and dysfunction, is 100% related to her November 19, 2004 fall. Dr. Díaz was of the opinion that Claimant's rotator cuff inflammation, biceps tendinosis at its labral attachment, and her acromioclavicular joint pain and inflammation are consistent with her mechanism of injury, and are 100% related to her November 19, 2004 fall. Dr. Díaz also stated the opinion that Claimant sustained an injury to her right wrist and that it is 100% related to her November 19, 2004 fall. Dr. Díaz was of the opinion that Claimant's relationship with Drs. Smith, Primack and Raschbacher had deteriorated beyond repair, and he strongly advised against sending Claimant back to them for continued treatment. Dr. Díaz recommended a custom

medial compartment unloading brace. He also noted that due to the combination of the delay in appropriate diagnosis, and the chronic knee pain, Claimant's right quadriceps had become very deconditioned, and would require a long-term rehab program. Dr. Díaz stated that Claimant should be sent to a physical therapy center experienced in right shoulder girdle myofascial spasm and thoracic outlet tightness. He also stated that chiropractic manipulation of the first rib and active release techniques for the scapulae were indicated. Dr. Díaz stated that once the brachial plexus and shoulder problems were addressed, Claimant's wrist median neuropathy had a good chance of resolving. Dr. Díaz stated that Claimant should be referred to an orthopedist for her upper extremity problems. Dr. Díaz noted that Claimant would need an assessment of her ACJ, and she should have bilateral ACJ X-rays both with and without weight bearing. An ACJ injection for diagnostic and therapeutic purposes is indicated. Dr. Díaz also stated that Claimant could be a candidate for a distal clavicle resection. Dr. Díaz noted that Claimant had RTC pathology, and may benefit from an MRA. He was of the opinion that Claimant's left elbow lateral epicondylitis should similarly have a therapeutic injection, and she should also be referred for some instrument assisted soft mobilization. None of Dr. Diaz's opinions establish that it is highly probable and free from serious and substantial doubt that Dr. Fall's opinions in this regard were erroneous. Dr. Diaz's opinions support the proposition that Claimant is entitled to a change of physician.

18. Concerning Claimant's right wrist, Dr. Díaz stated that she should be sent for an MRA to visualize all soft tissue structures. Dr. Díaz also felt that repeating the upper extremity EMG was indicated. He stated that the orthopedist would likely decide on a trial of a carpal tunnel cortisone injection. Dr. Díaz felt that Claimant's adjustment disorder deserved treatment. He recommended a referral to a Spanish-speaking psychologist. Post MMI, Dr. Díaz recommended physical therapy, chiropractic manipulation for Claimant's shoulder girdle and use of medications for 5 years. Dr. Díaz determined that Claimant had 6% upper extremity impairment due to right wrist range of motion deficits. He also stated the opinion that this did not accurately represent her level of dysfunction, so he assigned her a rating under the crepitus section of 12% upper extremity impairment. He determined that Claimant had 9% upper extremity impairment due to range of motion deficits of the right shoulder. Dr. Díaz stated that Claimant's upper extremity impairments should be converted to whole person for several reasons: Suspected labral pathology; acromioclavicular joint pathology; shoulder girdle myofascial spasm; cervical accessory muscle spasm; thoracic outlet impingement of the brachial plexus that is affecting her median nerve; and ulnar nerve. The total 24% upper extremity impairment was then converted to 14% whole person impairment. Dr. Díaz assigned 11% lower extremity impairment for range of motion deficits of Claimant's knee, 10% for her medial meniscus, and 5% for the lateral meniscus, for a total of 24% lower extremity impairment, or 10% as a whole person. Combining the arm rating of 14% with 10% of the leg equaled 23% whole person impairment. For the reasons stated in paragraph 17 above, the ALJ finds that all of Dr. Diaz's treatment

recommendations, with the exception of treatment for the right knee and the right elbow epicondylitis, are not causally related to the compensable injury herein.

19. Without objection by the Claimant, Respondents produced evidence that Dr. Diaz was suspended from practicing medicine on June 22, 2007, three months after he expressed his opinion concerning Claimant's condition, having been convicted of **misdemeanor** sexual assault for engaging in an inappropriate relationship with a 16-year old. Dr. Diaz had been a Level 2 accredited physician. Without producing any credible evidence that there was a nexus between Dr. Diaz's abilities as a doctor, Respondents implied that his conviction, plus speculative statements of the Inquiry Panel of the Medical Board (not the Hearings Panel) that the doctor's abuse of alcohol and marijuana and his psychiatric disorders **may** (not did) have rendered him unable to perform medical services with reasonable skill and safety. Respondents produced no credible evidence that Dr. Diaz was unable to perform medical services with reasonable skill and safety on March 1, 2007 or beforehand. Indeed, the gist of Respondents' argument is that because Dr. Diaz "is not a good person," his medical observations of the Claimant on March 1, 2007, and beforehand have been discredited and his opinions should be disregarded. This argument is not well taken. The ALJ finds, however, that Dr. Diaz's opinions are not sufficient to overcome the DIME physician's opinions on lack of causal relatedness of all of the Claimant's medical conditions with the exception of the right knee and the right elbow epicondylitis.

20. On April 4, 2007, Scott J. Primack, D.O., noted that Claimant underwent a sonographic analysis. He stated, "In reference to the right elbow, there was evidence of lateral epicondylitis. This would be consistent with an acute injury." Dr. Primack also stated, "My decisions regarding causality are based upon the underlying pathology from the ultrasound. I can state my opinions to within a reasonable degree of medical probability.

Causality and the DIME

21. On July 12, 2007, Allison Fall, M.D., Division Independent Medical Examiner (DIME), determined that Claimant had 11% lower extremity impairment for range of motion losses of the right knee. Dr. Fall also assigned 5% lower extremity impairment for the significant medial meniscectomy. Combining 11% with 5% yielded a total lower extremity impairment of 15%, or 6% whole person impairment. For the right elbow, Dr. Fall determined that Claimant had 5% upper extremity impairment, or 3% whole person impairment. The combined impairment was 9% whole person impairment. Dr. Fall agreed with a repeat left knee MRI as recommended by Dr. Failinger, and depending upon the results the possibility of another surgery would mean that Claimant was no longer at MMI. Dr. Fall stated that if the MRI did not reveal a surgical indication, the Claimant

could benefit from a cortisone injection of the right knee, and also a right medial epicondylar injection under maintenance. Dr. Fall also recommended a Heelbo sleeve to protect the right elbow. Dr. Fall reported that Claimant's permanent restrictions were no prolonged squatting, no kneeling on the right knee, and no climbing of ladders.

22. Dr. Fall indicated: "In my opinion, there is no indication of work-related injury to the left knee, bilateral shoulders, left upper extremity, mid-back, peripheral nervous system, sleep disorder, or depression. Carpal tunnel syndrome is not related to the fall she sustained historically or by mechanism of injury." Dr. Fall was of the opinion that Claimant's work-related RUE condition was restricted to medial epicondylitis. Because of Claimant's persistent complaints and limitations, Dr. Fall rated the Claimant's medial epicondylitis using a cumulative trauma disorder matrix. Dr. Fall did not restrict Claimant's activities with regard to either upper extremity. Other physicians did restrict upper extremity activity. In this regard, Dr. Fall's opinion with respect to medical restrictions is on a level playing field, and the ALJ finds that the medical opinions restricting upper extremity activities are more persuasive and outweigh Dr. Fall's opinions in this regard by preponderant evidence. Accepting Dr. Fall's opinions as facially accurate, they do not eliminate the fact that Claimant is incapable of earning wages in the competitive labor market on a reasonably sustainable basis, because of the injuries that Claimant sustained on November 19, 2004, under-laid and/or overlaid by Claimant's overall physical condition. None of Dr. Fall's opinions on causal relatedness of Claimant's medical conditions, other than the right epicondylitis, have been overcome by clear and convincing evidence.

23. On August 17, 2007, Respondents filed a Final Admission of Liability (FAL), admitting for an MMI date of January 25, 2007;15% impairment of the [right] lower extremity, and 5% impairment of the [right] upper extremity. Based on the totality of the evidence, the ALJ infers and finds that Respondents' intended to admit for the right elbow epicondylitis in admitting for a percentage of the RUE because Respondents based their FAL on the DIME opinions of Dr. Fall, and the ALJ finds that Respondents admitted for the right epicondylitis. Respondents also admitted for limited maintenance medical benefits; specifically, right medial epicondylar injection and a Heelbo sleeve to protect the elbow, and an average weekly wage of $245.69 and temporary total disability (TTD) benefits of $164.46 per week though January 24, 2007. Based on the totality of the evidence, it is clear that Respondents' FAL was limited to the right medial epicondylitis opinion of the DIME physician.

24. Because the original decision of the ALJ erroneously attributed all of Claimant's RUE problems to the admitted compensable injury of November 19, 2004, Respondents characterize the finding of PTD as utilizing an analysis without foundation amounting to a "house of cards." After remand, the ALJ determines that the more appropriate analysis considers the medical impairments of the right knee and the right elbow epicondylitis in conjunction with

all of the Claimant's innate, non-work related physical and mental conditions as a significant contributing straw leading to the "breaking of the "camel's back," *i.e.,* rendering the Claimant PTD.

25. On September 25, 2007, Dr. Raschbacher reported Claimant's permanent restrictions as no squatting, no crawling or kneeling; limit climbing to ½ hour per day; spend most the day seated; avoid lifting from squatting position. Dr. Raschbacher stated that Claimant's present impairment was due to her work-related injury.

26. In his deposition, taken on November 29, 2007, Dr. Raschbacher testified that the MRI showing lateral epicondylitis in the right elbow was consistent with the fact that the Claimant had complained of lateral pain in the right elbow from the beginning.

27. Dr. Raschbacher stated that the lateral epicondylitis in itself can cause pain and loss of function. Dr. Raschbacher was of the opinion that assuming Dr. Fall is correct in her causation determination that the lateral epicondylitis is work-related and that it causes loss of function, it would be appropriate to limit that Claimant with regard to activities of that upper extremity.

28. Dr. Raschbacher stated that reasonable restrictions for Claimant's upper extremity would be no repetitive use of the right hand, no sustained, frequent or continual gripping, grasping, squeezing, lifting, or pinching. All of the above should be limited to occasional.

29. Dr. Raschbacher was of the opinion that cortisone injections can help with meniscal pain, and that he would leave that to the discretion of the orthopedic surgeon and the patient. Dr. Raschbacher also stated that the injections can also help with the epicondylitis of the elbow. Dr. Raschbacher was of the opinion that if the epicondylitis is related to this work injury, which it has been found to be, a cortisone injection would absolutely be a reasonable treatment for epicondylitis. This opinion supports the Claimant's need for post-MMI medical maintenance treatment. Dr. Raschbacher stated that if Claimant was having medial tear pain, then unloading that medial compartment might improve pain from that source, and that unloading brace would not be unreasonable.

30. On March 14, 2008, Dr. Raschbacher noted that he had dispensed a Heelbo sleeve for Claimant to use for her right elbow.

31. On October 8, 2007, an MRI of Claimant's right knee showed "early degenerative change patellofemoral joint medial facet. There was also some residual irregularity of the body and posterior horn. Definite retear could not be diagnosed without intraarticular gadolinium. "

32. An MRI of Claimant's right elbow, taken on April 7, 2008, revealed lateral epicondylitis.

33. On October 15, 2007, Dr. Failinger prescribed a medial compartment unloading brace and right knee orthovist sleeve. Dr. Failinger also recommended viscosupplementation.

34. On January 7, 2008, Dr. Failinger stated that Claimant could try viscosupplementation and if that did not work, the options were very limited. He noted that a few patients consider a meniscal transplant but at Claimant's age, he could not recommend it, but she could get more options. On January 16, 2008, Dr. Failinger reported performing the first Orthovisc injection. On January 23, 2008, he reported performing the second Orthovisc injection. On January 30, 2008, he injected the final vial of Orthovisc.

35. On February 27, 2007, Dr. Failinger made a referral to Wayne Gershoff, M.D., to consider possible surgery.

36. On April 11, 2008, Dr. Failinger again referred Claimant to Dr. Gershoff and also to Hand Associates for a hand surgery specialist.

Change of Physician

37. Claimant stated at hearing that she was not pleased with Dr. Raschbacher, that he ignored her and she is requesting a change of physician to David Yamamoto, M.D., a Level II accredited physician by the Division of Workers' Compensation (DOWC). The ALJ finds that there is substantial evidence that Claimant did not trust her previous ATPs. Respondents offered no other alternative than the previous treating physicians. Claimant requested a change to a specific physician whom she trusts, Dr. Yamamoto. The ALJ infers and finds that faith in the cure is a significant component of the cure, and lack of faith therein hinders the cure. Therefore, Claimant has established, by preponderant evidence that a change of physician to Dr. Yamamoto is warranted.

38. Claimant has continued to require medications for pain related to her work injuries after MMI, including ibuprofen and acetaminophen. Further, Dr. Failinger specifically made two referrals. One referral was to Dr. Gershoff, and the second referral was to a hand specialist at Hand Surgery Associates.

The Claimant

39. On April 16, 2008, the deposition of Derrick Franks, Claimant's supervisor at Montbello High School, was taken. Franks testified that he met Claimant when he started at Montbello High School in the fall of 2005. He

testified that in the fall of 2005, when it began getting cold, he noticed Claimant limping and in discomfort. He also testified that he actively restricted Claimant's duties if she looked like she was in discomfort or distress. He further testified that with Claimant's permanent restrictions of no squatting, no crawling or kneeling, no climbing more than on half-hour per day, spend most of the day seated, and avoid lifting from the squatting position; Claimant would not be able to perform any job in a DPS kitchen, nor any kitchen in which he has been a supervisor. The ALJ finds that Franks' testimony concerning Claimant's lack of ability to perform any job duties at DPS corroborates the severity of the Claimant's present complaints.

40. Claimant made a job search that included approximately 200 job contacts that required the assistance of her daughter-in-law and her husband to accomplish. Without persuasive support, Respondents impliedly argue that Claimant's job search was not "credible." Claimant's desire to be productive does not render her capable of carrying out work on a reasonably sustainable basis. Vocational Rehabilitation Counselor Lee White was persuasive and credible in this regard. Vocational Counselor and Evaluator Donna Ferris was not persuasive or credible in this regard. Respondents failed to present persuasive evidence that Claimant did **not** conduct a **credible** job search, despite Respondents' arguments that Claimant told potential employers of restrictions that were never actually placed on her and that Claimant did not really intend to secure employment, an argumentative allegation without any visible means of support.

41. It is compelling that Claimant wanted to continue working at DPS and was essentially told that DPS had nothing for her. After her separation from DPS, she has tried to find work to no avail. The ALJ infers and finds that Claimant's lay testimony is highly credible. Respondents did not impeach her testimony at the hearing by presenting persuasive evidence that Claimant's job search was not credible. Respondents, moreover, attempted to impeach her testimony, for the first time, in their appellate brief by arguing that she did not make a credible job search.

Vocational Opinions

42. On November 27, 2007, Lee White, vocational rehabilitation counselor and evaluator, noted that Claimant was 50 years old. She was able to attend school into the 6th grade while growing up in Mexico. Spanish language basic skills testing revealed a grade school level of Spanish literacy, and math skills that were basically limited to addition and subtraction. White noted that Claimant has a negligible understanding of spoken English. White reported that Claimant does not have computer skills. White was of the opinion that Claimant is an extremely poor candidate for retraining to a new occupation, and that is not a realistic expectation. White noted that Claimant has always used her ability to

earn a living by manual labor. Minus her ability to labor in a sustained manner, Claimant does not have return to work options. White stated that it is not at all realistic to consider that Claimant has some type of remote employment alternative. White was of the opinion that Claimant is not employable in any type of clerical, security, or cashiering capacity. White provided a credible and convincing report that, given the medical restrictions both for the right knee and the upper extremity, there are no jobs Claimant would be able to locate, obtain and retain because there are other factors which impede her, including significant problems with her right upper extremity, whether work-related or not. White concluded that Claimant is in all likelihood permanently and totally disabled. The ALJ finds White's opinion consistent with the totality of the evidence, well researched and highly persuasive and credible. Coupled with Claimant's credible testimony about her abilities and inabilities plus the human factors catalogued by White, the ALJ finds that Claimant is not employable in the competitive job market on a reasonably sustainable basis. Further, the ALJ infers and finds that White's opinion supports the proposition that Claimant is incapable of earning wages in the competitive labor market on a reasonably sustainable basis.

43. Donna Ferris, vocational counselor and evaluator, testified on behalf of the Respondents. She relied on Dr. Fall's restrictions of no kneeling, squatting or crawling. According to Ferris, these were the most **reliable** restrictions. Ferris did not explain why they were the most reliable restrictions, other than implying that a DIME physician's restrictions had more dignity than other restrictions. This simply is not so. A DIME's restrictions are on a level playing field with other physician's restrictions. There was no persuasive evidence that Ferris possessed the medical expertise to make judgments, and express opinions, on the relative reliability of differing medical opinions concerning restrictions. Indeed, it appears that Ferris' underlying assumptions were based, in great part, on the least restrictive medical restrictions. Her labor market research, which was general, revealed that Claimant, based on Dr. Fall's restrictions, had cashiering skills, could work in the fast food industry. Also, Ferris would not rule out **light** janitorial work or **light** production work. Ferris did not persuasively elaborate on the availability of **light** janitorial or production work in the competitive labor market, nor did she persuasively explain whether these so called **light** janitorial or production jobs were not "sheltered" or specially accommodated jobs. Neither did Ferris persuasively address the issue of whether Claimant could find employment and pursue it on a **reasonably sustainable basis**. Ferris was of the opinion that Claimant was capable of earning wages and, therefore, not permanently and totally disabled. The ALJ finds Ferris' opinions unpersuasive. Moreover, the ALJ finds the opinions of Lee White more persuasive than those of Donna Ferris.

44. Claimant and her husband testified that Claimant has difficulty with walking and completing tasks around the house. She cannot perform the kinds of jobs for which she has experience. Claimant was offered a

job counting coins but the work would have been difficult because of her right knee problems and she would have had trouble driving to the work site. She was unable to accept the job offer because it was far from her home and she has difficulty driving. The job was near Golden, Colorado. Claimant lives in northeast Denver. After five to ten minutes of driving, she has to ask someone to take over for her due to the pain. Claimant credibly testified, "I have a hard time driving, because I have trouble using – well, using the pedal and the gas and the brake, and trouble with my arm using the steering wheel also, so I'm worried about causing or having an accident. I cannot drive far." The ALJ finds the Claimant's testimony in this regard highly persuasive and un-impeached. Also, there is no persuasive evidence that Claimant could have done this job on a reasonably sustainable basis. Nevertheless, Respondents argue that because Claimant did not accept the coin counting job, she is barred from receiving permanent total disability benefits. As found below, Respondents raised this affirmative defense for the first time in their answer brief, filed July 29, 2008. Under the totality of the evidence, this argument is without merit. Claimant cannot read or write English and has limited understanding of English. Her daughter-in-law taught Claimant to fill out any employment applications and when Claimant was not able to complete them, she would have her husband help her with the form

45. Respondents did not endorse the affirmative defense of "refusal of offer of employment" in their Response to Application for Hearing, or at the commencement of the hearing. Respondents raised this affirmative defense for the first time in their answer brief, filed July 29, 2008. There was no persuasive evidence that Claimant refused an offer of competitive employment that she could perform on a reasonably sustainable basis.

46. Claimant presented at hearing in a straightforward and credible manner. Her testimony was internally consistent and it was consistent with the medical histories she had given treatment providers, plus with the totality of the evidence. The medical providers opinions concerning Claimant's restrictions are essentially in agreement and undisputed. The ALJ places considerable weight on the Claimant's testimony with regard to her abilities and inabilities.

47. MMI was not designated as an issue. The admitted MMI date is January 25, 2007. Therefore, the ALJ finds that Claimant reached MMI on January 25, 2007.

48. AWW was not designated as an issue. The admitted AWW is $245.69, which the ALJ finds to be the Claimant's AWW. This AWW yields a PTD rate of $164.46 per week, and the ALJ so finds.

49. Although the Claimant suffers from non-work related debilitating conditions, her admitted injury of November 19, 2004 was a significant causative factor of Claimant's inability to earn wages. The Claimant's pre-existing mental and/or physical condition, combine with the admitted injury herein to render

Claimant unemployable. Claimant has proven, by a preponderance of the evidence, that she is incapable of earning wages in the competitive labor market on a reasonably sustainable basis and is, therefore, permanently and totally disabled. She has proven by preponderant evidence that her medial epicondylitis in the RUE and her right knee injury are causally related to the compensable event of November 19, 2004. Because Claimant's RUE and RLE were rated for PPD by the DIME physician, these conditions cannot be said to be insignificant. Indeed, the ALJ infers and finds that they significantly contribute to Claimant's inability to earn wages. Her other non-work related conditions combined to make her unable to maintain employment.

50. Claimant has also proven by preponderant evidence that she is in need of post-MMI medical treatment of the RUE medial epicondylitis and the right knee to maintain her stabilized plateau of MMI, as supported by the opinion of Dr. Raschbacher and DIME Dr. Fall, who recommend a right medial epicondylar cortisone injection in a maintenance evlaluation of March 14, 2008. Claimant's confidence in, and relationship with, Drs. Smith, Failinger, Primack and Raschbacher, however, is irretrievably broken and the best interests of all would be served by a change of physicians at this time. Respondents have not suggested another physician to whom Claimant's post-MMI care may be transferred. Claimant has suggested Dr. Yamamoto, a Level 2 accredited physician. Therefore, a change to Dr. Yamamoto is factually warranted. Claimant has further proven by preponderant evidence that she has sustained a serious, permanent bodily disfigurement to her right knee, consisting of a swollen kneecap and keloid-like scarring about the knee, which is plainly visible to public view.

Apportionment

51. Respondents failed to present any persuasive evidence that a prior disability—defined as an alteration of a person's ability to meet personal, social or occupational demands—was a "contributing factor" to her present disability and, therefore, apportionment is not warranted. Therefore, Respondents failed to prove their affirmative defense of apportionment by preponderant evidence.

Ultimate Findings

52. Respondents argue, by implication, that PTD liability should only attach to the discrete, causally related compensable injuries of November 19, 2004, *i.e.,* the injuries to the right knee and the right elbow epicondylitis, without regard to the Claimant's overall condition even if her innate conditions render her unemployable. The ALJ finds this intellectual construct in derogation of the "full responsibility" rule. There is no persuasive evidence that Claimant (subsequent to the admitted compensable injury herein) sustained new intervening, injuries or occupational diseases that contributed to her present overall medical condition comprised of the right knee condition, the right elbow epicondylitis and non-work

related conditions to other body parts and the Claimant's mental coping with the overall pain flowing therefrom. Indeed, Claimant was able to work prior to her admitted injury and her Employer's determined that there was no job the Claimant could do for the Employer in February 2007. The ALJ infers and finds that Claimant's right knee and right epicondylitis injuries of November 19, 2004, coupled with her underlying non-work related mental predisposition to multi-faceted pain to other body parts have combined to render her unemployable in the competitive labor market.

53. The Claimant has proven, by a preponderance of the evidence that she is incapable of earning wages in the competitive labor market on a reasonably sustainable basis. Therefore, the Claimant has proven that she is permanently and totally disabled.

54. Claimant has proven, by a preponderance of the evidence that a change of authorized treating physician to Dr. Yamamoto is warranted.

55. Respondents have failed to prove by preponderant evidence that apportionment is warranted.

CONCLUSIONS OF LAW UPON REMAND

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker 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 Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (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). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a 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); COLORADO JURY INSTRUCTIONS, CIVIL, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The medical opinions on Claimant's medical restrictions are essentially un-contradicted. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for*

Court or Jury, 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the evidence of the Claimant, Lee White, the Claimant's treating physicians, and the FCE evaluator, concerning medical restrictions is credible and it supports the fact that Claimant is PTD. As found, the Claimant's present complaints of pain and descriptions of her overall physical condition are highly credible and support her inability to earn wages. As further found, she is in need of post-MMI medical treatment for the RUE medial epicondylitis; and, a change of physicians to Dr. Yamamoto is warranted.

Burden of Proof

b. A DIME opinion on causal relatedness of a condition to a permanent impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 86 (Colo. App. 2002). As found, Dr. Fall's opinion that the right knee and the right elbow epicondyltis are the only conditions of the Claimant that are causally related to the November 19, 2004 admitted injury has not been overcome by clear and convincing evidence.

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing all aspects of her claim and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Claimant has sustained her burden of proof that she is permanently and totally disabled because she is unable to earn any wages in the same or any other employment because of a combination of the admitted injury herein, which has significantly contributed to her PTD, and her innate non-work related mental and physical conditions. Further, Claimant has proven, through the opinion of DIME Dr. Fall, that the medial epicondylitis of the RUE is causally related to the admitted compensable injury of November 19, 2004; that she continues to require medical treatment therefore, that she is entitled to a change of physician to Dr. Yamamoto; and, that she has sustained a serious and permanent bodily disfigurement. As further found, Respondents have failed to sustain their burden of proof on the affirmative defense of apportionment.

Full Responsibility Rule

d. The "full responsibility" rule was enunciated by the Supreme Court as follows: "when an employer who hires an employee who, by reason of a pre-existing condition or by reason of a prior injury, is to some extent disabled, he (the employer) takes the man with such a handicap." *United Airlines, Inc. v. Industrial Claim Appeals Office,* 993 P.2d 1152, 1154-55 (Colo. 2000). The 'full responsibility rule" was first adopted in *Colorado Fuel & Iron Corp. v. Industrial Commission,* 151 Colo. 18, 379 P.2d 153 (1962) [wherein the claimant sustained a 30% PPD, his condition subsequently deteriorated, and he was awarded PTD benefits]. In *Colorado Fuel & Iron,* the insurance carrier argued that there would be a 'pyramiding' of benefits if the injured worker received both a 30% award and a PTD award. The Supreme Court soundly rejected this argument and held that the last employer was fully responsible for the injured worker's PTD. Because there was no persuasive evidence of an intervening injuries or diseases subsequent to Claimant's admitted injuries, the ALJ infers and finds that her non-work related conditions represented other innate non-work related conditions and her innate coping or not coping with pain, which caused her inability to earn wages in the competitive labor market on a reasonably sustainable basis. For these reasons, the "full responsibility rule" should apply to the present case.

Competent Evidence of Permanent Total Disability

e. Expert opinion or testimony is neither necessary nor conclusive in proving a period of disability, the extent of permanent total disability, or a worsening of condition. *Ringsby Truck Lines, Inc. v. Industrial Commission,* 30 Colo. App. 224, 491 P.2d 106 (1971); *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Don Ward and Co. v. Henry,* 502 P.2d 429 (Colo. App. 1972); *Casa Bonita Restaurant v. Industrial Commission,* 624 P.2d 1340 (Colo. App. 1981); *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1943). As found, Claimant's lay testimony concerning her present abilities and inabilities is highly persuasive. Overlaid on Claimant's physical restrictions, her lay view of her abilities and inabilities adds to an overall unemployability.

f. Respondents' argument that the ALJ's finding of permanent total disability is not based on substantial evidence is without merit. An ALJ's factual findings must be supported by substantial evidence in the record. *Brownson-Rausin v. Industrial Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Although there is conflicting evidence, *e.g.,* Katie Montoya's vocational opinion, could possibly support a finding other than a permanent total disability, the totality of the evidence, however, supports a finding that Claimant is permanently and totally disabled because of a combination of the causally related industrial injuries herein, the Claimant's "human factors," her

underlying non-work related conditions. The totality of the evidence is more than adequate to support a conclusion of PTD.

Permanent Total Disability

g. Claimant must prove that the admitted injury herein is a significant causative factor in her PTD. *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). As found, Claimant has sustained this burden. The Claimant, however, is not required to prove that the admitted injury is the sole cause of her PTD. *Climax Molybdenum Co. v. Walter,* 812 P.2d 1168 (Colo. 1991); *Colorado Fuel & Iron Corp. v. Industrial Commission, supra* [if personal factors combine with the work-related injury to render a worker PTD, the worker is entitled to PTD benefits]. As found, Claimant's other non-work related mental and physical conditions combined with the admitted injury herein to render the Claimant unemployable.

h. An employee is permanently and totally disabled if she is unable to earn any wages in the same or other employment. PTD is defined in Section 8-40-201(16.5)(a), C.R.S. (2008). The determination of whether the Claimant is incapable of earning wages in the same or other employment is to be based upon the ALJ's consideration of a number of "human factors." These factors include the Claimant's physical condition, mental ability, age, employment history, education, prior training, experience and the "availability of work" the Claimant can perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998)*; Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001). Also see *Martinez v. Elaine E. Foss*, W.C. No. 4-240-066 (ICAO, June 24, 1998). The test for permanent total disability is whether employment exists that is reasonably available to a claimant under her particular circumstances. *Id*. This means, whether the employment is available in the competitive job market, which a claimant can perform on a reasonably sustainable basis. As found, the claimant has proven that she is incapable of earning wages in the competitive labor market, on a reasonably sustainable basis, and there is no work reasonably available to her. As found, the Claimant herein is incapable of earning wages in the competitive labor market on a reasonably sustainable basis. Therefore, she is permanently and totally disabled.

i. A determination of whether a claimant is permanently and totally disabled is a question of fact for the ALJ, based on the various interdependent factors including the worker's age, education, prior work experience and vocational training, the worker's overall physical condition and mental capabilities, and the availability of the type of work which the worker can perform. *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). Section 8-40-201(16.5) does not mandate that a claimant produce medical opinion that he is permanently and totally disabled. Indeed, vocational opinions,

not medical opinions, are more *apropos* for a determination of PTD. The physician does not determine industrial loss of use, economic loss, or any other type of loss giving rise to disability payments. A claimant's ability to earn wages within the meaning of Section 8-40-201(16.5) is not purely a medical question. Rather, in evaluating a claim for permanent total disability, the ALJ is called upon to consider the effects of the industrial injury upon the claimant's ability to earn any wages considering the claimant's physical condition, educational background, vocational history and other relevant factors. *Best-Way Concrete Company v. Baumgartner*, 908 P.2d 1194 (Colo. App. 1995). In *Roop v. Estes/ Hi-Flier*, W.C. No. 4-121-928 (ICAO, February 17, 1994), the Panel held that "the claimant's testimony alone which the ALJ credited…, constitutes substantial, credible evidence of permanent total disability". As found, considering the Claimant's present age (50), education (6th Grade in Mexico), lack of language skills in English, and lack of computer skills, Claimant is a poor candidate for retraining—much less for being capable of earning wages in the competitive labor market on a reasonably sustainable basis. One human factor is the Claimant's ability to maintain employment within her physical abilities. This is because the ability to earn wages inherently includes consideration of whether she is capable of getting hired and sustaining employment. Furthermore, occasional performance of physical activities that are useful in the labor market does not preclude a finding of permanent total disability if the evidence indicates that a claimant is unable to sustain the activities for a sufficient period of time to be hired and paid wages. *Moller v. North Metro Community Services*, W.C. No. 4-216-43 (ICAO, August 6, 1998). As found, Claimant is not capable of reasonably sustaining employment in the competitive labor market.

j. Where the possibility of being retrained for employment exists, and where respondents have not offered vocational rehabilitation services, and where the injured worker would need professional assistance to be vocationally rehabilitated, such retraining is not feasible or accessible, and, therefore, a finding of permanent total disability is proper. *Drywall Products v. Constuble*, 832 P.2d 957 (Colo. App. 1991), *cert. denied. See also Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). As found, Claimant is not even a good candidate for retraining.

k. Employability depends upon the existence of employment that is reasonably available to a claimant under her particular circumstances. ALJ's have the discretion to make reasoned judgments concerning a claimant's employability based on the physical restrictions, the claimant's capacity to travel, the availability of transportation, and the scope of the labor market in the claimant's community. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). As found, the Claimant herein is permanently and totally disabled. She has permanent impairment as reported by the DIME physician, Dr. Fall. Dr. Raschbacher reported Claimant's permanent restrictions as no squatting, no crawling or kneeling; limit climbing to ½ hour per day; spend most the day seated; avoid lifting from squatting position. Dr. Raschbacher stated that reasonable restrictions for Claimant's upper extremity would be no repetitive use

of the right hand, no sustained, frequent or continual gripping, grasping, squeezing, lifting, or pinching. All of the above should be limited to occasional. Claimant performed full effort during her FCE and it showed that she is limited in lifting only 10 lbs. occasionally only and nothing frequently. She is able to stand and walk only 10 to 15 minutes on an occasional basis and exhibited impaired manipulative abilities. As found, Claimant is a Spanish speaking, 50 year old individual with a 6th grade education in Mexico. Her husband observed that she had difficulty with all household tasks, walking and getting around. Lee White provided a credible and convincing report that, given the medical restrictions both for the right knee and the upper extremity (causally and non-causally related to the admitted injury), there are no jobs Claimant would be able to locate, obtain and retain because there are other factors which impede her, including significant problems with her right upper extremity, some causally related to the admitted injury and others not related. Claimant made a thorough job search that included approximately 200 job contacts and required the assistance of her daughter-in-law and her husband to accomplish this. As found, because Claimant wishes to be productive does not make her able to obtain, carry out and/or retain a job in the labor market. As found, Respondents implied argument that Claimant's job search is not credible and Claimant had no intention of finding work is without visible evidentiary means of support.

Affirmative Defense of Refusal of Offer of Employment

l. Section 8-42-111 (3), C.R.S. (2008) states: "A disabled employee capable of rehabilitation which would enable the employee to earn any wages… who refuses an offer of employment by the same or other employer…shall not be awarded permanent total disability." The offer of employment refused must be of employment the Claimant could pursue on a reasonably sustainable basis. *See Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998)*; Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001). *Also see Martinez v. Elaine E. Foss*, W.C. No. 4-240-066, (ICAO, June 24, 1998). As found, there was no persuasive proof that Claimant could pursue the "coin counting" job on a reasonably sustainable basis. It is speculative that she could pursue and maintain employment in this extremely limited job across town. Consequently, the Claimant not accepting the "coin counting" job does not preclude a determination that she is permanently and totally disabled.

m. Section 8-42-111(3), C.R.S. (2008), creates an affirmative defense to a claim for PTD benefits that applies when a claimant has first established a prima facie case of PTD. *See Drywall Products v. Constuble, supra*. Respondents, however, did not endorse the issue of refusal of an offer of employment in their Response to Application for Hearing, or at the commencement of the hearing. As found, they first raised this affirmative defense in their answer brief, filed on July 29, 2008. *See Kersting v. Industrial*

Commission, 39 Colo. App. 297, 567 P.2d 394 (1977) [an affirmative defense must be explicitly plead or it is waived]; *Climax Molybdenum Co. v. Walter,* 812 P.2d 1168 (Colo. 1991*); Drywall Products v. Constuble, supra.* Thus, this defense was waived, and it is not incumbent upon the ALJ to enter findings of fact concerning the issue. *See Johnson v. Denver Tramway Corp.,* 115 Colo. 214, 171 P.2d 410 (1946)*; Kersting v. Industrial Commission, supra.*

n. In *Romero v. Castle Rock Construction Co.,* W.C. No. 4-390-451 (ICAO, March 14, 2000), the claimant testified that his pain and rigidity in his neck prevented him from driving to the remote job sites contemplated by the offered employment. The Panel stated, "The fact that the Claimant's driving limitation is not the result of an express 'medical restriction,' is not dispositive." The ALJ's authority to consider "human factors," including the Claimant's "general physical condition," permits the ALJ to consider a "wide variety of evidence including the Claimant's ability to handle pain and the perception of pain." Therefore, ICAO determined that the claimant's refusal to accept the employment was objectively reasonable. As found, Claimant was unable to accept the coin-counting job offer because it was far from her home and she has difficulty driving. The job was near Golden, Colorado. Claimant lives in northeast Denver. Claimant testified that after five to ten minutes of driving she has to ask someone to take over for her due to the pain. Claimant stated, "I have a hard time driving, because I have trouble using – well, using the pedal and the gas and the break, and trouble with my arm using the steering wheel also, so I'm worried about causing or having an accident. I cannot drive far." Therefore, Claimant's refusal to accept this offer was objectively reasonable.

Apportionment

o. Apportionment is an affirmative defense. It is Respondents burden to prove this defense. Section 8-43-210, C.R.S. (2008). *See Anderson v. Brinkhoff,* 859 P. 2d 819 (Colo. 1993); *Askew v. Industrial Claim Appeals Office,* 927 P. 2d 1333 (Colo. 1996). Apportionment in a permanent total disability case is not appropriate when no former employer to whom to apportion can be found and apportionment would have been to the long deceased Subsequent Injury Fund. *United Airlines, Inc. v. Industrial Claim Appeals Office* (the *Bowland* case), 993 P.2d 1152 (Colo. 2000). As found, Respondents also failed to prove this affirmative defense.

p. Congenital conditions, uninfluenced by intervening causes or injuries are not subject to apportionment. In *Absolute Employment Services v. Industrial Claim Appeals Office,* 997 P.2d 1229 (Colo. App. 1999), the respondents argued that PTD benefits should be reduced because the claimant was legally blind from birth and had a low IQ. Respondents' vocational expert in *Absolute Employment* testified that these two conditions reduced claimant's access to 85% of the labor market. In denying apportionment, the Court of

Appeals held that these two conditions represented the claimant's innate, baseline capacity to meet personal, social or occupational demands, not an alteration in the capacity to meet these demands. Although the facts in *Absolute Employment* are extreme, there is a compelling analogy to the facts in the present case.

Pursuant to the "full responsibility rule," and in the absence of another entity to whom to apportion liability, the employer on the risk at the time of the compensable injury is generally liable for the entire disability. *Resouces One, LLC v. Industrial Claim Appeals Office,* 148 P.3d 287, 288 (Colo. App. 2006). As found, there is no entity to apportion the Claimant's pre-existing, non-work related conditions that contributed to her PTD, although the compensable injuries contributed significantly to her PTD. To accept Respondents argument would render the Claimant similar to Philip Nolan, the man without a country, it would render her a permanently and totally disabled individual, whose compensable injuries contributed significantly to her PTD, without any source of full **PTD benefits in the workers' compensation system.**

Change of Physician

q. Respondents are obliged to provide a physician willing to render treatment so long as it is reasonably necessary. *Tellez v. Teledyne Water Pik,* W.C. No. 3-990-062 (ICAO, March 24, 1992); *aff'd., Teledyne Water Pik v. ICAO*, (Colo. App. No. 92CA0643, December 24, 1992) [not selected for publication]. Upon a proper showing, the injured worker may procure permission at any time to have a physician of the worker's selection attend said worker. Section 8-43-404(5)(a), C.R.S. (2008). An ALJ has broad discretion in authorizing a change of physician so long as that decision is supported by substantial evidence. *Brenneman v. McDuff Electronics*, W.C. No. 3-936-449 (ICAO, November 14, 1991)). Accordingly, even a finding that a particular doctor "is not sympathetic to Claimant's complaints" is sufficient ground for authorizing a change if supported by the evidence. *Ramirez v. Excel Corporation*, W.C. No. 3-990-123 (ICAO, March 16, 1993). Similarly, a claimant in need of further medical treatment, who had developed "a mistrust" of her doctor after being told that further treatment was unnecessary, was entitled to a change of physician. *In Re Claim of Carson v. Wal-Mart*, W.C. No. 3-964-079 (ICAO, April 12, 1993). As found, Dr. Raschbacher ignored the Claimant and she wanted a change of physician to Dr. Yamamoto. Dr. Raschbacher also informed Claimant that he would not make any other referrals unless the insurance company authorized them. Dr. Diaz strongly advised against sending Claimant back to Dr. Raschbacher. As found, substantial evidence exists that allows reasonable inferences that the Claimant did not trust Dr. Raschbacher and should be entitled to a change of physician. As found, Claimant established that a change of physician to Dr. Yamamoto is warranted.

***Grover* Medical Benefits**

r. Where an injured worker reaches MMI but requires medical care to prevent her condition from deteriorating, it is permissible to leave medical benefits open subsequent to the final award. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). As found, Claimant continued to require medications for pain related to her work injuries, including ibuprofen and acetaminophen. Further, Dr. Failinger specifically made two referrals. One referral was to Dr. Gershoff for the right elbow epicondyltis. Dr. Failinger was an ATP and he made referrals within the chain of referrals. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999). To be authorized, all referrals must remain within the chain of authorized referrals. *Mason Jar Restaurant v. Industrial Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995). As found, based on Dr. Failinger's referrals, Dr. Gershoff is within the causally related authorized chain of referrals and the treatment is reasonably necessary to treat the claimant's post maximum medical improvement work related complaints. Although referrals for the treatment of Claimant's hand may have been within the authorized chain of referrals, the condition of the Claimant's right hand, as found, is not causally related to her compensable injuries.

Bodily Disfigurement

s. 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 compensation benefits provided in the Act, the director may allow compensation, not to exceed two thousand dollars, to the employee who suffers such disfigurement. C.R.S. Section 8-42-108, C.R.S. (2008) [HB 07-1297 states that the effective date is July 1, 2007 and it shall not apply to **injuries** occurring on or before the effective date.]

t. A disfigurement award should be based on an observable compromise of the natural appearance of a person. *See Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961); *Twilight Jones Lounge v. Showers*, 732 P.2d 1230 (Colo. App. 1986). As found, the Claimant's bodily disfigurement is an observable compromise of her physical appearance including a disfigurement in the form of scars and swelling. Her right lower extremity surgical scars include a keloid scar on the right knee, an indented one half inch scar below the knee cap and a third one half inch scar on the lateral aspect of her knee. All of these disfigurements are plainly visible to public view.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents affirmative defense of apportionment is hereby denied and dismissed.

B. Respondents affirmative defense of "refusal of offer of employment" is hereby denied and dismissed.

C. Respondents shall pay the costs of all authorized,causally related and reasonably necessary medical care and treatment to maintain her at maximum medical improvement, according to the Division of Workers' Compensation Medical Fee Schedule.

D. Effective June 13, 2008, a change of physician to David Yamamoto, M.D., is hereby granted, and Dr. Yamamoto shall henceforth be the Claimant's authorized treating physician.

E. Respondents shall pay the Claimant permanent total disability benefits of $164.46 per week, or $23.49 per day, from January 25, 2007, the date of maximum medical improvement, and continuing for the rest of the Claimant's natural life. For the period from January 25, 2007 through June 13, 2008 (the hearing date), both dates inclusive, a total of 506 days, Respondents shall pay the Claimant aggregate permanent total disability benefits of $11,888.11 less the $8,830.51 credit, in the net aggregate amount of $3,057.60, which is payable retroactively and forthwith. From June 14, 2008 and continuing for the rest of the Claimant's natural life, Respondents shall pay the Claimant permanent total disability benefits of $164.46 per week, less any offsets permitted by law.

F. For and on account of Claimant's bodily disfigurement as hereinabove described, Respondents shall pay the Claimant $1,500.00, payable in one lump sum in addition to all other benefits due and payable.

G. Respondents may take credit for all of the scheduled permanent partial disability benefits paid pursuant to the Final Admission of Liability, dated August 17, 2007, in the aggregate amount of $8,830.51 as hereinabove calculated.

H. Respondents are entitled to all offsets permitted by law.

I. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

J. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of February 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 3-671-044

ISSUES

The issue presented for determination was Claimant's appeal of denial of admission into the Major Medical Insurance Fund ("MMIF") for her injury of April 5, 1979.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge finds as fact:

1. Claimant sustained a compensable injury on April 5, 1979 while employed for Cyprus Mines Corporation ("Employer"), insured by Truck Insurance Exchange ("Insurer"). On that date, Claimant slipped and fell in a puddle of water injuring her knees.

2. Between 1979 and 1983 Claimant received medical treatment and surgeries for her knee injuries.

3. On October 13, 1983 Claimant entered into a Stipulation for Settlement and Final Release of all Claims ("Settlement"). In exchange for her release of her rights to compensation and benefits, including medical benefits, under the Workers' Compensation Act, Claimant received the sum of $21, 331.87 of which $4, 667.97 was for the remaining liability of the Insurer for medical benefits under the statutory cap on the Insurer's liability for medical expense under the statutory provisions in effect at the time of Claimant's injury.

4. At the time Claimant entered into the Settlement, Insurer had paid $15,332.03 in medical expenses on account of Claimant's injury.

5. Claimant returned to the State of Colorado in 1998 and began to experience increasing symptoms in her knees. Claimant was employed at that time by J.D. Edwards Co. and had personal health insurance through that employer. Claimant selected Dr. Reister to provide treatment for her knees through her personal health insurance and Dr. Reister became Claimant's authorized treating physician.

6. Claimant later changed employers and Dr. Reister was no longer covered under her personal insurance plan with her new employer. On the recommendation of a friend, Claimant then selected Dr. Boublik of the Steadman-Hawkins Clinic to provide her with additional treatment for her knees.

7. Dr. Reister did not refer Claimant to Dr. Boublik. Claimant did not make a request for a change of physicians from Dr. Reister to Dr. Boublik. Dr. Boublik is not an authorized treating physician for purposes of Claimant's work injury.

8. Claimant first applied for admission into the MMIF on February 27, 2008. Claimant stated on her Application for Admission into the fund that she had spent a total of $7,140.72 in medical expenses and that her present treating physicians were Dr. Kendall Lubick and Dr. Martin Boublik.

9. By letter dated March 20, 2008, Lucinda Ridley, Claims Adjuster Supervior Special Funds Unit of the Division, advised Claimant that Dr. Boublik was considered to be an unauthorized physician and that Dr. Reister would be considered the authorized physician for Claimant's work injury. Ms. Ridley further advised that any expenses associated with treatment by Dr. Boublik would not be paid by MMIF.

10. In a letter to Claimant dated April 14, 2008, Ms. Ridley noted that Claimant had selected Dr. Reister for treatment of her knee injury when she had moved back to Colorado. Mr. Ridley again advised Claimant that if she needed further treatment for her knee injury and wished to use the expenses for such treatment to meet the requirement for admission into MMIF she would need to return to Dr. Reister.

11. By Order dated April 29, 2008, Bob Summers, Director of the Division, denied Claimant's Application for admission into the MMIF. As found by Director Summers, Claimant's authorized treating physician was Dr. John Reister, M.D. The Director further ordered that Claimant may make re-application for admission into the MMIF once her authorized medical expenses have met or exceeded the $20,000 limit of liability.

12. Director Summers issued a Corrected Order dated May 20, 2008 dismissing Claimant's Application for admission into the MMIF. Director Summers corrected that prior order noting that $15,332.03 in medical expenses had previously been paid by the Insurer and that Claimant may make re-application for admission to the MMIF once she can establish that authorized expenses for the injury to her knees met or exceeded the $20,000 threshold.

13. As a result of Director Summers Corrected Order Claimant must establish medical expenses of $4,667.97 for treatment of her knee injuries from an authorized treating physician in order to establish the basis for admission into the MMIF.

14. Claimant filed a second Application for Admission on June 2, 2008. Claimant submitted with this Application a spreadsheet of her medical expenses totaling $5,533.86. Of these expenses, only $35.84 were expenses for treatment by Dr. Reister.

15. By letter dated June 14, 2008 Director Summers effectively denied Claimant's re-application for admission into the MMIF and noted that factual issues were present that required resolution by an Administrative Law Judge.

16. Claimant filed an Application for Hearing on July 2, 2008 requesting a hearing.

17. Claimant has failed to prove, by a preponderance of the evidence, that she has incurred medical expenses for treatment of her knee injuries from authorized treating physicians equal to or exceeding $4,667.97. Claimant has failed to prove by a preponderance of the evidence the basis for admission into the MMIF.

CONCLUSIONS OF LAW

18. 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).

19. 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. 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 (2008) C.R.S.

20. WCRP 14-2(A) governs appeals from orders denying admission to the MMIF and provides:

> "A party who is dissatisfied with an order dismissing or denying an application for admission or dissatisfied with a written denial of benefits may apply for a hearing with the Office of Administrative Courts within 30 days from the date of the order."

Claimant's original application for admission into the MMIF was denied by the Order of Director Summers of April 29, 2008 and the Corrected Order of May 20, 2008. Although Claimant did not timely request a hearing after entry of these orders, Claimant re-applied for admission into the MMIF on June 2, 2008. That

Application was denied by the Director's letter of June 14, 2008. Claimant then timely requested a hearing under WCRP 14-2(A) by filing an Application for Hearing on July 2, 2008. Claimant's appeal of the Director's denial of her re-application for admission into the MMIF is timely.

21. Medical treatment is compensable under the Workers' Compensation Act ("Act") where it is provided by an authorized treating physician. *Bunch v. Indus. Claim Appeals Office,* 148 P.3d 381,383 (Colo. App. 2006). If a claimant obtains unauthorized medical treatment, the employer or its insurer are not required to pay for it. *Yeck v. Indus. Claim Appeals Office,* 996 P. 2d 228 (Colo. App. 1999). The Act does not permit a claimant to change physicians or to employ additional physicians without notice to the employer or its insurer. See, *Pickett v. Colorado State Hospital,* 513 P.2d 228 (Colo. App. 1973). An employer is liable for expenses incurred when as part of the normal progression of authorized treatment for a compensable injury an authorized physician refers claimant to another physician or physicians. *Greager v. Indus. Comm'n,* 701 P.2d 168 (Colo. App. 1985). By virtue of the provisions of Section 8-46-202, C.R.S. the MMIF stands in the shoes of the employer and insurer to provide benefits for qualified employees in addition to the benefits available under the Act. *Jefferson County Sch. Dist. R-1 v. Div. of Labor,* 791 P.2d 1217 (Colo. App. 1990). As such, had Claimant wished to have Dr. Boublik considered as an authorized treating physician for purposes of her claim and to establish the payment of expenses sufficient to qualify her for admission into the MMIF Claimant would have either had to obtain a referral from Dr. Reister to Dr. Boublik or make a request to change physicians to the Division. See, Section 8-43-404 (5)(a), C.R.S., previously Section 8-51-110(5), C.R.S., (1986). As found, Dr. Boublik is not an authorized treating physician and the expenses for his treatment of Claimant's knee injuries may not be considered for the purpose of establishing the necessary amount of medical expenses to qualify Claimant for admission into the MMIF. Additionally, as the authorized expenses for treatment by Dr. Reister fall below the amount necessary for Claimant to establish admission into the MMIF, the Claimant has failed to prove entitlement to admission into the MMIF.

22. In light of the above findings and conclusions, the Judge does not address the additional arguments raised by the Division that a portion of Claimant's claimed expenses were for treatment of unrelated conditions or conditions that arose after closure of the MMIF or the application of the equitable doctrine of laches.

ORDER

It is therefore ordered that:

The written decision of the Director dated June 14, 2008 denying Claimant's application for admission into the Major Medical Insurance Fund is

affirmed and Claimant's Application for Admission into the Major Medical Insurance Fund dated June 2, 2008 is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED: February 6, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-770-651

ISSUES

Whether Respondents should be permitted to suspend Claimant's compensation for temporary partial benefits under the provisions of Section 8-43-404(3), C.R.S.

FINDINGS OF FACT

The following facts were stipulated to by the parties:

1. Claimant is temporary partial disability ("TPD") benefits at the rate of $212.27 per week as a result of the injury that is the subject of this claim. Claimant was working in a modified duty job for Employer until September 8, 2008.

2. Claimant's last day of work for Employer was September 8, 2008. After Claimant left employment, Claimant relocated to Europe to help care for his mother. Claimant is a native of Bosnia.

3. Prior to leaving employment with Employer, Claimant requested and was granted leave under the Family Medical Leave Act ("FMLA").

4. On December 2, 2008 Claimant wrote Employer advising that he would not be returning to Colorado at the end of his FMLA leave but instead would be staying in Europe with his mother until March 2009.

5. Respondents do not have a present address for Claimant in Europe. Since Claimant's absence from the United States Respondents have sent Claimant's benefits checks to his attorney.

6. At the time Claimant left Colorado, Respondents were providing Claimant with medical treatment. Claimant last treated with the authorized treating physician ("ATP"), Dr. Linda Mitchell, M.D. on August 18, 2008.

7. At the time of his last visit with Dr. Mitchell Claimant was referred for an epidural steroid injection. Claimant was scheduled to return for a follow up visit with Dr. Mitchell on September 28, 2008. Claimant did not obtain the injection and did not attend the follow up visit of September 28, 2008 with Dr. Mitchell.

8. At all times since Claimant's last visit with Dr. Mitchell on August 18, 2008 Respondents have offered Claimant medical treatment in Colorado for his work related injury.

9. In the event Claimant returns to Colorado, such that he can resume treatment with the ATP, Respondents will provide Claimant treatment that is reasonable, necessary and causally related to the injury such that Claimant can reach maximum medical improvement ("MMI"). As of the date of Claimant's return to treatment Respondents agree to resume payment of temporary disability benefits pursuant to law and if applicable.

10. Respondents filed a Petition to Modify, Terminate or Suspend Compensation on December 12, 2008 seeking to suspend Claimant's compensation based upon Claimant's residence in Europe.

11. Claimant currently resides in Munich, Germany. Claimant will file a change of address with the Division of Workers' Compensation and Respondents. Claimant wishes to obtain medical treatment in Germany and requests Respondents to designate a treating physician in Munich.

Based upon the evidence presented, the ALJ makes these additional findings of fact:

12. Claimant was evaluated by Dr. Mitchell on June 25, 2008. Claimant had last been seen by Dr. Mitchell on May 19, 2008 as he had been out of town for about a month due to a death in the family. Dr. Mitchell referred Claimant for a sympathetic block and scheduled a follow up appointment for July 7, 2008.

13. At the time Claimant was seen by Dr. Mitchell on August 18, 2008 Dr. Mitchell continued Claimant on modified duty. Dr. Mitchell stated in her August 18, 2008 report that MMI status was "unknown".

14. Respondents have scheduled Claimant for a follow up examination with Dr. Mitchell for February 5, 2009 and notified Claimant's counsel of this appointment by letter.

15. Claimant is willing to cooperate with medical treatment for his injury. Respondents do not claim that Claimant is refusing medical treatment or refusing to attend appointments with the ATP.

DISCUSSION AND CONCLUSIONS OF LAW

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

17. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), 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), *supra*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of Respondents. Section 8-43-201, *supra*.

18. In support of their Petition to Suspend, Respondents rely upon the first sentence of Section 8-43-404(3), C.R.S. which provides:

> "So long as the employee, after written request by the employer or insurer, refuses to submit to medical examination or vocational evaluation or in any way obstructs same, all right to collect, or to begin or maintain any proceeding for the collection of, compensation shall be suspended."

The first two sentences of Section 8-43-404(3), C.R.S. have been held to create a two-tiered system of sanctions for refusal to submit to medical examinations. The first sentence, as relied upon by Respondents, permits a temporary suspension of the right to collect benefits for the period during which the claimant refuses to attend the medical examination. The second sentence creates a permanent bar if claimant refuses to attend the examination after being ordered to do so. *Magnetic Engineering, Inc.,* supra at 388-89. The refusal to attend must occur *after written request* by the employer or insurer.

19. The first sentence of Section 8-43-404(3), C.R.S. has been held to apply to the failure of claimant to attend appointments with an examining physician, *Sigala v. Indus. Claim Appeals Office,* 159 P.3d 785 (Colo. App. 2006), rev'd on other grounds, *Sigala v. Atencio's Market,* 184 P.3d 40 (Colo. 2008), while it is the third sentence of Section 8-43-404(3), C.R.S. that has been held to apply to a claimant's failure to attend appointments with a treating physician. *Sigala v. Indus. Claim Appeals Office,* supra at 788; *Dziewior v. Mich. Gen. Corp.,* 672 P.2d 1026 (Colo. App. 1983).

20. As found, Respondents do not argue that Claimant has refused to attend appointments with the ATP or that Claimant has refused medical treatment. Respondents argue that Claimant's temporary relocation to Europe to care for his mother constitutes an obstruction of Respondents ability to provide Claimant with medical treatment to enable him to reach MMI, and correspondingly, allow Respondents to terminate the TPD benefits being paid. Section 8-42-106(2)(a), C.R.S. The ALJ concludes that in this instance Respondents reliance upon the first sentence of Section 8-43-404(3), C.R.S. to support suspension of benefits is misplaced. First, Claimant has not refused to attend an appointment with an examining physician. Accordingly, the first sentence of Section 8-43-404(3) is not applicable. In addition, Respondents did not present evidence that Claimant refused to attend an appointment after written request to do so by the employer or insurer. The evidence of a written request here pertained to a request for the Claimant to return to the ATP for an examination later on the day of the hearing. At the time of hearing, it was unknown whether Claimant would attend that appointment. The ALJ therefore concludes that the first sentence of Section 8-43-404(3) and the facts of this case do not support Respondents Petition to Suspend Claimant's benefits.

21. The ALJ would not reach a different result were the provisions of the third sentence of Section 8-43-404(3), C.R.S. to be applied to the facts. The third sentence of Section 8-43-404(3) provides:

> "If any employee persists in any unsanitary or injurious practice which tends to imperil or retard recovery or refuses to submit to such medical or surgical treatment or vocational rehabilitation as is reasonably essential to promote recover, the director shall have the discretion to reduce or suspend the compensation of any such injured employee."

Again, Respondents do not argue that Claimant has refused to submit to medical or surgical treatment reasonably essential to promote Claimant's recovery from his work injury. Respondents have also not argued that Claimant has engaged in any injurious practice. Even in the presence of evidence of refusal to submit to treatment, the ALJ must make a factual determination concerning the reasonableness of the refusal in determining whether to exercise the discretion to reduce or suspend a claimant's benefits under the third sentence of Section 8-43-404(3). *MGM Supply v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). And, assuming *arguendo* that Claimant attends the appointment with the ATP scheduled for later on the day of hearing, the suspension of benefits is only temporary and Claimant would not lose any benefits once the basis for cessation of benefits was removed. *Dziewior,* supra at 1020-30. *Sigala v. Atencio's Market,* supra, (the term "suspend" does not connote a permanent loss of benefits; decided under the provisions of Section 8-42-105(2)(c), C.R.S.).

ORDER

It is therefore ordered that:

Respondents Petition to Modify, Terminate or Suspend Compensation dated December 12, 2008 is denied.

All matters not determined herein are reserved for future determination.

DATED: February 6, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-756-394

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), o January 29, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 1/29/09, Courtroom 3, beginning at 8:51 AM, and ending at 11:20 AM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel to be submitted electronically within 5 working days, giving Respondents 3 working days thereafter within which to file objections. The proposed decision was filed

on February 4, 2009. No timely objections were filed. The matter was deemed submitted for decision on February 10, 2009. After a consideration of the proposed decision, the ALJ has modified the same and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern The issues to be determined by this decision concern Claimant's Petition to Re-open; if re-opened, average weekly wage (AWW); temporary total disability (TTD) benefits from September 13, 2008 and continuing; and, Respondents' affirmative defense of "responsibility for termination."

Claimant has the burden of proof, by a preponderance of the evidence, on all issues with the exception of "responsibility for termination" and entitlement to take an unemployment insurance (UI) benefit offset of 100% against temporary disability benefits, in which case Respondents have the burden of proof by preponderant evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant suffered an admitted compensable injury to her low back arising out of the course and scope of her employment on November 6, 2007. Respondents filed a Final Admission of Liability (FAL), dated April 22, 2008, for medical benefits, a maximum medical improvement (MMI) date of April 9, 2008, and an AWW of $435.29. For her admitted injury, Claimant treated with Craig Anderson, M.D., who became her authorized treating physician (ATP). Respondents relied on Dr. Anderson's opinion at the time in filing the FAL. That FAL also admitted for medical treatment after MMI, and no temporary or permanent disability benefits.

2. Claimant continued to work for the Employer after the date of MMI, in her regular job, earning $15.07 per hour for a 40-hour week as of her last day of work for the Employer. She had received a raise in March of 2008 from $14.63 per hour to $15.07 an hour. This rate yields an AWW of $602.80. This amount fairly reflects Claimant's temporary wage loss after she was terminated from employment. This AWW yields a TTD rate of $401.87 per week, or $57.41 per day.

3. In June of 2008, Claimant returned to see Dr. Anderson because of continued pain in her back and neck that had worsened. Dr. Anderson initially placed Claimant on restrictions, and began to treat her for the worsening of condition. He set a follow up appointment for July 2, 2008, and indicated that

Barry Ogin, M.D., could be consulted for injections if needed. Dr. Anderson's report, attached to the Petition to Reopen establishes a worsening of condition since MMI.

4. Claimant's condition continued to worsen though she remained at work throughout the summer of 2008. Claimant had received a warning in June of 2008 that she was not meeting expectations and was told that she needed to average 3 refunds per hour to be able to meet the Employers' goals for her.

5. Claimant kept records of her production and believed that she was able to average 3 refunds per hour for the remainder of the summer. The Employers' records indicate that she averaged 3.17 refunds per hour in July, 2.97 refunds per hour in August and 3.03 refunds per hour in September. This was done while Claimant continued to treat on a regular basis with Dr. Anderson for her injury. Tanya Pickett, Claimant's supervisor testified that the 2.97 refunds for August rendered Claimant's performance below expectations. Pickett also indicated that Claimant's was terminated for making phone calls on company time and for "poor attitude." Picket did not further explain what "poor attitude" meant. Under the totality of the evidence, the ALJ infers and finds that "poor attitude" meant that Claimant stood up for her rights, which is not an unreasonable stance in our constitutional republic. The ALJ finds Pickett's reasons for recommending that Claimant be terminated to be unfounded and/or unreasonable and lacking in credibility as a valid reason for terminating Claimant's employment.

6. The Employer terminated the Claimant, allegedly for performance issues, on September 12, 2008, while Claimant was under medical restrictions from Dr. Anderson. Molly Niles, the former HR (human resources) director at Beacon, testified that the Claimant did not meet expectations, and that Claimant had used the company phone to call a radio station for a contest in August. Respondents' Exhibit M, admitted into evidence, indicates that the Claimant's phone made 85 outside calls on the days in question. Claimant testified that she made the calls while on her break and lunch time, and that the reason the number of calls was so high is because she used the redial on the phone to repeatedly call when she got a busy signal. There was no persuasive evidence offered by the Employer to refute Claimant's testimony that the calls were made in her personal time and not on company time. Claimant also testified that other employees were engaged in the same activity, but none were disciplined. Niles stated that it was not a violation of company rules for employees to make persona calls on their break or lunch time. Respondents have failed to prove, by preponderant evidence that Claimant's employment was terminated because of a volitional act on Claimant's part. Not measuring up to expectations

7. Claimant was in treatment with Dr. Anderson that has escalated over the months following her termination. She has now seen Dr. Ogin for injections and has had diagnostic testing done. Dr. Anderson formally requested

the Respondents to re-open her case. The Claimant's current diagnosis is lumbar pain with lumbar disk herniation. She is on temporary restrictions from Dr. Anderson and is not working.

8. Respondents have proven, by preponderant evidence that the Claimant received unemployment insurance (UI) benefits of $706.00 every two weeks and has been receiving those benefits since October 5, 2008. This calculates to $353.00 per week. Claimant has not worked since the date of her termination on September 12, 2008.

9. Claimant herein has proven by a preponderance of the evidence that she has sustained a worsening of condition subsequent to the filing of a FAL in her case. The Alj finds that the worsening that was described in her testimony and supported by the medical evidence submitted herein is sufficient to support her petition to Re-open. The totality of the evidence, including the numerous medical reports of Dr. Anderson, the ATP, indicate that Claimant's condition has worsened, beginning with Dr. Anderson's report of June 16, 2008, wherein he places her on restrictions and reinstates treatment which continues as of the date of the hearing. Claimant has not been placed at MMI, nor has Dr. Anderson released her to un-restricted work since she began treating for her worsening of condition in June of 2008.

10. Claimant has also proven, by a preponderance of the evidence, that she has not worked or earned wages since September 13, 2008; that her ATP has not released her to return to un-restricted work; and, that she has not been declared to be at MMI by her ATP. Therefore, the Claimant has been TTD since September 13, 2008 and continuing. The period from September 13, 2008 through October 4, 2008, both dates inclusive, is 21 days. The period from October 5, 2008 through the hearing date, January 29, 2009, inclusive, equals 116 days.

11. Respondents have failed to prove, by a preponderance of the evidence that Claimant was responsible for her termination through a volitional act on her part.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. In deciding whether an injured worker 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 Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (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). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a 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 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, Tanya Pickett's testimony is not credible because it is not reasonable or probable. Claimant's testimony is straight forward, consistent, reasonable and credible. The Employer's stated reasons for terminating the Claimant's employment are not reasonable and, therefore, not credible.

b. Dr. Anderson's medical opinions on the worsening of Claimant's condition as of June 2008, and his physical restrictions, are essentially un-contradicted. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. His opinions are reasonable and undisputed. Therefore, the ALJ considers them controlling on the medical issues herein.

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing a worsening of condition warranting re-opening and entitlement to additional benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has sustained her burden with respect to re-opening as of June 2008, and additional medical and indemnity benefits after her September 12, 2008 termination from employment. Respindents have failed to sustain their burden with respect to Claimant's alleged "responsibility for termination" through any volitional act on her part.

d. Section 8-42-102(2)(d), C.R.S. (2008), sets forth the method for calculating the AWW. The overall purpose of the statutory scheme is to calculate "a fair approximation of a claimant's wage loss and diminished earning capacity." *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The entire objective of the

wage calculation under the Act is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. Although the AWW is generally determined from an employee's wage at the time of injury, if for any reason this general method will not render a fair computation of wages, the ALJ has long been vested with discretionary authority to use an alternative method in determining a fair wage. *See Campbell v. IBM Corp, supra.*. Here, the AWW is $602.80, based on Claimants credible testimony, and the wage records submitted herein, that indicate that she has been earning $15.07 per hour for 40 hours a week since March of 2008. The TTD rate is $401.86 per week, or $57.41 per day.

e. In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the Court of Appeals held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence the concept of "fault" as it is used in the unemployment insurance context, is instructive for purposes of the termination statutes. In that context, "fault" requires that a claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1985). That determination must be based upon an examination of the totality of circumstances. *Id.*, The burden to show that a claimant was responsible for her discharge is on the respondents. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000). As found, Respondents did not sustain their burden of showing that Claimant was “responsible for her termination” through a volitional act on her part.

f. The question whether a claimant acted volitionally or exercised a degree of control over the circumstances of the termination is ordinarily one of fact for the ALJ. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 [Industrial Claim Appeals Office (ICAO), March 17, 2004]. Specifically, the Claimant here did not commit a volitional act that made her responsible for her termination. The Employer has the right to terminate employment for any non-discriminatory reason, however, the ALJ finds Respondents’ alleged reasons, *i.e.,* lack of productivity or alleged misuse of company property were not proven. The lack of productivity is not a volitional act on Claimant’s part under the circumstances of this case.

g. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a “disability,” and that she has suffered a wage loss that, “to some degree,” is the result of the industrial disability. Section 8-42-103(1), C.R.S. (2008); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for reasons which are not her responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. This is true because the employee’s restrictions presumably impair her opportunity to

obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973, (ICAO, December 18, 2000). Claimant's termination in this case was not her fault but as a result of the Employer's dissatisfaction with her.

h. Once the prerequisites for TPD and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), TPD and TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, Claimant has been sustaining a 100% temporary wage loss since September 13, 2008. From October 5, 2008, she began receiving UI benefits of $353.00 per week.

i. Section 8-42-103 (1) (f), C.R.S. (2008), provides for a 100% offset of UI benefits. As found, Claimant began receiving UI benefits of $706.00 every two weeks and has been receiving those benefits since October 5, 2008. This calculates to $353.00 per week. Claimant has not worked since the date of her termination on September 12, 2008. Consequently, Respondents are entitled to offset $353.00 per week against Claimant's TTD rate of $401.86 per week, for a net TTD benefit of $48.86 per week, or $6.98 per day from October 5, 2008 and continuing during Claimant's receipt of UI benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all the costs of Claimant's authorized, causally related and reasonably necessary medical care and treatment, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. For the period from September 13, 2008 through October 4, 2008, both dates inclusive, a total of 21 days, Respondents shall pay the Claimant temporary total disability benefits of $401.86 per week, or $57. 41 per day, in the aggregate amount of $1,205.58, which is payable retroactively and forthwith, without offset.

C. From October 5, 2008 through January 29, 2009, both dates inclusive, a total of 116 days, Respondents shall pay the Claimant net temporary total disability benefits of $48.86 per week, or $6.98 per day, in the aggregate amount of $809. 68, that is payable retroactively and forthwith. Grand total retroactive temporary disability benefits, payable retroactively and forthwith, are $2,015.26.

D. Respondents shall pay the Claimant net temporary total disability benefits (after the UI offset) of $48.86 per seek from January 30, 2009 and continuing until cessation thereof, or modification thereof, is authorized by law.

E. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

F. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of February 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-771-333

ISSUES

The sole issue determined herein is compensability.

FINDINGS OF FACT

1.In 2006, claimant was struck in the face in an altercation and sought medical care. A computed tomography ("CT") scan showed mild disc narrowing and osteophyte formation at C5-6 and C6-7. He apparently obtained no additional medical care at that time.

2.Claimant also suffered from bleeding ulcers, which caused nausea.

3.On July 22, 2008, claimant began work as a welder for the employer. Claimant, who lived in Colorado Springs, commuted daily to a construction job site in the southern part of the Denver metropolitan area.

4.Claimant had significant problems with absenteeism and tardiness on the job site.

5.After lunch on August 7, 2008, claimant returned to work on the seventh floor of the building under construction. Claimant alleges that another employee, Mr. Rezak, hit claimant on the head with a large cardboard tube, causing claimant's neck to snap to the side. He alleges that he immediately complained to Mr. Heard about the "horseplay," but he agrees that he did not report any injury at the time. Claimant, nevertheless, testified that Mr. Heard told him to "walk it

off." He alleges that symptoms developed over the next couple of days and he then reported the injury to Mr. Frahm.

6.Claimant's wife testified that he stated on the evening of August 7, 2008, that he had been hit on the head with a cardboard pipe and "saw stars." She noticed that in two or three days, claimant was grabbing his arm and complaining about numbness.

7.Mr. Fouts, an erector employed by the employer, observed the incident in which Mr. Rezak "flicked" claimant on his hard hat with a cardboard tube. Claimant's head did not snap forward. Both employees were laughing after the incident. Claimant did appear angry and did not pick up any cardboard tube. Mr. Fouts testified that the cardboard tube that claimant introduced as exhibit 5 was not the tube used by Mr. Rezak.

8.Mr. Heard testified that claimant did not complain on August 7, 2008, about Mr. Rezak hitting him with a cardboard tube. Mr. Heard testified that he was not working near claimant on the date in question. Mr. Heard learned a "few days later" that claimant had blamed him for hitting claimant with the tube. Mr. Heard testified that he did not tell claimant to "walk it off" and did not refuse a request for medical care. Claimant did not report an injury and did not request medical care.

9.Mr. Frahm testified that claimant's attendance was unacceptable and that he had informed claimant to show up for work or he would be replaced. On August 19, 2008, claimant first reported to Mr. Frahm that he had suffered a neck injury in the August 7, 2008, incident. Mr. Frahm did not refer claimant to a specific provider because claimant already possessed the new employee information packet that listed the authorized medical providers.

10.On August 21, 2008, claimant sought treatment at Penrose Hospital emergency room. Claimant's wife testified that she took him to the emergency room because claimant's face was red, he was holding his arm, and he could not remember things. Claimant testified that he went because he suffered increasing symptoms of vomiting and neck spasm. He reported a history of being hit on the head with a "heavy pipe" on August 7 and suffered symptoms within 30 minutes. The physician diagnosed a contusion and prescribed Flexeril. Claimant did not report any history of his 2006 neck symptoms.

11.On August 22, 2008, claimant appeared for work and informed Mr. Frahm that he was taking Flexeril. Mr. Frahm sent claimant home due to the fact that he was using a prescription drug.

12.Claimant was scheduled to return to work on August 25, 2008, but he called in to report that he suffered a flat tire. Claimant returned to a tire store near his home in Colorado Springs to have the repair. Claimant later talked to Mr. Frahm, who terminated his employment.

13.On September 22, 2008, claimant returned to work doing sheet metal work for Colony Metals.

14.On September 29, 2008, Dr. Ramaswamy examined claimant, who reported a history of being hit on the head on August 7 and suffering immediate symptoms. Claimant omitted the history of the 2006 neck symptoms. Dr. Ramaswamy diagnosed cervical spine strain, possible cervical radiculopathy, and headaches. Dr. Ramaswamy prescribed medications and imposed restrictions. Claimant testified that he was referred for a new CT scan, but no such report was introduced as record evidence.

15.On December 13, 2008, Dr. Scott performed an independent medical examination ("IME") for respondents. Claimant denied any previous neck problems and reported the history of the August 7 incident. Dr. Scott diagnosed possible cervical sprain and "claimed" right upper extremity parasthesia with possible muscle contraction headaches. He recommended obtaining preexisting medical records.

16.Claimant's testimony is not credible. The testimony of Mr. Fouts, Mr. Heard, and Mr. Frahm is credible. Claimant did not suffer an accidental injury on August 7, 2008. The incident involved minimal contact with claimant, who also was laughing afterward. Claimant did not immediately complain about the incident. He did not retrieve the tube used by Mr. Rezak. He did not seek medical treatment for a long time after the incident. He made inconsistent statements of the time of the onset of symptoms. Contrary to his testimony, claimant did not report any injury until August 19. Claimant had preexisting degenerative conditions in his cervical spine. Although aggravation of such preexisting conditions can lead to a new injury arising out of and in the course of employment, claimant did not suffer any such injury on this occasion. The nature of the minor incident, the delay in reporting an injury, and the inconsistencies in claimant's version of events all make it unlikely that he suffered the injury as alleged.

CONCLUSIONS OF LAW

1. Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a

preponderance of the evidence. 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. 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). As found, claimant has failed to prove by a preponderance of the evidence that he suffered an accidental injury on August 7, 2008.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation and benefits is denied and dismissed.

DATED: February 10, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-766-331

ISSUES

The issues for determination include compensability and medical benefits (reasonable and necessary, related, authorized).

Based upon the findings and order below that the claim is not compensable, the ALJ does not address the additional issues.

FINDINGS OF FACT

1. Claimant has worked as a drywall installer and welder for Respondent-Employer since 2006. Claimant has worked off and on for Respondent-Employer as well as other employers doing drywall and welding work for the last ten years.

2. Claimant testified that his work as a drywall installer and welder requires him to use his arms over his head on a repetitive basis. When hanging drywall, Claimant uses his hand over his head at least 50% of the time. When hanging "floating ceilings" Claimant uses his hands over his head about 90% of the time. Claimant testified that he has had ongoing problems with numbness in three digits of his left hand for several years. These symptoms generally occur at

the end of the day after installing drywall or hanging ceilings. However, these symptoms had never been severe or long lasting enough to prevent him from working, and Claimant accepted these symptoms as part and parcel of being in his line of work.

3. On Sunday, February 24, 2008 Claimant was traveling in his cousin's vehicle. While his cousin was repairing a fuel line, Claimant noticed swelling in his left arm. Claimant initially traveled to Animas Surgical Hospital Emergency Department. A CT scan was done which showed distention of the left subclavian vein. Claimant was then taken by Durango Fire and Rescue to the Emergency Room at Mercy Regional Medical Center (MRMC).

4. On intake at MRMC, Claimant reported sudden onset of swelling. Claimant stated on intake that he did overhead work with sheetrock. Claimant also reported that he drank, but did not drink excessively the night before nor had he had any "positional or heavy sleep problems laying on one side or another…" Claimant was given an ultrasound of the left upper extremity which revealed "focal thrombrosis of the medial aspect of the left subclavian vein producing peripheral venous dilation and sluggish flow… [t]he subclavian vein clot is somewhat complex in appearance suggesting a combination of chronic and acute thrombrosis." Blood thinning medications were administered, and Claimant was admitted for an overnight stay. On February 25, 2008, Claimant underwent angioplasty and stent placement in the left subclavian vein. The impression was "severe left subclavian vein stenosis at the thoracic inlet…"

5. During his own personal time, Claimant had been working on a truck on Saturday, February 23, 2008 with help from his cousin. Claimant was changing the transmission in his personal vehicle, and was not performing this work in connection with his employment with Respondent-Employer. Claimant testified that he and his cousin spent about six hours altogether working on the vehicle, although he did not perform physical labor during the entire six hour period. Claimant's actual physical work included removing bolts from various parts of the truck. Most of this work was done while Claimant was under the vehicle on a creeper. Claimant removed the bolts for the "cross member" (a brace that holds up the transfer case), drive shaft, and exhaust manifold in order to access the transmission and unbolt it. Claimant's cousin assisted in the removal of these parts after Claimant had unbolted them. Claimant estimated he took off 25-30 bolts in all. In unscrewing the bolts, Claimant used his right hand to operate a socket wrench and would use his left arm to lean on and to reach up and obtain the loosened bolts. When Claimant used his arms, they were outstretched straight from his shoulder or slightly above shoulder level. The transmission was held by a transmission jack, so that Claimant did not have to hold it when it came loose. After completing this work, Claimant had no symptoms of numbness or tingling in his left upper extremity.

6. Following his treatment on February 24-25, 2008 at MRMC, Claimant missed about a week from work, but returned to work the following Monday. Claimant resumed his regular duties in March 2008, but eventually left his employment with Respondent-Employer on or about May 8, 2008 with no severe problems noted in his left upper extremity during this period.

7. Claimant subsequently worked for two other employers – Rocking J Oilfield Services and Durango Transfer Moving and Storage. Claimant was employed by Rocking J Oilfield Services for approximately two weeks in May, 2008, and with Durango Transfer Moving and Storage for three to four weeks in June, 2008. Claimant's work with Rocking J Oilfield Services involved clearing brush, trees, and other debris for the preparation of oil well sites. In performing this work, Claimant used a chain saw. Claimant's work with Durango Transfer Moving and Storage involved moving residential household items from one location to another. Neither job required Claimant to use his arms above his head.

8. On May 22, 2008, Claimant returned to MRMC after being stuck with a cactus needle in his leg. On May 31, 2008, Claimant returned again to the ER at MRMC complaining of renewed swelling in his left upper extremity. An ultrasound of the left upper extremity revealed partial thrombrosis of the left subclavian stent and mild narrowing of the midportion of the stent" and "distended left arm veins with sluggish flow." The radiologist reviewing the ultrasound stated, "I anticipate that at some point redilation of the stent will be necessary..."

9. On June 26, 2008, Claimant returned to the emergency room at MRMC. Claimant's left subclavian vein had suffered another occlusion. An ultrasound found that the midportion of the stent placed on February 24, 2008 had crimped. Claimant was referred to Roy Carlson, M.D.

10. On July 22, 2008, Dr. Carlson evaluated Claimant. Dr. Carlson noted that Claimant had been doing drywall work, and that in the fall of 2007, he had noticed paresthesias and pain in his left upper extremity, but worked through it. On exam, Dr. Carlson observed that Claimant's left upper extremity was swollen. Dr. Carlson also noted that Claimant had paresthesias in the third, fourth, and fifth digits on elevated stress test. Dr. Carlson opined that Claimant "obviously has venous thoracic outlet syndrome and probably some neurogenic. His occupation required him to use his arms over his head, which always exacerbates the problem. I believe that he had neurogenic TOS in the fall of 2007 and then developed venous occlusion in February of 2008 though the occlusion comes after repetitive trauma to the vein." Dr. Carlson believed Claimant's condition was work-related and advised Claimant to inquire about worker's compensation. However, Dr. Carlson conceded that Claimant's work activities on his truck on February 23, 2008 could have contributed as the "final

straw" to development of the clot, Claimant's severe pain and swelling in his left upper extremity on February 24, 2008, and resulting need for medical treatment.

11. After returning from his visit with Dr. Carlson, Claimant informed representatives of Respondent-Employer for the first time that his condition was work-related, and wrote a letter to this effect dated July 25, 2008. Claimant filed a claim for compensation shortly thereafter.

12. Claimant believed he filled out the claim for compensation after the visit with Dr. Carlson. However, the claim for compensation form was dated April 7, 2008. The same form also stated that Claimant ended his employment on May 8, 2008. Claimant could not recall why the form was dated April 7, 2008.

13. At the request of the Respondents, Dr. Paz examined Claimant on October 10, 2008 during an independent medical evaluation.

14. Dr. Paz opined that Claimant's clotting condition was not the result of Claimant's work for the Respondent-Employer. He explained that Claimant had never suffered the severe pain and swelling in his left upper extremity during the many years he had performed work as a drywaller and welder, but had only experienced sporadic, neurogenic symptoms which were temporary in nature. If Claimant's work activities had contributed to the development of the clot on February 24, 2008, Dr. Paz would have expected Claimant's left upper extremity symptoms to progress rather than remain stable and transient over time. On the other hand, Dr. Paz noted that Claimant developed the acute and severe symptoms of pain and swelling in his left upper extremity within 24 hours after performing work underneath his truck on Saturday, February 23, 2008. Therefore, Dr. Paz plausibly reasoned that claimant's use of his left arm underneath the truck on February 23, 2008 likely led to initial formation of the clot which progressed to an occluded state by Sunday, February 24, 2008. He also indicated that Claimant's long history of cigarette smoking may have contributed to the development of the clot.

15. The ALJ finds that the opinion of Dr. Paz that Claimant's blood clotting condition is not work-related is the most persuasive and is more probable than Dr. Carlson's opinion.

16. As a result, the ALJ finds that Claimant has failed to establish by a preponderance of the evidence that his blood clotting condition arose out of the work he performed for Respondent-Employer.

CONCLUSIONS OF LAW

1.The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2007), 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. (2007). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. (2007). 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. Section 8-43-201, C.R.S. (2007).

2.In meeting his burden of proof that his claim is compensable, Claimant must prove that the injury arose out of and in the course of employment. *See Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998). A compensable injury is an injury which "arises out of" and "in the course of" employment. *See* C.R.S. §8-41-301(1)(b); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003); *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *See* C.R.S. §8-41-301(1)(c); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). In other words, Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *See Wal-Mart Stores v. Industrial Claim Appeals Office,* 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

3.In accordance with Section 8-43-215, C.R.S. (2007), 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).

4.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).

5. As found above, the opinion of Dr. Paz that Claimant's blood clotting condition is not work-related is the most persuasive and is more probable than Dr. Carlson's opinion.

6. It is clear that Claimant suffered an acute injury to his left arm as a result of a blood clot in his left subclavian vein on Sunday, February 24, 2008. The only prior indication of an issue was Claimant's intermittent tingling of his left arm and fingers, which subsided with rest. Both Dr. Carlson and Dr. Paz indicated that these symptoms were most likely neurogenic (as opposed to venous) in nature. In addition, these prior symptoms were much less severe than the intense pain and swelling Claimant first suffered on February 24, 2008. As a result, there is insufficient evidence for the ALJ to conclude that these prior symptoms were indicative of a problem which led to Claimant's blood clot condition on February 24, 2008 and resulting need for medical treatment. More likely, Claimant's blood clot developed as the result of the personal work he performed on his truck on Saturday, February 23, 2008 while Claimant was not working for Respondent-Employer.

7. Further, it is concluded that the crimping of the stent and Claimant's development of a second blood clot was not caused by Claimant's work for Respondent-Employer. Because the development of the initial clot on February 24, 2008 was not likely caused by Claimant's work activities at Respondent-Employer, any subsequent blood clotting condition which developed as the result of the initial clot on February 24, 2008 or its treatment is also not likely caused by Claimant's work activities at Respondent-Employer. Further, Claimant had left his employment with Respondent-Employer on May 8, 2008 before the development of this second clot. At the time Claimant left his employment with Respondent-Employer on May 8, 2008, there is insufficient evidence that his work activities at Respondent-Employer after he returned to work in March 2008 caused the second clot to develop or contributed to its development.

8. Based upon a totality of the circumstances, the ALJ concludes that there is insufficient evidence to establish that the Claimant's acute episode on February 24, 2008 was proximately caused by his work conditions. Consequently, the credible evidence of record fails to demonstrate by a preponderance of the evidence that the Claimant's acute injury on Sunday, February 24, 2008, subsequent left upper extremity problems (including, but not limited to the crimping of the stent and second blood clot), and need for medical treatment arose out of and in the course of his employment at Respondent-Employer and is compensable.

ORDER

It is therefore ordered that:

Claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

DATE: February 10, 2009

/s/ original signed by:

Donald E. Walsh

Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-655-687

ISSUES

The issues for determination are subsequent intervening conditions, permanent total disability benefits, and SSDI offset.

FINDINGS OF FACT

1. Claimant first sustained a work-related back injury on June 23, 2000 while employed by a different employer. Claimant came under the care of Dr. John Reasoner, who recommended conservative treatment measures, including physical therapy, medication, chiropractic treatment, and a neuromuscular stimulator. On July 6, 2001, Dr. Reasoner reported that Claimant was at maximum medical improvement, with no impairment. Dr. Reasoner discharged Claimant from medical care and returned him to full duty employment.

2. Claimant challenged the opinions of the authorized treating physician and a division-sponsored independent medical examination (DIME) was scheduled for May 15, 2002 with Dr. John Bissell. In his report of the same date, Dr. Bissell diagnosed chronic lumbosacral sprain/strain, chronic thoracic sprain/strain, L5-S1 degenerative disc disease, insomnia, and pain syndrome with general medical condition. These conditions were all reported as being related to the June 23, 2000, work injury. Dr. Bissell noted that Claimant had no pre-existing impairment related to his thoracic or lumbar spine, and he opined with reasonable medical probability that the work injury had aggravated Claimant's lumbosacral degenerative disc disease. Dr. Bissell reported "none" under Axis I (psychiatric diagnoses), and he opined that, despite Claimant's severe pain, Claimant's life activities were only minimally affected.

3. Dr. Bissell further reported that Claimant was capable of returning to work, but felt a functional capacity evaluation should be conducted because "some restrictions in his job duties may be necessary." Lastly, Dr. Bissell assessed a 19% whole person impairment rating, which included 7 percent impairment for a specific disorder of the lumbar spine (L5-S1 degenerative disc disease), and 13 percent for reduction of the Claimant's lumbar range of motion. Dr. Bissell provided this impairment

rating, notwithstanding his opinion that Claimant had not reached maximum medical improvement, based on DOWC requirements.

4. Claimant thereafter sustained further and additional injury to his back on July 10, 2005, while performing the duties of his employment as a meat cutter with Employer. Claimant's July 10, 2005, injury is the subject of this claim.

5. Claimant was referred to Concentra Medical Centers where he was first evaluated by Dr. Keith Kersten on July 11, 2005. Dr. Kersten found Claimant to be suffering from a low back strain with lumbar disc degeneration. Dr. Kersten prescribed Ultram and Flexeril, he referred Claimant for physical therapy, and he returned Claimant to modified work duty.

6. Claimant returned to Concentra Medical Centers on July 13, 2005, where he was evaluated by Dr. Donald Gibertini. Dr. Gibertini diagnosed Claimant with thoracolumbar, lumbar strain and right leg sciatic pain. Claimant was given Valium and referred for MRI evaluation. Claimant was soon thereafter switched back to Flexeril and taken off work due to persistent severe back pain. Claimant's physical therapy was put on hold after a July 26, 2005, evaluation revealed worsening low back pain.

7. Dr. Gibertini recommended that Claimant be seen by Dr. Daniel Baer for a physiatry evaluation. Dr. Baer diagnosed Claimant with chronic low back pain and recommended that Claimant resume physical therapy. Claimant was reevaluated by Dr. Baer on August 31, 2005, at which time Claimant was offered an epidural steroid injection. Claimant was reluctant to consider a lumbar injection due to a bad experience Claimant had with an injection for treatment of his earlier work-related low back injury. Dr. Baer therefore prescribed a Medrol Dosepak. At the time of his September 2005 evaluation, it was noted that Claimant had improved 20% on the oral steroids.

8. On January 23, 2006, Claimant was seen by Dr. Roberto Masferrer for a surgical evaluation. Dr. Masferrer reported his clinical impression of lumbar spondylosis, more prominent at L4-5, with a lesser degree of involvement at L3-4 and L5-S1, which Dr. Masferrer felt was unrelated to Claimant's back injury. Dr. Masferrer recommended against all forms of invasive therapy including epidural steroid injections, IDET, arthroscopic surgery, microdiscectomy, and open decompressive procedures. Dr. Masferrer did recommend conservative forms of non-invasive treatment including physical therapy, chiropractic manipulations, treatment with nonsteroidal anti-inflammatory agents and muscle relaxants, along with pain management without narcotic medications.

9. Claimant presented to Dr. Al Hattem at Concentra on March 2, 2006, after having experienced several episodes of bladder incontinence. Dr. Hattem referred Claimant for lumbar MRI testing, which was completed on March 3, 2006. Findings from that testing were positive for subtle annular disc bulging at L1-2 and very subtle annular disc bulging and mild facet joint hypertrophy at L3-4. At the L5-S1 level, subtle annular disc bulging, posterior osteophytosis, and mild facet joint hypertrophy (without compromise of the spinal canal) were found to be present. Finally, the MRI showed broad-based annular disc bulging at L4-5, worse on the right where it abutted the right L5 nerve root. Facet hypertrophic changes were noted, causing mild to moderate right foraminal stenosis. There was no evidence of critical canal stenosis or findings to cause cauda equine syndrome.

10. On June 6, 2006, Dr. Hattem issued an impairment rating report. Dr. Hattem noted that although Claimant had not experienced any further episodes of bladder incontinence, Claimant remained with persistent low back pain with bilateral foot and leg burning. Based on his opinion that Claimant would not derive any benefit from additional conservative treatment measures, Dr. Hattem placed Claimant at maximum medical improvement. In connection with Claimant's July 10, 2005, work-related injury, Dr. Hattem assigned a 14% whole person impairment rating, which included 8% impairment for abnormal lumbar motion, and an additional 7% whole person impairment for a soft tissue lesion with moderate to severe degenerative changes on structural tests. Regarding Claimant's work capabilities, and notwithstanding the absence of a formal functional capacity evaluation, Dr. Hattem recommended that Claimant comply with permanent restrictions "so as not to aggravate his condition." Dr. Hattem recommended that Claimant not work beyond the sedentary level, thereby limiting Claimant's lifting to 5-10 pounds. Dr. Hattem further recommended that Claimant avoid repetitive bending and twisting at the waist.

11. On October 4, 2006, Claimant underwent a DIME with Dr. John Bissell in connection with his July 10, 2005, work injury. Dr. Bissell diagnosed Claimant as suffering "claim-related" L4-5 disc displacement without myelopathy and depression. Dr. Bissell also diagnosed Claimant with L5-S1 disc displacement and thoracic spondylosis without myelopathy, but clarified that these two conditions pre-existed Claimant's July 2005 work injury. Additionally, Dr. Bissell did note that Claimant had experienced intermittent bowel and bladder incontinence, for which no clear physiologic or anatomic basis had been found. Dr. Bissell opined that the earlier onset of these symptoms was not temporally related to the July 2005 injury.

12. Dr. Bissell reported that Claimant is not capable of returning to work, including at his former job; that Claimant's medical condition has moderately or severely impacted his daily life activities; and that restrictions and accommodations are necessary for Claimant to meet personal, social, and occupational demands.

13. Dr. Bissell agreed that Claimant reached maximum medical improvement and he rated Claimant for his lumbar spine condition and depression.

14. Dr. Bissell assessed a 21% whole person impairment rating for Claimant's lumbar spine condition, which included 7% whole person impairment for a specific disorder of the lumbar spine (L4-5 disc) and 15% percent whole person impairment for reduction of the Claimant's lumbar range of motion.

15. Dr. Bissell found Claimant to suffer from depression and to have a mild to moderate category of permanent mental impairment for activities of daily living, social functioning, adaptation to stress and thinking, concentration and judgment. Dr. Bissell averaged the two highest area of function ratings to give 2.5, which he converted to a 10% overall psychiatric permanent impairment. This was then combined with Claimant's 21% whole person physical impairment, resulting in a 29% total whole person impairment.

16. Dr. Bissell subtracted 19% whole person impairment from Claimant's 29% total whole person impairment that he apportioned to Claimant's previous work-related lumbar spine injury, resulting in a 10% residual whole person impairment.

17. On March 8, 2007, Respondents filed a Final Admission of Liability, admitting for permanent partial disability benefits based on the impairment rating provided by Dr. Bissell.

18. Claimant underwent a functional capacity evaluation on April 16, 2007. The evaluator, Gail Gerig, reported that the evaluation was a valid assessment of Claimant's residual functioning and that Claimant's level of work was sub-sedentary with a 60 minute intermittent sitting tolerance. Additionally, Ms. Gerig reported that Claimant could stand occasionally and intermittently for no more than 20 to 30 minutes in an eight hour work day; that he could walk occasionally and intermittently for no more than 30 minutes in an eight hour work day; that upper extremity tasks should be completed with an equal work and rest ratio; that Claimant needed a change in posture every 20 to 30 minutes, along with the ability to recline slightly in order to de-weight his spine; that grasp, handle, grip, pinch and reach were restricted to occasional; and that Claimant was completely restricted from crouching, bending, stooping, static kneeling, and stair climbing. Ms. Gerig reported that Claimant cannot safely return to any of

his previous work positions and she concluded that, "Because of [Claimant's] chronic, objective spine problems, previous heavier work levels, limited education, possible academic deficits and current work restrictions, a safe, long-term work position may not be feasible."

19. Gail Gerig testified at the June 19, 2008, hearing. As specifically pertaining to Claimant's functional capabilities, Ms. Gerig testified that she agreed with Dr. Bissell's opinion that Claimant's medical condition has moderately/severely impacted Claimant's daily life activities. It was the further testimony of Ms. Gerig that, based on the results of Claimant's functional capacity evaluation, she also agreed with Dr. Bissell's opinion that Claimant is not capable of returning to work, including his former job. As was noted in her report, Ms. Gerig testified that Claimant tested at a sub-sedentary work level. Ms. Gerig explained that the definition of sedentary work requires negligible frequent lift, carry, push and pull of items (including the human body), as well as sitting up to 6 hours per eight-hour workday. Ms. Gerig explained that, in light of Claimant's inability to perform frequent work and/or sit for longer than 30 minutes to an hour, Claimant did not even reach the level of sedentary work capacity.

20. Claimant underwent a vocational evaluation on June 18, 2007, with Michael Fitzgibbons. Mr. Fitzgibbons reported that Claimant is a high school graduate and retains academic abilities adequate for entry-level work. Mr. Fitzgibbons noted that, due to a childhood brain injury, Claimant has difficulty learning new material and particularly, he has problems with reading comprehension. These difficulties manifested throughout Claimant's educational and vocational history. Claimant was able to learn occupations that had semi-skilled tasks; but invariably when he tried more complex, more skilled types of tasks, Claimant failed.

21. Claimant's relevant work history consists primarily of semi-skilled employment with medium to heavy physical demands. Because Claimant is now restricted to at most sedentary employment, Mr. Fitzgibbons opined that Claimant is not physically capable of engaging in any of his past employment and Claimant's acquired job skills are not transferable to alternate semi-skilled employment. Mr. Fitzgibbons concluded that Claimant is not capable of successfully returning to work in any occupation.

22. Claimant also underwent a vocational assessment by Katie Montoya who, contrary to the opinion of Mr. Fitzgibbons, suggested that there were a number of jobs that Claimant may be able to perform. Ms. Montoya identified positions in a variety of occupations including customer service, hotel work, shirt presser, telephone solicitor, and parking lot attendant. In reaching her conclusion about Claimant's ability to work, Ms. Montoya utilized a sedentary to light work classification. In terms of physical

exertional activity, Ms. Montoya testified that "sedentary to light exertional activities" would include 10 to 20 pounds lifting, frequent sitting (66% of a work shift), occasional standing and reaching (under 33% of a shift), frequent to constant handling, and non-repetitive bending. Ms. Montoya also testified that, if she employed the restrictions outlined in Gail Gerig's report of functional capacity for purpose of assessing Claimant's physical abilities, it would be a "very difficult task" to identify any work that Claimant is capable of performing. Ms. Montoya placed more reliance on the functional capacity report completed by Excel Physical Therapy than the report of Ms. Gerig because "the Excel report was utilized by Dr. Bisgard, and confirmed by Dr. Bisgard."

23. Mr. Fitzgibbons reviewed the report of Ms. Montoya. He disagreed with her conclusions regarding Claimant's ability to work, and he testified at the June 19, 2008, hearing that, in light of Claimant's level of skill combined with his limitations, Claimant would not be successful within a reasonable degree of vocational probability in completing any of the occupations identified by Ms. Montoya or any other occupation. Both by report dated May 29, 2008, and testimony given at the June 19, 2008, hearing, Mr. Fitzgibbons provided specific, record-supported reasoning as to why Claimant was not suited for return to work to any of the occupations identified by Ms. Montoya based on either Claimant's physical limitations or his emotional impairment, or a combination of both.

24. Claimant underwent psychiatric evaluation on August 28, 2008, by Dr. Kenneth Gamblin. Dr. Gamblin testified at the January 2, 2009, hearing that: Claimant had no significant or disabling problems with depression prior to his July 2005 work injury; that Claimant is suffering from both pain and depression; both the pain and the depression limit Claimant's activities of daily living; and that Claimant has depressive symptoms independent of the pain and has permanent psychiatric impairment related solely to his depression. Dr. Gamblin explained that, following his injury and over the course of time, Claimant came to realize that he is no longer capable of completing the activities he had normally completed. Claimant had loss of income, loss of insurance, loss of housing, and he had to go on public assistance. All of this contributed to Claimant being depressed, with depressed mood, loss of energy, loss of interest in activities, difficulty interacting with other people, becoming irritable, difficulty completing daily activities, loss of ability to look to the future and plan for his future, etc. These depressive symptoms are independent of Claimant's pain.

25. Dr. Gamblin assessed a 20% overall psychiatric permanent impairment related to Claimant's depression. As pertinent to activities of daily living, Dr. Gamblin's rating included: mild impairment in self-care and hygiene; minimal impairment in sexual dysfunction; mild impairment in ability to

obtain restful sleep; marked impairment in interpersonal relationships (notably, depression-related loss of interest, loss of motivation, irritability, and difficulty managing interpersonal relationships); mild impairment in communication with other people; mild impairment in ability to manage conflicts; moderate impairment in ability to perform complex and varied tasks (relating to Claimant's problems with concentration); minimal impairment in judgment; mild impairment in problem-solving and ability to abstract and understand concepts; mild impairment in memory; mild impairment in maintaining attention-concentration, specific tasks; marked impairment in ability to perform activities, including work, on schedule; and moderate impairment in ability to adapt to job performance requirements. Dr. Gamblin noted that Claimant reported an 80-pound weight gain and he opined that Claimant had gained weight as a result of his depression.

26. It is Dr. Gamblin's opinion that Claimant's depressive pathology is likely to continue into the indefinite future and that his condition is permanent. Dr. Gamblin also opined that, although additional treatment may "help" Claimant, it would not change his impairment. Dr. Gamblin testified that although part of Claimant's depression is from pain and part from issues from the work injury other than pain, in the final analysis, the etiology of Claimant's depression does not change the quality of the depression.

27. Dr. Gamblin testified that he had reviewed the two DIME reports prepared by Dr. Bissell. He noted that Dr. Bissell did not rate Claimant for any depression after the first injury, and agreed with Dr. Bissell's opinion that Claimant has separate, ratable depressive pathology, in addition to the pain from the July 2005 injury. Dr. Gamblin further agreed with Dr. Bissell's opinion that Claimant is not capable of resuming work.

28. Dr. Gamblin testified that there was no indication from the records that Claimant was treating for depression or had any impairment from depression prior to his July 2005 injury and while working for Employer. Dr. Gamblin testified that there was no indication that Claimant was unable, in any way, to perform the physical aspects of his work as a meat cutter at Employer. He testified that there was no indication that Claimant was slow in doing his work, no indication that Claimant was a not meeting work quota, and no indication that Claimant had any problem with maintaining a work schedule while he worked for Employer.

29. Claimant underwent an independent medical examination on September 29, 2008, by Dr. Robert Kleinman. Dr. Kleinman also testified at the January 2, 2009, hearing. Dr. Kleinman testified that Claimant's psychiatric status does not "prevent his ability to return to work." Dr. Kleinman is of the opinion that the level of Claimant's depression is not, in and of itself, of the severity to keep Claimant from working. Dr. Kleinman

testified that Claimant's depression has been inadequately treated and therefore, if Claimant's depression was in fact keeping him from working, Claimant "should be motivated to be treated, aggressively, in order to support himself." Dr. Kleinman testified that physical impairments are not to be rated on the Mental Impairment Worksheet, so if pain is causing a disruption in activities of daily living, it would not be rated under the Mental Impairment Worksheet. Dr. Kleinman testified further that a Somatoform Disorder is likewise not to be rated on the Mental Impairment Worksheet and that the Mental Impairment Worksheet is solely for the mental aspects of the injury.

30. Dr. Kleinman is of the opinion that Claimant has depression and that the depression is related to Claimant's injury. Dr. Kleinman believes however that the impairment is due to the physical component of the injury. Dr. Kleinman explained that he specifically asked Claimant, "But for the injury, but for the pain, would you be having such-and-such a problem" and the Claimant answered, "No." Dr. Kleinman further opined that some of the issues with the impairment were preexisting, noting a statement found in Dr. Bissell's 2002 report that Claimant was "already reporting comprehension problems."

31. Dr. Kleinman diagnosed Claimant as having an adjustment disorder, with depression, based on his opinion that Claimant's depression is solely related to Claimant's work injury and its sequelae. Dr. Kleinman opined that Claimant's psychiatric condition was treatable and that Claimant had not yet been adequately treated for his depression. Dr. Kleinman went on to suggest; "from a medical point of view, if a person had a significant depression, so that he was unable to work, and unable to have any quality of life, electroconvulsive therapy could be considered." Dr. Kleinman made further treatment recommendations such as placement in an intense outpatient program or a pain clinic. Dr. Kleinman testified that this treatment "would be considered as an effort to return him to the work place." Dr. Kleinman admitted that at no time prior to the January 2, 2009, hearing had he made any recommendation that Claimant receive additional treatment, nor did he report to anyone his opinion that Claimant would likely benefit from further treatment. Dr. Kleinman testified that he did not consider Claimant's psychiatric status to be permanent because, "the level of depression isn't of the severity that it should be permanent… he has no past history of depression, so it's not a recurring illness." Dr. Kleinman criticized Dr. Bissell's psychiatric examination of Claimant, partly because Dr. Bissell's diagnosis of depression "is a lay term--he didn't use a medical term."

32. The testimony and opinions of Dr. Gamblin, Dr. Bissell, Gail Gerig, and Michael Fitzgibbons are credible and persuasive.

33. Considering the human factors, it is found that Claimant is not capable of earning a wage due to this compensable injury. The inability to earn a wage is the result of this compensable injury and not the result of any subsequent intervening conditions.

34. Claimant began receiving Social Security Disability benefits in January 2006. The initial amount of the benefit was $974.40 per month.

CONCLUSIONS OF LAW

Permanent total disability is defined as the claimant's inability "to earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. A claimant is required to prove permanent total disability by a preponderance of the evidence. *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991). In determining whether the claimant is capable of earning wages, the Administrative Law Judge may consider a myriad of "human factors" that define the claimant as an individual. *Christie v. Coors Transportation Co*., 933 P.2d 1330 (Colo. 1997). These factors may include the claimant's physical condition, mental ability, age, employment history, education and the "availability of work" the claimant can perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The only limitation is that the effects of the industrial injury must be a "significant causative factor" in the permanent total disability. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo.App. 1986).

The overall objective of this standard is to determine whether, in view of all of these factors, employment is "reasonably available to the claimant under his or her particular circumstances." *Weld County School District RE-12 v. Bymer*, 955 P.2d at 558. Thus, the availability of employment must be determined on a "case-by-case basis" and "will necessarily vary according to the particular abilities and surroundings of the claimant." *Id.* at 557. The claimant's ability to earn wages inherently includes consideration of whether the claimant is capable of getting hired for and sustaining employment, i.e., the ability to sustain the work activities for a sufficient period of time to maintain the employment and earn wages. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo.App. 2001); *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo.App. 1995).

As a result of his July 10, 2005, work-related injury to his back, Claimant is restricted to less than sedentary work activities. Claimant's physical limitations and work restrictions act to diminish the likelihood of his obtaining employment in the first instance and in the highly unlikely event Claimant were successful in getting hired for a job, his marked impairment with interpersonal relationships, along with his impaired ability to communicate with people, manage conflicts, perform complex and varied tasks, maintain concentration, and adapt to job performance requirements, would negate any chance of Claimant maintaining the employment and earning a wage.

Claimant has met his burden of proving permanent and total disability and in establishing that a significant causative factor in his permanent total disability is the industrial disability resulting from his July 10, 2005 work-related injury.

Section 8-42-104(2)(a), C.R.S., which governs apportionment in cases of permanent total disability, provides that: "…when there is a previous disability, the percentage of disability for a subsequent injury shall be determined by computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury."

The apportionment allowed under this provision can be made only if the following two conditions are met. First, the respondents must prove the existence of a previous "disability." Second, the respondents must establish by competent evidence the nature and extent of the previous disability as it existed "at the time of the subsequent injury." Respondents established neither element.

"Disability" is assessed by nonmedical means, and is an alteration of an individual's capacity to meet personal, social, or occupational demands. "Impairment", on the other hand, is an alteration of an individual's health status that is assessed by medical means. Thus, an impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Askew v. Industrial Claim Appeals Office,* 927 P.2d 1333 (1996).

There is no apportionment if the claimant has fully recovered from a past disability so that the prior injury does not contribute to the present disability. *Mountain Meadows Nursing Center v. Industrial Claim Appeals Office*, 990 P.2d 1090 (Colo.App. 1999).

Claimant's July 10, 2005, industrial injury rendered Claimant permanently unemployable, unable to earn any wages, and totally disabled. Claimant has met his burden of proving a direct causal relationship between his July 10, 2005, work injury and the permanent total disability for which he now seeks compensation. Claimant has demonstrated that his industrial injury is the significant causative factor in his permanent total disability, therefore meeting his burden of proving permanent and total disability.

Claimant has received SSDI benefits beginning in January 2006. The initial amount of the benefit was $974.40 per month, which is $224.86 per week. Insurer may reduce the permanent disability benefits due by one-half that amount, or $112.46 per week. Section 8-42-103(1)(c), C.R.S.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant permanent total disability benefits commencing at maximum medical improvement. Insurer may reduce the benefit by $112.46 per week commencing January 1, 2006. Insurer may credit any previous payments of permanent disability benefits. Insurer shall pay Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

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

DATED: *February 10, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-740-549

ISSUES

The issues for determination are maximum medical improvement (MMI) and whether Dr. Kleiner is a physician authorized to treat Claimant on this clam. Permanent disability benefits, treatment after MMI, and other issues are not determined by this order and remain open for future determination.

FINDINGS OF FACT

1.On May 16, 2008, Claimant, through counsel, sent a letter to the adjuster that requested that Claimant "be attended by Jeffrey Kleiner, M.D., as the authorized treating physician." Insurer received this letter no later than May 24, 2008. Insurer did not respond to the request within twenty days.

2.On June 20, 2008, Dr. Kleiner examined Claimant. The examination was reasonably needed to cure and relieve Claimant from the effects of the compensable injury.

3.Claimant has a history of low back problems that predate her work injury. The MRI study reflects the natural degenerative process for a 60-year-old woman and does not support any nerve impingements or problems that can explain Claimant's extensive pain complaints. Claimant alleges medication allergies that predate her work injury. There is a significant lack of objective evidence to support a determinable medical problem and significant evidence of overreaction, pain magnification, symptom exaggeration, and non-physiologic findings.

4.Claimant's exaggerated pain behaviors include Waddell signs that were always positive. All of the treating doctors and the DIME documented Claimant's unusual behavior. Dr. Reiter reported Claimant was not able to do the MRI scan because it hurt too much to lay down on the table and Claimant stated that they must have put some kind of medicine in the earphones because she got light headed and dizzy when she put them on. Dr. Mason reported that Claimant was very intolerant to palpatory and reflex examination. Transitional movements were done with grunting, grimacing, and near tearfulness. Dr. Reiss reported that Claimant had a very dramatic presentation, but her objective findings were limited. Dr. Johnsrud reported that Claimant said she had difficulties dressing herself, washing in the shower, etc. Dr. Burris noted extreme pain behaviors throughout her entire time in the clinic. As she was walking to and from the examination room she constantly grunted and winced from pain. A visual inspection of the lumbar spine showed no deformities, swelling or ecchymosis. Dr Johnsrud was unable to apply light touch to her back or light touch to her garments without her crying out in pain and withdrawing immediately from the pain. She refused all range of motion maneuvers. While Claimant was in the standing position, Dr. Johnsrude told her that he was going to apply pressure to the top of her skull and she began crying and withdrew before he even had a chance to place hands on her head. Dr. Burkhardt reported Claimant demonstrated severe pain behaviors as soon as the exam began, although during the history she sat with no apparent distress. As soon as the neurologic exam started, Claimant developed severe pain behaviors, grunting, and was nearly in tears. "Clearly effort given is out of proportion with what is clearly demonstrated by her ability, for instance, to get up and walk." Testing of her deltoids caused lower back pain that was nonphysiologic. There was no tenderness throughout the thoracic spine. On September 30, 2008, approximately five minutes of video surveillance of Claimant's activities at a building supply store showed no signs of restrictions or limitations opening and closing doors, lifting and carrying purchased items, and driving. Dr. Burkhardt reviewed the video of Claimant and admitted that Claimant's activities on the video were inconsistent with the Claimant's presentation at her evaluation on August 14, 2008. She testified that Claimant's activities on the video were not inconsistent with the fact that Claimant exaggerates her pain complaints and condition. Dr. Burkhardt states, "I don't think there's any question that she embellishes or exaggerates her symptoms."

5.Claimant's exaggerated pain behaviors point to a possible psychological factor. Claimant's stressors, however, appear non-work related and include taking care of her daughter and grandbaby after her daughter's serious auto accident and injuries. Other stressors predate the work injury and include reactions to medication other than aspirin. Nevertheless, Dr. Burkhardt concluded that Claimant was not at MMI because she needed psychological treatment for her psychological "baggage" (despite that fact that Claimant previously declined psychological counseling and testified that she did not think it

would help). Dr. Burkhardt determined Claimant is not at MMI because she needs treatment for non-work related psychological factors.

6.Claimant told her physicians and testified that she will not take medication other than aspirin and will not accept injections. She is not comfortable with physical therapy because it hurts her.

7.Dr. Burkhardt recommended non-medication treatments, including a one-year membership to a gym for pool therapy and consideration of chiropractic treatment, referral for biofeedback, and a psychiatric evaluation. Claimant's treating physicians already recommended the same treatment on multiple occasions. Claimant has participated in pool therapy. There is no objective evidence of improvement and this can continue as medical maintenance. Claimant reported and testified she did not like physical therapy because it was too rough. As a result, chiropractic care is not reasonable because it is rougher than physical therapy.

8.Dr. Mason recommended biofeedback on multiple occasions and Claimant refused. Claimant testified that told Dr. Burkhardt that she did not understand that she was offered biofeedback but stated she was interested in trying biofeedback. Claimant's testimony is not credible. The medical records establish that Dr. Mason discussed biofeedback with Claimant on numerous occasions. On December 18, 2007, Dr. Mason discussed possible biofeedback with Claimant to help with the stress, however, Claimant did not want to pursue that. On February 12, 2008, Dr. Mason, "again discussed with [Claimant] the possibility of pain psychology evaluation and/or biofeedback treatment and she remains reluctant to pursue that." On March 11, 2008, Dr. Mason noted, "She continues to not want to take medications or consider certain other treatment modalities that we have discussed in the past such as biofeedback and pain psychology." On May 19, 2008, Dr. Mason "again brought up the possibility of biofeedback with [Claimant] and she stated, 'that doesn't work for me'."

9.Claimant was and is not interested in psychological counseling. On February 12, 2008, Dr. Mason discussed with her the possibility of pain psychology evaluation and/or biofeedback treatment and she remains reluctant to pursue that." Dr. Burris recommended a psychological evaluation with a chronic pain specialist. On May 1, 2008, Dr. Johnsrud performed the psychological evaluation, although Claimant did not have time to finish testing. Dr. Johnsrud recommended brief psychological treatment for stress management. However, Claimant seemed reluctant. Claimant returned to Dr. Burris on May 13, 2008. Dr. Burris noted that Clamant failed to follow up with his recommendations for medical maintenance care including psychological counseling with Dr. Johnsrud or treatment with Dr. Mason. On May 19, 2008, Dr. Mason noted Claimant did not follow up with Dr. Johnsrud, as recommended by Dr. Burris, and Claimant remained fairly resistant to the idea of pain psychology.

10.Dr. Burkhardt recognized that Claimant previously rejected offered treatment and failed to reconcile Claimant's actions in rejecting that treatment on multiple occasions with the assumption that Claimant would agree to proceed with treatment. "There's clearly some disconnect between the information available to me in the medical records and the information being presented to me by the patient at that time, and I'm not sure I can entirely tell you how to resolve that." Dr. Burkhardt admitted that one reaches a point where they have done everything they can, and "then you give up and you say, okay, we're at maximum medical improvement."

11.The determination that Claimant has reached MMI is based on the treatment offered and provided, the opinions of multiple treating physicians, and the fact that Dr. Burkhardt's additional treatment recommendations are not reasonable or necessary in light of the circumstances of this case.

12.Dr. Jeff Kleiner recommended diagnostic intervention including sacroiliac joint injections with steroid and, if successful, consideration of radiofrequency ablation or evaluation for facet joint disorders at L4-5 and L5-S1. Claimant testified that she is not willing to proceed with Dr. Kleiner's recommendations for sacroiliac joint injections with steroid nor with prescription medications and she found physical therapy too painful. Dr. Kleiner testified that non-medication treatment to date had been exhaustive and that Dr. Burkhardt's treatment recommendations only addressed the symptoms and not the underlying condition, if one exists. He was concerned that no specific diagnosis exists and recommended diagnostic injections to help arrive at a definitive diagnosis that would allow development of a treatment plan. Without injections, one cannot arrive at a diagnosis and one can't make appropriate treatment recommendations. In this case, however, because Claimant refuses to proceed with diagnostic injections, Dr. Kleiner admitted that Claimant may be at MMI.

13.The video shows that Clamant is more active than she portrays to her treating physicians. The fact that Claimant cares for her daughter and grandbaby confirms Claimant is more active than she portrays to her treating physicians. Additional treatment will not change Claimant's actual, non-exaggerated, condition. Dr. Burkhardt's conclusion that Claimant is not at MMI is not supported the evidence. Dr. Burkhardt only evaluated Claimant one time. The facts support that treatment to date was reasonable and exhaustive in light of Claimant's limitations. Claimant is at MMI.

CONCLUSIONS OF LAW

A claimant may request to be treated by a physician of her own choosing. If the Respondents do not grant or deny that request in a timely fashion, they are deemed to have waived any objection to the request. Section 8-43-404(5)(a)(VI), C.R.S. Claimant requested in a letter to Insurer that Dr. Kleiner be authorized. Insurer did not timely respond to the request. Dr. Kleiner is authorized. His examination on June 20, 2008, was related to the compensable injury. Insurer is

liable for the costs of that examination, in amounts not to exceed the Division of Workers' Compensation fee Schedule. Sections 8-42-101(1) and (3), C.R.S.

Maximum medical improvement is defined as "[A] point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement." Section 8-40-201(11.5), C.R.S.

There is no objective evidence of a medically determinable physical or mental impairment that results from the work injury. Claimant's physical or mental impairment, if any, is not related to the work injury. No further treatment is expected to improve Claimant's work-related condition in part because no objective condition exists, as noted above, and in part because Claimant restricts the types of treatment she will allow. The recommendation for medical maintenance will not likely result in significant improvement in Claimant's condition. It is highly probable that the opinion of Dr. Burkhardt that Claimant is not at MMI is incorrect. Respondents have shown by clear and convincing evidence that Claimant is at MMI for her work related condition and that Dr. Burkhardt's opinion is incorrect.

ORDER

It is therefore ordered that:

1. Dr. Kleiner is authorized, and Insurer is liable for the costs of his examination of Claimant on June 20, 2008, in amounts not to exceed the Division of Workers' Compensation fee schedule.

2. Claimant is at MMI for the effects of the compensable injury.

3. Issues not determined by this order are reserved.

DATED: *February 10, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-745-387

ISSUES

The following issues were raised for consideration at hearing:

1. Temporary total disability benefits;

2. Petition to terminate benefits; and

2. Responsibility for termination.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant commenced his employment for the Employer on October 5, 2007. Claimant injured himself in an admitted work injury on November 23, 2007. Claimant was employed by the Employer in the automobile lubrication department in a lite duty assignment.

2. On October 6, 2007, Claimant participated in new employee orientation where he was advised of the Employer's attendance policy. Claimant's initials and signature appears on an attendance record reflecting his participation in the new employee orientation program. Claimant was aware that three instances of "no call no show" would result in the termination of his employment. Claimant was further aware that the Employer had a policy, which required employees or a representative of the employee to contact a "one-eight hundred" telephone number when the employee did not appear for work.

3. Claimant was incarcerated for fours day beginning March 1, 2008. Because of his incarceration, Claimant was not able to appear for work. On March 1, Claimant's brother contacted the Employer to advise the Employer of Claimant's absence from work. Thereafter, neither Claimant, his brother, nor any representative acting on Claimant's behalf contacted the Employer to report Claimant's absence. On March 10, 2008, when the Employer did not hear from the Claimant, his employment with the Employer was terminated.

4. Claimant testified that he was released from jail on March 4, 2008 and that he appeared at the Employer's on March 5, 2008. He testified that, on March 5, 2008, Claimant spoke to the assistant manager in charge of the section of the store he was assigned to work in. Claimant testified that the assistant manager did not refer Claimant to the store manager. He was given no relief by the assistant manager. Claimant further testified that he was unfamiliar with the Employer's attendance policy. Claimant also testified that he sought unemployment compensation following his termination, but despite records of an unemployment compensation proceeding in which an unemployment

compensation judge found that Claimant reported he quit his job, Claimant testified that he never told a judge that he quit his job.

5. The assistant store manager to whom Claimant claimed to have spoken testified at hearing. The assistant manager testified that he could not recall speaking to Claimant on March 5, 2008 and that, if he had spoken to Claimant on March 5, 2008, he would have referred Claimant to the store manager. On March 5, 2008, Claimant had not been terminated from employment and it was the Employer's policy that if an employee is incarcerated, when that employee returns to work, he is employed as long as he proves that he was found not guilty of the charges, which caused his incarceration.

6. The store manager also testified at hearing. She testified that she learned from Claimant's brother that he was in jail. She testified that the first day of Claimant's incarceration was not counted as a "no call no show" against Claimant based on his brother's communication. However, the subsequent days between March 2 and March 10, 2008, when Claimant did not contact the Employer, was counted against Claimant as "no call no show" and resulted in Claimant's termination.

7. It is found that Claimant was not a credible witness. It is further found that Claimant's wage loss was caused by a volitional act. Since Respondents established that Claimant is responsible for his separation from employment, he is not entitled to recover indemnity benefits from the Employer.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act) Section 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. Claimant shoulders the burden of proving by a preponderance of the evidence that his injury arose out of the course and scope of his employment. Section 8-41-301(1), C.R.S.; *See City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). 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 Claimant nor in favor of the rights of Respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses' 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 interests. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJs 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. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. To obtain indemnity benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 639 (Colo. App. 1997). Under sections 8-42-105(4) and 8-42-103(1)(g), the claimant is precluded from receiving indemnity benefits if he is found to be responsible for his wage loss. The concept of "responsibility" in sections 8-42-105(4) and 8-42-103(1)(g), is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). Fault does not require willful intent. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996)(unemployment insurance).

4. Respondents sustained its burden of proof to establish that Claimant engaged in a volitional act, which caused the termination of his employment. Respondents' evidence, both documentary and testimonial, was found more credible and persuasive than the testimony provided by Claimant. Claimant's denial of knowledge of the attendance policy, his representations concerning his testimony at the unemployment compensation hearing, and his contention that he appeared at the Employer's immediately upon his release where he spoke to the assistant manager was not deemed credible.

ORDER

It is therefore ordered that:

1. Respondents' petition to terminate benefits under Section 8-42-105 (4) and 8-42-103(1)(g) is granted.

2. Claimant's claim for temporary total disability benefits is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED: February 10, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-727-772

ISSUES

The issues presented for review included whether Respondents were able to overcome the Division Independent Medical Examiners' Opinion concerning Maximum Medical Improvement (MMI) and whether Claimant was at MMI. Claimant also has requested Temporary Total Disability ("TTD").

FINDINGS OF FACT

1.Respondent-Employer, a temporary employment agency, employed Claimant. He was placed for work at an assignment for a company that manufactures medical instruments. Claimant worked at that assignment as an employee of the Respondent-Employer hereunder.

2.On June 20, 2007, Claimant was working as a parts finisher when the exhaust fan over a nitric acid bath failed, and Claimant was exposed to a nitric acid cloud. Claimant testified that the exposure lasted 10 minutes.

3.Claimant notified his supervisor and the plant was immediately evacuated.

4.As a result of the exposure, Claimant experienced a burning sensation in his nose, throat, and chest with difficulty breathing. Claimant did not suffer burns of the nose and mouth.

5.HAZMAT personnel were called to the scene and decontaminated the Claimant by stripping him, washing him and giving him decontamination fluid to wash his mouth.

6.Ambulance paramedics administered pulmonary medicine and oxygen on the way to the Penrose Community Hospital.

7.The Claimant was treated at Penrose Community Hospital with oxygen and pulmonary medicine and was directed to follow up immediately with his employer's worker's compensation medical providers at Concentra.

8.On October 26, 2007, Dr. Daniel Peterson noted mild pre-existing emphysema no improvement in Claimant's condition. The November 16, 2007 report of Dr. Peterson notes that there is "very little evidence of serious disease."

9.Concentra treated the Claimant with inhalers and referred him to Dr. Tobi Shuman, a pulmonary specialist. Dr. Shuman diagnosed occupational asthma and pleurisy. She noted that the Pulmonary Function Test revealed asthma. She also noted that the Claimant's CT scans revealed emphysematous and bronchiectasis. Bronchiectasis is manifested by airways that are inflamed and easily collapsible resulting in airflow obstruction with shortness of breath.

10.Claimant resumed medical treatment with Concentra following the treatment by Dr. Shuman. Concentra referred Claimant to Penrose Hospital for respiratory therapy. Claimant testified he had "only half" of the therapy when Respondents stopped all medical care. Claimant was placed at Maximum Medical Improvement ("MMI") on January 24, 2008. On the date of MMI report of Dr. Hattem, Claimant was breathing normally without distress and his lungs were clear. The MMI report occurred on January 24, 2008, more than six months prior to the DIME with Dr. Polanco.

11.Claimant objected timely to Respondents' Final Admission of Liability dated January 28, 2008 and also filed a Notice and Proposal to Select Division IME Physician.

12.Dr. Polanco was selected as the Division Independent Medical Examination ("DIME") physician and completed his evaluation on July 31, 2008. Dr. Polanco opined that the Claimant was not at MMI.

13.On September 18, 2008, Respondents filed an Application for Hearing seeking to withdraw their General and Final Admissions of Liability, as well as seeking to overcome the Division IME.

14.Dr. Polanco opined that exposure to nitric acid gas was one of the aspects causing Claimant's deficits.

15.Dr. Repsher evaluated Claimant on January 21, 2008 after Claimant was referred to him by Claimant's authorized treatment provider ("ATP"), Dr. Hattem. Dr. Repsher was qualified as an expert in the disciplines of pulmonary inhalational toxicology and chemical inhalation. Dr. Repsher is an ATP.

16.Dr. Repsher reviewed Claimant's medical records and conducted an evaluation of Claimant. Dr. Repsher opined that Claimant experienced a minor exposure to nitric acid gas and was at MMI on the date of the accident. He further stated that the follow up care by the authorized treating physician at Concentra, Dr. Shuman and Penrose Hospital was unnecessary and unrelated. Claimant told Dr. Repsher he was no longer smoking; however, Dr. Repsher testified he noticed an aroma of smoke when he evaluated Claimant.

17.Dr. Repsher opined that in order to inhale a clinically significant amount of nitric acid gas the exposure would result in severe burns of the nose and mouth and conjunctivitis of the eyes. Claimant did not suffer such effects. Dr. Repsher opined that there was no medical basis for Dr. Polanco's opinion and that it was incorrect. The ALJ finds Dr. Repsher to be credible. Dr. Repsher credibly testified that there is a lack of objective evidence to support a claim for ongoing nitric acid exposure

18.The Court finds the testimony of Claimant to be credible regarding the occurrence of the nitric acid exposure and the initial need for medical treatment.

19.The Court also finds that Dr. Polanco's opinion on MMI has been overcome by clear and convincing evidence.

20.Dr. Polanco did make an accurate medical diagnosis in his evaluation of Claimant. Dr. Polanco did not have accurate medical information at the time of his DIME evaluation. Dr. Polanco's report is silent on the issue of causation issue as well. Dr. Polanco inaccurately considers Claimant's own alleged non-history of prior respiratory problems. However, the medical records support that Claimant had pre-existing medical respiratory problems.

21.The ALJ concludes that the ATP's opinion that Claimant reached MMI on January 24, 2008 and did not suffer any permanent impairment nor require additional care is the more credible opinion on MMI by clear and convincing evidence.

22.The ALJ concludes that Claimant was at MMI on January 24, 2008 and that subsequent to that date Respondent-Insurer is not responsible for Claimant's medical care for any pulmonary issues Claimant may have.

CONCLUSIONS OF LAW

1. Pursuant to C.R.S. § 8-42-107(8), the standard of proof for determining whether the DIME opinion is incorrect is one of clear and convincing evidence. Such proof requires evidence demonstrating it is "highly probable" the DIME physician's rating is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). It is solely for the trier of fact to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Mehlbrandt v. Hall*, 121 Colo. 165, 169, 213 P.2d 605 (1950); *Eisnach v. Industrial Commissio*n, 633P.2d 502 (Colo. App. 1981). It is a question of fact as to whether the burden of proof has been satisfied here and whether the Respondents have overcome the DIME opinions of Dr. Polanco.

2. Dr. Polanco's opinion that Claimant is no longer at MMI for the June 20, 2007 date of injury is clearly erroneous and it is highly probable that

such a determination is incorrect. Based on the totality of the circumstances and the evidence presented, Respondents have overcome the findings and opinions of the DIME physician, Dr. Polanco as they pertain to the issue of MMI.

ORDER

It is therefore ordered that:

1. The opinion of the DIME physician, Dr. Polanco that Claimant is "not at MMI" is overcome by Respondents. Claimant's date of MMI for the June 20, 2007 injury suffered while in the employ of Respondent-Employer is January 24, 2008.

2. Respondent-Insurer is not responsible for Claimant's medical care for any pulmonary issues Claimant may have subsequent to January 24, 2008.

3. Claimants request for total temporary disability benefits subsequent to January 24, 2008 is denied and dismissed.

4. All other issues are reserved for future determination.

DATE: February 11, 2009

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-720-817

ISSUES

The issues determined herein include:

1. Whether the Claimant is entitled to ongoing medical care to maintain her condition at maximum medical improvement;

2. Whether the Claimant's average weekly wage should be increased "if the vacation time she accumulated would not automatically disappear at the end of the year;"

3. Whether the Claimant is entitled to temporary total or temporary partial disability benefits for periods of time when the Claimant had to miss work

to attend medical appointments and her personal or vacation time was used instead; and

4. Whether the Respondents are entitled to an award of attorney fees pursuant to C.R.S § 8-42-211(2)(d) for the Claimant's filing an Application for Hearing on the issues of maximum medical improvement and ongoing temporary disability benefits without requesting a Division IME or filing Petition to Reopen the claim with the required medical reports attached.

FINDINGS OF FACT

1.On October 19, 2006, the Claimant was injured in an admitted accident in the course and scope of her employment with the Employer.

2.In connection with her October 19, 2006 accident, the Claimant completed an "Associate's Statement."

3.In her Associate's Statement, the Claimant indicated her October 19, 2006 injury was to her left arm and shoulder.

4.After reporting the October 19, 2006 accident and requesting medical treatment, the Claimant was referred to, and began treating with, Dr. Pia Schalin at Emergicare, the employer's authorized treating provider for work-related injuries.

5.The Claimant's medical care and treatment was subsequently transferred to Dr. Douglas Bradley at Emergicare.

6.Dr. Bradley referred the Claimant to Dr. Roger Sung for evaluation.

7.The Claimant ultimately underwent a discectomy and fusion at C4-5 and C6-7, performed by Dr. Sung to treat her work-related injuries.

8.On January 23, 2008, the Claimant was evaluated by Dr. Sung. On that date, Dr. Sung placed the Claimant at maximum medical improvement (MMI) from her neck injury. Dr. Sung addressed the Claimant's complaint of low back pain and recommended an MRI.

9.On June 22, 2008, the Claimant was evaluated by Dr. Bradley for the purpose of determining her permanent physical impairment resulting from the October 19, 2006 accident. Dr. Bradley's report of MMI and impairment documents a May 6, 2008, MRI of the Claimant's lumbar spine, which he notes showed minor lower lumbar discogenic disease without stenosis, nerve root impingement, or annular tearing. Dr. Bradley opined this would be a normal MRI for the Claimant, given her age. Dr. Bradley's June 22, 2008 report documents

that on June 10, 2008, the Claimant's lumbar range of motion was invalid and not consistent. Dr. Bradley opined the Claimant's low back pain and leg pain is not related to her October 19, 2006 injury at work. Dr. Bradley opined the Claimant has a neurological disorder that is affecting her legs and which needs to be evaluated by a neurologist through her personal health insurance.

10.Dr. Bradley found the Claimant reached MMI from her work-related injuries on June 4, 2008. He assigned 26 percent whole person impairment to her cervical spine injuries, combining eleven percent whole person impairment under Table 53II(F) and seventeen percent whole person impairment for loss of cervical range of motion. Dr. Bradley did not assign any permanent physical impairment to the Claimant's complaints of upper extremity numbness, as it was not in a nerve root distribution.

11.In his June 22, 2008 report, Dr. Bradley initially indicates, "Medical maintenance care only is warranted." The report later indicates, "She requires no medications." In this regard, Dr. Bradley's report is ambiguous.

12.The Insurer filed a Final Admission of Liability consistent with Dr. Bradley's report of MMI and Impairment on July 28, 2008. The Final Admission does not admit for medical treatment post-MMI.

13.The July 28, 2008 Final Admission of Liability admitted liability for an average weekly wage of $486.79 and for TTD from November 5, 2007 through December 21, 2007.

14.On August 20, 2008, the Claimant objected to the July 28, 2008 Final Admission of Liability, but she did not file a Notice and Proposal to Select a DIME.

15.On August 20, 2008, the Claimant filed an Application for Hearing. The Application for Hearing endorsed the issues of "other issues," set forth as:

16.Grover medical benefits; Claimant may no longer be at MMI and may require additional medical benefits to return to MMI; in addition she may be entitled to temporary disability benefits if she is no longer at MMI; temporary disability benefits for periods of time when the Claimant had to miss work to attend medical appointments and her personal and/or vacation time was used instead; average weekly wage if the vacation time she accumulated would not automatically disappear at the end of the year.

15.Respondents filed a Motion to Strike the issues of "Claimant may no longer be at MMI and may require additional medical benefits to return to MMI; in addition she may be entitled to temporary disability benefits if she is no longer at MMI" from the Application for Hearing.

16.A Prehearing Conference was held on December 19, 2008 before Prehearing Administrative Law Judge Thomas McBride on the issue of the Respondents' Motion to Strike the issues from the Application for Hearing.

17.On December 19, 2008, PALJ McBride granted the Respondents' Motion to Strike, in part, and struck the issues of "Claimant may no longer be at MMI and may require additional medical benefits to return to MMI; in addition she may be entitled to temporary disability benefits if she is no longer at MMI" from the August 20, 2008 Application for Hearing as not ripe for determination.

18.The Claimant testified that she currently requires medical treatment for her neck pain, shoulder pain, bilateral upper extremity pain and numbness, mid-back pain, low back pain, bilateral leg pain and numbness, and pain in the soles of her feet. Dr. Bradley indicated the Claimant's mid-back pain, low back pain, bilateral leg pain and numbness, and pain in the soles of her feet is not related to the October 19, 2006 accident.

19.The Claimant is entitled to post-MMI medical treatment to maintain her work-related conditions as determined by Dr. Bradley at MMI. The Claimant did not request a Division IME. Therefore, the ALJ is bound by Dr. Bradley's findings as to the injuries and conditions that are work-related.

20.The Claimant's request for an increase in her average weekly wage was specifically based on a request to use the Claimant's vacation time that is forfeited by the Respondent Employer's policy that vacation time must be used by the employee's anniversary date of employment. The ALJ finds the Claimant failed to establish by a preponderance of the evidence that lost vacation time, if any, should be included in the calculation of the Claimant's average weekly wage.

21.The ALJ finds the Claimant's average weekly wage to be $486.79 as admitted in the Final Admission of Liability.

22.The Claimant requests an award of additional TTD or TPD for periods of time when the Claimant had to miss work to attend medical appointments and her personal and/or vacation time was used instead. The Claimant testified to the dates for which she sought an additional award of TTD or TPD. The Claimant agreed that all the dates for which she sought additional TTD or TPD were on or after she was placed at MMI by Dr. Bradley.

23.PALJ McBride's Order striking the issues of ""Claimant may no longer be at MMI and may require additional medical benefits to return to MMI; in addition she may be entitled to temporary disability benefits if she is no longer at MMI" from the August 20, 2008 Application for Hearing as not ripe does not explain why the PALJ found the issues not ripe for hearing. Therefore, the ALJ

finds the Respondents failed to establish by a preponderance of the evidence that the issues so struck were not ripe.

CONCLUSIONS OF LAW

1.Section 8-42-101(1)(a), C.R.S., provides that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A Claimant may be entitled to medical benefits after MMI if there is substantial evidence in the record to support a determination that future medical treatment will be reasonable and necessary to relieve the effects of the industrial injury or prevent a deterioration of the Claimant's condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Although the opinion of Dr. Bradley regarding the Claimant's need for ongoing accident-related medical care is equivocal, the ALJ finds that the Claimant established by a preponderance of the evidence that she is in need of future medical treatment to prevent a deterioration of her work-related condition, as determined by Dr. Douglas Bradley.

2.The Claimant did not request a Division IME challenging Dr. Bradley's findings regarding causation of her mid-back, low back, and lower extremity complaints. Therefore, the ALJ is bound by Dr. Bradley's determinations on those issues. The issue of causation of the Claimant's mid-back, low back, and lower extremity complaints are closed pursuant to C.R.S. § 8-43-203(2)(B)(II).

3.The term "wages" means the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury. Section 8-40-201(19)(a). C.R.S. § 8-40-201(19)(b) provides, in relevant part:

> The term "wages" shall include the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan, 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 shall not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19).

4.Accrued vacation time is not an advantage or fringe benefit specifically enumerated by statute for inclusion in the calculation of a Claimant's average weekly wage. The leave time at issue here is subject to forfeiture each year on the anniversary date of the Claimant's hire. A forfeiture provision may preclude

an employee from redeeming unlimited accumulated leave time at termination. Since the value of Claimant's leave time is dependent upon actual usage, and will be forfeited if in fact it is not used, it cannot be considered a cash equivalent. Therefore, it is properly excluded from the calculation of average weekly wage. *City of Lamar v. Koehn,* 968 P.2d 164 (Colo.App. 1998).

4.The Claimant seeks an award of temporary disability benefits for periods after she was placed at MMI. Per C.R.S. § 8-42-105(3)(a) and 8-42-106(2)(a), temporary disability benefits terminate when the employee reaches maximum medical improvement.

5.Section 8-43-211(1)(d), C.R.S. provides as follows: "If any person requests a hearing or files a notice to set a hearing on issues which are not ripe for adjudication at the time such request or filing is made, such person shall be assessed the reasonable attorney fees and costs of the opposing party in preparing for such hearing or setting." The term "ripe for adjudication" is not defined by the statute. However, in *Olivas-Soto v. Industrial Claim Appeals Office* 143 P.3d 1178 (Colo. App. 2006), the court noted that generally ripeness tests whether an issue is real, immediate, and fit for adjudication. Under that doctrine, adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury, which may never occur. PALJ McBride struck issues from the Claimant's application for hearing as not ripe for determination. There is no explanation as to why the PALJ struck the issues as not ripe for determination. Therefore, the undersigned ALJ finds the Respondents failed to establish by a preponderance of the evidence that the issues were not real, immediate, and fit for adjudication.

6.The ALJ's factual findings concern only evidence that is dispositive to the issues involved. The ALJ has not addressed every piece of evidence that he finds persuasive or 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).

ORDER

It is therefore ordered that:

1.The Claimant is entitled to a general award of medical benefits post-MMI to prevent deterioration of the conditions Dr. Bradley determined are work-related.

2.The Claimant's request for an increase in her AWW "if the vacation time she accumulated would not automatically disappear at the end of the year;" is denied. The Claimant's AWW is $486.79 as admitted in the Final Admission of Liability.

3.The Claimant's request for additional temporary total and/or temporary partial disability benefits is denied and dismissed.

4.The Respondents' request for an award of attorney fees per C.R.S. § 8-43-211(2)(d) is denied and dismissed.

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

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

DATE: February 11, 2009 /s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-765-987

ISSUES

- Did the respondents prove by a preponderance of the evidence that the claimant was responsible for his termination from employment and, therefore, not entitled to an award of temporary total disability benefits?
- Should the claimant's average weekly wage be modified to reflect a salary increase that was approved before the date of injury, but did not become effective until after the date of injury?

FINDINGS OF FACT

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

1. The claimant worked at the employer's dairy farm. On October 30, 2007, the claimant sustained a compensable low back injury. At the time of this injury the claimant was employed in the "maternity" area of the dairy where he assisted in birthing calves and performed other activities related to the health of the animals.

2. The primary treating physician for the injury was Dr. Cathy Smith, M.D. Dr. Smith diagnosed the injury as a "contusion" and sacroiliac (SI) joint

dysfunction. The claimant received various modes of treatment including medications, physical therapy and SI joint injections.

3. Despite the injury the claimant continued to work at the dairy. However, he was intermittently placed under medical restrictions that precluded him from performing all of the duties of his pre-injury employment.

4. The employer generally followed a stepped disciplinary policy. Under this policy three written warnings within a year could result in termination of an employee. The employer's written code of conduct forbids "insubordination or other disrespectful conduct." The claimant admitted that he was aware of the stepped disciplinary procedure.

5. On November 5, 2007, the employer issued the claimant a written warning for "insubordination." The written warning contains a space for the "company statement." In the company statement section of the warning a representative of the employer wrote that the claimant was physically working with cows in violation of his restrictions. When the claimant's supervisor (Ms. Gonzalez) spoke to the claimant "on Sunday" she told the claimant that he violated her instruction. The claimant replied, "he didn't want to work her [sic] anymore and left." The claimant returned to the employer's premises on November 5, 2007, and stated that he wanted to return to work.

6. The claimant testified at hearing that when he spoke with Ms. Gonzalez in November 2007 she yelled at him and treated him badly. However, the claimant stated that, contrary to the company statement in the warning, he did not walk off of the job, but instead went to the office to look for another supervisor. According to the claimant he found another supervisor and that person gave him permission to leave the employer's premises. Therefore, the claimant disagreed with the propriety of the November 2007 written warning.

7. Ms. Gonzalez testified that, although she did not personally write the November 2007 warning, she was involved in the incident that led up to it. According to Ms. Gonzalez she was not at work on a day when the claimant allegedly exceeded his physical restrictions by assisting in the birth of a calf. However, she investigated the incident the next day and spoke to the claimant. Ms. Gonzalez stated that when she confronted the claimant about exceeding his restrictions he stated that he did not like working at the dairy and walked off the job. The ALJ credits the testimony of Ms. Gonzales that in November 2007 the claimant expressed dissatisfaction with his job at the dairy.

8. Dr. Smith examined the claimant on May 19, 2008. At that visit the claimant reported an increase in pain in the SI joint and buttocks areas after he was ordered to use a shovel to clean manure from between livestock corrals. On that date Dr. Smith imposed restrictions of no shoveling, bending or twisting.

9. Ms. Aylor is the employer's "organic stewardship specialist." In this capacity Ms. Aylor is responsible for inspecting and certifying the employer's dairy facilities and executing the employer's employee safety program. In August or early September 2008 the employer decided to identify a specific light-duty position that the claimant could perform within the restrictions imposed by Dr. Smith. Ms. Aylor was partially responsible for defining the claimant's duties in the new position.

10. Ms. Aylor identified the jobs of "cutting tails" and "flaming udders" as being within the claimant's restrictions. Cutting tails, which was to be performed in the milking barn, required the claimant to walk behind a row of 24 restrained cows and trim their tails with a pair of scissors. Owing to the construction of the milking barn the cow tails hung between waist and shoulder height. "Flaming udders," also performed in the milking barn, required the claimant to walk behind a row of 24 restrained cows with a wand attached by a hose to a propane tank. The wand was approximately three feet in length and emitted a low intensity flame at its end. The purpose of flaming the udders was to singe hair and thereby kill bacteria that might infect the milk. The claimant was required to use his hand and arm to pass the wand under a cow's udder approximately 4 times.. Each row of cows was changed every 15 minutes. While performing either of these jobs the claimant was required to alternate between standing in one position and walking. The claimant was required to be on his feet at all times while cutting tails and flaming udders.

11. On September 4, 2008, the employer sent a letter to Dr. Smith noting that the claimant could not perform his regular duties and requesting Dr. Smith to determine whether he could perform various jobs including "cutting cow tails with scissors, while walking," and "flaming cow udders."

12. On September 8, 2008, Dr. Smith checked a space on the employer's letter indicating that the claimant could perform the job of flaming udders provided he did not have to bend, twist or stoop. However, Dr. Smith did not check the space to indicate the claimant could perform the job of cutting tails.

13. On September 8, 2008, the claimant testified that a supervisor, Mr. Gonzalez (husband of Ms. Gonzalez), "pulled him out of maternity" and assigned him to "cut tails in the corral." According to the claimant he experienced an increase in pain because cows in the corral were not well restrained and tended to move their hips from side to side during the cutting procedure.

14. On September 9, 2008, the claimant visited Dr. Smith with a complaint of back pain. Dr. Smith prescribed Tramadol for severe back pain and Naprosyn for less severe pain. Dr. Smith indicated the claimant's restrictions were unchanged and he could return to modified duty on September 9, 2008.

15. The claimant did not report for work on September 9, 2008, nor did he call the employer to notify them that he would not be able to work. The

claimant testified that after he visited Dr. Smith he fell asleep because he was taking medication. When the claimant awoke he realized he was already late for work. The claimant did not call the employer to report his absence because he had lost the employer's telephone number. The claimant admitted in his testimony that he "wrong" when he "no-called/no-showed" on September 9, 2008.

16. On September 11, 2008, Mr. Gonzalez, who was supervisor in the milking barn, issued the claimant a written warning for a violation of the employer's attendance policy. Mr. Gonzalez wrote that the claimant did not call or come to work on September 9, 2008, and that the doctor did not sign a form stating that he could not return to work. The claimant further advised Mr. Gonzalez that he could not call in because he lost the phone number. Mr. Gonzalez recorded that the claimant stated he was going to take a copy of the written warning to an interpreter before signing it, and that if the employer had any questions it could contact his lawyer.

17. On September 16, 2008, Dr. Smith signed a letter from the employer stating that the claimant could cut tails while walking provided the cows were restrained. Dr. Smith reiterated the claimant could perform the job of flaming udders.

18. On September 17, 2008, Dr. Smith examined the claimant. Dr. Smith stated that the claimant's restrictions were unchanged, but with the added recommendation that the claimant "change activity every two hours." Dr. Smith further wrote that the claimant "has to change positions to avoid prolonged stand [sic] in one position, prolonged walking, needs to stretch every 1-2 hours."

19. On September 25, 2008, Dr. Smith wrote the claimant's restrictions were unchanged, except that he "needs to sit for 15-20 minutes every 2 hours" in an eight hour shift.

20. On October 8, 2008, Dr. Smith wrote the claimant's restrictions were to continue eight-hour shifts, "continue to alternate sit/stand/walk," continue to avoid walking long distances over uneven ground, and to avoid repetitive bending, stooping, squatting and climbing.

21. Mr. Gonzalez credibly testified that prior to October 10, 2008, he observed the claimant was not flaming udders at a fast enough rate and counseled the claimant to improve. Insofar as the claimant denied that any such conversations occurred, the ALJ fins his testimony is not credible.

22. On October 10, 2008, Ms. Aylor was at the dairy where the claimant worked and observed the claimant for one hour while he performed the job of flaming udders. Ms. Aylor observed the claimant from behind a one-way window and the claimant did not know she was observing him. Ms. Aylor observed that the claimant flamed an average of 5 or 6 udders every 15 minutes. Ms. Aylor did not see the claimant exhibiting any pain behaviors or having any difficulty walking

up and down the milking barn. Ms. Aylor noted that an employee should be able to flame and average of 15 to 20 udders every 15 minutes. Ms. Aylor reported her observations of the claimant to his supervisor, Mr. Gonzalez.

23. On October 13, 2008, a meeting was held between the claimant, Mr. Gonzalez, and Ms. Aylor. The purpose of this meeting was to give the claimant a third written warning. The written warning was given for "attitude" and "quality of work." The company statement portion of the written warning states the claimant told Mr. Gonzalez that he "hated cutting tails and flaming udders," and told Mr. Gonzalez that the employer couldn't fire him because of "what his lawyer said." The warning further states the claimant made these remarks when he received the report of Ms. Aylor that he was flaming only 5 udders per row of cows.

24. Mr. Gonzalez testified that during the meeting on October 13, 2008, the claimant denied that he was not flaming udders fast enough, and also claimed that the effects of his injury were inhibiting his performance. Mr. Gonzalez recalled the claimant was gesturing during the meeting and repeatedly responded "no" to the remarks of his supervisors. Mr. Gonzalez interpreted the claimant's actions as evidencing a lack of desire to work. According to Mr. Gonzalez the claimant also said that it would be his word against the word of his supervisors.

25. Ms. Aylor testified concerning the meeting with the claimant on October 13, 2008. Ms. Aylor noted that Mr. Gonzalez told the claimant he had not been performing his duties up to the employer's expectations. According to Ms. Aylor the claimant began to roll his eyes and turn his head. She recalled the claimant said the written warning was "all lies" and that it would be his word against the word of the supervisors. Ms. Aylor stated that the claimant refused to sign the written warning and said he would take it to his lawyer.

26. Ms. Aylor testified that after the October 13, 2008, warning was issued, the claimant was terminated in accordance with the employer's policy because it was the third warning within one year's time. According to Ms. Aylor the termination was based on insubordination and the claimant's poor work quality.

27. The claimant signed the October 13, 2008, warning on October 15, 2008. At that time the claimant wrote that he could not flame more than 5 udders per line of cows because his injury prevented him from doing it any faster.

28. At the hearing the claimant testified that it was inaccurate to state that on average he flamed only 5 udders every fifteen minutes. The claimant stated that he was required to cut tails and flame udders at the same time. Therefore, he would sometimes cut 14 tails and flame five udders on the same line of cows. Other times he would cut 5 tails and flame 13 to 15 udders.

29. The claimant testified that pain associated with his injury made it difficult for him to meet the employer's expectations concerning the number of udders he was required to flame. The claimant also stated that because of his height he was required to lean over and extend the wand far under the cow in order to flame udders.

30. Ms. Aylor credibly testified that the claimant was not required to cut tails and flame udders during the same work shift. Ms. Aylor's testimony is corroborated by the testimony of Mr. Gonzalez. Further, Ms. Aylor credibly testified that during the time she observed the claimant on October 10 he was not cutting any tails, but was limited to flaming udders.

31. Ms Aylor credibly testified that the claimant was not required to extend his arm and reach under the cow with the wand in order to flame udders. Ms. Aylor credibly explained that the udder is located near the rear of the cow and that the udder is the only part of the cow's body that needs to be exposed to flame. She further explained that from where the claimant was required to stand in the milking barn that the wand is long enough to flame the udders without requiring him to reach. The photographs and video recording introduced into evidence corroborate Ms. Aylor's testimony. After observing the photographs, the video and the claimant at the hearing, the ALJ is not persuaded that flaming udders required the claimant to bend in order to perform the job.

32. Ms. Aylor credibly testified that when the claimant was performing the job of cutting tails or flaming udders he was permitted to sit and rest for 15 to 20 minutes every 2 hours. Ms. Aylor's testimony was corroborated by the credible testimony of Mr. Gonzalez.

33. The respondents proved it is more probably true than not that the claimant engaged in volitional conduct that led to his termination, and that he exercised some control over the circumstances leading to the termination. The ALJ finds, in accordance with the credible testimony of Ms. Aylor, that the jobs of cutting tails and flaming udders honored all of the restrictions imposed by Dr. Smith. The claimant was allowed, in fact required, to alternate between standing in one place and walking while he was performing these jobs. Further, the claimant was allowed to sit for 15 to 20 minutes every 2 hours. The ALJ is further persuaded that because of the construction of the milking barn and the consequent positioning and restraint of the cows, the claimant was not required to bend or stoop in order to cut the tails or flame the udders. The ALJ further finds that the claimant knew he was required to flame between 15 and 20 udders, and deliberately chose to perform the job at a substandard level, as observed by Ms. Aylor. The ALJ finds that the claimant's real motivation for failing to perform the job at the required level was not, as he claimed, physical inability attributable to the effects of the injury or any requirement that he cut tails and flame udders during the same shift. Instead, the ALJ finds the claimant chose not to perform

up to his capacity because he was unhappy working at the dairy, just as he told Ms. Gonzalez in November 2007 and Mr. Gonzalez in October 2008.

34. The ALJ further finds that on October 13, 2008, the claimant intentionally engaged in disrespectful conduct towards Mr. Gonzalez and Ms. Aylor. The ALJ is persuaded that the claimant exhibited a disrespectful attitude by gesturing, responding "no" to many inquiries and statements of his supervisors, by rolling his eyes, and by stating that all of the supervisors' remarks concerning his performance were "lies."

35. The ALJ finds that on October 13, 2008, the claimant fully aware his job was in jeopardy if he received another written warning. The claimant was aware of the employer's stepped disciplinary policy, and that a third warning could result in termination. The claimant knew he had received two written warnings within the previous year, and even acknowledged that he had bee "wrong" when he failed to call in on September 9, 2008.

36. At hearing the respondents stipulated that the claimant is entitled to temporary total disability benefits commencing October 13, 2008, unless the ALJ finds that they proved the claimant was "responsible" for the termination from employment.

37. At the time of the injury, the claimant was earning $2500 per month in salary. (The claimant also is entitled to COBRA benefits). The claimant's exhibits demonstrate that the claimant's salary was increased to $2550 per month effective November 1, 2007. As shown by claimant's Exhibit 4, the Personnel Action Notice, the increase in the claimant's wages had been approved by management by October 29, 2008, prior to the occurrence of the injury.

38. On November 24, 2008, Dr. Smith placed the claimant at maximum medical improvement (MMI) with a 14 percent whole person impairment rating. Dr. Smith stated the claimant has permanent restrictions to avoid "prolonged standing," and is required to "alternate positions frequently between standing and walking." The claimant is to avoid twisting, squatting and pivoting on the left. The claimant is also to avoid walking long distances over uneven ground. The ALJ infers from these restrictions that the claimant is permanently restricted from performing some of the regular duties of his pre-injury employment at the dairy.

CONCLUSIONS OF LAW

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

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. Section 8-40-102(1), C.R.S. Except as specifically noted below, 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. Section 8-43-201.

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). A Workers' Compensation case is decided on its merits. Section 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 Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

RESPONSIBILITY FOR TERMINATION

The claimant seeks an award of TTD benefits commencing October 13, 2008, and continuing. The respondents stipulate the claimant is entitled to an award of TTD benefits unless they proved by a preponderance of the evidence that the claimant was responsible for the termination from employment. The ALJ concludes the respondents proved by a preponderance of the evidence that the claimant was responsible for the termination.

Section 8-42-103(1)(g), C.R.S., and § 8-42-105(4), C.R.S. (termination statutes), provide that if a temporarily disabled employee "is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because these statutes provide a defense to an otherwise valid claim for TTD benefits, the respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003).

In *Colorado Springs Disposal v. Industrial Claim Appeals Office,* 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of fault as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Consequently, the concept of fault used in the unemployment insurance context is instructional. Fault requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital*

Equipment Corp., 902 P.2d 414 (Colo. App. 1994), opinion after remand, 908 P. 2d 1185 (Colo. App. 1995); *Lozano v. Grand River Hospital District,* W.C. No. 4-734-912 (ICAO, February 4, 2009). However, an employee is not responsible for a termination from employment if the physical effects of the industrial injury preclude the performance of assigned duties and cause the termination. *See Gilmore v. Industrial Claim Appeals Office, supra*; *Colorado Springs Disposal v. Industrial Claim Appeals Office, supra* (concept of responsible for termination does not refer to the claimant's injury or injury producing conduct); *Lozano v. Grand River Hospital District, supra.*

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). However, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. This is true even if the claimant is not specifically warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office, supra.*

As determined in Findings of Fact 33 through 35, the respondents proved it is more probably true than not that the claimant was "responsible" for the termination from employment within the meaning of the termination statutes. Specifically, the ALJ finds the claimant was aware of the employer's stepped disciplinary policy and that his job could be in danger if he received a third written warning. The claimant was assigned to light duty within the physical restrictions assigned by the treating physician, but he deliberately failed to meet the employer's production expectations because he did not care for his work. The effects of the injury did not prevent the claimant from meeting the employer's production expectations. Moreover, when the claimant was confronted with his conduct and given the third warning, he demonstrated deliberate disrespect towards the supervisors. As a consequence, the claimant was terminated. The ALJ concludes that the claimant's conduct was volitional and that he exercised control over the circumstances leading to the termination.

In these circumstances, the claim for TTD benefits must be denied.

AVERAGE WEEKLY WAGE

The claimant contends the AWW should be increased to include the $50 per month increase in salary that went into effect on November 1, 2007, two days after the date of the injury. The ALJ agrees with this argument.

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under some circumstances, the ALJ may determine a claimant's TTD rate based upon earnings the claimant received on a date other than the date of injury. *Pizza Hut v. Industrial Claim Appeals Office,* 18 P.3d 867 (Colo. App. 2001); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Avalanche Industries, Inc. v. Clark,* __P.3d__ (Colo. Sup. Ct. No. 07SC255, December 15, 2008). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Where a claimant's earnings increase periodically his AWW may be calculated based upon earnings during a given period of disability, not the earnings on the date of the original injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp.*, *supra*.

The ALJ, in the exercise of his discretion § 8-42-102(3), concludes that a fair calculation of the claimant's AWW should reflect the $50 per month ($11.54 per week) wage increase that the claimant received on November 1, 2007, two days after the industrial injury. In this regard, the ALJ notes that the employer had already approved the increase in wages before the October 30, 2008, industrial injury. Therefore, the claimant's expectation of receiving the increased wage was concrete and tangible before the injury occurred. Thus, it may safely be concluded that if the claimant incurs any period of temporary disability in the future he will sustain a wage loss during a period of time that, but for the injury, will necessarily include the wage increase. Further, the report of Dr. Smith indicates a reasonable likelihood that the claimant has sustained ratable permanent impairment as a result of the industrial injury, and this impairment has caused permanent restrictions that will preclude him from performing all of the duties he performed at the time of the injury. This inference follows from the fact that the permanent restrictions are very similar to those that existed during the time the employer assigned the claimant to perform "light duty" in the milking barn. The ALJ concludes that this evidence demonstrates a fair likelihood that the claimant's long-term earning capacity has been impaired by the injury, and that a fair calculation of the AWW should account for this fact in the event medical impairment benefits are ultimately awarded. *Cf. Pizza Hut v. Industrial Claim Appeals Office, supra; Broadmoor Hotel v. Industrial Claim Appeals Office,* 939 P.2d 460 (Colo. App. 1996).

The ALJ understands from the parties at the hearing that the only issue before him with respect to the AWW is whether the AWW should include the post-injury wage increase. Therefore, the ALJ has not determined the actual AWW.

That issue remains for future determination in the event the parties are unable to agree.

ORDER

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

1. Issues not resolved by this order are reserved for future determination.

2. The claim for temporary total disability benefits commencing October 13, 2008, and continuing, is denied.

3. The claimant's average weekly wage shall be increased by $11.54 per week to reflect the salary increase that became effective November 1, 2007.

DATED: February 11, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-767-305

ISSUES

The issues presented for determination at hearing were compensability and Claimant's claim for Temporary Total Disability ("TTD") benefits for the period from July 19, 2008 through September 9, 2008.

At hearing, the parties stipulated that Claimant's Average Weekly Wage was $380.00.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. Claimant moved to Colorado from Oklahoma in June 2008. Claimant began work with Employer on July 16, 2008. Claimant had previously worked in the oil fields and doing painting.

2. Employer is a temporary staffing agency. After being hired by Employer, Claimant was assigned to work for the company Two Men and a Truck doing moving of furniture.

3. Claimant testified that on Saturday, July 19, 2008 he was working for Two Men and a Truck and was moving a dresser. When Claimant bent down to pick up the dresser with another worker he experienced a "popping" in his right knee. Claimant has not had any prior right knee injuries or sought medical treatment for his right knee.

4. The incident moving the dresser on July 19, 2008 occurred between 4:30 and 5:00 PM. Claimant mentioned to an employee of Two Men and a Truck that he had "messed up my knee". Claimant did not call Employer to report the injury that day because the office was closed on a Saturday evening. Claimant continued working until about 6:30 PM that evening.

5. Claimant awoke the next day, Sunday, and noted that his right knee was swollen and stiff. Claimant waited to seek medical attention that day thinking that he may have only strained his knee.

6. Claimant presented for treatment to the Memorial Hospital emergency room at 5:25 PM on July 20, 2008. Claimant gave a history to the triage nurse that he bent down yesterday to pick up something and felt something pop in his right knee while coming back up. Claimant was diagnosed with probable ligament injury, given medications, placed in a knee imobilizer and referred to Dr. Paul Rahill for further treatment.

7. Claimant was examined by Dr. Rahill on July 25, 2008. Dr. Rahill obtained a history that Claimant had injured his knee while carrying out his duties as a mover on July 19, 2008 when he was in a squatting position and tried to lift and felt a pop in his knee. Dr. Rahill obtained a further history that when Claimant woke up the next day his knee was very swollen and stiff. Claimant complained to Dr. Rahill of pain, difficulty walking and swelling. Dr. Rahill's physical examination found exquisite tenderness over the posteromedial joint line and a strongly positive McMurray's test. Dr. Rahill's impression was acute right medical meniscus tear, possible ACL injury. Dr. Rahill referred Claimant for an MRI.

8. Claimant underwent an MRI of the right knee on August 13, 2008. The MRI revealed findings compatible with subacute lateral-patellar dislocation and associated bone contusion of the lateral femoral condyle.

9. Claimant returned for evaluation by Dr. Rahill on August 25, 2008. Dr. Rahill noted that Claimant was still having some pain especially with kneeling and walking. Dr. Rahill reviewed the MRI results and diagnosed a right patellar dislocation. Dr. Rahill released Claimant to return to work with restrictions of no climbing, squatting, kneeling or crawling.

10. Claimant's job assignment moving furniture at Two Men and a Truck required Claimant to squat. Following Claimant's right knee injury on July 19, 2008 Claimant was unable to squat and unable to perform his regular employment as assigned to Two Men and a Truck by Employer.

11. Claimant remained unable to perform his regular employment after being released to return to work with restrictions by Dr. Rahill on August 25, 2008. Claimant was not offered modified duty by Employer after the July 19, 2008 injury.

12. The designated medical provider of Employer for work injuries in July 2008 as Memorial Hospital. As found, Claimant sought treatment from Memorial Hospital after his injury and was referred by Memorial to Dr. Rahill. Memorial Hospital and Dr. Rahill are authorized treating physicians for purposes of Claimant's injury.

13. Claimant returned to work at Express Temporary Services on September 1, 2008. Claimant initially worked for this employer at Broadmoor Villa. Claimant then began working at Serv-Pro on September 8, 2008 and is, at the time of the hearing, a full –time employee of Serv-Pro performing fire restoration and clean-up work.

14. Claimant's testimony concerning his injury to his right knee on July 19, 2008 is credible and is found as fact. Claimant has proven, by a preponderance of the evidence, that he sustained an injury to his right knee on July 19, 2008 arising out of and in the course of his employment with Employer.

15. Claimant reported his injury to Employer on July 21, 2008 when he spoke with Sandra Cavazos, the personnel supervisor at Employer. Claimant completed a written report of injury for Employer on July 23, 2008 at the request of Ms. Cavazos. Ms. Cavazos testified that at the time the written report was completed Claimant stated he did not want to claim workers' compensation benefits. Claimant's written report of injury is consistent with the medical history obtained by Dr. Rahill and with Claimant's testimony at hearing.

16. Claimant filed a Worker's Claim for Compensation with the Division of Workers' Compensation on August 7, 2008 claiming compensation and benefits for a July 19, 2008 injury with Employer.

CONCLUSIONS OF LAW

16. 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).

17. 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. 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 (2008) C.R.S.

18. 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).

19. Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997.

20. As found, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his right knee on July 19, 2008 while employed by Employer. Although Claimant did not immediately report the injury, he did report the injury the following Monday after concluding that he needed medical attention. Also as found, Claimant's testimony at hearing is consistent with the history of injury given to his medical providers and as reported to Employer in the written report of injury completed by Claimant on July 23, 2008. Respondents did not present persuasive evidence that the injury did not occur as alleged by Claimant, was due to a pre-existing condition that was not aggravated or accelerated by Claimant's work or that occurred outside of the course of Claimant's employment with Employer. Any alleged statement of Claimant that he didn't want to claim workers' compensation benefits was not binding on

Claimant. See, *Oxford Chemicals v. Richardson,* 782 P.2d 843 (Colo. App. 1989).

21. As found, Claimant was unable to return to the usual job due to the effects of the work injury. Consequently, claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Claimant is entitled to TTD benefits if the injury caused a disability, the disability caused claimant to leave work, and claimant missed more than three regular working days. TTD benefits continue until the occurrence of one of the four terminating events specified in section 8-42-105(3), C.R.S. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Claimant's entitlement to TTD benefits ended September 1, 2008 under the provisions of Section 8-42-105 (3)(b), C.R.S. when Claimant returned to work.

ORDER

It is therefore ordered that:

Claimant's claim for compensation and benefits for a July 19, 2008 injury to the right knee is granted and Claimant's injury is compensable.

Respondents shall pay Claimant TTD benefits from July 20, 2008 through and including August 31, 2008 at the rate of $253.33 per week based upon the stipulated Average Weekly Wage of $380.00.

Claimant's claim for TTD benefits from September 1 through and including September 9, 2008 is denied and dismissed.

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

All matters not determined herein are reserved for future determination.

DATED: February 11, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-748-615

ISSUES

The issues determined herein are permanent partial disability ("PPD") and medical benefits.

FINDINGS OF FACT

1.Claimant has been employed as a jewelry associate for the employer for approximately three years.

2.On March 6, 2007, claimant suffered an admitted industrial injury when a small half-door fell, striking claimant's left knee.

3.Claimant had a previous admitted work injury on March 23, 2005, when she was involved in a rollover motor vehicle accident on LaVeta Pass. As a result of that earlier work injury, claimant suffered pain in her neck, shoulders, arms, and back.

4.Claimant was treated at Parkview Medical Center ER on March 23, 2005. She reported shoulder, hip, and extremity pain. X-rays taken of her left shoulder and pelvis were negative. She was given non-steroidal anti-inflammatory drugs for her pain. Dr. Bradley treated claimant, who reported a history of "osteoarthritis, mainly of the knees, ankles, hands" and "osteoporosis." Her complaints included bilateral shoulder pain, contusion/bruising on the right side of her head, and left leg pain. Dr. Bradley took claimant off work and continued prescription medications. On March 25, 2005, claimant reported slight improvement in her right shoulder. Dr. Bradley released claimant with modified work restrictions.

5.Over the next few weeks, the claimant continued to complain of right head pain and ongoing soreness in her left shoulder. On April 4, 2005, she began physical therapy at Dr. Bradley's referral. She reported minimal improvement from physical therapy over the next month. The records of physical therapy note that claimant walked with a "stooped slow gait." Claimant reported feeling "horrible all over" and that "every bone and muscle in her body hurt." On April 18, 2005, she reported her "head, back and knee were killing [her]." She consistently limped and complained of whole body pain. On May 9, 2005, she was noted to have a decreased stance on the right with an increased swing through on the left leg. On May 12, 2005, physical therapy was discontinued.

6.Dr. Bradley last examined claimant on May 9, 2005. At that time, she was complaining of left shoulder, head, back and ankle pain. Dr. Maisel at the Southern Colorado Clinic in Pueblo, Colorado assumed care for claimant. Dr. Maisel referred the claimant to Dr. David Richman, a physiatrist, for consultation.

7.Dr. Richman examined the claimant on June 29, 2005. He made several diagnoses and recommended extensive treatment and diagnostic tests. Claimant reported no improvement from Dr. Richman's treatment or referrals. Dr. Richman noted that claimant had significant pain behaviors and that an adequate physical examination was not even possible because of her pain responses. Dr. Richman concurred with the recommendation for a psychiatric consult, which the claimant refused.

8.Claimant continued to complain of severe intractable pain. She eventually underwent a functional capacity evaluation on February 1, 2006. The test results were deemed invalid due to inconsistent effort. The range of motion testing performed at that time was also deemed invalid. Despite the invalid range of motion testing, Dr. Maisel assigned fifteen percent whole person impairment by "estimating" claimant's demonstrated range of motion. The respondents then requested a Division Independent Medical Examination ("DIME").

9.Dr. Laura Moran was the selected examiner. Dr. Moran's first impression of claimant was of her limping, holding onto her husband's arm to ambulate. On physical exam, very light palpation caused claimant to cry out and hyperventilate. She cried throughout the examination, which took almost two hours due to the claimant's very slow responses and extreme pain behaviors. On inquiry about her limping, claimant reported she had pain in her back "all along." She walked holding onto the wall. Claimant reported an inability to lift more than five pounds and difficulty doing almost any type of housework.

10.Dr. Moran noted that claimant's cervical spine magnetic resonance image ("MRI") demonstrated only minimal degenerative changes. She stated that claimant's pain behaviors were found extreme by two other doctors. Dr. Moran indicated that claimant's pain behaviors and markedly decreased range of motion in her cervical spine and shoulders were "completely out of proportion to objective findings." Dr. Moran calculated 22% loss of cervical range of motion, but declined to give the claimant an impairment rating based upon loss of range of motion. Dr. Moran concluded that claimant should receive a 4% whole person impairment rating for specific disorders of the cervical spine. Dr. Moran opined that the claimant's condition is "largely a pain disorder/psychiatric issue and is not attributable to structural, verifiable physical derangement."

11.On August 22, 2006, the insurer filed a Final Admission of Liability for the March 23, 2005 accident. The insurer admitted liability for reasonable, necessary, and related medical treatment after maximum medical improvement ("MMI").

12.On December 28, 2006, Dr. Danylchuk examined claimant, who reported ongoing headache, neck pain, shoulder pain, low back pain, and leg

pain. Dr. Danylchuk noted stiffness in the neck and low back. He obtained a new computed tomography ("CT") scan of the cervical spine.

13.After the work injury on March 6, 2007, in the current claim, claimant did not immediately seek medical treatment. On March 22, 2007, Dr. Christopher Wilson at the Southern Colorado Clinic examined claimant, who complained about her left knee, leg, and foot. X-rays of the left knee showed slight to generalized osteopenia and degenerative arthritis of the knee with very slight involvement of the patellofemoral joint, very slight involvement of the medial femorotibial joint, and very slight involvement of the lateral femorotibial joint. X-rays of the left distal foreleg, ankle and foot, showed mild generalized osteopenia and degenerative changes in the ankle and foot. Dr. Wilson advised the claimant to follow up with Dr. Mark Potzler.

14.On March 27, 2007, Dr. Potzler examined claimant, who complained of "horrible bruising on her leg and foot." On physical exam, however, Dr. Potzler found no sign of any bruising on her leg, foot, or calf. Further, Dr Potzler observed claimant walking down the hall with a normal gait. In the exam room, she was barely able to bear any weight on her left foot at all and was barely able to cross the length of the exam room. After the exam, claimant very easily and quickly ambulated down the hall and out of the doctor's office with no problem. The diagnosis was contusion to the left foot, mid-calf and thigh.

15.Claimant returned to her regular job following the accident and has continued in that position without additional restrictions since.

16.On April 17, 2007, claimant continued to complain to Dr. Potzler of pain, discomfort and difficulty ambulating. Dr. Potzler noted that claimant had good range of knee motion, with no evidence of ligamentous instability. On May 8, 2007, Dr. Potzler again noted the recommended psychiatric evaluation and the claimant's universal refusal of the recommendation. On May 8, 2007, Dr. Potzler noted claimant to have minimal point tenderness in the leg and foot and good range of motion. Claimant continued with subjective complaints. Her physical exam was objectively normal, with good range of knee motion and the medial and collateral ligaments appearing to be intact. The anterior and posterior cruciate ligaments appeared to be intact.

17.On June 19, 2007, the claimant reported "both-sided knee problems." Given the claimant's subjective complaints, Dr. Potzler ordered a MRI of the knee.

18.Dr. Susan Zickafoose then assumed care for claimant. The MRI was not performed until August 6, 2007 due to the claimant's inability to lay flat, allegedly because of the March 23, 2005 accident. The August 6, 2007 MRI was read as showing a mild bone bruise in the medial subarticular region of the

patella facet and the posteromedial tibial plateau and type 2 signal change in the posterior horn of the medial meniscus, with no full thickness tear evident.

19.Following the August 6, 2007 MRI, Dr. Zickafoose referred the claimant back to physical therapy for deep myofascial release with Dr. Debra Carpenter. Dr. Zickafoose noted, "we are encouraged that there is nothing torn and no surgery will be needed."

20.Dr. Carpenter provided massage therapy on the left knee as well as chiropractic treatment for claimant's back. On November 2, 2007, claimant reported that her left knee was 75% improved. Dr. Carpenter noted that claimant's knee was no longer tender to palpation. Her left thigh was no longer tender. She had normal range of motion in the left knee. The left iliotibial band was no longer tender or painful upon movement. Both hamstrings and quadriceps were strong at +5. Joint stability remained very good with a negative drawer's sign. Dr. Carpenter suggested additional physical therapy on claimant and recommended specific chiropractic treatment and therapy to the rest of the claimant's body injured in the March 23, 2005 accident.

21.On December 6, 2007, Dr. Nicholas Kurz evaluated claimant. Claimant reported to Dr. Kurz that the treatments provided by Dr. Carpenter gave her minimal relief. She reported having multiple complications from the March 23, 2005 accident, with injuries to her neck, back, arm, and legs. Claimant reported near complete resolution of the left leg/knee injury sustained on March 6, 2007, although she did complain of a chronically retained bruise. Dr. Kurz examined the left lower extremity and did not identify any bruising. Claimant specifically denied swelling, ecchymosis, erythema, and loss of sensation. A targeted exam of the left leg revealed no abnormalities of the knee, thigh or calf. Dr. Kurz noted good complete range of knee motion. Based on his exam, Dr. Kurz placed the claimant at MMI for the March 6, 2007 accident, with no impairment and no recommendation for treatment post-MMI. According to Dr. Kurz, no permanent physical impairment would be anticipated from either a knee strain or a mild bone bruise unassociated with ligament tears.

22.Dr. Gary Gutterman also evaluated the claimant on December 6, 2007 for purposes of an independent psychiatric examination. Claimant told Dr. Gutterman that the pain in her left lower extremity was essentially gone much of the time. She stated that she continued to experience pain and muscle spasms in shoulders, arms, upper back, and low back. Claimant reported a variety of interests and hobbies to Dr. Gutterman, including looking after her horse, spending time with her grandchildren (babysitting two grandchildren, ages five and ten, each Friday and Saturday and two other grandchildren, ages two and four, one to two times per week), reading, watching television, going to yard sales, and spending time with family and friends. When describing her persisting pain, claimant reported seeing her family physician for a potential problem with "her vertebrae". She reported going cold turkey off the medications Ultracet and Flexeril towards the end of 2005 due to side effects. Her only pain complaint was

of low back spasms made near the end of the interview. She was able to sit through the entire two and a quarter hour interview. Dr. Gutterman diagnosed pain disorder and recommended psychological treatment for claimant unrelated to any work injury.

23.On January 29, 2008, the insurer filed a Final Admission of Liability for medical benefits only for the March 6, 2007 injury, but denied any post-MMI medical benefits.

24.On June 9, 2008, Dr. Kenneth Finn performed the DIME examination. He diagnosed bone bruise without meniscal tear. On physical exam, claimant complained of left knee pain, with pain into the distal thigh and proximal calf and left lateral ankle. She reported she was "50 percent" improved in her symptoms due to the treatment received from Dr. Carpenter. Nonetheless, she still complained of pain at a level 9/10, averaging an 8/10. Claimant told Dr. Finn that she could tolerate seven to eight minutes of sitting, ten minutes of standing, six to ten minutes of walking and fifteen to 20 minutes of driving. Her lifting capacity was allegedly limited to ten to twelve pounds.

25.Dr. Finn took one measurement of claimant's knee range of motion, at 127 degrees of flexion, 0 degrees of extension. He agreed that claimant was at MMI as of December 6, 2007. Dr. Finn determined 8% impairment of the lower extremity based upon loss of left knee flexion. Dr. Finn also recommended a second orthopedic evaluation as maintenance care, together with four months of additional chiropractic treatment.

26.On September 4, 2008, Dr. Kurz reexamined claimant, who complained of pain at a level 10/10. She reported pain in her wrists, shoulders, low back, thighs, hips, left knee and ankle. She related these complaints to her March 23, 2005 accident. Dr. Kurz noted claimant to ambulate into the exam room with a very slow gait and an exaggerated limp on the left leg. Claimant reported that she was unable to sit down, flex her lumbar muscles without difficulty, or flex or extend her knee due severe pain. There was no deformity noted of the knee. The exam was unchanged from previous exams. Dr. Kurz noted claimant's pain to be extremely out of proportion to any physical findings. Dr. Kurz again did not observe reduced range of motion of the left knee. Claimant became increasingly agitated in the course of the exam. Upon learning his opinions, she left the exam room rapidly and with a normal gait.

27.On a monthly basis, claimant and her husband rake and shovel horse manure out of their arena at home. They load it in a pickup truck and unload it at a landscaping business. Respondents obtained surveillance video depicting claimant performing these activities. Claimant admitted that it fairly depicted her performing these activities, although she could not provide any foundation for the date depicted in video recording. Claimant also was observed to bend at her

knees and waists to cut rose bushes. She was observed to walk slowly with some abnormal gait, not specifically limited to her left knee.

28.Dr. Kurz testified at hearing that range of motion measurements are effort-dependent, although he assisted claimant in achieving full range of motion in his examination. Because he observed apparent full range of motion, he did not perform goniometer measurements of the left knee motion. Dr. Kurz also testified that, if claimant has suffered no permanent physical impairment, there is no requirement that formal range of motion testing be performed. He noted the inconsistent gait by claimant and agreed with the diagnosis of bone bruise without meniscal tear. He explained that the MRI findings of type 2 signals indicated only lightened density from normal wear and tear, but no meniscal tear. He reiterated that claimant had somatic complaints due to an emotional cause. He disagreed with Dr. Finn's recommendations for another orthopedic evaluation. He also disagreed with Dr. Finn's recommendations for additional chiropractic treatment because the treatment reportedly did not help claimant very much and because the chiropractic treatment was primarily for the unrelated low back problems.

29.Claimant has failed to prove by a preponderance of the evidence that she suffered permanent medical impairment to her left leg as a result of the admitted March 6, 2007, work injury. The preponderance of the record evidence demonstrates that claimant suffered only a bone bruise from that accident. Claimant has repeatedly demonstrated inconsistent gait. She has continued to complain of chronic pain in various body parts after the March 2005 motor vehicle accident. Although Dr. Kurz assisted claimant with left knee range of motion and did not use a goniometer, his opinion is still more persuasive. Dr. Finn did not repeat goniometer measurements to check for consistent effort by claimant, who has demonstrated inconsistent examination. Dr. Carpenter's November 2, 2007, examination also supports the conclusion that claimant had full left knee range of motion. Consequently, claimant has no permanent impairment from the current injury.

30.Claimant has failed to prove by a preponderance of the evidence that another orthopedic surgeon evaluation or additional chiropractic treatment is reasonably necessary for the admitted left knee injury in this claim. Dr. Finn received a history of reported improvement with Dr. Carpenter's treatment; however, she continued to report extreme pain despite Dr. Carpenter's treatment. Therefore, her report of significant benefit from it is contradictory. Moreover, Dr. Carpenter was not providing chiropractic treatment for the claimant's March 6, 2007 injuries. She was providing deep tissue massage, treatment in the nature of physical therapy, as prescribed by Dr. Zickafoose. Dr. Carpenter's recommendation for additional chiropractic treatment related to the claimant's March 23, 2005 accident and ongoing symptoms from those injuries. Dr. Kurz is persuasive that chiropractic treatment is not appropriate or useful in connection with claimant's knee injury.

31.Dr. Kurz is persuasive that an additional orthopedic evaluation is not reasonably necessary in this claim. Dr. Kurz opined that claimant does not require an additional surgical evaluation. Dr. Kurz testified the type II signal change demonstrated on the August 6, 2007 MRI represents a linear signal that does not disrupt the articular surface of the meniscus. Further, no physician has related the type II signal to the claimant's March 6, 2007 accident.

CONCLUSIONS OF LAW

1. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and Subsection (8) provides a DIME process for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 803 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). The heightened burden of proof in Subsection (8) applies only if the threshold determination is made that the impairment is not limited to the schedule. Then, and only then, does either party face a clear and convincing evidence burden to overcome the rating of the DIME. *Webb v. Circuit City Stores, Inc.*, W.C. No. 4-467-005 (ICAO, August 16, 2002). The parties stipulated at hearing that the only issue was the amount of the scheduled rating. As found, claimant has failed to prove by a preponderance of the evidence that she is entitled to any PPD benefit due to the admitted left knee injury.

2. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury, including treatment after MMI. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). The DIME physician's opinions are not entitled to any special weight on the issue of post-MMI medical benefits. *Henderson v. Eastman Kodak Company*, W.C. No. 4-256-823 (Industrial Claim Appeals Office, July 27, 1999). As found, claimant has failed to prove by a preponderance of the evidence that another orthopedic surgeon evaluation or additional chiropractic treatment is reasonably necessary for the admitted left knee injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for PPD benefits is denied and dismissed.

2. Claimant's claim for post-MMI medical benefits in the form of an orthopedic surgeon consultation or additional chiropractic treatment is denied and dismissed.

DATED: February 12, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-775-679

ISSUES

The issues determined herein are compensability, medical benefits, liability for failure to insure, and penalty for failing to admit or contest liability.

FINDINGS OF FACT

1.The employer is a sole proprietorship, operating a landscaping business. Claimant was employed by the employer. Claimant also had concurrent employment on weekends with Homestake Enterprises.

2.On October 17, 1998, claimant suffered an injury arising out of and in the course of her employment with the employer. She was carrying irrigation pipes in her arms. She fell and landed on both elbows.

3.Claimant's supervisor, Mike, was present and took claimant to Penrose Hospital emergency room. The emergency room physician obtained x-rays, which showed bilateral elbow fractures. The physician placed casts on both elbows and prescribed splints as well oxycodone. The physician referred claimant to Dr. Jones for orthopedic evaluation and excused her from work.

4.Claimant filled the oxycodone prescription at Walgreen's, paying $17.49 out of pocket.

5.On the evening of October 17, 1998, the employer called claimant. She reported that she was unable to return to work because both arms were in splints. He informed her that he would take care of her and pay the medical bills. The employer did not refer claimant to any other medical provider.

6.The employer later called claimant and informed her that he did not have workers' compensation insurance. He has failed to pay any of the medical bills.

7.On October 20, 2008, Dr. Jones examined claimant. He prescribed splints and slings for the elbows. He prohibited claimant from performing any lifting.

8.On November 10, 2008, Physician's Assistant Stafford examined claimant. He diagnosed bilateral radial head fractures and left wrist sprain. He allowed claimant to discontinue the left elbow splint, prescribed slings, and prohibited claimant from lifting or gripping.

9.The medical treatment by Penrose Hospital, Dr. Jones, and the prescription medication was authorized and reasonably necessary to cure or relieve the effects of claimant's work injury.

10.The employer was uninsured for workers' compensation liability on the date of the injury.

11.The employer had notice on October 17, 2008, that claimant suffered a lost time injury. At no time has the employer filed an admission of liability or a notice of contest.

CONCLUSIONS OF LAW

1. Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). Claimant must prove entitlement to benefits by a preponderance of the evidence. 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. 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). As found, claimant has proven by a preponderance of the evidence that she suffered an injury on October 17, 1998, arising out of and in the course of her employment with the employer.

2. Respondent is liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Respondent is only liable for authorized or emergency medical treatment. See § 8-42-101(1), C.R.S.; *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P. 2d 228 (1973). Under § 8-43-404(5), C.R.S., the respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once the respondents have exercised their right to select the treating physician the

claimant may not change physicians without permission. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). A physician may become authorized to treat the claimant as a result of a referral from a previously authorized treating physician. The referral must be made in the "normal progression of authorized treatment." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985). If the employer fails to authorize a physician upon claimant's report of need for treatment, claimant is impliedly authorized to choose her own authorized treating physician. *Greager, supra*. As found, the medical treatment by Penrose Hospital, Dr. Jones, and the prescription medication was authorized and reasonably necessary to cure or relieve the effects of claimant's work injury.

3. As found, the employer did not have workers' compensation insurance at the time of the injury. Section 8-43-408(1), C.R.S., provides for 50% additional indemnity benefits, but does not increase the liability for medical benefits. Claimant did not seek temporary or permanent disability benefits at the present time. Consequently, no additional liability can be ordered at the present time.

4. Section 8-43-203(1), C.R.S., requires the employer to file an admission or contest of liability within 20 days after report of a lost time injury pursuant to section 8-43-101, C.R.S. As found, the employer had notice on October 17, 2008, of a lost time injury and failed to file any admission or contest at any time. Section 8-43-203(2), C.R.S., provides a penalty of one day's compensation for each day's failure to file the admission or contest. Claimant did not seek temporary or permanent disability benefits at the present time and did not litigate the issue of average weekly wage. Consequently, no penalty for failing to admit or deny can be imposed at the present time.

ORDER

It is therefore ordered that:

1. Respondent shall pay for all of claimant's reasonably necessary medical treatment by authorized providers, including the bills of Penrose Hospital, Dr. Jones, and their referrals. Respondent shall reimburse claimant in the amount of $17.49 for out of pocket expenditures for prescription medications.

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

DATED: February 12, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-752-352

ISSUES

The issues to be determined are medical benefits, authorized provider, claimant's request to have a physician he selects attend him, and temporary partial benefits from March 28, 2008, and continuing. The parties stipulated to the average weekly wage of $700.00. All issues not determined are reserved.

FINDINGS OF FACT

1.On January 2, 2008, Claimant sustained an admitted injury to his back when his co-employee dropped his end of a heavy propane tank, leaving Claimant to bear all of the weight.

2.An MRI of Claimant's lumbar spine, taken on January 29, 2008, revealed a broad bulge with contact on the S1 nerve root axillae bilaterally and bilateral neural foraminal narrowing at the L5-S1 level. There was also a broad bulge with contact on the thecal sac at the L2-3 level.

3.On March 14, 2008, Dr. Clarence Henke noted that Claimant was able to return to modified duty with restrictions of no lifting, carrying, pushing or pulling over 10 pounds, walking no more than 3 hours per day, standing no longer than 3 hours per day, and sitting no longer than 2 hours per day.

4.On March 17, 2008, Dr. Brian Beatty noted that Claimant had ongoing tenderness to palpation over the paralumbar musculature with moderate trigger point activity involving the L5-S1 level on the right. Dr. Beatty reported performing trigger point injection to the multifidus on the right to the L5-S1 level. Dr. Beatty restricted Claimant to no lifting, carrying, pushing or pulling over 10 pounds, no repetitive lifting over 5 pounds, walking no more than 3 hours per day, standing no longer than 3 hours per day, and sitting no longer than 2 hours per day.

5.On March 25, 2008, Dr. Brian Beatty reported that Claimant had ongoing tenderness to palpation over the paralumbar musculature with moderate trigger point activity involving the multifidus at the L5-S1 level. Structurally, Claimant's iliac crest height was elevated on the left as compared to the right, anterior/ superior iliac spine was elevated on the left as compared to the right and the posterior superior iliac spine was elevated on the right as compared to the left with lumbosacral spinal somatic dysfunction. Dr. Beatty reported performing trigger point injection to the multifidus at the L5-S1 level. Dr. Beatty continued to restrict Claimant to no lifting, carrying, pushing or pulling over 10 pounds, no repetitive lifting over 5 pounds, walking no more than 3 hours per day, standing

no longer than 3 hours per day, and sitting no longer than 2 hours per day. Dr. Beatty also stated that Claimant must limit bending at the waist.

6.On April 1, 2008, Dr. Brian Beatty reported Claimant's restrictions as no lifting, carrying, pushing or pulling over 10 pounds, no repetitive lifting over 5 pounds, walking no more than 2 hours per day, standing no more than 2 hours per day, sitting no more than 4 hours per day, and no crawling, kneeling, squatting or climbing.

7.On April 10, 2008, Dr. Brian Beatty reported that Claimant could do no lifting, carrying, pushing or pulling over 10 pounds, no repetitive lifting over 5 pounds, and no bending at the waist.

8.On April 14, 2008, Dr. Brian Beatty reported Claimant's restrictions as no lifting, carrying, pushing or pulling over 10 pounds, no repetitive lifting over 5 pounds, no crawling, kneeling, squatting, climbing or bending at the waist.

9.On April 17, 2008, Dr. Brian Beatty continued to restrict Claimant to no lifting, carrying, pushing or pulling over 10 pounds, no repetitive lifting over 5 pounds, no crawling, kneeling, squatting or climbing. Dr. Beatty stated that sitting, standing and walking were to be done intermittently.

10.An MRI of Claimant's lumbar spine, taken on April 17, 2008, revealed degenerative disk disease at L2-3, L3-4, L4-5, and L5-S1. High signal intensity was seen beneath the annular margin at L5-S1 on the right central to posterolateral aspect consistent with an annular fissure. There was also a right posterolateral to foraminal protrusion seen. A slightly larger left foraminal protrusion was seen at L5-S1. There was also paraspinal muscle atrophy.

11.On May 1, 2008, Dr. Brian Beatty continued to restrict Claimant to no lifting, carrying, pushing or pulling over 10 pounds, no repetitive lifting over 5 pounds, no crawling, kneeling, squatting, climbing, or bending at the waist. Walking, standing and sitting were to be done intermittently.

12.On May 29, 2008, Dr. Brian Beatty stated that Claimant could lift, carry, push and pull no more than 10 pounds. Repetitive lifting was limited to 5 pounds. Sitting and standing were to be done intermittently, and Claimant was advised that he could use a crutch.

13.On June 3, 2008, Dr. Nicholas Olsen reported performing a right L5-S1 transforaminal epidural steroid injection.

14.On June 10, 2008, Dr. Brian Beatty reported Claimant's restrictions as no lifting, carrying, pushing or pulling over 10 pounds, no repetitive lifting over 5 pounds, intermittent sitting and standing, and use of a crutch.

15.On June 17, 2008, Dr. James Ogsbury opined that surgery was not likely to be helpful. Dr. Ogsbury stated, "I have told him that I fully understand that the slow pace of natural healing is a problem for him but that issue does not change the fact that surgery is not likely to be helpful, in my opinion."

16.On June 20, 2008, Respondents filed an amended General Admission of Liability.

17.On July 1, 2008, Dr. John Aschberger reported his assessment as: L5-S1 degenerative changes and findings of nerve root encroachment occurring bilaterally with right lower extremity radicular symptoms. The physical examination suggested SI joint irritation and restrictions. Dr. Aschberger stated that the findings were consistent with earlier findings and physical examination findings as noted throughout the records. Dr. Aschberger stated that the examination was not significantly suggestive of symptom magnification. Dr. Aschberger stated that Claimant's history is consistent and appears reliable. Dr. Aschberger opined that additional treatment is warranted in this case with a more extensive course of therapy for stabilization and mobilization as tolerated, and consideration for additional pain control. Dr. Aschberger stated that Claimant was not at maximum medical improvement. Dr. Aschberger reported Claimant's work restrictions as bending and twisting intermittently and rarely, less than 10 times per hour. Lifting was restricted at 10 to 15 pounds occasionally and less than 10 pounds frequently. Dr. Aschberger noted that Claimant would have difficulty with lift and carry using the Lofstrand crutch. Dr. Aschberger recommended lumbar flexion-extension x-rays to rule out any instability at the L5-S1 level. He recommended an SI joint injection with injection of the associated lumbosacral ligament. In conjunction with a follow-up injection, Dr. Aschberger recommended return to therapy regarding stabilization and attempt at mobilization and continued correction regarding any dysfunction and misalignment at the pelvis. Dr. Aschberger stated that additional medication for pain management may be considered. He stated, "[Claimant] has limitations and is limited in terms of participation in therapy due to pain and better pain control with additional medication intervention may be helpful in allowing advancing his participation."

18.On July 2, 2008, Dr. Brian Beatty modified Claimant's restrictions to no lifting, carrying, pushing or pulling over 25 pounds and no repetitive lifting over 10 pounds.

19.On July 16, 2008, Dr. Brian Beatty continued to restrict Claimant to no lifting, carrying, pushing or pulling over 25 pounds, and no repetitive lifting over 10 pounds.

20.On August 7, 2008, Dr. Brian Beatty reported Claimant's restrictions as no lifting, carrying, pushing or pulling over 25 pounds.

21.On August 15, 2008, Dr. Ricardo Esparza stated that Claimant was diagnosed with Depressive disorder, generalized anxiety disorder and relational problems associated with a mental and medical condition. Dr. Esparza reported that Claimant was struggling with insomnia, fatigue, low motivation, lack of appetite, social withdrawal, low libido, irritability and intermittent tearfulness. Claimant's frustration remains because of his inability to engage in activities of daily living as in the past.

22.Claimant testified that, even though he returned to work on approximately March 18, 2008, to perform modified duty, he is continuing to have difficulty with standing, sitting and walking. After he is at work for about one to two hours, he needs to take medication and lie down because the pain becomes unbearable. The pain becomes so severe that he starts to sweat and feels he cannot move. He has been provided with accommodations with regard to sitting, standing and walking, but has not been provided a place to lie down when he needs to. There is no area to lie down other than on the floor in the reception area of the warehouse building. He would be unable to get down to the floor and then get up. It would be very hard for his back to lie on the hard surface of the floor. He has difficulty bending, walking, and stretching to clean the tables.

23.Claimant testified that he always has pain going from his back all the way down his leg. He has depression. The most he can stand is up to two hours. After lying down, the pain becomes manageable, but is not reduced sufficiently. When he generally gets to work, the pain level on a 1-10 scale was at the 5-6 level. By the time he works one to two hours, his pain level reaches a level of 9 and Claimant has to go home to lie down and take more medications.

24.Recently, Employer has provided a modified job of shredding paper, which is a sit down job, but he can still only perform it for about 2 hours at a time. Claimant's pain becomes unremitting and he cannot stand the pain. Claimant testified that if he were physically able to work more hours he would do so. Claimant testified that he needs to use the cane that Dr. Beatty prescribed to walk because his leg does not help him sufficiently for balance.

25.Claimant testified that he does not get along with Dr. Beatty. Claimant feels that Dr. Beatty does not listen to him, does not understand him. He has only examined him three times since March 2008. He does not feel that Dr. Beatty is sympathetic to him. He does not trust Dr. Beatty. He has not been able to relieve his pain. Claimant feels that Dr. Beatty does not see him as a patient but an object, like a worthless thing. Claimant is requesting that Dr. Chris Ryan treat him for this injury.

26.Escatel, the warehouse manager, testified that he witnessed that the Claimant has difficulty walking, getting around and seems in pain most of the time. When Claimant leaves work, he has informed Escatel that the pain is unbearable. He has noticed that Claimant has a lot of difficulty getting up and down from chairs and moving. Claimant has difficulty even walking to the door of the warehouse. Escatel has noticed that Claimant has gotten worse over time.

27.Dr. Beatty stated that Claimant has given a good effort while he has been under his care. Dr. Beatty has never discussed with Claimant his restrictions, his ability to work, how long he can stand, sit, walk, or what kind of work he is currently performing or what his current abilities are.

28.Claimant is unable to work a full eight hours per day because of his compensable injury. Claimant is partially disabled.

CONCLUSIONS OF LAW

1. The Workers' Compensation Act is intended to be "remedial and beneficent in purpose, and should be liberally construed" in order to accomplish these goals. Davison v. Industrial Claim Appeals Office & Mobley v. Industrial Claim Appeals Office, 84 P.3d 1023 (Colo. 2004).

2. The employer is obliged to provide a physician willing to render treatment so long as it is reasonably necessary. Tellez v. Teledyne Water Pik, W.C. No. 3-990-062, (ICAO, March 24, 1992); *aff'd.,* Teledyne Water Pik v. ICAO, Colo.App. No. 92CA0643, December 24, 1992 (not selected for publication).

3. Upon the proper showing to the division, the employee may procure permission at any time to have a physician of the employee's selection to treat the employee. C.R.S. 8-43-404(5)(a)(VI), C.R.S..

4. An ALJ has broad discretion in permitting a claimant to select a physician to treat him so long as that decision is supported by substantial evidence. Brenneman v. McDuff Electronics, W.C. No. 3-936-449, (ICAO, November 14, 1991.) Accordingly, even a finding that a particular doctor "is not sympathetic to a claimant's complaints" is sufficient ground for authorizing a change if supported by the evidence. Ramirez v. Excel Corporation, W.C. No. 3-990-123, (ICAO, March 16, 1993). Similarly, a claimant in need of further medical treatment, who had developed "a mistrust" of his doctor after being told that further treatment was unnecessary, was entitled to a change of physician. In Re Claim of Carson v. Wal-Mart, W.C. No. 3-964-07, (ICAO, April 12, 1993). Claimant testified that he does not trust Dr. Beatty, does not feel that Dr. Beatty understands or listens to him and has not been effective in relieving the effects of claimant's injuries. Claimant feels that Dr. Beatty treats him like an object not a patient. Claimant requests that Dr. Chris Ryan treat him.

5. In Merrill v. Mulberry Inn, Inc., W.C. No. 3-949-781, (I.C.A.O, November, 1995), the claimant's selection of a physician to treat him was permitted since the claimant and the doctor were unable to communicate properly. The treatment by the physician did not prove effective in relieving the claimant from the affects of her injury and the claimant had established a trusting relationship with another physician.

6. Where the request to select physicians was made before a claimant was placed at MMI and was based solely on the treating physician's nonmedical conduct, it is not a challenge to the treating physician's determination of MMI, and Story does not preclude the ALJ from granting a change of authorized physician. Ames v. Industrial Claim Appeals Office, 89 P.3d 477 (Colo.App. 2003).

7. Claimant has made a proper showing to select a physician to treat him. Claimant has selected Dr. Chris Ryan. Dr. Ryan is authorized as of

October 16, 2008. Physicians who were authorized before October 16, 2008, remain authorized. This does not affect any finding of MMI made by a treating physician prior to the date of the hearing. Insurer is only liable for treatment provided by Dr. Ryan that is reasonably needed to cure and relieve Claimant from the effects of the compensable injury. Section 8-42-101(1), C.R.S. Respondents may challenge any treatment of Dr. Ryan that is not reasonably needed to cure and relieve from the effects of this injury. This order does not grant or deny a medical benefit. Liability for medical benefits after the date of the hearing remains open for future determination.

8. The term "disability," as used in workers' compensation cases, connotes two elements. The first element is "medical incapacity" evidenced by loss or restriction of bodily function. There is no statutory requirement that a claimant present evidence of a medical opinion of an attending physician to establish his physical disability. *See* Lymburn v. Symbios Logic, 952 P.2d 831 (Colo.App. 1997). Rather, a claimant's testimony alone could be sufficient to establish a temporary "disability." Lymburn v. Symbios Logic, *supra.*

9. The second element is loss of wage earning capacity. Culver v. Ace Electric, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of "disability" may be evidenced by a complete inability to work, or physical restrictions which preclude a claimant from securing employment. Barnes v. Anheuser-Busch Sales Co. of Denver, W.C. No. 4-548-535, (ICAO, February 24, 2004).

10. A claimant must receive a "statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions." Rule 6-1(A)(4), WCRP.

11. An employer is responsible for the direct and natural consequences which flow from the compensable injury. Hembry v. Industrial Claim Appeals Office, 878 P.2d 114, (Colo.App. 1994).

12. Generally, the industrial injury need not be the sole cause of Claimant's temporary wage loss as long as the injury is "to some degree" the cause of the wage loss. The only exception to this rule is Section 8-42-105(4), C.R.S., which provides that in cases where a temporarily disabled employee is "responsible for termination of employment," the resulting wage loss "shall not be attributable to the on-the-job injury." Section 8-42-105, C.R.S., is not applicable to this case as Claimant was not terminated from employment. Section 8-42-106, C.R.S. is the statutory provision that addresses temporary partial disability benefits.

13. Claimant testified that he does not work a full 8 hours per day because his pain becomes unbearable and cannot continue working after 1 or 2 hours per day and needs to lie down and take medications. Claimant's testimony is credible and persuasive.

14. The Administrative Law Judge has broad discretion in assessing the weight and sufficiency of the evidence to determine whether a claimant's burden has been satisfied. Eisnach v. Industrial Commission, 633 P.2d 502 (Colo.App. 1981). As found, Claimant has provided substantial evidence and has satisfied his burden with respect to his request for a change of physician and for temporary partial disability benefits. Reasonable probability exists if the proposition is supported by substantial evidence which would warrant reasonable belief in the existence of facts supporting a particular finding. F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo.App. 1985). Claimant testified that he does not trust Dr. Beatty and that he is limited to working only a couple of hours before his pain becomes unbearable and he needs to lie down. Dr. Beatty has not discussed with Claimant his level of pain, his ability to work, his restrictions or his dissatisfaction with the medical care.

15. 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). The fact finder should consider among other things, the consistency of a witness' testimony and/ or actions; the reasonableness or unreasonableness (probability or improbability) of a witnesses' testimony and/or actions; 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); Colorado Jury Instructions, Civil, 3:16. The injured worker always has the greatest interest in the outcome. In this case, other factors outweigh the "interest" factor. Claimant's testimony and actions were consistent with the totality of the evidence.

16. Claimant has established by a preponderance of the evidence that he is unable to work eight hours per day and is partially disabled. Temporary partial disability benefits are due at the rate of two-thirds of the difference between Claimant's average weekly wage at the time of the accident and his average wage per week during the period of temporary partial disability. Section 8-42-106, C.R.S.

17. The stipulation of the parties is accepted. Claimant's average weekly wage is $700.00.

18. Insurer is liable for interest at the rate of eight percent per annum on all benefits not paid when due. Section 8-43-410, C.R.S.

ORDER

It is therefore ordered that:

1.Claimant has made a proper showing to select a physician to treat him. Dr. Christopher Ryan is authorized as of October 16, 2008.

2.Insurer is liable for temporary partial disability benefits from March 28, 2008, until terminated by law.

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

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

DATED: *February 12, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-766-798

ISSUES

- Who shall be considered dependents of the decedent Claimant for the purpose of awarding death benefits?
- How should the death benefits be apportioned between the eligible dependents?
- How should the death benefits be paid to the eligible dependents?

FINDINGS OF FACT

1. Claimant was killed in the course and scope of his employment with Employer on July 29, 2008. Respondents filed a Fatal Case General Admission on September 18, 2008.

2. At the time of his death, Claimant's average weekly wage was $1385.00. Death benefits are to be paid at the rate of $786.17 per week.

3. On July 29, 2008, Claimant had three children: CLR, JHR, and BDR. CLR was born on December 11, 2003. JHR was born on May 13, 2008. BDR was born on May 13, 2008.

4. JR, CLR, JHR, and BDR receive social security benefits at the rate of $1,011.00 per month. Respondents are entitled to offset social security benefits against death benefits pursuant to statute.

5. On July 29, 2008, Claimant was married to JR. JR and Claimant resided together in their family home in Vernal, UT. JR and Claimant were married on June 4, 2003.

6. There is no credible or persuasive evidence that the Claimant and JR were living apart at the time of the Claimant's death, or that JR was not dependent on Claimant for support.

CONCLUSIONS OF LAW

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

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. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201.

DEPENDENCY OF JR

Section 8-41-503(1), C.R.S., provides that dependents and the extent of dependency shall be determined "as of the date of the injury to the injured employee, and the right to death benefits shall become fixed as of said date irrespective of any subsequent change." Section 8-41-501(1)(a), C.R.S., provides that a widow is presumed to be wholly dependent unless it is shown she "was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependent in whole or in part on the deceased for support."

The ALJ concludes that JR is presumed to be wholly dependent on the decedent. As found, JR was the wife of the decedent on the date of death and she resided with the decedent at the time of the death. There is no credible or persuasive evidence that JR was not dependent on the decedent for support.

DEPENDENCY OF CLR, JHR AND BDR

Section 8-41-501(1)(b), C.R.S., provides that "minor children of the deceased under the age of eighteen years" are "presumed to be wholly dependent." Section 8-41-501(c)(I) & (II) provide that "minor children of the

deceased who are eighteen years or over and under the age of twenty-one years" are presumed to be wholly dependent if it is shown that "they were actually dependent upon the deceased for support" at the time of death, and "either at the time of the decedent's death or at the time they attained the age of eighteen years they were engaged in courses of study as full-time students at any accredited school."

The ALJ concludes that CLR, JHR and BDR are presumed to be wholly dependent on the deceased. All of these children are under the age of 18, are the natural children of the decedent, and resided with him on the date of death.

APPORTIONMENT OF DEATH BENEFITS

Section 8-42-121, C.R.S., provides for apportionment of death between multiple dependents "in such manner as the director may deem just and equitable." The ALJ concludes that there shall be an equal distribution of death benefits between the eligible dependents. The evidence does not demonstrate that any of the eligible dependents, including JR, CLR, JHR, and BDR, has any special educational, medical or other needs that might warrant some unequal distribution of benefits. Neither does the evidence indicate that any of the dependents has special access to other sources of income that might favor some alternative distribution of benefits.

PAYMENT OF DEATH BENEFITS

Section 8-42-121 provides that death benefits "shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents entitled to such compensation, as may be determined by the director." The ALJ concludes that the death benefits should be paid to JR for the benefit of all eligible dependents, and that she shall apply the benefits in the proportions directed by this order. The ALJ concludes that JR has the best interests of the minor children at heart, and is willing and able to apply the benefits in accordance with the best interests of the children and in accordance with the ALJ's direction.

ORDER

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

1. Issues not resolved by this order are reserved for future determination.

2. JR, CLR, JHR, and BDR are dependents of the decedent Claimant and are eligible to receive death benefits. Death benefits shall be apportioned equally among these dependents.

3. The death benefits shall be paid to JR, and shall be applied for the benefit of the eligible dependents, and in accordance with the apportionment directed in this order.

4. Respondents are entitled to offset social security benefits against death benefits pursuant to statute.

DATED: February 12, 2009

Barbara S. Henk
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-735-872 & WC 4-759-789

ISSUES

The sole issue determined herein is temporary total disability ("TTD") benefits in W.C. 4-759-789. The parties stipulated to an average weekly wage of $1,043.70.

FINDINGS OF FACT

1.Claimant has been employed as a truck driver for the employer for approximately 13 years. His duties require him to tie down loads with chains and binders.

2.In 2007, claimant began to experience bilateral thumb problems, left worse than right. He reported his injury on September 18, 2007.

3.Claimant underwent electromyography ("EMG") testing of his left hand, which was read as normal. He then underwent magnetic resonance ("MR") arthrogram of the left wrist on November 9, 2007. The MR arthrogram showed significant arthritis of the first metacarpal joint and the distal articular surface of the trapezium.

4.Dr. Devanny, an orthopedic surgeon, evaluated claimant on November 30, 2007, and diagnosed left thumb carpometacarpal ("CMC") arthritis. He recommended surgery, which was eventually performed on March 31, 2008. Claimant then underwent a course of physical therapy on the left hand.

5.Claimant continued to have left hand pain after surgery, in addition to his untreated right hand pain.

6.Claimant was released to return to work with no use of his left hand. On May 5, 2008, claimant returned to work for the employer. The employer offered work as a dispatcher, but claimant had no computer experience and was afraid to try the job. He worked for about four hours painting cones. He then was unable to continue due to right hand pain and went home.

7.On May 6, 2008, claimant called in sick. He returned to work on May 7, 2008, pulling weeds with his right hand only for the most of the day. On May 8, 2008, claimant failed to appear for work.

8.The employer admitted that it did not consider any restrictions on right hand use at the time of the May 5, 2008, offer of modified employment. Mr. Cash, the risk manager for the employer, called claimant and told him that he is just old and was able to work with right hand pain.

9.On September 10, 2008, Dr. Devanny reexamined claimant and noted increasing right hand pain. Dr. Devanny concluded that claimant was at maximum medical improvement ("MMI") for the left hand. Dr. Devanny noted that the right thumb had a positive grind and shift test. Dr. Devanny noted that he would be glad to treat the right thumb at any point and that claimant was seeking approval for that from the insurer. Dr. Devanny excused claimant from all work until reexamination on October 21, 2008.

10.On October 20, 2008, Mr. Cash wrote to Dr. Devanny and Dr. Nanes, the authorized treating physicians, and expressed surprise that claimant had been excused from work. He asked for specific restrictions so that the employer could offer a light duty job.

11.On October 29, 2008, Dr. Devanny replied to Mr. Cash, noting that claimant was at MMI for the left thumb and had no specific restrictions on the left hand or thumb. Dr. Devanny noted, however, that claimant has the same problem with his right thumb and needed surgery. Dr. Devanny noted that claimant was able to do "light duty."

12.On November 11, 2008, Dr. Nanes reexamined claimant's left thumb only. Dr. Nanes diagnosed left CMC arthritis with continued pain and loss of range of motion. Dr. Nanes determined 20% impairment of the left upper extremity. Dr. Nanes recommended post-MMI medications and imposed permanent restrictions against any pinching, gripping, or use of the left hand.

13.On November 20, 2008, the employer provided a written offer of work to claimant, approved by Dr. Nanes on November 21, 2008. The offer was for a night watchman position commencing November 26, 2008, from 9:00 p.m. to 4:15 a.m. seven days per week, with a 30 minute meal break, for a total of 45

and one-half hours per week at $21 per hour. The duties required moving two large metal gates approximately two times per night, although the written job description did not list those duties.

14.Claimant declined to accept the written offer of modified work.

15.Claimant returned to Dr. Nanes in December 2008, but he refused to treat the right hand.

16.On December 19, 2008, the insurer filed a general admission of liability for medical benefits only for the right hand injury in WC 4-759-789. Surgery on the right thumb was scheduled for January 26, 2009.

17.On January 13, 2009, the insurer filed a final admission of liability in WC 4-735-872 for the left hand injury. The admission terminated TTD benefits after May 4, 2008, and then resumed them from September 10 through October 28, 2008. The admission provided scheduled permanent disability benefits for the left hand. The insurer admitted liability for post-MMI medical benefits for the left hand.

18.Dr. Devanny testified by deposition that he would restrict claimant from moving heavy gates at work. He would limit claimant's gripping, grasping, pinching, lifting, and carrying. Dr. Devanny continued to recommend right thumb arthroplasty.

19.At all times since May 5, 2008, claimant has been disabled due to his admitted right thumb work injury. The May 5 return to work offer ignored any right hand disability, by the employer's own admission. Claimant clearly was unable to paint cones or pull weeds with his untreated right thumb. Dr. Devanny's subsequent September 10, 2008, excuse from work due to the right hand indicates claimant's right hand disability even before that date.

20.The insurer reinstated TTD benefits in the left hand claim, WC 4-735-872, from September 10 through October 28, 2008.

21.After October 28, 2008, when claimant was at MMI for his left hand injury, he continued to be temporarily totally disabled due to his untreated right thumb injury.

22.The employer's November 20, 2008, modified duty offer again failed to make any provision for the disability of the right hand. The employer admitted that the offer only provided that claimant would not have to use his left hand, pursuant to the November 11, 2008, restrictions by Dr. Nanes.

CONCLUSIONS OF LAW

1.Claimant was unable to return to the usual job due to the effects of the work injury. Consequently, claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Claimant is entitled to TTD benefits if the injury caused a disability, the disability caused claimant to leave work, and claimant missed more than three regular working days. TTD benefits continue until the occurrence of one of the four terminating events specified in section 8-42-105(3), C.R.S. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

2.Respondents argue that claimant's entitlement to TTD benefits terminated May 5, 2008, pursuant to section 8-42-105(3)(b), C.R.S., because claimant returned to modified employment. Claimant, however, was unable to continue to perform the modified duty because of his untreated right hand injury in WC 4-759-789. The modified duty was offered only in light of the treatment and restrictions on the left hand. Claimant remained temporarily totally disabled due to his right hand injury. No modified offer was ever made regarding the right hand injury, for which claimant was receiving no medical treatment. Consequently, claimant is entitled to TTD benefits from May 5 through September 9, 2008, when the insurer reinstated the benefits for the left hand.

3.Respondents also argue that claimant's TTD benefits terminated November 26, 2008, pursuant to section 8-42-105(3)(d)(I), C.R.S., because of claimant's failure to begin the modified employment offered in writing and approved by the attending physician. The same problem exists with this argument by respondents. The employer admitted that no modified duty was ever offered in light of any right hand restrictions in WC 4-759-789. Dr. Nanes refused to treat the right hand. His written restrictions pertain only to the left hand. Dr. Devanny restricted right hand use and would not have approved modified duty requiring moving the heavy gates. Consequently, the employer did not provide modified duty approved by a physician in WC 4-759-789. Claimant is entitled to TTD benefits commencing October 29, 2008, and continuing thereafter.

ORDER

It is therefore ordered that:

1.In WC 4-759-789, the insurer shall pay to claimant TTD benefits at the rate of $695.80 per week for the periods May 5 through September 9, 2008, and October 29, 2008, and continuing thereafter until modified or terminated according to law.

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

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

DATED: February 13, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-763-803

ISSUES

- Did claimant prove by a preponderance of the evidence that he sustained an injury arising out of the course and scope of his employment?

- Did claimant prove by a preponderance of the evidence that an average weekly wage of $329.49 more fairly approximates his wage loss as a result of his injury?

STIPULATIONS

The Judge adopts the following stipulations of the parties:

1. Claimant's average weekly wage (AWW) includes meals valued at $20.00 per week.

2. Claimant sustained an injury to his right knee during an assault, which is the subject matter of this claim.

3. Medical treatment claimant received for his right knee from Southwest Memorial Hospital and from Doug Bagge, M.D., is reasonable, necessary, and related to the injury.

4. Doug Bagge, M.D., is an authorized treating physician.

5. If claimant's injury is compensable, he is entitled to temporary total disability (TTD) benefits from June 9, 2008, ongoing until terminated in accordance with the Worker's Compensation Act of Colorado.

FINDINGS OF FACT

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

1. Employer operates a restaurant business that is open 24 hours per day. Ms. Cure was a manager of the restaurant. Claimant and Ms. Watkins worked for employer as food servers. Ms. Cure and claimant generally worked the late shift, from 7:00 p.m. until 3:00 a.m. Claimant worked some 3.5 years for employer, most recently from October 13, 2007, ongoing. Ms. Watkins' boyfriend, Donald Arron Brown, assaulted claimant in employer's parking lot around 2:40 a.m. on June 8, 2008.

2. On Saturday evening, June 7, 2008, claimant clocked-in for his shift around 7:00 p.m. Claimant clocked-out for lunch break between 9:10 and 9:47 p.m. on June 7th. Although claimant clocked back in at 9:47 p.m., Ms. Cure clocked him out on June 8th at 2:57 a.m.

3. The restaurant was busy during the evening of June 7th and early morning of June 8th. Sometime around 1:45 a.m. on June 8th, one of claimant's customers assaulted him. The customer was intoxicated and became argumentative when claimant served his meal, insisting that claimant brought the wrong meal. Claimant offered to correct the order but explained it would take additional time to prepare another order. Claimant left the table and went to his station to prepare a drink order. The intoxicated customer came over to him, grabbed the front of his shirt and pushed him up against a pie case. The drink order fell to the floor. Other customers pulled the intoxicated customer off of claimant. Ms. Cure had another server call the police.

4. Claimant was shaken from the intoxicated customer's assault and told Ms. Cure he was going outside to take a break and smoke a cigarette. Although she is uncertain whether claimant heard her say it before he went outside for his break, Ms. Cure gave claimant permission go home early. Claimant told Ms. Cure he would take a break and finish his side-work before clocking out. Ms. Cure asked Ms. Watkins to work late to cover the rest of claimant's shift. When Ms. Watkins agreed to cover the rest of claimant's shift, she told Ms. Cure that she had a friend who was picking her up to drive her home after her shift. Ms. Watkins told Ms. Cure that she needed to drive her friend home and then drive back to the restaurant before she could finish claimant's shift.

5. When the police arrived, Ms. Cure went out into the parking lot to get claimant, who was still on break. Claimant met with the police in the foyer of the restaurant and told them he did not want to press charges against the intoxicated customer, whom the police escorted off the premises.

6. Ms. Cure was extremely busy with customers after the police left. Ms. Cure thought claimant left work to go home after he had talked to the police. However, claimant had gone back out into the parking lot to finish his cigarette after talking to the police.

7. Ms. Watkins went to the parking log to ask claimant if he intended to leave work early. Claimant told Ms. Watkins he planned to finish his side-work and go home. The friend who came to the restaurant to pick up Ms. Watkins was her boyfriend, Brown. Ms. Watkins got into the car with Brown, who had been waiting for her. Crediting Ms. Cure's testimony, Brown became angry because she had asked Ms. Watkins to work past the end of her shift to cover for claimant.

8. Brown yelled something at claimant, who was in the parking lot on his smoking break. Claimant could not understand what Brown was saying and approached the car. Brown got out of the car and yelled at claimant, telling him he would kick his ass for calling the cops. Claimant attempted to calm Brown by telling him he had not called the police. Brown called claimant a "fucking cop caller" and punched him in the face. In self-defense, claimant lunged at Brown's waist to protect himself from being punched. Claimant however twisted his knee and fell to the ground. Brown continued kicking and punching claimant until customers pulled Brown off claimant. Ms. Cure again had someone call the police, who came to the restaurant, arrested Brown, and obtained witness statements. Claimant elected to press charges against Brown.

9. Claimant was transported via ambulance to Southwest Memorial Hospital, where he received emergent medical treatment for his knee. Orthopedic Surgeon Doug Bagge, M.D., has also provided claimant treatment for his knee condition.

10. Claimant showed it more probably true than not that the assault by Brown occurred during course of his employment. Brown's assault of claimant occurred in the course of his employment because claimant was clocked-in, on a break, and in the parking lot, which is the area designated by employer for smoking breaks. Although Ms. Cure had given claimant permission to leave before the end of his shift, and although Ms. Cure thought claimant had clocked-out before the assault occurred, claimant nonetheless was clocked-in and on a break at the time of the assault. Claimant's injury thus occurred within the time and place limits of his employment.

11. Claimant showed it more probably true than not that the assault by Brown arose out of an activity that had some connection with his work-related functions. Although Brown had a record of prior arrests for assault and had spent time in jail, Brown's assault of claimant was neither random nor the result of a neutral force because Brown was at the restaurant for a

business-related purpose -- to drive Ms. Watkins home after her shift. Claimant was unfamiliar with Brown, except as Ms. Watkins's boyfriend who had previously picked her up from the restaurant on a couple of occasions. Because of the assault on claimant by the intoxicated customer, Ms. Cure gave him permission to leave before the end of his shift. Brown became angry because Ms. Cure had directed Ms. Watkins to work past the end of her shift in order to allow claimant to leave early. Brown thus blamed claimant for the fact that Ms. Watkins could not leave with him at the end of her shift. Crediting Ms. Cure's testimony, claimant is not a combative person otherwise prone to fighting. There was no persuasive evidence showing that Brown assaulted claimant out of some private disagreement between them that was otherwise unrelated to claimant's employment. Brown's assault was directly connected to claimant's employment.

12. Claimant showed it more probably true than not that his earnings over some 12 weeks prior to his injury more fairly approximates his wage loss from the injury. Employer paid claimant every 2 weeks. During the 12 weeks prior to June 11th, claimant earned gross wages of $3713.89. While claimant's final pay period ended on June 11, 2008, he was unable to perform his regular work after June 8th because of restrictions due to his injury. Claimant thus was able to work only some 82 days of that 12-week period. Dividing claimant's gross earnings of $3713.89 by 82 days provides an average daily wage of 42.29, which multiplied by 7 days gives an average weekly rate of $317.04. Adding the stipulated $20.00 per week to that amount provides an AWW of $337.04.

CONCLUSIONS OF LAW

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

A. Compensability:

Claimant argues he has proven by a preponderance of the evidence that he sustained an injury from an assault arising out of the course and scope of his employment. The Judge agrees.

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), 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), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that his injury arose out of the course and scope of his employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). 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 claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

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). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. 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 (Colo. App. 2000).

An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of " requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *id.*

Assaults, which occur in the course of employment and that are associated with the employment, are considered to be compensable injuries. Assaults that have an “inherent connection” to the employment are compensable injuries. *Portofina Apartments v. Industrial Claim Appeals Office*, 789 P.2d 1117 (Colo. App. 1990) (fatal shooting of maintenance worker at apartment complex arose out of employment where resident of the complex and maintenance worker were involved in a prior verbal argument over maintenance of complex). *See Alpine Roofing Co. v. Dalton*, 39 Colo. App. 315, 539 P.2d 487 (1975) (foreman assaulted claimant whom he fired when they argued over a dispute involving wages); *L.E.L. Construction v. Goode,* 849 P.2d 876 (Colo. App. 1992), rev’d on other grounds, *L.E.L. Construction v. Goode,* 867 P.2d 875 (Colo. 1994) (injury held to be compensable when claimant was killed in a traffic accident after picking up his paycheck).

Assaults which result from a neutral force, such as a random assault, are also compensable injuries. *In re Question Submitted by the U.S. Court of Appeals (Tolbert v. Martin Marietta Corp.)*, 759 P.2d 17 (Colo. 1988)(court held employee’s injury from sexual assault compensable under positional risk doctrine

even though assault occurred during employee's lunch break, but while on employer's premises). However, where an assault stems from a private dispute with no connection to the employment, the injury is not work-related. *See, e.g., Velasquez v. Industrial Commission*, 41 Colo. App. 201, 581 P.2d 748 (1978) (shooting arising out of private dispute between co-employees that could have occurred at any time or place other than work does not arise out of the employment).

Here, the Judge found claimant showed it more probably true than not that the assault by Brown alike occurred during course of his employment and arose out of an activity that had some connection with his work-related functions. Claimant thus proved by a preponderance of the evidence that he sustained a compensable injury from the assault by Brown.

The Judge found Brown's assault of claimant occurred within the time and place limits of his employment. Claimant was clocked-in, on a break, and on employer premises in the parking lot, which is the area designated by employer for smoking breaks.

The Judge further found that Brown's assault was causally connected to claimant's employment. Brown's assault of claimant was neither random nor the result of a neutral force because Brown was at the restaurant for a work-related purpose -- to drive Ms. Watkins home after her shift. Claimant was unfamiliar with Brown, except as Ms. Watkins's boyfriend who had previously picked her up from the restaurant on a couple of occasions. Brown became angry because Ms. Cure had directed Ms. Watkins to work past the end of her shift in order to allow claimant to leave early. Brown thus blamed claimant for the fact that Ms. Watkins could not leave with him at the end of her shift.

As found, claimant is not a combative person otherwise prone to fighting. There was no persuasive evidence showing that Brown assaulted claimant out of some private disagreement between them that was otherwise unrelated to claimant's employment.

The Judge concludes insurer should provide claimant workers' compensation benefits under the Act based upon the compensable assault by Brown. Insurer should pay for the reasonably necessary medical treatment provided claimant by Southwest Memorial Hospital and by Doug Bagge, M.D.

B. Average Weekly Wage:

Claimant argues he has proven by a preponderance of the evidence that an average weekly wage of $329.49 more fairly approximates his wage loss as a result of his injury. The Judge nonetheless finds that an AWW of $337.04 more fairly approximates claimant's wage loss.

The Judge must determine an employee's average weekly wage (AWW) by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of injury, which must include any advantage or fringe benefit provided to the employee in lieu of wages. *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).). Section 8-42-102(3), *supra*, grants the Judge discretionary authority to alter the calculation if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

As found, claimant showed it more probably true than not that an AWW of $337.04 more fairly approximates his wage loss as a result of his injury at employer. Claimant thus proved by a preponderance of the evidence that his AWW is $337.04.

The Judge concludes insurer should pay claimant TTD benefits from June 9, 2008, ongoing pursuant to the Act, based upon an AWW of $337.04.

ORDER

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

1. Insurer shall pay for the reasonably necessary medical treatment provided claimant by Southwest Memorial Hospital and by Doug Bagge, M.D.

2. Insurer shall pay claimant TTD benefits from June 9, 2008, ongoing pursuant to the Act, based upon an AWW of $337.04.

3. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

4. Issues not expressly decided herein are reserved to the parties for future determination.

DATED: _February 13, 2009_

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-761-835

ISSUES

Whether Claimant has established by a preponderance of the evidence that he is entitled to a change of physician pursuant to §8-43-404(5), C.R.S.

FINDINGS OF FACT

1. On May 22, 2008 Claimant sustained an admitted industrial injury to his lower back during the course and scope of his employment with Employer. Employer directed Claimant to obtain medical treatment at Concentra Medical Centers. Claimant was subsequently referred to B. Andrew Castro, M.D. for an evaluation.

2. On June 20, 2008 Dr. Castro examined Claimant. He noted that Claimant had previously suffered a "herniated disc treated operatively in 2001 and a microdiscectomy." Dr. Castro diagnosed Claimant with a large disc herniation at the L4-L5 level. He recommended an epidural steroid injection at the L4 nerve root. Dr. Castro explained that, if Claimant obtained relief from the injection, surgical intervention might be considered.

3. Claimant testified at the hearing in this matter. He stated that Hugh McPherson, M.D. from the Center for Spinal Disorders in Thornton, Colorado performed his 2001 disc surgery. Claimant explained that he developed a positive relationship with Dr. McPherson and that the treatment he received assisted him greatly in recovering from the surgery.

4. Because of Claimant's relationship with Dr. McPherson, he sought a one-time change of physician to the Center for Spinal Disorders pursuant to WCRP 8-5. Claimant recognized that, although he sought treatment from Dr. McPherson, he would have to request Dr. Janssen at the Center for Spinal Disorders as his Authorized Treating Physician (ATP). Respondents granted Claimant's request.

5. Claimant began treatment at the Center for Spinal Disorders. Dr. Janssen referred him to Nicolas E. Grisoni, M.D. for treatment. Claimant subsequently realized that Dr. McPherson had transferred his practice to Peak Orthopedics and Spine in Centennial, Colorado. He then requested a change of physician to Peak Orthopedics and Spine so that he could obtain treatment from Dr. McPherson. Respondents denied Claimant's request.

6. On July 16, 2008 Claimant visited Dr. Grisoni for an evaluation. Dr. Grisoni remarked that Claimant suffered from multilevel degenerative disc disease. He noted that the disease was most significant at the L4-L5 and L5-S1 levels. Dr. Grisoni summarized that Claimant's symptoms consisted of 60% axial back pain and 40% radicular symptoms. He recommended conservative treatment including a pain management program, anti-inflammatory medications, physical therapy and epidural steroid injections. Dr. Grisoni commented that, if

Claimant continued to suffer significant symptoms despite conservative measures, surgical intervention would be considered.

7. Claimant testified that he is requesting a change of physician to Dr. McPherson because Dr. McPherson is a skilled orthopedic surgeon who had previously performed successful surgery on his back. He stated that Dr. McPherson is intimately familiar with his condition and he has developed trust and confidence in Dr. McPherson's abilities. Claimant also commented that Dr. McPherson is a good communicator who demonstrates a caring attitude. Nevertheless, Claimant acknowledged that he is able to effectively communicate with Dr. Grisoni and has no concerns about Dr. Grisoni's ability to provide proper medical treatment.

8. Claimant has failed to demonstrate that it is more probably true than not that he is entitled to a change of physician. He credibly explained that he would prefer to receive treatment from Dr. McPherson because he has developed trust and confidence in Dr. McPherson as a result of a prior surgery. However, Claimant readily acknowledged that he is able to effectively communicate with Dr. Grisoni and does not have any concerns about Dr. Grisoni's ability to provide adequate medical treatment. In the absence of inadequate medical care, a change of physician is not required simply because Claimant desires treatment from a physician of his own choosing. Therefore, Claimant has failed to make a proper showing that he is entitled to a change of physician to Dr. McPherson.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* W.C. No. 4-597-412 (ICAP, July 24, 2008). Because §8-43-404(5)(a), C.R.S. does not define "proper showing" the ALJ has discretionary authority to determine whether the circumstances warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (ICAP, May 5, 2006).

5. The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.* The ALJ may consider whether the claimant and physician were unable to communicate such that the physician's treatment failed to prove effective in relieving the claimant from the effects of the industrial injury. *See Merrill v. Mulberry Inn, Inc.,* W.C. No. 3-949-781 (ICAP, Nov. 16, 1995). However, a change of physician is not required merely because a claimant expresses dissatisfaction with the designated treating physician or would simply prefer to receive treatment from a doctor of his choosing. *In Re Hoefner,* W.C. No. 4-541-518 (ICAP, June 2, 2003). Finally, where an employee has been receiving adequate medical treatment, courts need not permit a change of physician. *See Greenwalt-Beltmain v. Dep't of Regulatory Agencies,* W.C. No. 3-896-932 (ICAP, Dec. 5, 1995); *Zimmerman v. United Parcel Service,* W.C. No. 4-018-264 (ICAP, Aug. 23, 1995).

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he is entitled to a change of physician. He credibly explained that he would prefer to receive treatment from Dr. McPherson because he has developed trust and confidence in Dr. McPherson as a result of a prior surgery. However, Claimant readily acknowledged that he is able to effectively communicate with Dr. Grisoni and does not have any concerns about Dr. Grisoni's ability to provide adequate medical treatment. In the absence of inadequate medical care, a change of physician is not required simply because Claimant desires treatment from a physician of his own choosing. Therefore, Claimant has failed to make a proper showing that he is entitled to a change of physician to Dr. McPherson.

ORDER

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

1. Claimant is not entitled to a change of physician to Dr. McPherson.

2. Any issues not resolved by this Order are reserved for future determination.

DATED: February 17, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-769-770

ISSUES

Whether Claimant should be entitled to temporary total disability benefits ("TTD") for the period from July 17, 2008 through and including September 15, 2008.

Whether Claimant's claim for TTD benefits for the period from July 17, 2008 through and including September 15, 2008 is barred by the provisions of Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. because Claimant was responsible for her separation from employment.

At the commencement of the hearing, the parties stipulated that Claimant's Average Weekly Wage ("AWW") was $305.94.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge finds as fact:

1. Claimant was hired in November 2007 as a temporary part-time associate by Employer to work as a jewelry associate. At the time of hire, Claimant lived in Ft. Lupton, CO 35 miles from the store location of Employer in Louisville, CO.

2. Claimant was advised at the time she was hired as a temporary employee that due to fluctuations in Employer's business, it becomes necessary to add additional associates when sales volume increases and to decrease staff when sales decrease. Claimant was further advised that when sales volume was reduced her temporary employment would be terminated.

3. In January 2008, Claimant was offered and accepted a permanent part-time position as a cashier. Claimant was at that time advised that her schedule and number of hours scheduled would be determined by her availability and the needs of Employer's business.

4. Claimant sustained an admitted injury on May 30, 2008. At the time of injury, Claimant was bending over into a shopping cart to reach some merchandise when she felt a "pull" in her low back.

5. Following her injury, Claimant initially sought medical treatment on May 31, 2008 at Platte Valley Medical Center where she was diagnosed with a lower back strain and advised to remain off work until June 2, 2008.

6. Claimant was first seen by the authorized treating physicians at Concentra Medical Center on June 11, 2008 when at that time she was evaluated by Dr. David Orgel, M.D. Claimant gave a history to Dr. Orgel that she had injured her back at work two weeks ago moving folding chairs from a cart, had sought treatment from the emergency room and taken two weeks off work, having returned to work within the last week. Claimant advised Dr. Orgel that she was working full duty, being somewhat careful with lifting, but overall was 85% improved. Dr. Orgel diagnosed improving low back pain and allowed Claimant to continue working full duty. Dr. Orgel referred Claimant for physical therapy.

7. At a physical therapy visit on June 18, 2008 Claimant stated to the therapist that she had no pain at that time but had had pain recently when she was working on the "flat bed register" for 3 hours and had experienced an increase in pain.

8. Claimant was evaluated by Dr. Orgel on June 27, 2008. Claimant advised the physician that she was asymptomatic when not at work but that during the workday when lifting and bending was required her back would ache and by the end of the day her back was very uncomfortable. Claimant and Dr. Orgel discussed that she would continue to try to perform her usual job for another month while at the same time attempting to find a different job with Employer that did not require as much lifting. Dr. Orgel set an appointment for Claimant to return in one month, sooner if she was unable to tolerate full duty.

9. Claimant returned to Concentra Medical Centers on July 3, 2008 complaining that her trial of performing her usual duties involving lifting had caused extreme low back pain and difficulty with movement. Claimant was examined at this time by Dr. Lori Smith, M.D. Dr. Smith noted spasms in the paraspinal muscles and placed Claimant on restrictions of no lifting over 25 pounds, no pushing/pulling over 30 pounds, limited kneeling, crawling, squatting and climbing as tolerate with no standing or walking longer than tolerated.

10. Claimant was seen by Dr. Orgel on July 10, 2008 complaining of increased pain that she felt was from prolonged standing. Claimant stated to Dr. Orgel that she had been working folding clothes. Dr. Orgel changed Claimant's physical restrictions to limit her to lifting to 10 pounds.

11. Dr. Smith placed Claimant at maximum medical improvement ("MMI") as of September 15, 2008 and released Claimant to return to work, without restrictions.

12. After being placed on restrictions by Dr. Smith, Claimant was told by her supervisor, Jodi Passero, that she could not work the front-end cashier job because of her restrictions. Claimant was not assigned to cashier by Ms. Passero after July 3, 2008. After being placed on restrictions by Dr. Smith, Claimant was assigned to work as a door greeter for customers and folding clothes.

13. Claimant's hours and work assignments are determined by her manager, Jodi. After the Claimant was placed on restrictions effective July 3, 2008 Ms. Passero attempted to assign Claimant the same amount of hours that she had been working as a cashier. However, according to the testimony of Ms. Passero, Employer was at this time overstaffed at the door greeter position and there were times when Ms. Passero did not need the Claimant to work and other times when she did need her to cover breaks for other employees and absences. As such, the length of Claimant's shift depended on the needs of the Employer.

14. Claimant was scheduled for, but did not work, on July 5, 7, 10, 12 and 13, 2008. On July 12 and 13, 2008 Claimant called in sick and these were unapproved absences. (See, Respondent's Exhibit K, page 149).

15. Ms. Passero credibly testified, and it is found, that while on work restrictions Claimant asked three or four times to leave work early. According to the credible testimony of Rene Nix, Employer's marketing/membership manager, Claimant would choose to go home early when her shift overlapped with other employees.

16. On July 6, 2008 Claimant was scheduled to work from 10:30 AM to 6:30 PM. On that date, Claimant clocked in at 10:01 AM and was approved by her manager to leave early, clocking out at 2:16 PM.

17. On July 9, 2008 Claimant was scheduled to work from 1:00 PM to 9:00 PM. On that date, Claimant clocked in at 4:10 PM and left work at 10:54 PM.

18. On July 14, 2008 Claimant was not scheduled to work but was allowed by her manager to work from 4:01 PM to 7:51 PM.

19. Claimant resigned from employment with Employer on July 16, 2008. Claimant testified that on this day she was assigned by her manager to work the express checkout lane as a cashier. Claimant testified that she tried to work this job for ½ hour but had increased pain and then was put back to working the exit door checking customers receipts and merchandise prior to them leaving the store. Claimant also testified that she later advised Employer that her last day would be August 1, 2008. Claimant testified that she resigned for health reasons because Employer was not following her work restrictions and because she had not been given her full hours after being placed on restrictions.

20. Claimant's testimony that she was assigned to and attempted to work a cashier job for ½ hour on July 16, 2008 conflicts with the time records showing that Claimant clocked in on that day at 1:00 PM and clocked out at 1:15 PM. The Judge resolves this conflict in favor of the time records as being more accurate and credible.

21. Ms. Passero credibly testified, and it is found, that on July 16, 2008 after tendering her resignation to Employer Claimant was given the option to work out the remainder of her two weeks, however Claimant declined. In her exit interview with Ms. Passero Claimant told Ms. Passero that she was quitting because she was looking at the possibility of getting a job at Taco Bell that was closer to her home and that Claimant felt would work with her restrictions. Claimant told Ms. Passero that she had been looking for work because she had not been getting enough hours at Employer.

22. Claimant was re-evaluated by Dr. Orgel on July 30, 2008. Dr. Orgel noted that Claimant had not been working because her hours were cut. Dr. Orgel did not note any complaint from Claimant that the Employer had not been following her work restrictions or that she was unable to perform the modified duty to which she had been assigned. Dr. Orgel allowed the Claimant's work restrictions to remain the same.

23. Had Claimant not resigned her employment with Employer effective July 16, 2008, Employer would have been able to continue to provide Claimant with modified duty within the restrictions assigned by the authorized physicians at Concentra.

24. Claimant's separation from employment with Employer was the result of a volitional act by Claimant and Claimant exercised some degree of control over the circumstances leading to her termination of employment with Employer. Claimant decided to terminate her employment with Employer to look for other work.

CONCLUSIONS OF LAW

25. 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).

26. 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. 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 (2008) C.R.S.

27. To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

28. Under the provisions of Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. where it is determined that a temporarily disabled worker is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury. A Claimant is responsible for a termination if the Claimant performs a volitional act or exercises some degree of control over the circumstances leading to the termination considering the totality of the circumstances. This concept is broad and turns on the specific facts of each case. *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994). The burden to show that Claimant was responsible for the separation from

employment rests with Respondents. *Colorado Compensation Insurance Authority v. Indus. Claim Appeals Office,* 18 P.3d 790 (Colo. App. 2000).

29. Although Claimant here voluntarily resigned from employment, that fact alone is not dispositive of whether Claimant was responsible for her separation from employment with Employer. In *Blair v. Art C. Klein Construction Inc.,* W.C. No. 4-556-576 (Industrial Claim Appeals Office, November 3, 2003) it was held that claimant's voluntary resignation is not dispositive of the issue of whether a Claimant was responsible for termination of the employment. *Blair, supra,* held that the pertinent issue is the reason the claimant quit because the claimant is not "responsible" where the termination is the result of the injury. *See Colorado Springs Disposal v. Industrial Claim Appeals Office, supra; Gregg v. Lawrence Construction Co.,* W.C. No. 4-475-888 (ICAO, April 22, 2002); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (ICAO April 24, 2002). According to *Blair, supra,* "if the claimant was compelled to resign from this employment such that it can be said the termination was a necessary and natural consequence of the injury, rather than the claimant's subjective choice, the claimant would not be at fault for the termination."

30. Claimant here argues that her conduct in resigning her employment was not volitional because the Employer reduced her hours to the point that it was no longer economical for her to continue working for Employer. The Judge is not persuaded that Claimant's decision to resign her employment was not a volitional act. Claimant's decision was based upon her own subjective choice to find other, possibly more suitable employment. Claimant was advised at the time she was hired on a permanent part-time basis that her hours could fluctuate depending upon the business needs of Employer. As such, Claimant could not reasonably expect that her hours would remain the same over all time periods, regardless of whether she sustained a work injury or not. The Judge is not persuaded that Employer intentionally cut Claimant's hours because she was placed on restrictions and was no longer able to perform her usual cashier duties. As found, after the Claimant was placed on restrictions, she was assigned a work schedule and did not work the full amount of the hours she was provided because she asked to leave early. In fact, on one occasion Claimant was allowed to work when she was not scheduled to do so. Claimant here could have continued working the reduced hours available at Employer. Instead, she elected to resign to seek other employment. The Judge is not persuaded that Claimant was being asked to work beyond her work restrictions or that she was unable to tolerate the work assigned within the restrictions given. The Judge is not persuaded, after review of the totality of the circumstances, that Claimant here was compelled to resign her employment as a necessary and natural consequence of her work injury. Because her resignation was not compelled by the necessary and natural consequences of the work injury, Claimant was "responsible" for her termination of employment from Employer. *Blair v. Art C. Klein Construction Inc., supra*. Because Claimant was responsible for her

separation from employment, her resulting wage loss after July 16, 2008 is not attributable to her work injury and therefore, is not compensable.

ORDER

It is therefore ordered that:

Claimant's claim for TTD benefits from July 17, 2008 to and including September 15, 2008 is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED: February 17, 2009

Ted A. Krumreich
Administrative Law Judge

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS

W.C. No. 4-750-087

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr.,

Administrative Law Judge (ALJ) on February 5, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 2/5/09, Courtroom 4, beginning at 3:15 PM, and ending at 3:50 PM). No testimony was taken. The matter was submitted on stipulations and evidentiary submissions, admitted into evidence.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel, which was submitted on February 12, 2009. On February 13, 2009, counsel for Respondent filed an email, indicating no objection to the proposed decision. After a consideration of the proposed decision, the ALJ has made some modifications and issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns average weekly wage (AWW).

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The parties stipulated that case numbers WC. No. 4-739-212 (date of injury September 12, 2007), and W.C. No. 4-750-089 (date of injury February 1, 2008) should be consolidated under W.C. No. 4-739-212. These cases are hereby consolidated for purposes of this decision.

2. The parties further agreed that the AWW determined herein shall apply to the consolidated cases as well as the present case, and the ALJ so determines.

3. The parties stipulated, and the ALJ finds, that the Claimant began her employment with the Employer on April 5, 2007.

4. Respondent filed a Final Admission of Liability (FAL) in all three consolidated cases to which Claimant timely objected.

5. Claimant was injured on September 12, 2007, and again on February 1, 2008, and these injuries arose out of the course and scope of her employment with the Employer.

6. The parties stipulated, and the ALJ finds, that from April 5, 2007 through August 31, 2007, the Claimant earned gross wages of $5,183.45.

7. The parties further stipulated, and the ALJ finds, that from July 20, 2007 through September 14, 2007, a period of eight weeks, the Claimant earned $2,618.47.

8. The parties further stipulated, and the ALJ finds, that on July 20, 2007 the Claimant had received a raise to $8.00 per hour, and was working 40 hours per week plus some overtime.

9. The parties further stipulated, and the ALJ finds that prior to July 20,2007, the Claimant was earning less than $8.00 per hour.

10. Claimant was earning eight dollars ($8.00) per hour as of July 20, 2007 and worked at least 40 hours per week with some weeks when she worked overtime. For the 8 weeks from July 20, 2007 to September 14, 2007, Claimant earned $2,618.47 or $327.31 per week. The ALJ finds that the best evidence of Claimant's actual wage loss when she became temporarily and totally disabled is the average of her weekly earnings for the eight (8) weeks culminating on September 14, 2007. This yields an AWW of $327.31.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. Section 8-42-102 (2), C.R.S. (2008), provides for the calculation of a Claimant's average weekly wage, as follows:

> "Where 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)"

b. Section 8-42-102(2)(c) requires a calculation as follows:

> "...multiplying the daily wage by the number of days and fractions of days in the week during which the employee under a contract of hire was working at the time of the injury or would have worked if the injury had not intervened."

c. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Industrial Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). An ALJ has the discretion to determine a claimant's AWW, including the

claimant's cost for COBRA insurance, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, the best evidence of the Claimant's present wage loss is the wage she was earning after her raise to $8.00 an hour for a 40-hour week, during the 8 week period ending on September 14, 2007. Therefore, her AWW should be $327.31.

ORDER

IT IS THEREFORE, ORDERED THAT:

A. W.C. Nos. 4-739-212 and 4-750-087 are hereby consolidated and shall hereafter be administered as one case under W.C. No. 4-739-212.

B. The Claimant's average weekly wage for all three cases is $327.31.

C. Respondent shall pay the Claimant retroactive and present TTD benefits based on her average weekly wage of $327.31.

D. Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due that were not paid when due.

E. That the hearing for 4-739-212 scheduled for February 12, 2009 is hereby stricken.

F. Any and all issues not determined herein are reserved for future decision .

DATED this _____ day of February 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS

W.C. No. 4-747-655

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondent,

No further hearings have been held. On February 17, 2009, Respondents filed an "Unopposed Motion for Corrected Order." The same is well taken and this decision is corrected accordingly. Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 13, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 1/13/09, Courtroom 3, beginning at 8:30 AM, and ending at 9:47 AM).

ISSUES

The issues to be determined by this decision concern compensability and medical benefits.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant was working as a flight attendant for the Employer on January 4, 2008.

2. During the course of a nine-hour day, Claimant only had five minutes as a break. This is un-rebutted. During this break, she attempted to eat a sandwich for lunch, but was unable to finish the sandwich before her flight duties resumed.

3. During her third flight of the day, she began to experience stomach pain.

4. Upon the flight crew's arrival in Aspen, Colorado, the Employer caused the Claimant to be taken by ambulance to Aspen Valley Hospital. Thereafter, all of her care and treatment for the hypoglycemic attack was causally related, authorized and reasonably necessary.

5. Claimant's testimony is un-rebutted, consistent with the medical records, and highly credible.

6. Claimant was diagnosed with hypoglycemia due to a blood sugar reading of 50.

7. Robert W. Watson, Jr., M.D., did an Independent Medical Examination, consisting of a medical records review at Respondents' request; and, he testified at hearing. He was of the opinion that a low blood sugar reading like Claimant's most probably resulted from not having enough glucose stores in her body. His testimony also established, by a preponderance of the evidence that reduced glucose stores most probably resulted from lack of food eaten by Claimant. Dr. Watson's opinions and testimony are especially credible because he was engaged to do an objective assessment of the cause of Claimant's hypoglycemic attack. Ultimately, his objective opinion was more helpful to Claimant's theory of the case than to Respondents' theory.

8. Claimant has never had a hypoglycemic attack before.

9. Dr. Watson's testimony establishes that this hypoglycemic attack was likely acute in nature, and not chronic.

10. Based on Dr. Watson's opinion, the ALJ finds that Claimant likely did not eat enough food due to time constraints on the day of her hypoglycemic attack. This led to her body having low glucose stores. This frantic schedule was a special hazard of her employment. Therefore, Claimant has proven, by a preponderance of the evidence that her hypoglycemic attack arose out of the course and scope of her employment and was not the result of an imported condition.

11. Claimant has further proven, by a preponderance of the evidence, that any medical care and treatment for the hypoglycemic attack of January 4, 2008, was authorized, causally related and reasonably necessary to alleviate the effects of the hypoglycemic attack.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. In deciding whether an injured worker 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 Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (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). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a 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 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, Claimant's testimony is un-rebutted and highly credible. This inability to eat food was a special hazard of Claimant's job as a flight attendant. As further found, Dr. Watson's testimony that Claimant's acute hypoglycemia probably resulted from low glucose stores in un-rebutted and credible. A fact finder is not free to disregard un-rebutted evidence unless it is inherently improbable. Claimant's testimony and Dr. Watson's opinions are probable, persuasive and credible. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury, special hazards of employment leading thereto, and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008) *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). A preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has sustained her burden of proof with respect to a special hazard of employment causing her compensable hypoglycemic attack.

c. The facts in the present case are distinguishable from the facts in *Gates Rubber Co. v. Industrial Com'n,* 705 P.2d 6 (Colo. App. 1985), wherein the employee's feet suddenly flew out from under him, resulting in a fatal head injury when he hit the floor. The situation was characterized as a syncopal event where

the deceased's dependents could not explain a causal connection between the injury and the employment. In the present case, the special hazard of a frantic airline turnaround schedule caused the injury.

d. The facts in *National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo.App.1992*)*, where the unique risks associated with the claimant's job duties contributed to the circumstances of her injury. In the present case, the Claimant's quick turnaround times and lack of breaks during her workday contributed to her low glucose stores and eventual hospitalization, and amounted to a special hazard of her employment.

e. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). To be authorized, all referrals must remain within the chain of authorized referrals. *Mason Jar Restaurant v. Industrial Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995). As found, the Employer caused the Claimant to be taken to the Aspen Valley Hospital by ambulance and all of her subsequent medical treatment emanated from Asspen Valley Hospital.

f. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. Section 8-42-101 (1) (a), C.R.S. (2008). *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, all of the Claimant's medical care and treatment, as reflected in the evidence, was and is reasonably necessary.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all authorized, causally related and reasonably necessary medical expenses for Claimant's hypoglycemic attack of January 4, 2008.

B. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of February 2009.

EDWIN L. FELTER, JR.

Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

W.C. No. 4-770-446

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr. (ALJ), on February 6, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 2/6/09, Courtroom 3, beginning at 8:30 AM, and ending at 12:00 PM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel, giving Respondent 3 working days within which to file objections thereto. The proposed decision was filed on February 11, 2009. No timely objections were filed and the

matter was deemed submitted on February 18, 2009. After a consideration of the proposed decision, the ALJ has made modifications thereto and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether Claimant sustained a compensable low back injury while working for Employer on August 20, 2008; if so, whether he is entitled to temporary total disability (TTD) benefits; whether his medical treatment was reasonably necessary and causally related to his work-related injury; and, whether David Orgel, M.D., is an authorized treating physician (ATP).

STIPULATIONS

If the case is determined to be compensable:

- Claimant's average weekly wage (AWW) is $516.00
- Claimant's TTD rate is $344.00
- The period of TTD begins on September 1, 2008.

FINDINGS OF FACT

Based on the evidence present at hearing, the ALJ makes the following Findings of Fact:

1. The ALJ finds the above stipulations as fact.

2. On August 20, 2008, while working for the Employer as an Associate Manager, Claimant suffered a low back injury while unloading a truck. He had an onset of back symptoms on August 20, 2008. He had been performing heavy lifting for a few hours and even advised a co-employee that he was having back problems on that day.

3. On August 23, 2008, Claimant heard a "pop" in his back and suffered a herniated disc that was part of the natural progression for his August 20, 2008 back injury.

4. The Employer referred the Claimant to Concentra, where Claimant came under the care of Dr. Orgel, who became the Claimant's ATP. Claimant received medical care at Salud Clinic before reporting the work-related nature of his back injury to his Employer. Salud Clinic and its referrals were not authorized.

5. Dr. Orgel, Claimant's ATP, was of the opinion that it was reasonably probable that Claimant suffered a compensable work-related injury to his low back on August 20, 2008 while performing work activities. Essentially, Dr. Orgel

outlined a probable theory of the heavy work on August 20 starting a progression that caused the disc herniation on August 23, at the time the Claimant heard the "pop" in his back at home. The ALJ finds that Dr. Orgel's opinions are based on a more thorough knowledge of Claimant's case than any other physician in the Claimant's case.

6. On 2008, Gordon Yee, M.D., was of the opinion that Claimant's back injury was work-related.

7. Gretchen Brunworth, M.D., examined the Claimant once, as an independent medical examiner (IME), at the request of the Respondent. She was of the opinion that the Claimant (who had a history of prior back problems, which healed up within days or a few weeks and Claimant was subsequently able to work) experienced an aggravation of his degenerative back problems on August 23, 2008, at home, and Claimant therefore did not sustain a compensable injury. Dr. Brunworth rested much of her opinion on Claimant's medical history to her not being consistent with the medical records because Claimant mentioned different dates of back problems. The ALJ observed that the Claimant, at hearing, was not good with dates. For this reason, the ALJ finds the ATP's (Dr. Orgel) opinion on the compensability of Claimant's herniated disc and present back problems more persuasive and credible than Dr. Brunworth's opinion in this regard.

8. Claimant has proven by a preponderance of the evidence that he sustained a compensable aggravation of his underlying degenerative back condition on August 20, 2008, while performing heavy lifting at work. The "pop" at home, which brought the herniated disc to full fruition, was a natural progression of the work-related aggravation set in motion at work on August 20, 2008.

9. Claimant has proven by a preponderance of the evidence that Dr. Orgel and Concentra are authorized; that the medical care for Claimant's back and herniated disc has been reasonably necessary to cure and relieve the effects of the Compensable injury of August 20, 2008; and, it has been causally related to the compensable back injury herein.

10. Claimant has further proven by preponderant evidence that as a result of his work-related injury, he has been unable to return to work since September 1, 2008, and his work-related injury has caused him to suffer a 100% wage loss since September 1, 2008. The Employer has not offered the Claimant modified employment, the Claimant has not been released to return to work without restrictions, and he has not been declared to be at maximum medical improvement (MMI). Therefore, the Claimant has proven, by a preponderance of the evidence that he has been TTD since September 1, 2008 and continuing.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

CREDIBILITY

a. In deciding whether an injured worker 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 Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (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). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a 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 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, Dr. Orgel's (the ATP) opinion that Claimant sustained a compensable injury at work on August 20, 2008 and the "pop" the Claimant experienced at home on August 23 was a natural progression of the work-related injury of December 20 is based on more familiarity with the Claimant's case, makes more sense in terms of consistency and probability, and is more persuasive and credible than the opinion of Dr. Brunworth. Additionally, Dr. Dr. Yee corroborated Orgel's opinion on work-relatedness of Claimant's back injury.

BURDEN OF PROOF

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As

found, Claimant has met his burden on compensability, medical benefits and TTD since September 1, 2008.

COMPENSABILITY

c. A "compensable" industrial accident is one, which results in an injury requiring medical treatment or causing disability. Pursuant to Section 8-41-301(1)(b), C.R.S. (2008), to qualify for recovery under the Workers' Compensation Act of Colorado, a claimant must be performing services arising out of and in the course of his or her employment at the time of their injury. For an injury to occur "in the course of" employment, Claimants must demonstrate that their injuries occurred within the time and place limits of their employment and during an activity that had some connection with their work-related functions. *Triad Painting Co. v. Blair*, 812 P. 2d 638, 641 (Colo.1991) The "arising out of" requirement is narrower than the "in the course of" requirement. *See Triad Painting Co., supra*. In order for an injury to arise out of employment, there is no requirement that the activity be a strict duty or obligation of employment, nor is there any requirement that the employer enjoy a specific benefit from the activity. Instead, an activity arises out of employment if it is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment." *Price v. Industrial Claim Appeals Office.* 919 P.2d 207 (Colo. 1996). As found, Claimant sustained an injury on August 20, 2008, arising out of the course and scope of his employment with the Employer herein.

MEDICAL BENEFTIS

d. Once compensability is established, a respondent is liable for all authorized medical treatment, which is reasonable and necessary to treat the claimant's industrial injury. Section 8-42-101(1)(a), C.R.S. (2008); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo.App.1990). As found, all of the Claimant's medical care and treatment for his back injury of August 20, 2008 was authorized, causally related and reasonably necessary to cure and relieve the effects of that injury. Therefore, Respondent is liable for the medical treatment of Claimant's compensable back injury of August 20, 2008. All medical treatment provided by Dr. Orgel and all physicians within the authorized chain of physicians up to the date of hearing are reasonably necessary and causally related to work-related injury. The Salud Clinic and all treatment provided by Salud is unauthorized and any medical bills pertaining to those treatments are not the responsibility of Respondent.

TEMPORARY DISABILITY BENEFITS.

e. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has

suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S. (2008); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973, (ICAO, December 18, 2000). Once the prerequisites for TPD and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), TPD and TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, Claimant has not worked since September 1, 2008; he has not been released to return to work without restrictions; his Employer has not offered him modified work; and, his ATP has not declared him to be at MMI. Therefore, Claimant has been TTD since September 1, 2009. At the stipulated TTD rate, Claimant is owed $7873.71 as of February 6, 2009.

ORDER

IT IS THEREFORE ORDERED THAT:

A. Claimant sustained a compensable injury to his low back on August 20, 2008.

B. Respondent shall pay the costs of authorized, reasonably necessary and causally related medical treatment for Claimant's compensable back injury, in accordance with the Division of Workers' Compensation Medical Fee Schedule. Treatment at the Salud Clinic was **not** authorized medical treatment.

C. Respondent shall pay the Claimant temporary total disability benefits of $334 per week, or $47.71 per day, from September 1, 2008 through February 6, 2009, both dates inclusive, a total of 159 days, in the aggregate amount of $7, 586.57, which is payable retroactively and forthwith. From February 7, 2009 until provided otherwise by law, Respondent shall continue paying the Claimant $334 per week in temporary total disability benefits.

D. Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this____ day February 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-773-208

ISSUES

- Did the claimant prove by a preponderance of the evidence that the need for medical treatment he obtained on September 30, 2008, and thereafter, was proximately caused by the industrial injury that he sustained on September 4, 2008?

- Did the claimant prove by a preponderance of the evidence that the medical treatment he obtained from South Federal Family Practice and Dr. Lankenau was authorized treatment?

FINDINGS OF FACT

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

1. The claimant was employed as a driver and utility man on the employer's road repair crew. As a utility man the claimant walked beside a large resurfacing machine that churned up asphalt paving. The claimant assisted in the operation of the machine and sometimes crawled inside of it where he used a hammer to install new "bits". The claimant also drove a large dump truck that the resurfacing machine filled with old asphalt. The dump truck had a tight suspension and tended to jar the claimant, particularly when it was driven over rough surfaces. Mr. Loos supervised the claimant.

2. On Thursday, September 4, 2008, the claimant was walking towards his supervisor in the employer's parking lot when another employee backed up a truck and hit the claimant. The truck hit the claimant in the area of his lower back and buttocks. The truck did not knock the claimant down, although it did push him forward for several feet. At the time of this incident the claimant experienced low back pain and pain down his legs.

3. The claimant advised Mr. Loos that he had "tweaked his back" and he was taken to the employer's Occupational Health and Safety Clinic (OHSC). At OHSC Dr. Cynthia Kuehn, M.D. examined the claimant. The claimant gave a history of "episodic back pain in his life but nothing that has required treatment by a physician." Dr. Kuehn noted the claimant did not report any numbness or tingling in his arms and legs, and that the thoracic and lumbar spine were "completely nontender." However, the claimant did report tightness in the paraspinous muscles, especially on the right. Dr. Kuehn concluded that x-rays were not indicated and diagnosed "mid and low back contusion." Dr. Kuehn prescribed Naprosyn, advised the claimant to use ice and heat, and instructed him to return on Monday September 8, 2008. Dr. Kuehn released the claimant to perform "modified" employment."

4. The claimant rested in bed from Thursday until Monday, September 8, 2008. On September 8 the claimant returned to OHSC where N.P. Annette Rossi-Davis examined him. The notes from this visit indicate the claimant stated he had "no pain," was "feeling great," and was ready for discharge and release to "full duty." The claimant was released to return to full duty work.

5. The claimant testified that he was not entirely pain free on September 8, 2008. Rather, he stated that he was experiencing "slight pain" and believed it was being helped by the medication prescribed by Dr. Kuehn.

6. The claimant admitted that he did return to work full duty and was able to perform the same duties as before the September 4 injury. However, the claimant stated that his pain increased as he continued working.

7. On September 30, 2008, as the claimant was driving to work in his personal vehicle, he experienced a sudden increase in back pain as well as numbness in his feet and legs, worse on the right.

8. When the claimant got to work on September 30, 2008, he advised Mr. Loos that he did not think he could work. Mr. Loos referred the claimant back to OHSC.

9. The claimant returned to OHSC on September 30, 2008, and Dr. Kuehn performed an examination. The note from this visit, which was apparently dictated by Dr. Walker rather than Dr. Kuehn, reflects the claimant gave a history of driving his own vehicle into work "when he suddenly felt a sharp pain in his back and a sharp numbness and tingling sensation through his buttocks to the back of his legs." The claimant further stated that he could not "recall exactly what caused these symptoms [to] occur, but he thinks it may be he hit a pothole in the road." The claimant reported taking Naprosyn the previous evening and the same morning, but this had no effect on his pain. The claimant reported "10/10 pain" which he had never had before. The claimant was found to be tender along the spinous processes from T-12 through S-1, tender on the

sacroiliac (SI) joints, and tender on the paraspinous muscles at the same level. The claimant was diagnosed with "lower back pain, acute."

10. On September 30, 2008, Dr. Kuehn opined that the claimant's "history is not consistent with an exacerbation of the lower back pain he was treated for on September 4, 2008." Dr. Kuehn noted the claimant's lower back pain experienced after he was hit by a truck "resolved after several days of rest," and opined the current pain "does not appear to be work-related." Dr. Kuehn took the claimant off of work and referred him to his personal physician for care and treatment of the back and leg symptoms.

11. Mr. Loos had an opportunity to observe the claimant performing his job from September 8, 2008, through September 30, 2008. Mr. Loos credibly testified that during this period of time he did not notice the claimant engaged in any pain behaviors, nor did he notice the claimant having any difficulties performing his job.

12. On September 30, 2008, the claimant reported to his family physicians at South Federal Family Practice (SFFP). Stephanie Kuenn, P.A., examined the claimant. According to P.A. Kuenn's note, the claimant gave a history of being struck in the back by a truck on September 4, 2008, returning to work, and then experiencing increased back pain and numbness in the right leg "today." P.A. Kuenn recorded that the claimant stated he had never had a pain free day September 4, 2008. P.A. Kuehn referred the claimant for spinal x-rays and "encouraged the claimant to reopen" the workers' compensation case.

13. On September 30, 2008, the claimant underwent x-ray examination of his lower back. The ex-rays were reported as showing mild degenerative disc disease (DDD) at L4-5 and L5-S1.

14. On October 1, 2008, P.A. Kuenn issued a written report in which she noted the claimant had not had a pain free day since September 4, 2008, and opined, "This is related to original injury." P.A. Kuenn directed the claimant to follow-up with workers' compensation.

15. On October 14, 2008, the claimant returned to the OHCS, where Dr. David Blair, M.D., performed an examination. On October 14, 2008, the claimant told Dr. Blair that when he returned to the clinic on September 8, 2008, "he still had some pain but felt well enough that he could do his usual duties." The claimant further advised Dr. Blair that on September 30, 2008, he experienced a "flare-up of low back pain and this was associated with pain radiating into the right lower extremity and numbness" in the right lower extremity. The claimant stated that, "no injury events or activities outside of routine activities at work and of daily living had occurred between the recheck on September 8 and the one on September 30." Dr. Blair opined from "information that I have available today, it does appear that the patient's current symptoms are related to

his work injury on September 4." Dr. Blair released the claimant to return to "restricted work" and prescribed an MRI scan.

16. On October 22, 2008, the claimant returned to OHCS to undergo the MRI scan. However, OCHS refused to perform the scan because the employer had informed the clinic that it was going to contest liability for the workers' compensation claim.

17. On October 29, 2008, the claimant underwent at MRI of the lumbar spine. This study revealed the presence of herniated discs at L4-5 and L5-S1, with loss of disc height and disc desiccation at L2-3 and L3-4.

18. The claimant's personal physician at SFFP referred the claimant to Dr. John Lankenau, M.D. for treatment of his ongoing back problems. Dr. Lankenau is an orthopedist. In a report dated November 13, 2008, Dr. Lankenau reported the claimant had some back pain following the accident in early September 2008, but "his leg pain appeared to start at the end of September." Dr. Lankenau examined the MRI results and noted the presence of herniated discs at both L4-5 and L5-S1 with compression of the L5 and S1 nerve roots. Dr. Lankenau explained to the claimant that he was uncertain that the diagnosis was "related to his motor vehicle accident given the time frame between the onset of his radiculopathy and his accident, which is nearly a month." Dr. Lankenau recommended surgery but the claimant elected to undergo epidural steroid injections.

19. The claimant underwent the recommended epidural steroid injections. Thereafter, on December 4, 2008, the claimant returned to Dr. Lankenau and advised that his pain and weakness had resolved and that he desired to return to work. Dr. Lankenau, although expressing some reluctance, released the claimant to return to work.

20. The respondent referred the claimant to Dr. Robert Watson, M.D., for an independent medical examination (IME). Dr. Watson is board certified in physical medicine and is level II accredited by the Division of Workers' Compensation. Dr. Watson reviewed the claimant's medical records and performed a physical examination on December 4, 2008. Dr. Watson issued a written report on December 4, 2008, and testified by deposition on January 29, 2009.

21. In his deposition, Dr. Watson testified to a reasonable degree of medical probability, that the claimant's back injury of September 4, 2008, is probably not causally related to the herniated discs that were diagnosed subsequent to the claimant's increased symptoms on September 30, 2008. Dr. Watson explained, based on his review of the medical records, that considering the symptoms attributable to the September 4, 2008, incident had significantly improved or resolved by September 8, 2008, there is no temporal relationship

between the injury of September 4, 2008, and the increased symptoms on September 30, 2008. Further, Dr. Watson noted that Dr. Kuehn recorded that the claimant experienced an "intervening event" when he struck a pothole while driving to work on September 30. Finally, Dr. Watson opined that the claimant's MRI results are indicative of ongoing DDD over a long period of time. Dr. Watson opined that, although he cannot give a date on which the discs herniated, it is probable that they became symptomatic over a long period of time, and that they symptoms manifested themselves on September 30, 2008, after the claimant hit the pothole.

22. The claimant failed to prove it is more probably true than not that the symptoms he experienced on September 30, 2008, and the subsequently diagnosed herniated discs, are causally related to the industrial injury that he sustained on September 4, 2008. It is more probably true than not that the September 30, 2008, symptoms and the herniated discs are the result of natural progression of the claimant's pre-existing DDD, or an aggravation of the pre-existing DDD that occurred while the claimant was driving to work on September 30, 2008. The ALJ credits the persuasive testimony and reasoning of Dr. Watson that there is no probable relationship between the September 4, 2008, incident and the occurrence of symptoms on September 30, 2008. Dr. Watson persuasively explained that there is an insufficient temporal relationship between the events of September 4, 2008, and the onset of the claimant's severe symptoms on September 30, 2008. This is true because the symptoms the claimant reported on September 4, 2008, had essentially resolved by September 8, 2008. Moreover, the symptoms the claimant reported on September 4, 2008, were significantly different than those he reported on September 30, 2008. As noted by Dr. Lankenau, the claimant did not report radicular symptoms until September 30, 2008. Moreover, Dr. Watson persuasively opined the claimant suffered from significant DDD prior to September 4, 2008, and the natural progression of this disease process could explain the onset of symptoms on September 30, 2008. Moreover, as Dr. Watson noted, on September 30, 2008, the claimant advised Dr. Kuehn that he experienced the onset of symptoms while driving to work and thought he might have hit a pothole. Dr. Watson persuasively explained how this event could be associated with the September 30 onset of symptoms. Dr. Watson's opinion in this regard is corroborated by Dr. Kuehn's opinion that the claimant's symptoms on September 30 were not work-related.

23. The opinion of Dr. Blair that the claimant's symptoms after September 30, 2008, are causally related to the industrial injury of September 4, 2008, is not found to be as credible or entitled to as much weight as the contrary opinions of Dr. Watson and Dr. Kuehn. It is not clear to the ALJ that Dr. Blair was aware that on September 8, 2008, the claimant told N.P. Rossi-Davis that his symptoms from September 4 had resolved and that he was pain free. Further, Dr. Blair was apparently unaware that on September 30, 2008, the claimant told Dr. Kuehn that he thought he might have hit a pothole in the road while driving to work. To the contrary, it appears that the claimant told Dr. Blair that nothing

unusual had happened between September 8 and September 30, 2008. The ALJ is not persuaded that Dr. Blair's opinion on the issue of causation is sufficiently informed to warrant much weight.

24. Similarly, the opinion of P.A. Kuenn is not found to be as credible or persuasive as the opinions of Dr. Watson and Dr. Kuehn. First, there is a distinct difference between the medical expertise of physicians and physician's assistants, and the ALJ finds that this difference adds weight to the opinions of Dr. Watson and Dr. Kuehn when compared to those of P.A. Kuenn. It further appears that P.A. Kuenn's opinion is not fully informed with respect to the underlying medical evidence. In fact, the claimant told P.A. Kuenn that he was never pain free after September 4, 2008, after he told N.P. Rossi-Davis that he was pain free and felt great on September 8, 2008.

25. The claimant's testimony that he remained symptomatic after September 8, 2008, is not credible and persuasive. First, that testimony is contradicted by the claimant's September 8, 2008, statements to N.P. Rossi-Davis that he was pain free and desired to return to work. Moreover, evidence that the claimant returned to his regular duties and worked without apparent difficulty or discomfort from September 8, 2008, until September 30, 2008, contradicts his assertion that he remained symptomatic after September 8, 2008.

26. Evidence and inferences inconsistent with these findings are not deemed credible or persuasive.

CONCLUSIONS OF LAW

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

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. 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. Section 8-43-201.

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). A Workers' Compensation case is decided on its merits. Section 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 Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

CAUSE OF NEED FOR MEDICAL TREATMENT

The claimant contends that he is entitled to an award of medical benefits for treatment of the symptoms he experienced on September 30, 2008, and thereafter for the herniated discs. The claimant contends that the industrial injury of September 4, 2008, caused the symptoms and herniated discs, or aggravated his pre-existing DDD. The respondent contends the claimant failed to meet his burden of proof. The respondent further asserts that the weight of the evidence establishes the September 30 symptoms and herniated discs are unrelated to the September 4 injury and are most probably the result of the natural progression of the pre-existing DDD, or an aggravation of the DDD that occurred while the claimant was driving to work on September 30, 2008. The ALJ agrees with the respondents.

The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or 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). Similarly, no compensability exists if the need for treatment was caused as the direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

The question of whether the claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for

treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990).

As determined in Findings of Fact 22 through 26, the ALJ concludes the claimant failed to prove it is more probably true than not that the industrial injury of September 4, 2008, was the proximate cause of the symptoms he experienced on September 30, 2008, and the subsequently diagnosed herniated discs. As found, the ALJ is persuaded by the credible testimony of Dr. Watson that there is an insufficient temporal relationship between the September 4 injury and the September 30 symptoms. This is especially true since the weight of the evidence establishes that the claimant was symptom free on September 8, 2008, and did not display any radicular symptoms until September 30. The ALJ concludes that the opinions of Dr. Watson are corroborated by the credible opinions of Dr. Kuehn, as well as the inability of Dr. Lankenau to determine the cause of the claimant's condition on September 30. For similar reasons the ALJ is persuaded that the most likely cause of the claimant's symptoms on September 30 is the natural progression of the pre-existing DDD, or an aggravation of the DDD that occurred while the claimant was driving to work on September 30, 2008.

ORDER

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

1. The claim for medical treatment is denied and dismissed.

DATED: February 19, 2008

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-600-778

ISSUES

Whether penalties should be imposed pursuant to § 8-43-304, C.R.S., against Claimant for failure to provide an executed authorization for release of

healthcare information (hereinafter "release") and list of physicians within 15 days as required by WCRP 5-4(C).

STIPULATED FACTS

At the outset of hearing, the parties stipulated to the following facts:

1. On May 23, 2008, counsel for Respondents sent to Claimant's counsel a request for a release of healthcare information and names of physicians Claimant had seen for his workers' compensation injury. Claimant was required to furnish the signed release and list of physicians to Respondents within 15 days of May 23, 2008. Because the 15th day fell on a Saturday, Claimant had until Monday, June 9, 2008, to provide the signed release and list of physicians to Respondents.

2. Respondents' counsel received Claimant's signed release on January 6, 2009.

3. Respondents' counsel received the list of physicians on January 8, 2009.

FINDINGS OF FACT

1. The Stipulated Facts are incorporated herein.
2. Claimant was injured while working for Employer in December 2003. The parties proceeded to hearing in April 2007, which led Claimant to believe that his case had concluded with the exception of maintenance medical treatment.
3. Claimant's primary place of residence and mailing address is located in Ogden, Utah.
4. Claimant's attorney inadvertently did not forward Respondents' request for release of healthcare information and list of physicians dated May 23, 2008, to Claimant.
5. Respondents' counsel sent another letter dated June 26, 2008, to Claimant's counsel inquiring about the status of the executed release and list of physicians. The letter warns that if the signed release and list of providers is not received by July 7, 2008, Respondents will file an application for hearing on the issue of penalties for non-compliance with WCRP 5-4(C).
6. Claimant's attorney forwarded, by U.S. Mail, the unsigned release along with a letter dated July 14, 2008, to Claimant's home in Ogden, Utah. The letter advised Claimant to sign the medical release and return the form to his attorney. This letter does not request that Claimant provide a list of physicians.
7. Sometime in February 2008, Claimant began a work-related training program to learn directional drilling. The program required him to temporarily reside in Grand Junction, Colorado, until late October 2008.

8. The training program required Claimant to work out in the field for 12 hours every day. After working 12 hours, Claimant would return to his hotel room in Grand Junction for the 12 hours he had off. Every fourth or fifth day, Claimant would occasionally receive an additional 12 hours off, meaning he may have 24 consecutive hours off.

9. Approximately every six weeks, Claimant's employer moved the drilling equipment to the next worksite. If any delays occurred during the equipment move, Claimant would receive up to three consecutive days off.

10. Claimant had arranged for family members to check on his house in Ogden and gather his mail while he resided in Grand Junction. Claimant's family members gathered the mail and piled it up for Claimant to review later. Claimant's family members neither read nor sorted his mail for him. Claimant admittedly did not make very specific arrangements for anyone to open and read his mail or look for anything important because he was not anticipating anything important.

11. Claimant paid his bills on the internet during this period and some bills that he received by mail went unpaid. He had arranged for his former wife to pay the utility bills when such utilities were about to be discontinued.

12. Claimant returned to Ogden approximately three or four times during the entire training program. The opportunity to return to Ogden arose when the delays in moving the drilling equipment occurred. Claimant drove to and from Ogden and stayed for only one or two days. Due to the short duration of these visits, he did not review his mail.

13. In late October 2008, Claimant's employer laid him off, so he returned to his permanent residence in Ogden. Around this time, Claimant received his attorney's motion to withdraw, which was dated October 14, 2008.

14. Claimant contacted his attorney and learned that Respondents had scheduled a medical appointment and that he needed to sign some paperwork. Claimant did not have the paperwork to sign although he admitted that it could be in the pile of mail that he has not yet finished reviewing. Eventually, Claimant's attorney sent the unsigned release to him, which he signed and sent back to his attorney.

15. Claimant's counsel included a last known telephone number for Claimant in his Motion to Withdraw. Claimant testified that he did not recognize the telephone number and that he began using a web-based telephone service around January 2008. The web-based telephone service allowed him to receive e-mail messages regarding incoming telephone calls while he worked in the field. Claimant did not provide his web-based telephone number to his attorney until October 2008.

16. Between April 2007 and January 8, 2009, Claimant underwent post-maximum medical improvement maintenance treatment with his authorized treating physician, Dr. Anden. Dr. Anden never denied treatment to Claimant. Dr. Anden prescribed one new medication and suggested that Claimant return to chiropractic care. According to Claimant, he actually received the medication implying that Insurer did not deny any request for authorization for such prescription medication.

17. Claimant also saw Dr. Weaver in December 2008 for an independent medical examination at Respondents' request. According to Dr. Weaver's report dated December 8, 2008, Claimant had not returned to a chiropractor. Dr. Weaver referred Claimant to McKay-Dee Hospital for a neurosurgeon consultation and MRI. Dr. Weaver opined that Claimant continues to need treatment for his work-related injury.

18. Claimant has not undergone treatment with a physician other than Dr. Anden for his work-related injury since April 2007.

19. There is no persuasive evidence that between April 2007 and January 8, 2009, any physician had requested prior authorization for chiropractic or any other treatment to Insurer. Respondents actually questioned the Claimant's need for further maintenance treatment due to the lack of treatment Claimant had received since April 2007. Accordingly, there is no persuasive evidence that Respondents were financially harmed by Claimant's failure to timely provide the signed release and list of physicians.

20. Respondents filed their Application for Hearing on September 30, 2008, although the letter dated June 26, 2008, warned that if the release and physician list were not received by July 7, 2008, an application for hearing would be filed.

21. From May 2008 through September 30, 2008, no application for hearing was pending. There is no persuasive evidence that any issues related to Claimant's workers' compensation claim were in dispute during the relevant time period. Thus, Claimant's assumption that he would not receive any mail regarding his workers' compensation claim was not unreasonable.

22. Respondents introduced no persuasive evidence as to how Claimant's failure to provide releases in violation of W.C.R.P. 5-4(c) caused them harm or otherwise prejudiced them in any way.

23. Respondents have demonstrated by a preponderance of the evidence that Claimant violated WCRP 5-4(C) by failing to provide the release and list of physicians within 15 days of the request. Had Claimant timely reviewed his mail or had someone else review his mail, he may have learned about the request sooner. It was Claimant's failure to review his mail that ultimately led to the violation. Under the totality of the circumstances, however, Claimant's failure to review his mail while he temporarily resided away from home was not objectively unreasonable. Accordingly, Claimant's failure to comply with WCRP 5-4(C) within 15 days was not objectively unreasonable.

CONCLUSIONS OF LAW

1. 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).

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 actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interests. See *Prudential Insurance Co. v Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

3. Section 8-43-304(1), C.R.S., provides in relevant part,

> Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided . . . shall also be punished by a fine of not more than five hundred dollars per day for each such offense, seventy-five percent payable to the aggrieved party and twenty-five percent to the subsequent injury fund created in section 8-46-101.

4. The imposition of penalties under § 8-43-304(1), C.R.S., requires a two-step analysis. The ALJ must first determine whether the disputed conduct constituted a violation of the Workers' Compensation Act or Rules. *See Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). Where a violation is found, the violator is subject to a penalty if the violator's actions which resulted in the violation were objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P. 2d 676 (Colo. App. 1995). Claimant's actions are measured by an objective standard based on what steps a reasonable claimant would take to comply with a rule or lawful order. *Jiminez v. Industrial Claim Appeals Office*, 107 P. 3d 965 (Colo. App. 2003); *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d at 679.

5. WCRP 5-4(C) provides that a party shall have 15 days from the date the request is mailed to complete, sign and return a release of medical and/or other relevant information. If the party disputes that the request is reasonable or that information sought is reasonably necessary, that party may file a motion with the OAC or set a pre-hearing conference.

6. As found, Claimant violated WCRP 5-4(C) when he failed to provide the authorization for release of information and list of physicians requested on May 23, 2008. The Rule provides that a requested release be provided, unless the request is unreasonable or not reasonably necessary. Claimant failed to issue the release within 15 days of the request because he was unaware that Respondents had made such a request.

7. Based on Claimant's violation of WCRP 5-4(C), the Judge may impose penalties if the actions that led to the violation were objectively unreasonable. Here, Claimant's failure to review his mail or otherwise arrange for someone to review his mail constitutes the action that led to his violation of WCRP 5-4 (C). Thus, the question is whether this action or inaction was objectively unreasonable. Claimant's situation during the relevant time period was unique. Claimant was not living at his usual residence because he had temporarily relocated to Grand Junction to participate in a work-related training program. He paid most of his bills through the internet and had asked his former wife to pay his utility bills. Claimant credibly testified that he was not anticipating receiving any important mail especially anything related to his workers' compensation claim given resolution of outstanding issues at the April 2007 hearing. As such, he did not arrange for anyone to actually review his mail and alert him to anything that might look important. In order to maintain some communication, Claimant obtained a web-based telephone service so he could receive telephone calls and messages. Claimant, however, did not reported his situation to his attorney which was not unreasonable given the lack of legal activity in his workers' compensation claim since April 2007. Claimant took the steps a reasonable person or claimant would take to ensure that his affairs were handled in his absence. Under the totality of the circumstances, Claimant's actions were not objectively unreasonable. Accordingly, Respondents' request for penalties is denied.

ORDER

It is therefore ordered that:

1. Respondents' claim for penalties related to Claimant's violation of WCRP 5-4(C) is DENIED and DISMISSED.

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

DATED: February 18, 2009

Laura A. Broniak
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-712-019

SUPPLEMENTAL ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondent.

No further hearings have been held in the above-captioned matter. In a letter, dated February 18, 2009, counsel for Respondent points out that Claimant, in his Brief in Support of Petition to Review, filed January 28, 2009, states that attorney fees were erroneously awarded against the Claimant. Claimant is correct. Attorney fees should have been awarded against Claimant's attorney.

On November 5, 2008, the ALJ issued Full Findings of Fact, Conclusions of Law and Order, which erroneously omitted a denial of Claimant's "Verified Motion to Recuse," in the "Order" portion. This was corrected. Claimant filed a Petition to Review this decision.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 18, 2008, in Greeley, Colorado. No testimonial evidence was taken, and the matter was submitted on a factual stipulation of the parties and the documents admitted into evidence. Respondent presented the testimony of Suzanne Polyakovics by Stipulation. No other testimony was presented. The hearing was digitally recorded, hand-held digital recorder (reference: 9/18/08, Greeley, beginning at folio 4.4.00011, and ending at folio 5.5.00017).

ISSUES

The issues to be determined by this decision concern: (1) Claimant's "Verified Motion to Recuse;" (2) whether or not Claimant was appropriately

denied her request to take the deposition of a Division of Workers' Compensation (DOWC) official, Kathryn Mueller, M.D., the administrator of the DOWC Division Independent Medical Examination (DIME) Program; (3) whether the Claimant, by her actions and inactions, waived her right to a DIME; (4) whether or not the Claimant set issues for hearing that were not ripe, thus, entitling Respondent to reasonable attorney fees; and, if so, (5) what are Respondent's reasonable attorney fees?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Recusal

1. At the commencement of the hearing, Claimant filed a "Verified Motion to Recuse," alleging, *inter alia*: (1) "…such overt hatred of the undersigned [Claimant's attorney] was particularly evident at the telephonic pre-hearing conference [status conference] in this matter two days ago in which said ALJ perfunctorily, otherwise inexplicably, and improperly and unlawfully denied the Claimant the right to present evidence in support of the issues duly endorsed by her present Application for Hearing…by accordingly denying Claimant the right to depose either or both Katherine (*sic*) Mueller or the head of the [D] IME section…; (2) the ALJ has "consistently" ruled against Claimant's attorney regardless of the law and the facts in a criminal and political manner to "steal thousands of dollars in fraudulently claimed attorney's fees from said Mexicano's worker's compensation client and because the ALJ "detests, and has always detested the undersigned counsel [Claimant's counsel]; (3) and, several other conclusory allegations which are devoid of underlying factual allegations leading a reasonable person to form the conclusions formed by Affiant Claimant's counsel. The ALJ accepts the allegations of the "Verified Motion" as facially true for purposes of ruling on Claimant's recusal motion. As concluded below and ordered, the "Verified Motion to recuse" is denied at this juncture because all proceedings must halt until there has been a ruling on a recusal request.

2. In the "Verified Motion," Claimant alleges that the ALJ herein has improperly ruled against his clients on numerous previous occasions.). The "Verified Motion" does not allege that any of these prior rulings, against the clients of Claimant's attorney herein, have been reversed by a higher tribunal.

3. Claimant alleged that the ALJ is biased because during a status conference the ALJ denied Claimant's untimely request to subpoena Dr. Mueller

or alternatively depose her. Claimant alleges that the ALJ stated "you're not going to get them. This is your hearing on that and I am denying it." Even if true, these allegations are insufficient to facially establish bias or lack of partiality.

4. Claimant's attorney herein has created negative allegations, *e.g.,* the judge "hates" him, and used these allegations as a basis for recusal.

Procedural Matters

5. In his position statement, Claimant requests the ALJ to take judicial notice of "computer entries and Office of Administrative Courts and Division Of Workers Compensation and its I.M.E. Unit's files in consideration of this matter pursuant to CRE 201." The ALJ declines Claimant's request. An evidentiary hearing was held in this matter on September 18, 2008 and Claimant declined to present any witnesses and produced only documents in her case in chief. Respondent presented its case in chief through documents and though the stipulated testimony of Polyakovics. At no time during the hearing did Claimant request the ALJ take judicial notice of any of these files. Further, Claimant failed to present these files to the ALJ at the hearing and therefore Claimant has not complied with CRE 201(d). Claimant also has not complied with Workers' Compensation Rules of procedure (WCRP), Rule 9-4, because Claimant did not seek to have these records certified and did not seek to introduce them into evidence. This request of Claimant's is frivolous and groundless.

6. At a Status Conference on September 16, 2008, held after 1:00 PM, Claimant's attorney stated he intended to present the testimony of Kathryn Mueller, M.D., the Medical Director of the Division of Workers' Compensation (DOWC). Claimant's attorney admitted he had not subpoenaed Dr. Mueller and it was less than 48 hours to the hearing. See C.R.C.P. 45(c). [subpoenas must be served no later than 48 hours prior to trial]. Claimant has never produced a subpoena served on Dr. Mueller for the hearing nor does Claimant allege that one exists.

7. At the status conference, Claimant requested a deposition of Dr. Mueller. This request was denied. A status conference is not the appropriate place for a motion to depose a witness. From the date of his Application for Hearing in April 2008 until the Status Conference of September 16, 2008, the Claimant made no attempt to depose Dr. Mueller. In any event, WCRP 9-1(B)(2) states "Depositions of other witnesses may be taken upon written motion, order, and written notice to all parties." Claimant did not make a written motion to depose Dr. Mueller prior to or at the hearing.

8. Further, DOWC Rule 9-4, states that "absent extraordinary circumstances, no employee of the DOWC should be expected or required to testify at a hearing." Section 8-43-210 also states that a deposition may be submitted as evidence upon a showing of "good cause." Claimant has not

presented the ALJ with any extraordinary circumstances. Claimant has not shown any good cause for deposition, and Claimant made no reasonable attempt to obtain Dr. Mueller's deposition prior to hearing.

9. Furthermore, Dr. Mueller's proposed testimony would only be relevant to the issue of the "propriety of the DIME," which Claimant is precluded from raising herein because ALJ Harr already decided the issue and concluded the Office of Administrative Courts did not have jurisdiction.

10. Claimant did not request a continuance of the hearing. Dr. Mueller was not under subpoena for the hearing. At the hearing itself, Claimant did not request a post hearing deposition of Dr. Mueller nor did Claimant make any showing of good cause for the deposition of Dr. Mueller and Claimant did not even raise the argument. To the extent that Claimant's position statement is a request for a post hearing deposition, it is denied for all the reasons outlined above.

The DIME

11. The Claimant sustained a work related injury on December 3, 2006. The Respondent referred Claimant to Dr. Johnson for medical care. On May 29, 2007, Dr. Johnson placed the Claimant at maximum medical improvement (MMI) with no impairment. Respondent filed a Final Admission of Liability on June 11, 2007, consistent with Dr. Johnson's report.

12. Claimant filed a Notice and Proposal for DIME on June 21, 2007. After negotiations for a physician failed, the Claimant filed an Application for a DIME on July 27, 2007.

13. The DOWC selected Brian Reiss, M.D., as the DIME physician on August 27, 2007.

14. Claimant did not schedule an examination with Dr. Reiss. From August 27, 2007 to the present, Claimant has undertaken no steps to schedule the DIME with Dr. Reiss. Claimant is presumed to know the Workers' Compensation rule concerning the scheduling of a DIME, and the ALJ infers and finds that despite this knowledge, Claimant did not timely schedule a DIME.

15. Claimant filed an Application for Hearing concerning the propriety of the DIME selection process. ALJ Mike Harr found Claimant's arguments concerning the DIME process frivolous. ALJ Harr stated "the judge finds the issue raised in her Application for Hearing to be frivolous and groundless." The Industrial Claim Appeals Office (ICAO) indirectly affirmed this finding in determining that although the issue was "frivolous," the award of attorney fees by ALJ Harr was reversed because the issue was "ripe," and ALJ Harr had jurisdiction to determine the issue. Claimant has not pursued any legal

proceedings to challenge the DIME selection process or the DOWC's Selection of Dr. Reiss.

Waiver

16. After ALJ Harr found the Claimant's challenge to the DIME process "frivolous and groundless," the Claimant has failed to schedule the DIME examination. In addition, after ALJ Harr's order, Respondent reminded the Claimant of her obligation to schedule the DIME and she still has failed to schedule the DIME.

17. According to Suzanne Polyakovics, Claims Administrator for the Employer, the Claimant has never scheduled the DIME, and Polyakovics has never received notice of a DIME from the DOWC, the Claimant or from Dr. Reiss.

18. Claimant's inaction reflects her intent to relinquish her right to the DIME. Knowing that the Rule required her to schedule the DIME examination within five business days, the Claimant has failed to schedule the examination at all, up to and including the present time. She has intentionally failed to schedule the examination despite the fact that on March 6, 2008 ALJ Harr found her arguments to be frivolous and groundless. She has failed to schedule the examination after being reminded to do so by the Respondent. She has failed to take any action to schedule the DIME for over a year. The totality of the evidence demonstrates Claimant's intent to abandon the DIME.

19. The Claimant had until September 4, 2007 to schedule the DIME. She failed to schedule the DIME for more than one year. Her conduct demonstrates that she knew of the selection of the DIME Examiner on August 27, 2007 and knew that she should have scheduled the examination within five business days or by September 4, 2007. Over the past year, she has failed to take any action to set the DIME with Dr. Reiss.

20. Setting the matter for hearing concerning the propriety of the DIME does not show Claimant's intent to pursue a DIME while challenging the specific process. This contention is inconsistent with the totality of the evidence because the designated issue in Claimant's Application for Hearing was previously determined to be frivolous and groundless and not a bona fide dispute over the DIME process. ALJ Harr previously concluded that Claimant's Application for Hearing was frivolous and groundless. ICAO affirmed this decision. Claimant failed to raise any legitimate challenge to the DIME, and her prior Hearing Application does not reflect an intention to maintain the DIME process.

Issue Preclusion

21. Claimant filed an Application for Hearing on August 13, 2007 concerning the "propriety of the Division IME." ALJ Harr conducted a hearing on that Application and issued a decision. His decision directly addressed Claimant's issue of the "propriety of the division IME." Respondent appealed that decision on March 14, 2008. While the decision was under appeal and before the ICAO issued a ruling, the Claimant filed the current Application for Hearing (on April 30, 2008), endorsing the exact same issues, *i.e.,* "propriety of the DIME process." The ALJ infers and finds that this issue was not ripe for determination on September 18, 2008 because the exact issue had previously been determined to be "frivolous and groundless."

Attorney Fees

22. Claimant, through counsel, filed a petition to review ALJ Harr's decision was on March 14, 2008. At the time the Claimant filed the Application for Hearing herein on April 30, 2008, the issues were subject to an appeal and the Application for Hearing was not "ripe" at the time it was filed.

23. Counsel for Respondent filed a sworn affidavit setting forth a breakdown of time, attorney fees and costs. Depending on the activity involved, Attorney Thomas billed the respondent either $75 an hour or $145 an hour, in the aggregate fee amount of $2,506, for over 100 hours of legal work to defend the issues at the September 18 hearing. Considering the fact that Attorney Thomas has practiced law for 15 years, specializing in workers' compensation matters, the ALJ finds the hourly rates inherently fair and reasonable. Considering the complexity of the issue Respondent was required to defend, coupled with the fact that Respondent correctly argues that the exact issue had been defended, argued and decided before, the ALJ finds the 100 plus hours excessive and the ALJ infers and finds that 5o hours plus is more reasonable for aggregate attorney fees of $1,253 to defend the issues at the September 18 hearing. Respondent incurred costs of $83.85. The ALJ finds that Respondent incurred reasonably assessed attorney fees and costs of $1,338.85.

Ultimate Findings

24. Claimant has failed to prove, by a preponderance of the evidence that the DIME process was improper. Respondent has proven, by a preponderance of the evidence that the same issue Claimant designated for the September 18, 2008 hearing was adjudicated by ALJ Harr insofar as the claimed issue was determined to be "frivolous and groundless," and ICAO affirmed this adjudication, thus, the issue was not ripe for adjudication at the September 18, 2008 hearing.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Recusal

a. Disqualification (recusal) is governed by Rule 97, C.R.C.P. The factual allegations upon which conclusions or inferences are based must be accepted as facially true in ruling on a motion to recuse. *See Wright v. District Court*, 731 P. 2d 661 (Colo. 1987). As found, the factual allegations in Claimant's "Verified Motion to Recuse" were accepted as facially true.

b. An affidavit alleging facts, not opinions or conclusions, supporting a reasonable inference of actual or apparent bias, is required for recusal. *Prefer v. PharmNetRx*, 18 P. 3d 844 (Colo. App. 2000), *cert. dismissed*, 2000. Mere conclusions or opinions, alleged in an affidavit in support of recusal, are insufficient to warrant recusal. *People v. Cook*, 22 P. 3d 947 (Colo. App. 2000). As found, Claimant's "Verified Motion" alleges conclusions and/or opinions, but no underlying evidentiary facts supporting a reasonable inference of actual or apparent bias. If there is a reasonable question concerning the judge's impartiality, recusal is required. *Wood Bros. Homes v. City of Fort Collins*, 670 P. 2d 9 (Colo. App. 1983). As found, Claimant's allegations do not raise a reasonable question concerning the ALJ's impartiality. An attorney cannot simply hurl out scandalous, conclusory accusations concerning a judge and then allege that the judge would necessarily have to be biased and lack partiality because of those allegations inititated by the attorney seeking to disqualify the judge.

c. The most clearly articulated test for recusal is whether a reasonable person, knowing all the relevant facts, harbors doubts about a judge's impartiality. *Switzer v. Berry*, 198 F. 3d 1255 (10th Cir. 2000). As found, a review of the bedrock factual allegations in the Verified Motion to Recuse herein would not cause a reasonable person to harbor doubts about this ALJ's impartiality.

d. In the absence of a valid reason for disqualification relating to the subject matter of the litigation, the judge has a duty of presideing over the case. *Blades v. DaFoe,* 666 P.2d 1126 (Colo. App. 1983), *rev'd on other grounds* 704 P. 2d 317 (Colo. 1985). As found and concluded, there is no valid reason for disqualiufication of the ALJ herein.

e. The fact that a movant for a jhudge's disqualification has appeared before a judge in other matters is insufficient for disqualification of the judge as a matter of law. *People v. Johnson,* 634 P.2d 407 (Colo. 1981). This principle holds true even when the judge has made numerous erroneous prior rulings. *Riva Ridge Apartments v. Robert G. Fisher Co., Inc.,* 745 P.2d 1034 (Colo. App. 1987). As found, the "Verified Motion" does not even allege that any of the prior rulings against the clients of Claimant's attorney herein have been reversed by a higher tribunal.

f. A judge's opinion formed against a party from evcidence before the court in a judicial proceeding, including an opinion on guilt or innocence, is generally not a basis for disqualification. *People ex rel. S.G.,* 91 p.3d 443 (Colo. App. 2004). The "Verified Motion" alleges "hatred" and implies that the ALJ has adverse opinions concerning Claimant's counsel, based on previous cases before the ALJ. The ALJ concludes that these allegations, accepted as facially true, do not form the basis of a recusal.

g. The Supreme Court determined that to allow a litigant to file a letter critical of a trial judge or to inform the judge of the filing of a complaint with the judicial qualifications commission and later assert the judge's knowledge of the complaint as a basis for disqualification would encourage impermissible judge shopping. *In re Mann,* 655 P.2d 814 (Colo. 1982). Quite simply, an attorney cannot create a negative factual composite of a judge and later use this as the basis for recusal. As found, Claimant's attorney herein has created negative allegations, *e.g.,* the judge "hates" him, and used these allegations as a basis for recusal.

Waiver of the DIME

h. The Doctrine of Waiver applies to workers' compensation proceedings. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988). Waiver is the intentional relinquishment of a known right and may be implied when a party engages in conduct that manifests an intent to relinquish the right or acts inconsistently with its assertion. *Tripp v. Parga*, 847 P.2d 165, 167 (Colo. App. 1992). Waiver may be implied by conduct where the party acts inconsistently with a known right. *See Tripp* at 167. It is a factual question for an ALJ to determine whether a claimant's conduct shows an intent to abandon her right to a DIME. As found, the Claimant's conduct and inaction established Claimant's intent to abandon the DIME.

i. In workers' compensation, courts have recognized that a claimant, through conduct, may waive the right to workers' compensation benefits. For example, in *Hanna v. Print Expediters, Inc.* 77 P.3d 863 (Colo. App. 2003), the Court of Appeals determined that a claimant, by failing to seek future medical care at a hearing on permanent partial disability waived her right to those future medical benefits. *See also Winters v. The Industrial Commission,* 736 P.2d 1256 (Colo. App. 1986) [claimant waived right to vocational rehabilitation by failing to cooperate with the vocational rehabilitation counselor); *Walton v. The Industrial Commission*, 738 P.2d. 66 (Colo. App. 1987) (claimant waived right to vocational rehabilitation and temporary disability benefits by failing to set the issue for hearing). As found, Claimant's inaction to pursue the DIME process for approximately one year amounted to a waiver of the DIME process through conduct (inaction).

j. The Industrial Claim Appeals Office (ICAO) has concluded that a party may waive its right to a DIME by an "unconscionable delay." *Gaither v. Resource Exchange,* W.C. No. 4-125-439 (ICAO, 1994) In *Gaither,* the ALJ found respondents waived their right to a DIME because they failed to take any action for sixty days to prosecute the DIME. The ALJ found a mere sixty days to be an "unconscionable delay" that manifested the respondents' intent to abandon the DIME process. As found, the delay in the present case was approximately one year. The ALJ concludes that this was a waiver of the right to a DIME.

k. Parties to a workers' compensation claim are presumed to know the applicable law. *Midget Consol. Gold Mining Co. v. Industrial Commission*, 64 Colo. 218, 193 P. 493 (Colo. 1920)*; Paul v. Industrial Commission*, 632 P.2d 638 (Colo. App. 1981). The presumption aids a party in meeting its burden of proof. *Union Ins. Co. v. RCA Corp.,* 724 P.2d 80 (Colo. App. 1986). Further, a party may not use ignorance of the law as a defense to its legal duties. *Grant v. Professional Contract Services*, W.C. NO .4-531-613 (ICAO, January 24, 2005). Under Workers' Compensation Rule 11-2(H), a claimant has five business days to "schedule the examination." As found, the Claimant had until September 4, 2007 to schedule the examination. Claimant waived her right to a DIME by failing to schedule the examination for more than one year. Claimant's conduct demonstrates that she knew of the selection of the DIME Examiner on August 27, 2007 and knew that she should have scheduled the examination within five business days or by September 4, 2007. Over the past year, the Claimant has failed to take any action to set the DIME with Dr. Reiss. By intentionally failing to set the DIME, the Claimant has waived her right to it. As found, setting the matter for hearing concerning the propriety of the DIME did not show Claimant's intent to pursue a DIME. The ALJ rejected this contention because Claimant's Application for Hearing was frivolous and groundless and not a bona fide dispute over the DIME process. ALJ Harr previously concluded that Claimant's Application for Hearing was frivolous and groundless. ICAO affirmed this ision. Because Claimant failed to raise any legitimate challenge to the DIME in her present Application for Hearing, and in her prior Hearing Application, she had **no** intent to maintain the DIME process. Also, as found, because she failed to comply with the DOWC Rule for scheduling a DIME, and because she failed to take any action to schedule the DIME for more than one year, and because she failed to bring a bona fide challenge to the propriety of the DIME, her conduct demonstrates her intent to waive her right to the DIME process.

<u>Issue Preclusion</u>

l. Collateral estoppel, or issue preclusion, bars re-litigation of an issue that was actually litigated and decided in a prior proceeding. *Bebo Const. Co. v. Mattox & O'Brien, P.C.,* 990 P.2d 78, 84 (Colo.1999). Issue preclusion applies to workers compensation proceeding. *Sunny Acres Villa v. Cooper*, 25 P. 3d 44 (Colo. 2001). Issue preclusion applies when: 1.) the issue precluded is identical to the issue actually determined in the prior proceeding; 2.) the party

against whom estoppel is asserted has been a party to or in privity with a party in the prior proceeding; 3.) there is a final judgment on the merits in the prior proceeding; and 4.) the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue in the prior proceeding. *Bebo* at 84-85. As found, Claimant presented the identical issue to ALJ Harr and it became final when affirmed on appeal by the ICAO. The Panel noted "the claimant filed an application for hearing regarding the propriety of the DIME panel selection and physician specialties." This is the same issue Claimant raised in the present Application for Hearing, the parties are the same, there is a final decision on the merits and Claimant had a full and fair opportunity to litigate the issue before ALJ Harr. Therefore, Claimant is barred from raising the issues at the present time.

Attorney Fees

m. Section 8-43-211(d), C.R.S. (2008), provides for attorney fees: "If any person requests a hearing or files a notice to set a hearing on issues which are not ripe for adjudication at the time such request or filing is made, such person sh*all* be assessed the reasonable attorney fees and costs of the opposing party in preparing for such hearing." In this case, the person requesting the hearing on the issues that were not ripe was Claimant's attorney, Richard K. Blundell, Esq. The statute requires an ALJ to determine whether the issues were ripe "at the time the application for hearing" is filed. Later events have no impact on the analysis. Therefore, this ALJ must determine whether the issue of the "propriety of the Division IME" was ripe when claimant filed the application for hearing on April 30, 2008.

The ALJ concludes the issue of "propriety of DIME" was not ripe because it had been previously decided by another ALJ and was under appeal. Section 8-43-301(12) C.R.S. (2008) prohibits an ALJ from determining an issue that is under appeal. That statute states: "If a petition to review is filed, a hearing may be held and orders on any other issue during the pendency of the appeal." The ICAO has held that an issue is not "ripe" for adjudication" if a current appeal is pending. *See, Silence v. Carpet Clearance Warehouse*, W.C.4-172-786 (ICAO, March 10, 1995) [issues under appeal "were not ripe for adjudication" at subsequent hearing until appeal ended]. As found, a petition to review was filed March 14, 2008. At the time Claimant filed the Application for Hearing on April 30, 2008, the issues were subject to an appeal and the Application for Hearing was not "ripe." Therefore, Respondent is entitled to attorney fees.

n. As found, Counsel for Respondent filed a sworn affidavit setting forth a breakdown of time, attorney fees and costs. Depending on the activity involved, Attorney Thomas billed the respondent either $75 an hour or $145 an hour, in the aggregate fee amount of $2,506, for over 100 hours of legal work to defend the issues at the September 18 hearing. Considering the fact that Attorney Thomas has practiced law for 15 years, specializing in workers' compensation matters, the ALJ finds the hourly rates inherently fair and

reasonable. Considering the complexity of the issue Respondent was required to defend, coupled with the fact that Respondent correctly argues that the exact issue had been defended, argued and decided before, the ALJ finds the 100 plus hours excessive and the ALJ infers and finds that 5o hours plus is more reasonable for aggregate attorney fees of $1,253 to defend the issues at the September 18 hearing. Respondent incurred costs of $83.85. The ALJ finds that Respondent incurred reasonably assessed attorney fees and costs of $1,338.85.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant's Verified Motion to Recuse is hereby denied and dismissed.

B. Claimant, through inaction, has waived her right to pursue a Division Independent Medical Examination.

C. The issue concerning the "propriety of the Division Independent Medical Examination" is precluded from being re-litigated by virtue of the doctrine of "issue preclusion."

D. The Claimant's attorney shall pay and reimburse the Respondent $1,338.85 for its attorney fees and costs, incurred in defending the "propriety of the Division Independent Medical Examination" a second time for the hearing of September 18, 2008.

E. Claimant's attorney is granted a stay of 20 days from the date of this Supplemental Order within which to pay the attorney fees and costs. In the event Claimant timely files a timely Petition to Review, payment for the attorney fees and costs shall be stayed while the appeal is pending.

F. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of February 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-669-749

ISSUES

The issues determined herein are penalties for Respondents' violation of section 8-43-503(3) (dictation of medical care) and attorney fees and costs for Respondents' request for hearing on issues not ripe for adjudication at the time such request was made. (8-43-211(2)(d).

FINDINGS OF FACT

1.This claim arises out of a date of injury of November 26, 2005.

2.Following the initial accident, claimant was seen by Dr. Fraley who diagnosed claimant with a left shoulder contusion, a right knee contusion, a right breast contusion, a left foot sprain and a left pinky strain.

3.As the claim progressed, the authorized treating physician (ATP), Dr. Quick, treated additional body parts of the claimant, including the shoulder girdle and cervical spine, as well as psychological conditions.

4.On July 14, 2008, claimant presented to Dr. Quick and he opined in his report that the claimant was at maximum medical improvement for her left shoulder, her right wrist and the right thumb. Dr. Quick opined that claimant had not yet reached MMI for her psychological injuries and injuries to her shoulder girdle and cervical spine and he noted that she was continuing to receive treatment for these injuries from other providers in the claim.

5.As of July 14, 2008, Dr. Quick's medical reports indicate that he believed claimant's psychological injuries and injuries to her shoulder girdle and cervical spine were causally related to her industrial accident.

6.On August 14, 2008, respondents' independent expert, Dr. Cebrian, opined that as a result of the original date of injury, claimant had suffered a left shoulder contusion, a right knee contusion, a breast contusion, a left foot sprain and a left fifth finger sprain. Dr. Cebrian opined that claimant had reached maximum medical improvement for all related conditions resulting from the original date of injury. Dr. Cebrian opined that he did not believe claimant's psychological injuries and injuries to her shoulder girdle and cervical spine were causally related to her industrial accident.

7.On August 15, 2008 respondents' then counsel, Joseph Irwin, Esq., forwarded Dr. Quick a copy of Dr. Cebrian's report along with a letter requesting that Dr. Quick review Dr. Cebrian's report and indicate whether he agreed with Dr. Cebrian's conclusions.

8.On August 15, 2008 respondents filed an Application for Hearing and Notice to Set (Application) endorsing compensability and MMI.

9.Respondents filed the Application for Hearing to obtain a judicial ruling regarding the relatedness of claimant's psychological injuries and injuries to her shoulder girdle and cervical spine to the admitted work injury. Respondents raised the MMI issue to resolve the ambiguity regarding claimant's MMI status, as stated in Dr. Quick's July 14, 2008 report, which would have resulted if the ALJ had determined that claimant's psychological injuries and injuries to her cervical spine and shoulder girdle were not related to the admitted injury.

10.On September 22, 2008, Dr. Quick issued an impairment report, indicating that the claimant had reached maximum medical improvement for all conditions. Dr. Quick's impairment report referenced that he had read the report from Dr. Cebrian and the letter from Mr. Irwin.

11.In his September 22, 2008 report Dr. Quick opined that he did not believe claimant's shoulder girdle and cervical spine injuries were causally related to the claimant's industrial accident.

12.On October 6, 2008 Dr. Quick issued a report wherein he confirmed that he had exercised his own independent medical judgment in placing the Claimant at MMI and assigning an impairment rating on September 22, 2008.

13.On October 21, 2008 respondents filed a Final Admission of Liability consistent with the findings set forth in Dr. Quick's September 22, 2008 report.

14.On October 22, 2008 respondents withdrew their August 15, 2008 Application for Hearing because the September 22, 2008 impairment report from Dr. Quick had resolved the disputes regarding MMI and compensability and the issues were now moot.

CONCLUSIONS OF LAW

1. In assessing penalties under § 8-43-304(1), C.R.S. (2005), the ALJ must first determine whether the alleged conduct constituted a violation of the Workers' Compensation Act, a Rule, or an Order. If the alleged conduct does not constitute a violation of the Act, a Rule, or an Order, then the penalty is dismissed. § 8-43-304(1); Pioneers Hosp. v. Indus. Claim Appeals Office, 114 P.3d 97, 98 (Colo. App. 2005).

2. If the Court finds that a violation occurred, then the Court must make a secondary determination regarding whether the conduct was unreasonable as measured by an objective standard. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907

P.2d 676, 678-79 (Colo. App. 1995). The reasonableness of an employer's or insurer's action depends on whether the action was predicated on a rational argument based in law or fact. Jimenez v. Indus. Claim Appeals Office, supra, 107 P.3d at 967; *Diversified Veterans Center v. Hewuse*, 942 P.2d 1312, 1313 (Colo. App. 1997).

3. Claimant alleges that the respondents violated § 8-43-503(3), C.R.S. (2005), which provides that "[e]mployers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment."

4. Pursuant to the plain language of the statute, for a penalty to be imposed against a respondent for violation of § 8-43-503(3), claimant must prove by a preponderance of the evidence that the employer or insurer "dictated" (1) the type of treatment that could be provided, (2) the duration of treatment, or (3) the degree of physical impairment.

5. In *York v. Larchwood Inns*, W.C. No. 4-365-429 (ICAO November 7, 2002) ICAO addressed the meaning of "dictate" as utilized in § 8-43-503 (3):

> *Webster's II New Collegiate Dictionary* (2005) defines the term "dictate" as the process of issuing "orders or commands." Application of this definition to § 8-43-503(3) leads to no absurdity. Thus, we conclude § 8-43-503(3) precludes a representative of the insurer from issuing commands to a treating physicians concerning the type of treatment to be provided to the claimant. *Id*.

6. In *York*, the respondents' attorney sent a treating physician a letter detailing claimant's history of requesting narcotic medication. Claimant requested a penalty pursuant to § 8-43-503(3), which the ALJ denied. The ICAO affirmed, explaining that the letter did not direct the treating physician to provide a particular course of treatment, or prohibit him from providing any particular treatment including narcotics. The ICAO concluded the letter did not purport to "dictate" treatment.

7. Similarly, in *Williams v. City of Colorado Springs,* W.C. No. 5-565-576 (ICAO February 15, 2008), the claimant sought penalties for alleged improper dictation of care related to an adjuster asking the treating doctor if the claimant could be referred to a specific psychologist. ICAO affirmed the ALJ's dismissal of the penalty on the grounds that the adjuster had not commanded or directed that the treating doctor refer the claimant to a specific psychologist, but rather that the adjuster had only inquired

and suggested whether it would be possible to refer the claimant to the specific doctor.

8. Claimant relies upon a letter written on August 15, 2008 by Respondents' counsel to establish that Respondents were attempting to dictate medical care. After a review of the letter, and Dr. Quick's subsequent reports, the ALJ concludes that the letter did not have the intent or effect of dictating medical care.

9. The record does not contain probative evidence demonstrating that the respondents ordered, directed, or commanded Dr. Quick to engage in a specific course of conduct. There is no evidence in the record that Dr. Quick was influenced or compelled to engage in a specific course of conduct because of the actions of the respondents. There is no evidence in the record to support that treatment was delayed or that a course of treatment was altered because of the actions of the respondents.

10. CRS Section 8-43-211(2)(d) permits the recovery of reasonable attorney's fees against a party who requests a hearing or files a notice to set a hearing on issues, which are not ripe for adjudication at the time such request or filing is made.

11. Ripeness tests whether an issue is real, immediate, and fit for adjudication. *Olivias-Soto v. ICAO,* 143 P.3d 1178 (August 24, 2006).

12. Respondents argue that the compensability issue was ripe for determination at the time of the filing of the August 15, 2008 Application for Hearing in that they were challenging compensability as it relates to specific body parts being treated and not the entire claim, for which a general admission of liability had been filed.

13. Under Colorado law, even after an admission of liability is filed, the respondents retain the right to dispute the compensability or relatedness of the need for continuing treatment. Snyder v. Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. pp. 1997); *Hanna, Jr. v. State Farm Insurance Companies*, W.C. No. 77 P.3d 863, 866 (Colo. App. 2003). The determination of whether the need for treatment was caused by the industrial injury or some other cause is one of fact for determination by the ALJ. Owens v. Industrial Claim Appeals Office, 49 P.3d 1187 (Colo. App. 2002).

14. Respondents reserve the right to challenge the need for medical treatment and whether the injury is compensable, even after a general admission of liability is filed. *Sanchez v. Family Dollar Stores, Inc.*, W.C. No. 4-631-793 (October 20, 2006). Even after an admission is filed, the claimant retains the burden of proof to establish compensability or

relatedness of alleged industrial injuries. *Maddox v. Harp Distributing, Inc.*, W.C. No. 4-471-963 (November 7, 2005).

15. The ALJ concludes that Respondents endorsement of compensability was ripe for determination at the time the Application was filed because respondents retained the right to litigate the causation or relatedness of certain body parts to the admitted industrial injury.

16. Respondents raised the MMI issue to resolve an ambiguity in the records and to obtain a judicial determination regarding whether the treating physician had in fact placed claimant at MMI. Respondents indicate in their argument that "if" the ALJ were to determine that only certain body parts were compensable or casually related to the admitted injury, that the order would have created a factual conflict as to the ATP's opinion on MMI, which would have needed to have been resolved by an ALJ at a hearing.

17. CRS Section 8-42-107(8) mandates that the only way to challenge the ATP's finding of MMI, or that the Claimant is not at MMI, is through the division independent medical examination (DIME) process.

18. The ALJ cannot determine MMI in the absence of a DIME. Here, there is no evidence that a DIME was sought or completed and thus, the Respondents must abide by the ATP's findings concerning MMI, unless the ATP has issued conflicting opinions or his opinion is ambiguous.

19. There is no ambiguity as to the ATP stating that Claimant was not at MMI at the time the Application was filed on August 15, 2008. Thus, there is nothing for the ALJ to determine.

20. Even if the respondents had proceeded to hearing on compensability and obtained a ruling from the ALJ finding that the claimant's psychological injuries and shoulder girdle and cervical spine injuries were not causally related to claimant's industrial accident, there would not have been a resulting ambiguity in Dr. Quick's July 14, 2008 medical report regarding claimant's MMI status.

21. The other option for the Respondents would be to request a DIME after 18 months of treatment by the ATP. There is no evidence that respondents sought an 18 month DIME.

22. The ALJ concludes that the Respondents filed an Application with an issue that was not ripe.

ORDER

1.Claimant's request for penalties for dictating medical care is denied and dismissed.

2.Respondents are responsible for Claimant's attorney's fees and costs that were incurred as a result of Claimant's preparation for hearing on the issue of MMI.

3.Claimant's counsel is directed to file an affidavit with Claimant's fees and costs incurred as a result of Claimant's preparation for hearing on the issue of MMI. Said affidavit shall be filed no later than 30 days from the date of this order.

4.Respondents shall be afforded 20 days from the date of submission of the affidavit to file an application for hearing on the reasonableness of the fees and costs.

5.Respondents shall pay statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

6.Any and all issues not determined herein are reserved for future decision.

DATE: February 19, 2009

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-710-932

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 16, 2008 and concluded on February 9, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 12/16/08, Courtroom 3, beginning at 3:20 PM, and ending at 5:10 PM; and, 2/9/09, Courtroom 3, beginning at 1:30 PM, and ending at 3:17 PM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel, giving Respondents 3 working days within which to file electronic objections thereto. The proposed decision was submitted on February 12, 2009. No timely objections have been filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns whether the Claimant has overcome the Division Independent Medical Examination (DIME) of Stanley H. Ginsburg, M.D., by clear and convincing evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant suffered an admitted work-related injury on January 8, 2007, while working for the Employer.

2. Claimant was working at the car rental facility in January 2007, walked out, and hit a patch of ice at 6:45 PM. It was dark, and she could not see the ice and "went skating on one leg." She threw herself backward almost involuntarily in hyperextension and although she caught herself without falling and went back inside, she felt her back was strained. She went back to work, was off work and at the time she was off work was so stiff she could not move. She was feeling she was "locked" the next morning and at her health care providers direction, for three days she did not work.

3. Ultimately, Respondents filed a Final Admission of Liability (FAL), dated September 8, 2008, admitting for temporary disability benefits through May 14, 2008; for permanent partial disability benefits, based on 34% of

the left lower extremity (LLE), 7% whole person for the lumbar region, and 3% psychological impairment; and, MMI on May 15, 2008. The FAL was based on the opinions of Kathie McCranie, M.D., [the authorized treating physician (ATP)]. Claimant filed a timely objection to the FAL. Dr. Ginsburg conducted a DIME, and a follow up DIME. Claimant challenged Dr. Ginsburg's opinion that Claimant had reached MMI on May 15, 2008.

Medical

4. Claimant's post-accident medical care included the following objective, diagnostic study on June 11, 2007:

> MRI ARTHROGRAM LEFT HIP on June 11, 2007
>
> IMPRESSION:
> Partial detachment of the left anterior superior acetabulum labrum that extends to involve the anterior aspects of the superior acetabular labrum.

5. On September 12, 2007, John D. Papilion, M.D., performed surgery on the Claimant for an anterosuperior labral tear. On January 14, 2008, Dr. Pepilion indicated he wanted to do a repeat MRI (magnetic resonance imaging) arthrogram.

6. On February 7, 2008, the Claimant had been seeing Dr. McCranie for over 3 months. Her impressions were:

> (1) Left hip pain, status post arthroscopy for lateral tear and
> (2) Low back pain, rule out left sided facet involvement.

7. On April 23, 2008, the Claimant declined more psychiatric care.

8. On May 15, 2008, Dr. McCranie, as found, placed the Claimant at MMI and rated her for permanent impairment.

9. Dr. McCranie continues to see the Claimant and to prescribe medications.

<u>Maximum Medical Improvement</u>

10. Edwin M. Healey, M.D., a Diplomate of the American Board of Pain Medicine and an independent medical examiner (IME) for the Claimant, saw the Claimant on July 2, 2008. Dr. Healey observed Claimant and is of the opinion that Claimant:

She presents today with severe, chronic, excruciating, debilitating pain along with significant depression.

She has also not responded well to psychological counseling or antidepressants and expresses suicidal ideation today.

It is my opinion that she needs further evaluation, specifically I would recommend that she see Jerome Wiedel, MD, an orthopedic professor at the University of Colorado Medical Center, who specialized in arthroscopy of the hip and is a top expert in pathology of the hip in the United States. [Claimant] continues to have left hip pain and crepitus, and her left hip may continue to be a significant generator of pain. I recommend she see Dr. Wiedel at least on one occasion to review her MRI and perform an examination to see if he believes any further surgical procedure on the left hip might help alleviate her pain and disability.

Finally, [Claimant] continues to need to see a psychologist or psychological counselor for her chronic depression and needs to remain on pain medication and sleep and antidepressant medication. I would also recommend that she be put on a long-acting opioid to see if she might obtain better control of her pain and be able to improve her activity and then be given short-acting opioids for breakthrough pain. Dr. McCrainie appears to be reluctant to do this, but it certainly would be worth a trial to see if [Claimant] could get better relief of her chronic, ongoing pain. She would have to be monitored very closely if she were to go on opiod medication to make sure that there were no signs or symptoms of abuse.

At this point, it appears that she would not be able to return to work given her chronic pain and limitation in her abilities.

In summary, [Claimant] is severely impaired as a result of her January 8, 2007 injury. Prior to her January 8, 2007, she had no history of chronic pain, depression or other psychological problems and was able to lead a happy and vigorous life and was able to work full-time without any restrictions. Her January 8, 2007 injury has been a devastating injury to her which has essentially incapacitated her from being able to do housework, recreational activities or return to work. It is my opinion that further evaluation and treatment is indicated before she is declared a maximal medical improvement.[1]

---

[1] This was about 1 ½ months after Dr. McCranie had found Claimant at MMI.

11. The ALJ finds the opinions of Dr. Healy highly persuasive and credible. Indeed, the ALJ finds that Dr. Healy's opinions outweigh the opinions of DIME Dr. Ginsburg to the extent of rendering it highly probable, unmistakable, and free from serious and substantial doubt that Dr. Ginsburg's opinion concerning MMI on May 15, 2008 is clearly erroneous.

12. Claimant timely applied for a DIME and Dr. Ginsburg was selected.

13. On September 18, 2008, Dr. Ginsburg reported that the patient indicated she could not:

Flex her lower extremities;
Do knee flexion;
Do hip abduction;
Do adduction;
Do straight leg raising; or
Do lumbar flexion, because of extreme pain.

14. On September 18, 2008, the first attempt at a DIME examination failed.

15. On October 20, 2008, Claimant had a second opportunity to be tested by Dr. Ginsburg, but the results made all "range of motion" ratings impossible.

16. The Claimant had "unbearable discomfort" during the 2 attempted examinations.

17. Dr. Ginsburg's testimony was taken by deposition on January 19, 2009. He testified in his deposition concerning additional medical care at page 29, lines 8-10:

> A. I don't think that she needed additional surgery based on what I saw, but she clearly needed further medical care from her providers.

18. Later in his deposition, he said at page 30, lines 14-16:

> A. Well, it would do the following: I was asked whether she needs hip surgery and my response was I don't know.

19. Dr. Ginsburg also verified that Claimant was unable to do the straight leg-raising test at page 58, lines 18-24:

Q. Did she fail to do straight leg raising in a manner sufficient to give you a reasonable reading on that test result?

A. She couldn't do any straight leg raising. She couldn't raise her leg at all. I think I indicated that in our deposition, in my deposition, today and in the report as well.

20. Dr. Ginsburg makes it clear 3 times in his deposition testimony that Claimant simply was not able to perform those tests as opposed to being unwilling to do so:

Page 62, lines 18-22:

Q. What other strength tests was she unable to do or refused to do?

A. She couldn't do anything except for dorsiflexion and planter flexion because I couldn't put her in a position where I could test those.

Page 63, line 25 and page 64, line 1:

possible because she didn't --she wasn't able to comply.

Page 69, lines 10-13:

I don't think that – I don't think Miss McNeilan was malingering. I never thought that, but I think that she does have pain, and I indicated that.

21. Dr. Ginsburg repeatedly said Claimant's very real pain prevented her from performing or doing the tests necessary for claimant to have "Range of Motion" ratings.

22. During a demonstration on December 16, 2008, of part of the DIME testing for hip and lumbar injuries, Claimant's pain from trying to do that testing was apparent.

23. Based on Dr. Ginsburg **not** knowing whether more surgery would be required and his inability to do range of motion measurements on the Claimant, it is highly probable, unmistakable, and free from serious and substantial doubt that Dr. Ginsburg's opinion the Claimant was at MMI on May 15, 2008 was clearly erroneous. The medical care that Claimant requires far exceeds mere maintenance care, given her overwhelming pain issues.

24. As indicated by Dr. McCranie, Claimant is in need of psychiatric assistance, but Dr. McCranie put Claimant at MMI because Claimant at that time did not want further psychiatric assistance. The ALJ infers and finds that DIME Dr. Ginsburg placed the Claimant at MMI because he gave up on being able to perform further range of motion testing because of Claimant's overwhelming pain.

25. Claimant credibly stated that she now wants the psychiatric assistance recommended by her ATP, Dr. McCranie.

Ultimate Finding

26. Claimant has proven that it is highly probable, unmistakable, and free from serious and substantial doubt that DIME Dr. Ginsburg's opinion that Claimant reached MMI on May 15, 2008 is erroneous. Therefore, Claimant has sustained her burden of clear and convincing evidence.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. In deciding whether an injured worker 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 Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (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). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a 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 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, the fact that DIME Dr. Ginsburg did **not** know whether Claimant might need more surgery and that he could not perform range of motion measurements on the Claimant undermines his opinion that Claimant reached MMI on May 15, 2008. Also, Dr. Healy's assessment of Claimant's present condition makes it highly probable, unmistakable and free from serious and substantial doubt that Dr. Ginsburg's opinion concerning MMI. Under the totality of the evidence, including an assessment of Claimant's present condition, DIME Dr. Ginsburg's opinion of MMI is not credible.

b. The DIME doctor's findings consist not only of the initial report, but also many subsequent opinions given by the doctor. Please see *Andrade v Industrial Claim Appeals Office,*, 121 P.3d 328 (Colo.App.2005). The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). It is well established that the DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); Section 8-42-107(b)-(c), C.R.S. (2007). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra.* In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). The question of whether the DIME physician has placed a claimant at MMI or not, and whether that determination has been overcome is a factual determination for resolution by the ALJ. *Metro Moving & Storage Co. v. Gussert*, *supra. Also see* for *Leming v Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo.App.2002).

ORDER

IT IS, THEREFORE, ORDERED THAT:

The DIME of Dr. Ginsburg is overcome as the claimant has been found to be not at MMI.

DATED this_____day of February 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-765-128

ISSUES

The issues to be determined are compensability and medical benefits. All other issues endorsed by the parties were reserved pending determination of the issue of compensability and medical benefits if the claim was found compensable.

FINDINGS OF FACT

1. On June 6, 2008 while working as a CNA at Brighton Gardens Claimant tripped over a cord in one of her patient's rooms and fell. Claimant reported the incident that day but did not feel a need for medical attention.

2. An incident report was completed and did not indicate Claimant hurt her left foot.

3. Claimant's June 6, 2008 incident did not cause the need for Claimant to seek or obtain medical treatment.

4. On June 27, 2008, approximately three (3) weeks after the June 6, 2008 incident Claimant presented to the emergency room complaining of left foot pain.

5. The emergency room records specifically indicate Claimant did not incur any trauma and that her pain was "atraumatic" and there was no known injury.

6. Claimant was diagnosed as suffering from a Jones fracture of the left foot. As testified to by Dr. Olsen, a Jones Fracture is caused by activities of daily living and not trauma.

7. Claimant saw Dr. David Matthews on July 1, 2008. The history obtained by Dr. Mathews indicates Claimant works at night as a CNA, mostly sits and that she began to have pain in her left foot about 10 days ago. The history obtained by Dr. Mathews does not indicate Claimant incurred any trauma to her foot. Dr. Mathews specifically indicates in his report that "there was no injury." Dr. Mathews diagnosed Claimant with a Jones stress fracture of the left foot.

8. Claimant saw Dr. Fitzgerald on July 2, 2008 who also diagnosed her with a Jones fracture. Dr. Fitzgerald's report does not indicate Claimant suffered any trauma to her foot or was involved in any accident.

9. Claimant underwent an MRI of her right knee on September 15, 2008. The findings of the MRI are consistent with degenerative changes and according to Dr. Fitzgerald, 50% of people her age would have similar findings.

10. Dr. Olsen testified and agreed with Dr. Fitzgerald that 50% of people Claimant's age would have similar MRI findings and such findings are consistent with activities of daily living.

11. Dr. Fitzgerald opined Claimant had osteoarthritis of her right knee that was aggravated by her altered gait caused by bearing all of her weight on her right leg while her left foot fracture was being treated.

12. Dr. Fitzgerald indicated that "within a reasonable degree of medical probability the aggravation of Claimant's pre-existing arthritis of the right knee is related to the treatment of the fracture of her left fifth metatarsal. Dr. Fitzgerald's causation assessment is based on Claimant's altered gait and not direct trauma to the knee from the June 6, 2008 incident at work.

13. Dr. Kiernan indicated Claimant injured her right knee when she fell because Claimant had no prior history of difficulties with the right knee. Dr. Kiernan is incorrect that Claimant had no prior history of knee difficulties.

14. Dr. Hall evaluated Claimant on December 10, 2008 and indicated it was his opinion that Claimant's fracture is the direct consequence of the June 6, 2008 incident at work. Dr. Hall indicated that although there are notes in the chart that Claimant reported no specific trauma in the context of the symptoms, such reporting was due to the patient simply not putting these two events together and therefore it is more probable than not that the foot fracture is a consequence of the June 6, 2008 incident.

15. Claimant reported to Emily Orr, F.N.P. on approximately January 16, 2008 for right knee pain. The right knee pain was great enough at that time that it was thought to be contributing to Claimant's hypertension.

16. Claimant was evaluated by Dr Andrew Ellias on May 8, 2008, approximately four (4) weeks before the June 6, 2008 incident at work for right knee pain, left elbow pain, left hip pain and left calcaneal heal pain.

17. Before the June 6, 2008 incident, Claimant's preexisting right knee condition required her to wear a brace. Claimant had right knee and left foot problems for which she sought medical treatment before the June 6, 2008 incident.

18. Claimant previously fractured her foot while running up some stairs approximately 20 years ago. At that time Claimant's foot became swollen and black and blue.

19. Claimant testified at hearing she told the emergency room medical providers she tripped and fell at work and had an injury. However, the emergency room records do not indicate such.

20. Claimant was asked in Discovery to set forth in detail the symptoms of her left foot and right knee before June 6, 2008. Although Claimant had prior left foot and right knee symptoms, she denied having any left foot or right knee problems before June 6, 2008.

21. Claimant's testimony regarding the onset of her foot pain, the extent of her foot pain and its relation to the June 6, 2008 incident is not consistent with the credible evidence of record. Moreover, Claimant's testimony that she told the medical personnel at the emergency room that she injured her foot at work is not credible. The emergency room records do not indicate Claimant hurt her foot at work and it does not make sense that if Claimant told the emergency room personnel this information that they would specifically indicate Claimant's left foot was not caused by trauma and not include such pertinent information in their records.

22. Dr. Olsen examined Claimant on behalf of respondents. Claimant told Dr. Olsen that in the three weeks between June 6, 2008 and her initial presentation to the emergency room, she continued to work and her foot did not hurt.

23. Claimant told Dr. Olsen her left foot did not hurt at the time of the June 6, 2008 incident because she was taking naproxen for tennis elbow and the medication masked any pain in her left foot.

24. Dr. Olsen indicated the naproxen would not mask the pain caused by a fractured foot. Claimant also told Dr. Olsen that she did not notice the onset of pain until three weeks after the fall when she presented to the emergency room. She specifically told Dr. Olsen that the pain in her left foot was 0/10 at the time of the accident and in the three weeks leading up to June 27, 2008 until she presented to the emergency room.

25. Dr. Olsen opined Claimant's left foot fracture is not related to her fall at work on June 6, 2008. Dr. Olsen specifically noted the lack of symptoms immediately following the incident, the fact Claimant had pre-existing problems with her left foot, and that Claimant was able to work for almost three (3) weeks before she presented to the emergency room are not facts that are not indicative of a fracture as a result of Claimant's fall at work, but from activities of daily living.

26. Dr. Olsen also opined Claimant's right knee problems are not related to the fall at work.

27. The ALJ finds Dr. Olsen's analysis and opinions to be the more credible medical evidence in the record.

28. Claimant has failed to establish by a preponderance of the evidence that she sustained a work related injury on June 6, 2008.

CONCLUSIONS OF LAW

1. A "compensable" industrial accident is one which results in an injury requiring medical treatment or causing disability. Moreover, the existence of a pre- existing disease does not preclude a Claimant from suffering a compensable injury. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990); 1 Larson, Workmens' Compensation Law, § 12.21 (1995).

2. A Claimant has suffered a compensable injury if the industrial accident is the proximate cause of the Claimant's need for medical treatment or disability. Section 8- 41-301(1)(c), C.R.S. (1995 Cum. Supp.). An industrial accident is the "proximate" cause of a Claimant's disability if it is the "necessary precondition or trigger" of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988).

3. To prove a compensable injury, Claimant must prove by a preponderance of evidence her injury arose out of and in the course of her employment. Section 8-43-301(1)(c), C.R.S. 2008; *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

4. Proof by a preponderance of the evidence requires the proponent to establish that the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark*, 197 Colo. 306, 592 P.2d 792, 800 (1979).

5. Claimant contends the June 6, 2008 incident broke her left foot. However, Dr. Olsen testified that if Claimant broke her left foot on June 6, 2008, you would expect the immediate onset of pain that would preclude Claimant from working for almost three (3) weeks before presenting to the emergency room.

6. Moreover, Claimant's testimony regarding the onset of her foot pain, the extent of her foot pain and its relation to the June 6, 2008 incident is not credible. Moreover, Claimant's testimony that she told the medical personnel at the emergency room that she injured her foot at work is not credible. The emergency room records do not indicate Claimant hurt her foot at work and it does not make sense that if Claimant told the emergency room personnel this information that they would specifically indicate Claimant's left foot was not caused by trauma and not include such pertinent information in their records.

7. Claimant was diagnosed with a Jones stress fracture, which, by its definition, is not caused by trauma, but activities of daily living.

8. Claimant previously fractured her foot by going up some stairs. Although the fracture occurred quite some time ago, the fact that Claimant previously fractured her foot while going up stairs combined with Dr. Olsen's testimony is highly persuasive to this ALJ that her current fracture is a stress fracture caused by activities of daily living, or some other event, and not the June 6, 2008 incident.

9. Claimant had right knee problems before the June 6, 2008 incident. Dr. Fitzgerald indicated Claimant suffered from osteoarthritis of her right knee that was aggravated by her altered gait caused by the treatment to her left foot. However, because Claimant's left foot fracture was not caused by the fall at work, any consequences that flow from treating the left foot are not compensable.

10. Dr. Kiernan indicated Claimant's right knee injury and need for treatment was caused by the June 6, 2008 incident.

However, Dr. Kiernan based his opinion on the premise that Claimant did not have prior knee problems. Claimant's prior medical records and own testimony demonstrate she had prior right knee problems. Therefore, Dr. Kiernan's opinion is not found to be credible.

11. Claimant has failed to establish the June 6, 2008 incident at work caused the need for medical treatment or any disability. In resolving this issue this ALJ has not cited all disputed evidence before rejecting it as unpersuasive. *Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988). This ALJ has entered findings on the evidence found dispositive of the issues, and evidence and any inferences inconsistent with this order should be presumed to have been rejected. *Magnetic Engineering Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

12. Moreover, the absence of specific findings of fact on the evidence which Claimant relies in support of her claim does not mean this ALJ failed to consider such evidence. Cf. *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186 (Colo. App. 1995).

ORDER

It is therefore ordered that:

Claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

DATE: February 20, 2009

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-627-891

ISSUES

The issues to be determined by this decision are the following:

1. Whether claimant proved by a preponderance of the evidence that his condition has worsened such that his claim should be reopened for additional curative medical treatment for a change in medical condition causally related to this claim.

2. Whether claimant has proven by a preponderance of the evidence that he is entitled to additional medical benefits to cure and relieve his condition causally related to this claim.

Respondents reserved, without objection, the medical fee schedule at hearing.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ finds as fact:

1.Claimant sustained an admitted work-related injury to his right shoulder on September 22, 2004, when, while working as a laborer for Pueblo Truss, Inc. Claimant was carrying a truss with a co-worker. The co-worker dropped his end of the truss. When that end fell, the truss bounced twice on his shoulder before the truss fell onto the ground. Claimant timely reported this injury to his supervisor, and was promptly referred to Emergicare for treatment. Claimant's ATPs at Emergicare were Dr. Shriver and Dr. Bradley. Claimant returned to work on modified duty, and Respondent-Insurer admitted to the claim and paid medical benefits pursuant to the Colorado workers' compensation fee schedule.

2.At claimant's initial appointment at EmergiCare, claimant saw Phillip Shriver, M.D., who diagnosed claimant with a right scapular contusion, and a right trapezius strain. Claimant did not allege that his low back was injured or symptomatic. Records documenting claimant's subsequent medical appointments with the ATP do not contain any consistent complaints from claimant alleging, or documentation of, low back pain. Claimant's work-related diagnoses were right shoulder contusion, and trapezius sprain. Dr. Bradley stated claimant's objective findings and signs were, "Inconsistent," in his progress note dated October 19, 2004. While claimant stated at hearing he had low back pain, Dr. Bradley's progress note from November 30, 2004, documents no low back findings, but right buttocks numbness and tingling. There was no diagnosis of any low back pathology. On December 1, 2004, claimant had no complaints of low back or buttocks symptoms.

3.The ATP referred claimant to Michael C. Sparr, M.D. for consultation and electrodiagnostic study of claimant's right upper extremity. Claimant did not tell Dr. Sparr he had symptoms in his low back, and disclosed he had a work-related injury to his hip and right arm in 1999. Claimant did not disclose or discuss that injury during his hearing testimony. Claimant's pain diagram did not endorse symptoms in his lumbar spine. Dr. Sparr found claimant's history and pain description were vague. Dr. Bradley reported Dr. Sparr and he discussed the

case, and Dr. Sparr concluded claimant's back condition was not related to the injury covered by this claim. The ALJ finds this opinion is credible and persuasive. Claimant's low back condition is not causally related to this claim.

4.Dr. Bradley referred claimant to Brad R. Bingham, D.C., for chiropractic treatment. Dr. Bingham saw claimant for the first time on December 7, 2004. Dr. Bingham did not document or treat claimant for any lumbar or low back symptoms or complaints. Dr. Bingham's hand-written treatment notes for treatment claimant received on December 9, 14, 16, 21, and 28, 2004, all contain no mention of any treatment or evaluation of claimant's lumbar spine.

5.Claimant was also referred by the ATP to Mario M. Oliveria, M.D. for a neurologic evaluation on December 14, 2004. As when he saw Dr. Bradley and Dr. Bingham, claimant did not allege lumbar spine symptoms. Claimant did provide an entirely different description of how the injury covered by this claim occurred to Dr. Oliveria from the description he gave to Dr. Bradley and Dr. Bingham. Claimant, for the first time, told Dr. Oliveria that he lost his balance, fell backwards, and landed on the ground on his right shoulder and low back. In all previously documented reports of this injury, claimant said the truss bounced on his right shoulder and then the truss landed on the ground. There was no allegation or claim claimant fell. The ALJ finds this description of the injury is not credible, and the ALJ rejects claimant's claim his injury occurred in the way he described to Dr. Oliveria.

6.Dr. Bradley's progress note from December 21, 2004, provides a detailed list of claimant's subjective complaints, and objective findings. Claimant was sore in his mid back, and the back of his neck. There is no mention in this report of any low back symptoms. On January 21, 2005, claimant had no subjective complaints of low back pain, and his low back had full range of motion.

7.On January 26, 2005, claimant told the ATP that he hurt his low back while turning to look at a train. This was not a work-related event, and caused severe pain in claimant's low back, with spasms. X-rays taken at the time were interpreted by the ATP to reveal mild degenerative changes at L5-S1 that were, "[C]onsistent with his 1984 back injury." These low back symptoms resolved, quickly, for by February 4, 2005, claimant's low back was feeling better, and the ATP's treatment returned to focus on claimant's right shoulder contusion, trapezius sprain, and questionable migraine headaches.

8.Claimant told the ATP his low back had gone out, and that he had increased pain when he turned around, on February 21, 2005. The ALJ finds the ATP did not believe claimant had a low back injury causally related to this claim, because on that same visit he stated claimant was at MMI, released with maintenance care of medication for six months and home exercise, and diagnoses of right shoulder contusion, trapezius sprain, and ephalgia with questionable migraine headache. He was given restrictions of no lifting or carrying more than 20 pounds. This is further support for the ALJ's finding that

claimant's low back condition is not causally related to this claim, and medical benefits related to this condition are denied.

9.The ATP issued his report addressing MMI and impairment on March 15, 2005. It is a very detailed report, exhaustively discussing claimant's allegations, findings, and treatment. Claimant admitted a low back and lumbar disc injury in 1984, and the ATP stated claimant's lumbar spine degenerative changes seen on x-ray were related to that injury. Claimant had no lumbar spine impairment or work-related diagnoses according to Dr. Bradley. Claimant was released to work with the permanent restriction of no lifting over 20 pounds, and directions to stretch hourly, and do home exercises twice daily. He was instructed to take maintenance prescription medications for six months, and use his home TENS unit for six months.

10.Claimant returned to the ATP for maintenance medical treatment. On June 1, 2006, the ATP provided further details about claimant's prior low back work-related injury in 1984, stating that claimant injured two discs in that fall, "[A] nd ended up with a 10% or greater whole person impairment." Claimant did not disclose that impairment previously, or while testifying at hearing. The ALJ finds this is further credible evidence that claimant's low back condition is not causally related to this claim.

11.Claimant was evaluated by Elizabeth Bisgard, M.D. for a DIME on May 27, 2005. After claimant told her, "He is very interested in pursuing an independent exercise program on is own at a health club, where he will have access to equipment and a swimming pool," Dr. Bisgard recommended as maintenance medical treatment a health club membership for six months, preferably at a health club with a pool. This is the same treatment claimant currently seeks, and because it was recommended as maintenance medical care at the time claimant reached MMI cannot be the basis for a reopening of the claim.

12.Dr. Bisgard's DIME report reveals claimant was alleging significant symptoms when he was at MMI. Claimant said he pain that was at worst a 10 on a 10-point pain scale, "[W]hich has caused him to go to the emergency room on at least 3 visits to receive IM medication." Claimant said his least pain was a six on a 10-point pain scale, and when he saw Dr. Bisgard his paid was an eight on that pain scale. He could sit for 45 minutes to one hour, and stand for an hour. He could walk for 45 minutes to an hour. Claimant told Dr. Bisgard he could bend with some difficulty. Dr. Bisgard still found claimant was at MMI. The ALJ finds these were worse symptoms than claimant alleged and exhibited at hearing, and show claimant's condition has not worsened to allow for the reopening of this claim.

13.Claimant testified he worked at Pueblo Truss until August 2005. He was not injured while working at Pueblo Truss on modified duty and sustained, claimant testified, no injuries while he was not working for Pueblo Truss. In August 2006, claimant stated he began working for Andrews Food Service

("Andrews"). Claimant testified his job at Andrews was a heavy job, requiring him to lift all day, and lift items weighing an average of 50 pounds all day. This is despite his permanent work restriction, that claimant stated he followed, of no lifting over 20 pounds. Claimant stated on August 15, 2006, he sustained a new injury while working for Andrews when, as claimant described the injury, he smashed his right and left feet between a pallet and a forklift and hurt his back while twisting during the incident. Claimant testified he sustained another injury in 2006, but did not know when, while working at Andrews Food Service when his back, "Really went out." Claimant admitted his workers' compensation claim against Andrews for back and feet injuries was denied and ruled not compensable following a hearing. Claimant testified his job with Andrews ended in 2006 due to the lumbar spine injury that was denied after a hearing, and that he was able to do all aspects of his job for Andrews as required, full time, until his injuries at Andrews occurred. This testimony is conflicting and unreliable. Claimant further testified he worked his job at Andrews full time, and was on his feet all day. Claimant was able to do this job without difficulty or reduction in hours until, as he admitted at hearing, the two injuries he sustained at Andrews occurred. At that time, due to the second injury that injured his back, he was unable to keep working, and stopped that job. The ALJ finds this is compelling evidence that claimant was able to perform his duties at this heavy job until this unrelated, superseding injury and event occurred. Therefore, claimant's symptoms are not causally related to claimant's injury covered by this claim.

14.The ATP saw claimant on July 22, 2005, February 7, 2006, April 14, 2006, and June 1, 2006. At each appointment, the ATP reiterated claimant remained at MMI. On February 7, 2006, claimant stated his low back was injured while he was driving to Granby, Colorado, for a vacation and turned to his right to look at another car he was driving by. He was apparently taken by ambulance to the emergency room at St. Anthony's Hospital in Granby, where he received a prescription for Vicodin and a pain injection. His back went out again on January 25, 2006, while at home in Pueblo. Claimant told the ATP after that incident he had new complaints of constant low back pain, and shooting pains down the back of both legs. The ATP felt claimant had no specific nerve root injury, and diagnosed him with a chronic lumbar strain with normal lumbar spine x-rays that revealed no change when compared with the lumbar spine study of January 25, 2005. The ALJ finds claimant had many injuries subsequent to and unrelated to the injury covered by this claim, and these injuries occurred for a variety of reasons not related to this claim. This evidence shows claimant's condition is not causally related to this claim.

15.Claimant saw Joseph J. Illig, M.D. on May 24, 2006. Dr. Illig did not diagnose claimant with any lumbar spine pathology, and found claimant's examination results unreliable with, "[O]perant pain behavior." He did not recommend any further treatment, or studies, focused on claimant's lumbar spine. Claimant reported a third version of how this injury covered by this claim occurred to Dr. Illig, telling him he was jolted backward and went down to the ground, onto his knee. The ALJ finds this description of the accident is not

crebile, and shows claimant's hearing testimony is not credible and cannot be relied on as reliable evidence in this claim. Claimant has not proven that it is more probably true than not that his present condition and complaints are causally related to this claim.

16.On August 11, 2007, claimant went to the emergency room at Parkview Hospital, where he complained of a sudden onset of back pain with symptoms going into his legs that he attributed to the back injury that occurred at Andrews in August 2006. An MRI was discussed, but found not necessary at that time. This shows any alleged need for a lumbar spine MRI claimant requested at hearing is causally related to the August 2006 subsequent and not compensable injury. This is strong evidence claimant's alleged need for a lumbar spine MRI is not causally related to this claim's injury, and is not reasonable or necessary in this claim. It is also proof that this claim should not be reopened, as it was not needed until a subsequent injury occurred.

17.The ALJ finds claimant's testimony was conflicting and not credible, and do would not support a finding claimant's condition has worsened so that he is no longer at MMI, or that claimant is entitled to additional medical benefits.

18.Claimant obtained a job as a banquet server at Crowne Plaza Hotel in Colorado Springs in 2007. This was a very physically demanding, full time, position. Claimant testified he routinely worked more than full-time for Crowne Plaza, and was able to do this job without difficulty, until he injured his right arm on July 2, 2008. Claimant explained that he would carry trays loaded with plates of food and beverages from the kitchen or warming station to tables for banquet guests. These trays, claimant said, weighed between 30 and 35 pounds. He testified that he was sure he worked a significant amount of overtime, sometimes over 100 hours a pay period, before his newest injury in July 2008 occurred. Claimant stated he had no difficulty doing these heavy job tasks until that injury happened. Claimant was always able to do these duties fully, and would work overtime as needed. Claimant, Crowne Plaza's human resource representative, Ms. Del Valle, testified, was a good employee who, "[W]ould always make himself available to assist us." Claimant never requested an accommodation or modification to do his job's duties before his injury on July 2, 2008, occurred.

19.Claimant stated he was abiding by his restrictions at all times while working at Crowne Plaza. However, the medical records' contain clearly documented permanent restrictions, and claimant testified he did all aspects of his heavy job at Crowne Plaza. Therefore, this testimony is conflicting, and those conflicts cannot, the ALJ finds, be resolved. Claimant's ability to fully do this job, work significant overtime hours, and work without modification or restricted ability is strong evidence that his testimony at hearing that his condition has progressively worsened since 2005 is not true.

20.Claimant also discussed during his hearing testimony an injury to his back when he twisted to watch a train, and an incident when claimant was in a Starbucks store and his back went out on him. It appeared that claimant's back

would be fine, allowing him to perform regular tasks, but would go out during various activities. This was confirmed in medical records showing claimant received treatment at Memorial Hospital on November 19, 2008, and at Penrose Hospital on September 6, 2008, for complaints of new symptoms of pain in his neck and low back, the same areas of the body claimant alleges have worsened to the degree that this claim should be reopened for additional curative medical treatment. The treatment claimant received on November 19, 2008, at Memorial Hospital stemmed from a motor vehicle accident claimant was involved in that same day. The treatment claimant received at Penrose Hospital on September 6, 2008, involved low back pain that arose when claimant lifted a dog. The ALJ finds claimant has suffered various injuries over time. Claimant has not established that any current symptoms are as a result of his industrial injury of September 22, 2004.

21.The specific medical care claimant seeks was all recommended or sought by claimant before or when he was placed at maximum medical improvement in February 2005. Therefore, claimant's request for this care now does not represent evidence that his condition has worsened, and shows it is more probably true than not that claimant's condition has no worsened, that his claim should not be reopened for a change in condition, and that claimant is not entitled to additional medical benefits.

CONCLUSIONS OF LAW

Based on the evidence presented at hearing, the ALJ makes the following Conclusions of Law:

1.C.R.S. §8-43-201 states, "[A] claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." Also see *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). Proof by a preponderance of the evidence requires claimant to establish that the existence of a contested fact is more probable than its nonexistence. See *Hoster v. Weld County Bi-Products, Inc.*, W.C. No. 4-483-341 (ICAO March 20, 2002). In deciding whether Claimant has met his burden of proof, the ALJ is empowered, "[T]o 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 *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

2.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 of the testimony; 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). In deciding whether the Claimant has met his burden of proof, the ALJ is empowered, "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

3.§8-43-303 (1), C.R.S. permits a claim to be reopened based on a worsened condition. Claimant has the burden of proof to establish a change in a physical or mental condition that is causally related to the original industrial injury. Jarosinski v. Industrial Claim Appeals Office, 62 P.3d 1082 (Colo. App. 2002); Richards v. Industrial Claim Appeals Office, 996 P.2d 756 (Colo. App. 2000); *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985); Peregoy v. Indus. Claim Appeals Office, 87 P.3d 261 (Colo. App. 2004).

4.Reopening is appropriate where the degree of permanent disability has changed or where the claimant is entitled to additional medical or temporary disability benefits. Dorman v. B & W Construction Co., 765 P.2d 1033 (Colo. App. 1988). A change in condition refers to a change in the claimant's physical or mental condition that is causally related to the underlying industrial injury. *Jarosinski v. Indus. Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002). A change in condition, for purposes of the reopening statute, refers to a worsening of the claimant's work-related condition after MMI. El Paso County Dept. of Social Services v. Donn, 865 P.2d 877 (Colo. App. 1993); *Donohoe v. ENT Federal Credit Union*, W.C. No. 4-171-210 (I.C.A.O. September 15, 1995). The pertinent and necessary inquiry is whether claimant has suffered any deterioration in her condition that justifies additional benefits. Cordova v. Indus. Claim Appeals Office, 55 P.3d 186, 190 (Colo. App. 2002).

5.As the ICAO has held, "It is the purpose for which treatment is provided, not the 'nature' of the treatment, which determines whether the treatment is curative or provided for maintenance reasons. Milco Construction v. Cowan, 860 P.2d 539, 542 (Colo. App. 1992); *Hayward v. Unisys Corp.*, W.C. No. 4-230-686 (July 2, 2002), aff'd., *Hayward v. Industrial Claim Appeals Office*, (Colo. App. No. 02CA1446, January 9, 2003) (knee surgery may be curative or may be a form of Grover-style maintenance treatment designed to alleviate deterioration of the claimant's condition). *Cervantes v. Academy School District #20,* W. C. No. 4-604-873 (May 23, 2005).

6.To prove a worsening of a pre-existing injury, the claimant must demonstrate that the change in his condition is the, "[N]atural and proximate

consequence of the prior industrial injury, without any contribution from a separate, causative factor." *Vega v. City of Colorado Springs,* W.C. No. 3-986-865; 4-226-005 (ICAO, March 8, 2000) The issue of whether claimant's condition is the natural and proximate progression of the original injury is one of fact for resolution by the ALJ based upon the evidentiary record. *Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970); *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

7.The question of whether there was some other cause for the claimant's disability is one of fact for determination by the ALJ. See Owens v. Industrial Claim Appeals Office, 49 P.3d 1187 (Colo. App. 2002). The reopening authority under the provisions of § 8-43-303 is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. Renz v. Larimer County Sch. Dist. Poudre R-1, 924 P.2d 1177 (Colo.App. 1996). The ALJ exercises considerable discretion in determining whether to reopen a claim. Wilson v. Jim Snyder Drilling, 747 P.2d 647 (Colo. 1987); Richards v. Industrial Claim Appeals Office 996 P.2d 756 (Colo. App. 2000).

8.Reopening a case is not warranted if, once reopened, no additional benefits may be awarded. *Richards* supra.; See also Industrial Commission v. Vigil, 150 Colo. 356, 373 P.2d 308 (1962) (where claimant sought to reopen to obtain additional permanent partial disability benefits, the petition was denied because the claimant had not shown increased permanent disability); Brickell v. Business Machines, Inc., 817 P.2d 536 (Colo.App.1990) (reopening is appropriate if additional benefits are warranted); *Dorman v. B & W Construction Co.*, supra (while the reopening statute permits the reopening of an award if a worker's physical condition has worsened, a reopening is warranted only if additional benefits may be awarded).

9.Claimant has not established by a preponderance of the evidence that his condition causally related to this claim has worsened so that this claim should be reopened for a change in condition. Claimant has suffered various injuries over time unrelated to his injury covered by this claim. Claimant has not established that any current symptoms are as a result of his industrial injury of September 22, 2004. Claimant's inability to consistently describe his injury, and substantially change that description, is a sign his report are not credible or reliable. Claimant's testimony that his condition has worsened is not credible, is not supported by the credible evidence, and is rejected by the ALJ. No credible or persuasive evidence supports claimant's contention that this claim should be reopened for a change in condition, and that request is rejected.

10.Claimant has not proven by a preponderance of the evidence that he is entitled to additional medical treatment causally related to his injury covered by this claim. The ALJ concludes claimant's low back complaints and condition are not causally related to this claim. Dr. Bradley thoroughly documented the many

different complaints claimant voiced in his examinations of claimant as documented in the medical records received at hearing, and failed to document or assess any low back condition causally related to this claim. Dr. Sparr credibly opined claimant's low back condition is not causally related to this claim. The lack of any consistent or credible lumbar spine symptoms or findings can only be attributed to claimant's failure to allege such problems to Dr. Bradley, and supports the conclusion claimant's low back condition is not causally related to this claim. Had claimant in fact injured his low back to the degree he alleged at hearing, this injury would have been brought to the attention of his treating medical providers, and at the very least evaluated, if not treated, by those providers in the weeks after the injury occurred. If claimant had a related low back injury, that injury would have been found related by the ATP and treated. However, it was not. This evidence shows claimant's low back was not injured in the incident, and that claimant's testimony about this alleged low back condition is not credible. Claimant's testimony that he is entitled to additional medical benefits is not credible, is not supported by the credible evidence, and is rejected by the ALJ. Respondents are not responsible for providing medical benefits associated with claimant's current condition.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen this claim for a change in condition is denied and dismissed.

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

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

DATE: February 20, 2009

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-741-382

ISSUES

The issues to be determined by this decision concern Claimant's average weekly wage ("AWW"), and whether Claimant is entitled to temporary total disability ("TTD") benefits beginning March 1, 2008 through September 8, 2008 whereafter Respondent-Insurer began to pay TTD from September 9, 2008 and continuing until they can be terminated pursuant to law.

FINDINGS OF FACT

Based on the evidence presented at the hearing, the ALJ makes the following Findings of Fact:

1. The parties stipulated to an AWW of $723.83 at the hearing. Claimant's AWW is $723.83.

2. Claimant was employed by Respondent-Employer as an ironworker. He was injured in a fall at work on November 1, 2007. Respondent-Insurer admitted liability for Claimant's injuries.

3. Claimant began treating with Dwight Caughfield, M.D., on November 1, 2007. Dr. Caughfield was an authorized treating physician. On November 1, 2007, Dr. Caughfield released Claimant to full duty work with no restrictions.

4. Claimant next saw Dr. Caughfield on November 7, 2007. Dr. Caughfield released Claimant to full duty work with no restrictions.

5. Claimant next saw Dr. Caughfield on November 26, 2007. Dr. Caughfield released Claimant to full duty work with no restrictions.

6. Claimant next saw Dr. Caughfield on December 11, 2007. Dr. Caughfield released Claimant to full duty work with no restrictions.

7. Claimant next saw Dr. Caughfield on January 2, 2008. Dr. Caughfield released Claimant to full duty work with no restrictions.

8. Dr. Caughfield placed Claimant at maximum medical improvement ("MMI") on January 24, 2008. Dr. Caughfield reported that; "…there is no evidence of need for restrictions and there is no permanent impairment."

9. Respondents filed a final admission of liability ("FAL") consistent with Dr. Caughfield's opinions.

10. Claimant objected to the admission and requested a Division Independent Medical Examination ("Division IME").

11. Edward Fitzgerald, M.D., performed the Division IME on June 25, 2008. Dr. Fitzgerald determined Claimant was not at MMI, and he recommended more treatment. Dr. Fitzgerald opined that Claimant "… is not physically fit to return to the job that he had at the time that he was injured nor is he physically fit to return to any job for which he has training and experience…"

12. Respondents admitted liability for additional medical treatment in light of Dr. Fitzgerald's opinion that Claimant was not at MMI.

13. Claimant returned to Dr. Caughfield on September 9, 2008. Dr. Caughfield imposed work restrictions of no lifting greater than 15 pounds.

14. Counsel for Respondents stipulated at hearing that Respondents are liable for TTD benefits beginning September 9, 2008.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

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

2.A Claimant in a worker's compensation claim has the burden of proving of proving entitlement to benefits by a preponderance of the evidence. C.R.S. §8-42-101. 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 worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. C.R.S. §8-43-201. A worker's compensation case is decided on its merits. C.R.S. §8-43-201.

3.The ALJ's factual findings concern only the 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 of Fact as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo.App. 2000).

4.Unless the record contains conflicting opinions from attending physicians regarding a Claimant's release to work, the ALJ is not at liberty to

disregard the attending physician's opinion that a Claimant is released to return to employment. *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo.App. 1995).

5.An "attending physician" includes only those physicians who are authorized to provide treatment. *Popke v. Industrial Commission*, 944 P.2d 677 (Colo.App. 1997). There is insufficient evidence to establish that anyone other than Dr. Caughfield was Claimant's attending physician during the time periods at issue. The ALJ concludes Dr. Caughfield is the attending physician in this case.

6.A Division IME physician is not an attending physician. W.C.R.P. 11-1 (G) provides that a Division IME physician must agree to; "[n]ot become the treating physician for the IME Claimant, unless approved by the Director, ordered by an administrative law judge, or by both parties by written agreement." None of those exceptions applies in this case. Dr. Fitzgerald was a Division IME physician. He was not an attending physician.

7.An injured worker is entitled to TTD benefits if (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. *PDM Molding, Inc., v. Stanberg*, 898 P.2d 542 (Colo. 1995); C.R.S. §8-42-105(1).

8.TTD benefits continue until, *inter alia*, "the attending physician gives the employee a written release to return to regular employment." C.R.S. §8-42-105 (3)(c).

9.Dr. Caughfield released Claimant to regular work with no restrictions each time he saw Claimant, up to September 9, 2008. There are no conflicting opinions from attending physicians regarding Claimant's ability to work prior to September 9, 2008. The ALJ may not disregard Dr. Caughfield's release of Claimant to regular work. *Burns v. Robinson Dairy, Inc.*, *supra.* Claimant has failed to prove by a preponderance of the evidence that he is entitled to TTD benefits from March 1, 2008 to September 9, 2008.

10.On September 9, 2008, Dr. Caughfield imposed work restrictions for the first time. Claimant is currently unable to find work within Dr. Caughfield's restrictions. Claimant has proved entitlement to TTD benefits beginning September 9, 2008.

ORDER

It is therefore ordered that:

1.Claimant's AWW is $723.83.

2.Claimant's claim for TTD benefits from March 1, 2008 to September 9, 2008 is denied and dismissed.

3.Respondents shall pay TTD benefits to Claimant beginning September 9, 2008, and continuing until they can be terminated pursuant to law, at the rate of $482.55 per week.

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

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

DATE: February 23, 2009 /s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-766-754

ISSUES

The issues to be determined by this decision are 1) reopening of W.C. No. 4-734-226 with a date of injury of July 17, 2007; and 2) compensability of a July 22, 2008, injury to Claimant's left knee.

FINDINGS OF FACT

1. Claimant sprained his left knee in July 2007. This injury is the subject of W.C. No. 4-734-226. Dr. Lopez, in his report of August 30, 2007, diagnosed Claimant's condition as a left knee sprain. The sprain essentially resolved and Claimant was placed at maximum medical improvement without impairment or work restrictions.
2. Claimant's left knee gave out on July 22, 2008, when walking into a room he was working on for Employer. In the months before this incident, Claimant had been climbing and descending multiple flights of stairs at work. Claimant also had problems with his left knee years before this incident.

3. Claimant sought treatment from John Piccaro, M.D., on July 23, 2008. Under "Assessment", Dr. Piccaro noted that Claimant's knee gave out and tests were consistent with a meniscal injury. Dr. Piccaro stated, "I think this is an old injury that has been quiet intermittently and aggravated by ongoing heavy duty work and now that he's been doing 7 to 8 stories in a day."

4. Dr. Lopez examined Claimant on August 7, 2008. Dr. Lopez's assessment was "exacerbation of some underlying DJD in his knee."

5. An MRI on August 22, 2008, showed a tear of the medial meniscus with associated meniscal cyst. Dr. Dvirnak reviewed the MRI on August 27, 2008. He recommended arthroscopic surgery. He stated, "this is a work-related injury."

6. Claimant underwent the surgery on September 25, 2008. Dr. Dvirnak performed the surgery. The post-operative diagnosis was: "1. Left knee medial meniscus tear; 2. Parameniscal cyst; and 3. Fibrotic infrapatellar plica."

7. Douglas C. Scott, M.D., examined Claimant. Dr. Scott, in his November 21, 2008, report stated: "[Claimant] reported to me that his left knee buckled while walking on a flat surface at a construction site at Durango Mountain Resort on July 23, 2008. [Claimant] did not report to me any specific slip and/or twist of his left knee. He was simply walking on a flat surface when he noted that his left knee buckled… This buckling incident could have occurred either at work walking or not at work walking. He did not report that his incident occurred while climbing stairs. Therefore, in my opinion, this same buckling episode could have occurred at home, and is not specifically related to a physical exposure that [Claimant} would have only experienced at his work place, i.e. walking on a flat surface."

8. Dr. Scott's report contains a thorough history and review of the medical record. Dr. Scott explains the basis for his opinion well. The opinion of Dr. Scott is credible and more persuasive than the opinions to the contrary.

9. The meniscus tear found after the July 2008 incident was not the natural progression of the July 2007 sprain, or of any pre-existing condition. Claimant's Petition to Reopen W.C. 4-734-226 is denied.

10. There is no persuasive evidence to conclude that Claimant's meniscus tear occurred as a result of climbing and descending stairs at work. Claimant's employment did not cause, aggravate, or accelerate the meniscus tear. Claimant has not established by a preponderance of the evidence that he sustained an occupational disease. Section 8-40-201 (14), C.R.S.

11. Claimant's meniscus tear occurred when he was walking on a level surface at his workplace. The injury did not arise out of his employment.

12. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable accidental injury in July 2008.

CONCLUSIONS OF LAW

1. A compensable injury is one that arises out of and in the course of employment. The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that injuries that occur in the course of a worker's employment arise out of the employment. *Finn v Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The claimant has the burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v Horn*, 781 P.2d 150 (Colo.App. 1989).

2. 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 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-42-201.

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, 57 P.2d 1205 (1936); CJI Civil 3:16 (2005). 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).

4. The ALJ's factual findings concern only evidence that is dispositive of the issues involved and he is not required to address all evidence that might lead to a conflicting conclusion. *Magnetic Engineering, Inc. v ICAP*, 5 P.3d 385 (Colo.App. 2000).

5. A claim may be reopened based upon a claimant's "change in condition." Section 8-43-303(1), C.R.S. The claimant bears the burden of proof to establish the change of his physical condition, which must be causally related to the industrial injury. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo.App. 1997); *Savio House v. Dennis*, 665 P.2d 141 (Colo.App. 1983).

6. There was a change in the condition of Claimant's left knee in July 2008. However, Claimant has failed to establish by a preponderance of the evidence that the change in condition was causally related to the compensable injury in W.C. No. 4-734-226. Claimant's Petition to Reopen is denied.

7. Claimant's employment did not cause, aggravate, or accelerate the meniscus tear he suffered. Claimant has failed to establish by a preponderance of the evidence that he sustained an occupational disease in July 2008. Section 8-40-201(14), C.R.S.

8. Claimant has not established by a preponderance of the evidence that his July 2008 left knee injury had its origin in his work-related functions and is sufficiently related to his work so as to be considered part of his service to Employer. Claimant has not established by a preponderance of the evidence that he sustained an injury in July 2008 in the course and scope of his employment. Section 8-40-201(14), C.R.S.

9. It is not necessary to address other issues identified at the

commencement of the hearing based upon the denial of the petition to reopen and the claim for compensation.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen W.C. No. 4-734-226 is denied.

2. Claimant's claim in W.C. No. 4-766-754 is denied and dismissed.

DATED: *February 23, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-770-637

ISSUES

The following issues were raised for consideration at hearing:

1. Compensability;

2. Medical benefits;

3. Temporary total disability benefits (TTD);

4. Temporary partial disability benefits (TPD); and

5. Average weekly wage.

FINDINGS OF FACT

Having considered the evidence presented at hearing and the parties' post hearing position statements, the following Findings of Fact are entered.

1. Claimant was employed by the Employer as a cashier. Claimant is a 36-year-old female. She had been so employed since April 2004. In Claimant's position as a cashier for the Employer, she rings up customer purchases, fed and watered animals, and answer phones.

2. On August 27, 2008, Claimant arrived at work at 8:00 a.m. and greeted her co-worker and assistant manager. Claimant learned that her hours were cut at this time. Work hours for all the Employer's employees were cut. Claimant was disturbed by her hours being cut. Claimant's co-worker and her assistant manager observed that Claimant was visibly angry about her hours being cut. An hour later, Claimant was described by her co-worker as being visibly angry. Claimant's co-worker observed her carrying an empty ten-gallon aquatic tank. Claimant requested that her co-worker load a second empty aquatic tank in her arms. Claimant's co-worker inquired whether Claimant was sure she wanted the second tank loaded into her arms. Claimant replied that she did and Claimant said, she might slip and fall and hurt her back.

3. Claimant's co-worker's testimony concerning Claimant's demeanor when she arrived at work and Claimant's comments about suffering an injury were deemed credible and persuasive.

4. On August 27, 2008, Claimant performed her routine duties. At or around 11:30 a.m., Claimant was preparing to clean cat cages. Claimant testified that she pulled out the cat cages, which were stacked two cages high, and she felt a pop in her back and felt the sensation of liquid running down her back. Claimant further testified that she pulled herself upright and backward and felt pain in her right knee. No one observed Claimant's injury. Claimant's testimony concerning the mechanism of her injury was not deemed credible or persuasive.

5. Claimant immediately reported the injury to her manager. The manager asked her to sit outside while he checked on the company procedures regarding work injuries. She remained seated about 30 minute before the assistant manager called Claimant an ambulance and she was taken to the emergency room at Memorial Hospital in Colorado Springs.

6. At the emergency room, Claimant reported the mechanism of injury to medical personnel consistent with her description of the injury, which she gave to her assistant manager and during her testimony at hearing. Claimant's chief complaint was described at the emergency room as back pain. At the emergency room, Claimant was tearful complaining of depression, a 20 lb. weight gain, and sexual harassment to which she alleged to be subject by the "employer." Claimant was prescribed vicodin, valium, and a knee immobilizer.

7. The assistant manager also testified at hearing. However, his testimony was not deemed credible. The assistant manager claimed that following Claimant's alleged injury he did not send her outside to sit. He testified that Claimant remained in the store and that he observed she was placing weight on the leg she claimed was injured and that she continued her chores around the cat cages and appeared to be "beboping" or acting in a lively and playful manner while carrying out her chores. The assistant manager also testified that Claimant's alleged injury occurred at 8:45 a.m., contrary to the medical and employment records and Claimant's testimony. The Employer's First Report of

Injury reflects, and Claimant testified, that the injury occurred at 11:30 a.m. Medical records reflect that Claimant received medical attention at the emergency room on August 27th at approximately 2:00 p.m.

8. Claimant received treatment from the authorized provider of medical care from September 2, 2008 to December 24, 2008. Claimant was diagnosed with thoracic strain and right knee pain. Claimant was off work from August 28 to September 9, 2008. Thereafter, work restrictions were imposed and Claimant was placed in a modified duty position.

9. Claimant underwent an independent medical evaluation on October 23, 2008 with Dr. Timothy Hall, M.D. Dr. Hall opined that the Claimant's reported mechanism of injury was consistent with her reported injury, thoracic strain and right knee pain.

10. Based on the totality of the evidence, it is found that Claimant failed to sustain her burden of proof to establish that she suffered an injury in the course and scope of her employment. Factors, which impact this conclusion, are: the finding that Claimant expressed noteworthy anger at having her hours cut when she arrived at work on August 27, 2008; the finding that, prior to the alleged incident, Claimant told her co-worker while carrying the aquarium that she might injured her back; the finding that no one witnessed the injury; the finding that when Claimant arrived at the emergency room her complaints noted by hospital personnel concerned the alleged work injury and the complaints of depression, weight gain and sexual harassment by the employer. Furthermore, Claimant's co-worker's testimony was found more credible than Claimant's to the extent that her co-worker testified that Claimant was very angry about her hours being cut and she threatened to report a work injury at an earlier point when she was carrying a heavy object.

11. Based on the totality of the evidence, it is concluded that Claimant failed to establish that she suffered a work in jury in the course and scope of her employment. Accordingly, Claimant's workers' compensation claim is denied and dismissed.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act) Section 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. Claimant shoulders the burden of proving by a preponderance of the evidence that his injury arose out of the course and scope of his employment. Section 8-41-301(1), C.R.S.; *See City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). 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 Claimant nor in favor of the rights of Respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses' 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 interests. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. 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. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. Claimant failed to sustain her burden of proof to establish that she sustained a compensable injury while in the course and scope of her employment with the Employer. Claimant testimony lacked credibility based on the finding that Claimant expressed noteworthy anger at having her hours cut when she arrived at work on August 27, 2008; the finding that, prior to the alleged incident, Claimant told her co-worker while carrying the aquarium that she might injured her back; the finding that no one witnessed the injury; the finding that when Claimant arrived at the emergency room her complaints noted by hospital personnel concerned the alleged work injury and the complaints of depression, weight gain and sexual harassment by the employer. Furthermore, Claimant's co-worker's testimony was found more credible than Claimant's testimony to the extent that her co-worker testified that Claimant was very angry about her hours being cut and she threatened to report a work injury at an earlier point when she was carrying a heavy object.

4. Since it is found and concluded that Claimant failed to sustain her burden of proof, her workers' compensation claim for and back and right knee injury is denied and dismissed.

ORDER

It is therefore ordered that:

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

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

DATED: February 24, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-765-603

ISSUES

Whether Claimant established by a preponderance of the evidence that she sustained a compensable work related injury on July 20, 2008. If so, whether medical benefits obtained were reasonable, necessary and related to the injury.

FINDINGS OF FACT

1.Claimant was injured in the course of her employment on July 20, 2008 while she was attempting to assist co-employees Ms. Thompson and Ms. Schwartz return folding tables that were borrowed with permission from the employer Mountain Valley School District RE-1 for use at an art fair over the weekend proceeding the Sunday injury.

2.At approximately 6:15 p.m. on July 20, 2008 Ms. Thompson and Ms. Schwartz appeared at Claimant's home requesting assistance with getting into the school that was around the corner from Claimant's house. Claimant had her keys to the school. Ms. Thompson and Ms. Schwartz did not have their keys and they live approximately thirty miles from the school. Claimant agreed to accompany Ms. Thompson and Ms. Schwartz to the school building and to let them in. She further assisted with the unloading of folding tables from the bed of Ms. Thompson's pickup truck and helped carry the tables into the school building.

3.Prior to going to the school with Ms. Thompson and Ms. Schwartz, Claimant engaged in brief conversation with Ms. Schwartz and agreed to spend some time that evening sorting through Title I materials that were stacked in Ms. Schwartz's music room. Ms. Schwartz is the music teacher at the school.

4.When the three arrived at the school building on the evening of July 20, 2008, it was decided that at least one table would be placed in Ms. Schwartz's school room to use in sorting the Title I teaching material and several tables would be restored to their storage place in the gymnasium/auditorium. Claimant went into the gymnasium/auditorium and attempted to turn on a light. In so doing

she fell from the stage onto the floor fracturing her left elbow and sustaining other injuries.

5.Within several days of Claimant's accident the school secretary advised Claimant that the injury would not be accepted for workers' compensation. She was given the same information by the adjuster at Pinnacol Assurance who informed Claimant that the claim would not be admitted as a compensable injury. Claimant therefore utilized her personal health coverage with Blue Cross/Blue Shield and obtained medical care including surgery on her left elbow through her Blue Cross/Blue Shield coverage.

6.It was commonplace for teachers such as Claimant to go to the school building during the summer months when school was not in session in order to prepare for the school year. Additionally, approximately a week before Claimant's compensable injury she was called by the school principal to come over and meet with the principal and the superintendent of the school at which time she was informed that she would be working as the Title I Educational Director for reading and math as opposed to serving as the school librarian. Claimant attended that meeting on approximately fifteen minutes notice. Ms. Thompson and Ms. Schwartz both testified that it is routine and commonplace for teachers at Respondents' school to go to the school building during the summer months as described by Claimant.

7.Although Claimant never had the opportunity to sort the materials stored in Ms. Schwartz's music room on the evening of July 20, 2008, Claimant's intent to both assist Ms. Thompson and Ms. Schwartz in returning the school's folding table as well as to separate and sort Title I materials were clearly part of the business conducted by the Respondent-Employer school district. One of the tables was to be used in the sorting process.

8.Claimant, Ms. Thompson and Ms. Schwartz are all found to be credible and persuasive. Claimant's fall from the stage on the evening of July 20, 2008 is fully compensable.

9.Medical care received by Claimant through the Summit Vail Orthopedic Center and through Dr. Janes, for her shoulder injury of July 20, 2008, was reasonable and necessary to cure or relieve the Claimant from the effects of her injury. This includes Claimant's surgery.

CONCLUSIONS OF LAW

1.C.R.S. §8-43-201 provides, "(a) Claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its

merits." *Also see Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence*."); Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the Claimant to prove his entitlement to benefits by a preponderance of the evidence.").

2.Proof by a preponderance of the evidence requires Claimant to establish that the existence of a contested fact is more probable than its nonexistence. *See Hoster v. Weld County Bi-Products, Inc.*, W.C. No. 4-483-341 (ICAO March 20, 2002). In deciding whether the Claimant has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

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 (2005).

4.A claim is not compensable unless it arises out of employment. Section 8-41-301(1)(b), C.R.S. The "arising out of test" is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. There is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. The fact that an employee is injured on his employer's premises does not establish a compensable injury. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.*, 135 Colo. 372, 311 P.2d 705 (1957) (mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.;*Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). The ALJ must examine the totality of the circumstances to determine whether there is a sufficient nexus between the employment and the injury such that the accident may be said to have occurred in the scope of the Claimant's employment. *City and County of Denver School District No. 1 v. Industrial Commission*, 196 Colo. 131, 581 P.2d 1162 (1978).

5.The "arising out of" element is narrower than the "course" element and requires the Claimant to prove the injury had 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). However, the employee's activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incident to the conditions under which the employee usually performs the job. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). *University of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953). It is not essential that the employee is performing a mandatory act at the time of the injury. *See Employers' Mutual Ins. Co. v. Industrial Commission*, 76 Colo. 84, 230 P. 394 (1924).

6.Accidents which occur while a Claimant is engaged in voluntary or recreational actives are not compensable. *White v. ICAO, 8 P.3d 621 (Colo. App. July 20, 2000) (*"we discern nothing in the record that would have compelled the ALJ to conclude that Claimant's personal weight lifting activities during his break were not essentially recreational). *Dover Elevator Co. v. ICAO,* 961 P.2d 141 (Colo. App. 1998) ("the Claimant's motive for participation in the recreational activity [need] be determined and compensation denied if participation in the recreational activity was voluntary.") Accidents which occur while a Claimant is performing activities designed to further voluntary and recreational goals are similarly not compensable. *Coe v. Whirlpool Kitchens, Inc.,* W.C. No. 3-825-464 (ICAO March 9, 1989) (holding that Claimant's participation in the cleanup of a soft ball game "which served to further the voluntary recreational activity" precluded a finding of employment).

7.Claimant has established by a preponderance of the evidence that there was a direct causal relationship between the employment and the injury she sustained. Claimant's accident had its origin in Claimant's work-related functions, and was sufficiently related to her employment to be considered part of Claimant's service to the Respondent-Employer. As stated above, there is no requirement that the activity engaged in by Claimant was a mandatory duty. The evidence establishes that Claimant had a key to the school year round and that she had free access to the school building during the summer months when school was not in session. The evidence also establishes that it was routine for Claimant and other school personnel to frequent the school in the summer in order to prepare for the upcoming school year. Claimant responded to a request by other school personnel to assist in gaining access to the school so that school property could be returned. Claimant's actions in providing whatever assistance she chose arose out of and put her in the course of her employment with Respondent-Employer. Claimant's claim for workers' compensation benefits is compensable.

8.The activities engaged in by Claimant at the time she fell off the stage were suffered while performing activities for the benefit of the Respondent-Employer (restoring the employer's property to the employer's place of business) and occurred while Claimant was assisting co-employees in tasks consistent with the Respondent-Employer business. These activities were not so removed from the course of Claimant's work as a teacher as to be outside the course of

Claimant's employment.

9.As a result of Claimant's claim being compensable, Claimant is entitled to "medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve [her] from the effects of the injury. C.R.S. §8-42-101(1)(a) 2008.

ORDER

It is therefore ordered that:

1. Respondent-Insurer is ordered to provide benefits to Claimant under the Workers' Compensation Act of Colorado, for her work-related injuries of July 20, 2008.

2. Respondent-Insurer is responsible for and shall pay for Claimant's reasonable and necessary medical care related to the injury incurred on July 20, 2008, including but not limited to the surgery on Claimant's left elbow.

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

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

DATE: February 25, 2009

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-624-208

ISSUES

The sole issue determined herein is claimant's petition to reopen.

FINDINGS OF FACT

1.On June 24, 2004, claimant suffered an admitted work injury when he slipped and fell, striking his face on the floor.

2.On June 25, 2004, Dr. Polanco, the authorized treating physician, diagnosed facial contusion, tinnitus, cervical strain, chest contusion, and right hand contusion. Dr. Polanco subsequently diagnosed temporomandibular joint ("TMJ") dysfunction.

3.On July 20, 2004, claimant complained to Dr. Polanco of continuing tinnitus and left ear pain, but denied hearing loss. Dr. Polanco diagnosed eustachion tube dysfunction with serious otitis and "TM retraction." He referred claimant to Dr. Bandrowsky for the TMJ.

4.In August 2004, Dr. Bandrowsky obtained magnetic resonance image ("MRI") studies, which showed normal TMJ.

5.On August 16, 2004, Dr. Polanco determined that claimant was at maximum medical improvement ("MMI"). Claimant continued to complain of pain in his left ear. Dr. Polanco recommended completing any TMJ treatment with Dr. Bandrowsky, but Dr. Bandrowsky had not recommended any such treatment.

6.On November 8, 2004, Dr. Griffis performed the Division Independent Medical Examination ("DIME"). Dr. Griffis determined that claimant was not yet at MMI. Dr. Griffis recommended treatment for the TMJ dysfunction and physiatrist treatment for the cervical strain.

7.On January 6, 2005, Dr. Richman assumed treatment for claimant. He prescribed physical therapy and a right shoulder MRI. He referred claimant to Dr. Ellingson for TMJ treatment and to Dr. Cichon for assessment and treatment of left ear problems.

8.On February 3, 2005, Dr. Cichon examined claimant and obtained audiometric testing, which showed left sensorineural hearing loss. Dr. Cichon referred claimant for computed tomography ("CT") scan of the left TMJ.

9.The February 16, 2005, CT of the left TMJ was initially incomplete, but later was read as showing no fracture. The radiologist repeated the CT on March 1, 2005, and interpreted the second CT as showing a fracture of the left superior temporal bone.

10.On March 1, 2005, Dr. Ellingson examined claimant and prescribed TMJ splints. On May 18, 2005, Dr. Ellingson reexamined claimant, who reported no improvement and continued intense pain as well as clicking.

11.Dr. Richman obtained an orthopedic evaluation of the right shoulder. On May 5, 2005, Dr. Richman recommended proceeding with right shoulder arthroscopic surgery.

12.On March 2, 2005, Dr. Cichon reexamined claimant and stated that the CT scan showed no temporal bone fracture. Dr. Cichon recommended only repeated audiometric testing in six months.

13.On May 19, 2005, Dr. Cichon wrote a letter to claimant stating that the final CT report showed a left temporal bone fracture. Dr. Cichon stated, however, that there was no therapy other than time. The letter was addressed to claimant at his residence on Stewart Place.

14.Claimant testified that he had moved from that residence about one month before May 19, 2005. He also admitted, however, that he continued to received temporary disability checks at that residence, including one that he negotiated for payment on or before June 8, 2005. Claimant alleges that he did not receive the May 19 letter until about three weeks later when a relative called him to pick up correspondence at the old address.

15.On June 1, 2005, the parties signed a stipulation for settlement and motion for approval of settlement. The stipulation provided that the insurer would pay claimant $40,000 in one lump sum. In exchange, claimant waived his rights to any further benefits for the injury suffered on June 24, 2004, including hearing loss. The stipulation provided that the claim may not be reopened except on the grounds of fraud or mutual mistake of material fact. On June 2, 2005, Judge Mattoon approved the stipulation.

16.Claimant moved to Mexico for some time and worked in both Mexico and in Colorado.

17.In December 2007, claimant filed a petition to reopen the settlement based upon mutual mistake of material fact.

18.Claimant has failed to prove by a preponderance of the evidence that a mutual mistake of material fact exists. Claimant's testimony that he did not receive the May 19, 2005, letter until after signing the stipulation is not credible. He probably received the letter because he also received the temporary disability check. Nevertheless, even if he did not receive the corrected diagnosis until after signing the settlement agreement, claimant has demonstrated a unilateral mistake, at best. The record evidence does not demonstrate that the respondents based the settlement on a mistaken diagnosis. In fact, the medical records as far back as three months before the settlement show the diagnosis of temporal bone fracture. The record evidence does not establish that the adjuster or respondents' attorney lacked accurate medical information at the time. Furthermore, the mistake was not material. The existence of the fracture did not change the medical treatment. As Dr. Cichon noted, no additional treatment existed for the fracture. Claimant settled the claim in spite of recommendations for continued treatment of the right shoulder, cervical strain, and TMJ dysfunction. For these reasons, claimant has failed to demonstrate that the parties settled the claim based upon a mutual mistake of material fact.

CONCLUSIONS OF LAW

1. Section 8-43-303(1), C.R.S., provides that a settlement, which waives the right to reopen, may be reopened at any time on the ground of fraud or mutual mistake of material fact. Claimant alleges a mutual mistake of material fact due to the missed diagnosis of a left temporal bone fracture at the time of the June 1, 2005 stipulation. A mutual mistake of material fact is one in which the parties share a common misconception concerning a material term or condition of the agreement. *Maryland Casualty Co. v. Buckeye Gas Products, Co.,* 797 P. 2d 11 (Colo. 1990); *Cary v. Chevron U.S.A., Inc.,* 867 P.2d 117 (Colo. App. 1993). The misconception must pertain to an existing fact rather than an opinion or prophecy about the future. *Gleason v. Guzman,* 623 P.2d 378, 383 (Colo. 1981). As found, claimant has failed to prove by a preponderance of the evidence that a mutual mistake of material fact exists.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen is denied and dismissed.

DATED: February 25, 2009 /s/ original signed by:_____

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-779-950

ISSUES

- Did claimant prove by a preponderance of the evidence that her symptoms of mild carpal tunnel syndrome arose out of the course and scope of her employment?

- Did claimant prove by a preponderance of the evidence that she is entitled to medical benefits?

FINDINGS OF FACT

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

1. Claimant has worked for employer as a program administrator since September 24, 2007. Claimant worked for some 5 years prior to that performing keyboarding duties. On December 16, 2008, claimant filed a worker's claim for compensation, alleging her keyboarding activity at work caused her mild carpal tunnel syndrome (CTS) in her bilateral upper extremities.

2. Employer referred claimant to Yvonne M. Nelson, M.D., who examined her on December 17th. On Dr. Nelson's Patient Information form, claimant reported a date of injury of August 22, 2008. Claimant wrote that she was involved in a motor vehicle accident (MVA) while riding as a passenger on a bus on her way to work. Claimant wrote:

> The bus was hit in the rear end. I went forward and hit my left arm and caught myself with left hand.

Claimant wrote that she injured her left hand, arm, neck, and back. Claimant further indicated that she injured both her right and left sides.

3. Following the MVA, claimant sought emergent medical treatment for a left shoulder contusion and cervical strain. The emergency room provider referred claimant for follow-up care with her primary care physician (PCP).

4. Claimant sought follow-up medical attention from her PCP, Cynthia Ireland, M.D. Crediting her testimony, claimant has developed numbness in the fingers of both hands and pain in both wrists since the MVA. These symptoms started in her left upper extremity immediately following the MVA and developed in her right upper extremity by mid-September. Dr. Ireland eventually referred claimant to William Bentley, M.D., for nerve conduction studies of her bilateral upper extremities on December 3, 2008. Dr. Bentley reported the studies normal, except for clinically insignificant/borderline findings suggesting very mild CTS. Dr. Ireland provided claimant splints to wear at night.

5. Claimant believes that repetitive motion from use of her upper extremities to type caused her bilateral CTS. Claimant however admitted she had no medical treatment or lost time related to her hand symptoms until after the MVA. Following the MVA, Dr. Ireland released claimant from work. Claimant missed approximately 10 days of work before returning to work on a part-time basis of 4 to 6 hours per day. Claimant however could no tolerate sitting and typing because of pain. Dr. Ireland reduced claimant's ability to work to 4 hours per day. Claimant continued working these hours on a part-time basis until after December 3, 2008.

6. Dr. Nelson testified as an expert in the field of Occupational Medicine. Dr. Nelson was present at hearing to listen to claimant's testimony. Dr. Nelson reviewed medical records from claimant's PCPs. Dr. Nelson's medical opinion was persuasive.

7. The Judge credits Dr. Nelson's testimony in finding the following: Claimant has bilateral, mild wrist tenosynovitis, which is a milder form of CTS. This diagnosis is based upon nerve conduction studies, and not upon clinical symptoms or findings. Claimant has risk factors that contribute to developing CTS. Those risk factors include her body habitus, her intake of alcohol, and her habit of smoking cigarettes. The medical literature associates the development of CTS to repetitive, forceful flexion and extension of the wrist for more than 50% of a worker's 8-hour shift. Claimant developed her CTS symptoms while working only a 4-hour shift. Based upon the totality of the medical evidence, Dr. Nelson opined it medically improbable that claimant's keyboarding activity caused or contributed to her bilateral CTS.

8. Claimant failed to show it more probably true than not that keyboarding activity at work caused, intensified, or to a reasonable degree aggravated her CTS. The Judge credited the medical opinion of Dr. Nelson in finding it medically improbable that claimant's keyboarding activities caused or contributed to her bilateral CTS. Claimant's onset of CTS symptoms arose following her acute injury during the MVA. The Judge finds it more probably true that the MVA caused claimant's onset of CTS symptoms.

CONCLUSIONS OF LAW

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

Claimant argues she has proven by a preponderance of the evidence that her symptoms of mild CTS arose out of the course and scope of her employment. The Judge disagrees.

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), 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), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). 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 claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

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). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. 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 (Colo. App. 2000).

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. (2002), as:

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

This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P. 2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Here, the Judge found claimant failed to show it more probably true than not that keyboarding activity at work caused, intensified, or to a reasonable degree aggravated her CTS. Claimant thus failed to prove by a preponderance

of the evidence that she sustained a compensable occupational disease type injury.

The Judge credited the medical opinion of Dr. Nelson in finding it medically improbable that claimant's keyboarding activities caused or contributed to her bilateral CTS. Claimant's onset of CTS symptoms arose following her acute injury during the MVA. The Judge found it more probably true that the MVA caused claimant's onset of CTS symptoms.

The Judge concludes claimant's claim for workers' compensation benefits under the Act should be denied and dismissed.

ORDER

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

1. Claimant's claim for workers' compensation benefits under the Act is denied and dismissed.

DATED: _February 25, 2009_

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-700-667

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable industrial injury during the course and scope of his employment with Employer on September 5, 2006.

2. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S.

3. Whether Respondents have proven by a preponderance of the evidence that Claimant is not entitled to receive Temporary Total Disability (TTD) benefits because he failed to comply with an offer of modified employment pursuant to §8-42-105(3)(d)(I), C.R.S.

FINDINGS OF FACT

1. On March 16, 2006 Claimant suffered an industrial injury to his lower back while employed by Sysco Food Services of Nevada.

2. Claimant obtained medical treatment for his injury in Nevada. An MRI revealed that he had suffered a small, herniated disc at the L5-S1 level. Claimant's treatment included spinal injections and physical therapy.

3. On August 14, 2006 Claimant's treating physician determined that he had reached Maximum Medical Improvement (MMI). Claimant was discharged from medical care without permanent restrictions or impairment.

4. Claimant subsequently relocated to Colorado and obtained employment with Employer as a delivery driver. Claimant credibly explained that he received a daytime delivery position because he had nighttime childcare responsibilities. His job duties required him to engage in bending and lifting while delivering various items.

5. Prior to beginning employment Claimant received a safety handbook from Employer. The handbook directed employees on the proper method of lifting in order to maintain a healthy back. The safety handbook noted that employees should avoid twisting their bodies and move as one complete unit when lifting items.

6. On September 5, 2006 Claimant was carrying a crate of milk in the rear of his delivery truck during the course and scope of his employment with Employer. While lifting the crate of milk, merchandise began to fall towards him. Claimant explained that he then twisted in an attempt to avoid the falling merchandise. He subsequently experienced pain in his lower back and leg.

7. Claimant reported the incident to his supervisor. Employer then directed him to Concentra Medical Centers for treatment. Claimant was diagnosed with a lumbar strain. The treating physician prescribed medications and directed Claimant to undergo physical therapy.

8. Employer required Claimant to complete a statement about the September 5, 2006 incident in order to "prevent reoccurrence" of any unsafe actions. Claimant's supervisor recommended that Claimant should "move feet while twisting with any objects."

9. Claimant subsequently attempted to resume his regular job duties. However, because his job responsibilities aggravated his lower back condition, Claimant received work restrictions and was unable to return to his prior position.

10. On September 25, 2006 Employer offered Claimant modified employment. Claimant's shift lasted from 7:00 p.m. until 3:00 a.m. Claimant performed modified duties for approximately one month.

11. On September 30, 2006 Claimant underwent an MRI of his lower back. The MRI revealed herniated discs at both the L4-L5 and L5-S1 levels. The L4-L5 disc herniation had not existed on Claimant's prior MRI in Nevada.

12. In October 2006 Claimant informed Employer that he was unable to continue working the nightshift because of his childcare responsibilities. He thus requested a return to the dayshift. Employer advised Claimant that it could not accommodate his request. Claimant thus ceased employment.

13. Claimant continued to receive medications and underwent physical therapy for his condition. On December 12, 2006 he reached MMI for his September 5, 2006 lumbar strain. However, Claimant did not receive an impairment rating for his injury.

14. In early 2007 Claimant began employment as a delivery driver with a new employer. His job responsibilities were strictly limited to driving. Claimant left the position after approximately one year.

15. On May 24, 2007 Claimant underwent an independent medical evaluation with Richard A. Cestowski, D.O. of Las Vegas, Nevada. The evaluation addressed whether Claimant's continued lower back symptoms were related to his March 16, 2006 industrial injury in Nevada. Dr. Cestowski responded that Claimant's symptoms were unrelated to the March 16, 2006 Nevada injury but were instead caused by the September 5, 2006 lifting incident. After reviewing Claimant's medical history, Dr. Cestowski explained that Claimant's back condition was asymptomatic until September 5, 2006. He thus summarized that Claimant's lumbar spine and lower extremity symptoms were directly related to the September 5, 2006 incident that occurred while Claimant was working for Employer.

16. In approximately early 2008 Claimant began employment with American Distribution as a delivery driver. On March 18, 2008 Claimant suffered an aggravation of his lumbar spine condition during the course and scope of his employment with American Distribution. After considering Claimant's history, symptoms and diagnosis, Nurse Practioner Ronald L. Waits determined that Claimant's injury was related to his employment with American Distribution. NP Waits commented that Claimant's symptoms "appear[ed] to be an aggravation of a preexisting condition by work activities."

17. Claimant has demonstrated that it is more probably true than not that he sustained an industrial injury during the course and scope of his employment with Employer on September 5, 2006. Claimant credibly explained that, while carrying a crate of milk in his delivery truck, merchandise began to fall towards him. He then twisted in an attempt to avoid the falling merchandise and experienced pain in his lower back and leg. Claimant was diagnosed with a lumbar strain, received medications and underwent physical therapy for his condition. A subsequent MRI revealed that, in addition to a previous herniated

disc at the L5-S1 level, Claimant had sustained a disc herniation at the L4-L5 level. Claimant's employment thus aggravated, accelerated, or combined with his pre-existing lower back condition to produce a need for medical treatment.

18. Respondents have failed to establish that it is more probably true than not that Claimant willfully failed to obey a reasonable safety rule. Employer's safety handbook directed employees on the proper method of lifting in order to maintain a healthy back. The handbook noted that employees should avoid twisting and to move as one complete unit when lifting. Claimant credibly testified that while he was carrying a crate of milk in his delivery truck, merchandise began to fall towards him. He then twisted in an attempt to avoid the falling merchandise. Although Employer adopted a reasonable safety rule in order to decrease back injuries, Claimant's actions in twisting away from falling merchandise constituted a common sense deviation from the safety rule. Claimant's attempt to avoid the falling merchandise in the rear of his delivery truck thus did not constitute a deliberate violation of Employer's safety rule.

19. Respondents have failed to demonstrate that it is more probably true than not that Claimant was precluded from receiving TTD benefits because Employer offered him modified employment. As a result of Claimant's September 5, 2006 industrial injury he was unable to return to his prior position. On September 25, 2006 Employer offered Claimant modified employment. Claimant's shift lasted from 7:00 p.m. until 3:00 a.m. Claimant performed modified duties for approximately one month. However, in October 2006 Claimant informed Employer that he was unable to continue working the nightshift because of his childcare responsibilities. He requested a return to the dayshift. Employer advised Claimant that it could not accommodate his request and he ceased employment. Respondents offer of modified employment required Claimant to perform his job duties at a time that conflicted with his childcare responsibilities. Claimant credibly testified that he initially obtained a daytime delivery position with Employer because he had nighttime childcare duties. The offer of modified employment thus prevented Claimant from performing his childcare responsibilities. Accordingly, the offer of modified employment was not reasonably available to Claimant under an objective standard.

CONCLUSIONS OF LAW

1. 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 she 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 (ICAP, 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. Industrial Claim Appeals Office,* 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. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, 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).

6. As found, Claimant has demonstrated by a preponderance of the evidence that he sustained an industrial injury during the course and scope of his employment with Employer on September 5, 2006. Claimant credibly explained that, while carrying a crate of milk in his delivery truck, merchandise began to fall towards him. He then twisted in an attempt to avoid the falling merchandise and experienced pain in his lower back and leg. Claimant was diagnosed with a

lumbar strain, received medications and underwent physical therapy for his condition. A subsequent MRI revealed that, in addition to a previous herniated disc at the L5-S1 level, Claimant had sustained a disc herniation at the L4-L5 level. Claimant's employment thus aggravated, accelerated, or combined with his pre-existing lower back condition to produce a need for medical treatment.

Safety Rule Violation

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

8. Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* However, willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, W.C. No. 4-495-198 (ICAP, Oct. 20, 2003). "Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez,* W.C. No. 4-561-352 (ICAP, Apr. 29, 2004). Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.*, 907 P.2d at 719.

9. As found, Respondents have failed to establish by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule. Employer's safety handbook directed employees on the proper method of lifting in order to maintain a healthy back. The handbook noted that employees should avoid twisting and to move as one complete unit when lifting. Claimant credibly testified that while he was carrying a crate of milk in his delivery truck, merchandise began to fall towards him. He then twisted in an attempt to avoid the falling merchandise. Although Employer adopted a reasonable safety rule in order to decrease back injuries, Claimant's actions in twisting away from falling merchandise constituted a common sense deviation from the safety rule. Claimant's attempt to avoid the falling merchandise in the rear of his delivery truck thus did not constitute a deliberate violation of Employer's safety rule.

Temporary Total Disability Benefits

10. Section 8-42-105(3)(d)(I), C.R.S. authorizes the termination of TTD benefits when "the attending physician" gives the claimant a "written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. §8-42-105(3)(d)(I), C.R.S. Because the respondents seek to terminate benefits pursuant to §8-42-105(3)(d)(I), C.R.S. they have the burden to establish the factual predicates for application of the statute. *Witherspoon v. Metropolitan Club of Denver*, W.C. No. 4-509-612 (ICAP, Dec. 16, 2004). Under a proper interpretation of the statute the offered employment must be "reasonably available to the claimant under an objective standard." *In Re Villa,* W.C. No. 4-694-064 (ICAP, Oct. 3, 2008). Whether the offered employment is reasonably available under an objective standard is a determination of fact for the ALJ. *Id.*; *Simington v. Assured Transportation & Delivery,* W.C. No. 4-318-208 (ICAP, Mar. 19, 1998). Factors in determining whether employment is "reasonably available" include the distance a claimant is required to travel and the availability of transportation to reach the employment. *See Simington v. Assured Transportation & Delivery,* W.C. No. 4-318-208 (ICAP, Mar. 19, 1998); *Belanger v. Keystone Resorts, Inc.,* W.C. No. 4-250-114 (ICAP, Oct. 9, 1997); *Ragan v. Temp Force,* W.C. No. 4-216-679 (ICAP, June 7, 1996).

11. As found, Respondents have failed to demonstrate by a preponderance of the evidence that Claimant was precluded from receiving TTD benefits because Employer offered him modified employment. As a result of Claimant's September 5, 2006 industrial injury he was unable to return to his prior position. On September 25, 2006 Employer offered Claimant modified employment. Claimant's shift lasted from 7:00 p.m. until 3:00 a.m. Claimant performed modified duties for approximately one month. However, in October 2006 Claimant informed Employer that he was unable to continue working the nightshift because of his childcare responsibilities. He requested a return to the dayshift. Employer advised Claimant that it could not accommodate his request and he ceased employment. Respondents offer of modified employment required Claimant to perform his job duties at a time that conflicted with his childcare responsibilities. Claimant credibly testified that he initially obtained a daytime delivery position with Employer because he had nighttime childcare duties. The offer of modified employment thus prevented Claimant from performing his childcare responsibilities. Accordingly, the offer of modified employment was not reasonably available to Claimant under an objective standard.

ORDER

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

1. Claimant suffered a compensable injury during the course and scope of his employment with Employer on September 5, 2006.

2. Respondents have failed to demonstrate that Claimant willfully violated a reasonable safety rule.

3. Respondents have failed to establish that the September 25, 2006 offer of modified employment terminated Claimant's TTD benefits.

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

DATED: February 25, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-768-420

ISSUES

- Did claimant prove by a preponderance of the evidence that he sustained an injury arising out of his employment?
- Did claimant prove by a preponderance of the evidence that he is entitled to medical benefits?
- Did claimant prove by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits from August 4, 2008, ongoing?

FINDINGS OF FACT

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

1. Employer manufactures, sells, and delivers steel roofing product. Claimant worked some 15 years for employer as an over-the-road driver. Claimant's date of birth is November 29, 1953; his age at the time of hearing was 55 years. Claimant contends he injured himself while working for employer on July 30, 2008. The Judge adopts the parties' stipulation in finding that claimant's average weekly wage (AWW) exceeds the maximum rate of $1,179.25, entitling him to compensation benefits paid at the maximum rate of $786.17.

2. Claimant's duties involved driving an 18-wheel tractor with flatbed trailer to deliver steel roofing. Claimant drove a regional route with stops for some 18 to 19 customers. At a typical stop, claimant would unstrap the load, climb atop the load to pull back the tarp, and prepare the load for off-loading by a forklift. Once product is offloaded, claimant would again climb atop the remaining load to replace the tarp before re-strapping the load. Claimant also offloads by hand boxes of screws and other components weighing some 20 to 50 pounds.

3. The Judge credits claimant's testimony in finding: Claimant drove a load to deliver to an ACE Hardware store in Taos, New Mexico. Claimant parked his rig in the parking lot of the ACE Hardware, where he slept in the sleeper cabin of his truck until the morning of July 30, 2008. When he awoke on the morning of July 30th, claimant unstrapped the load, removed the tarp, spread the tarp on the ground, and folded it. The tarp weighed some 45 pounds. Claimant lifted the tarp and carried it to the front of the trailer. While lifting the tarp and pushing it onto the trailer, claimant felt a sudden sharp pain shooting from his back down to his right leg. The pain initially caused claimant to jump, but it lasted only one to two minutes before dissipating.

4. Claimant was able to complete his deliveries on July 30th before returning to employer's yard in Denver. Claimant dropped his empty trailer in the yard and hitched a loaded trailer onto his truck. Claimant then drove to Flagler, Colorado, where he slept through the night in his sleeper compartment.

5. The Judge credits claimant's testimony in finding: Claimant was stiff and had trouble moving and dressing himself when he awoke in Flagler on July 31, 2008. Claimant then drove from Flagler to Burlington, Colorado. Claimant found it difficult to sit comfortably in the seat because of symptoms in his lower back and leg. When claimant stepped out of the truck in Burlington, he was unable either to bear weight on his right leg or to stand up straight because of tremendous pain. Claimant had to hold that position for several minutes before he could attempt to move.

6. The Judge credits claimant's testimony in finding: While unable to move on the morning of July 31st, claimant grabbed his cell phone and telephoned his supervising traffic manager, Mr. Hines. Claimant told Hines that his back and leg were in pain and that he was unable to walk. Claimant told Hines he was uncertain what he had done to cause his pain. Claimant explained that he had never before experienced such severe lower back and leg pain and was uncertain what was causing the pain. Hines asked claimant to attempt to complete his route, which claimant eventually completed on August 2nd.

7. Claimant called Hines again on August 4, 2008, asking Hines to direct him to a physician for medical attention. Hines referred claimant to Michael P. McKenna, D.O., who first examined him on August 4th. Dr. McKenna recorded the following history of injury:

> [Claimant] woke up in his sleeper cab I believe it was Thursday morning with pain that increased significantly and severity through Friday and he was able to finally get his vehicle home Saturday morning. States he was basically unable to walk at that time.

Claimant agrees he failed to mention the tarp incident to Dr. McKenna. Claimant explained that, because the pain from lifting the tarp was short-lived, he did not think much about the incident.

8. On August 4th, Dr. McKenna diagnosed an acute lumbo-sacral strain with radiculopathy and released claimant from work. On August 7th, Dr. McKenna noted claimant had not improved after one week. Because of radiculopathy into claimant's right lower extremity, Dr. McKenna ordered a magnetic resonance imaging (MRI) scan of claimant's lumbar spine, which claimant underwent on August 19th.

9. On August 25, 2008, insurer's adjuster notified Dr. McKenna that insurer had denied claimant's claim. On August 27th, claimant saw Dr. McKenna through his private insurance to review the results of the MRI. At that time, Dr. McKenna asked claimant whether he had experienced this pain before awaking in the sleeper of his truck on July 31st. Claimant explained to Dr. McKenna that he earlier had experienced a similar pain while lifting and placing the tarp onto the trailer. Dr. McKenna recommended claimant see a back surgeon.

10. Claimant went to his personal physician Bernard Engel, M.D., who referred him to Orthopedic Surgeon Jeffrey J. Sabin, M.D. Dr. Sabin examined claimant on October 1, 2008, and noted the following history:

> [Claimant] was working and was moving a tarp over on a truck and then subsequent to that he was having a difficult time getting out of the truck (sic) even moving because of severe back pain.

Dr. Sabin was unable to explain claimant's pain generator on the basis of MRI findings. Dr. Sabin referred claimant to Phillip Engen, M.D., for an epidural steroid injection (ESI).

11. Dr. Engen obtained the following history from claimant on October 14, 2008:

> [Claimant] was putting a tarp on his trailer July 28, 2008. He felt a small pain in his right leg and then two days later he could not get out of bed. He was Flagler, Colorado. He completed his round. He went to Burlington, Colorado, and on July 30, 2008, he was in extreme pain with difficulty moving. This involved the entire low back, right buttock, right posterior thigh, right posterior calf.

Dr. Engen administered ESIs on October 14th and 28th, 2008.

12. At claimant's request, L. Barton Goldman, M.D., performed an independent medical examination (IME) of claimant on December 13, 2008. Dr. Goldman extensively reviewed claimant's medical records. Dr. Goldman noted a number of inconsistencies, for instance, claimant was unable to recall several prior episodes of low back pain until reminded by Dr. Goldman after reviewing Dr. Engel's records. Dr. Goldman also expressed concern about causation because, based upon the medical records, claimant failed to report the tarp incident to Dr. McKenna or any other physician until 1 to 2 months after the incident. Dr. Goldman stated that he could not credit claimant's story as showing it medically probable that his low back condition represented a work-related injury. Dr. Goldman wrote:

> I find that in taking into consideration all of the above factors (inaccurate past medical history, retrospective and delayed history of present illness, atypical pain and physical examination presentation, as well as atypical response to [ESIs], obvious presence of symptom magnification and depression) that … without further documentation, preferably within the first week or 2 after the July 30 event, I cannot extend the benefit of the doubt in terms of making [claimant's] present complaints and symptoms a work related phenomenon.

Dr. Goldman explained to claimant: The difference between correlation and causality; the fact that claimant's low back condition is common for a person his age who is not in good overall shape; that disk herniations and extrusions often occur in individuals arising from a night's sleep without any intervening event; and that claimant experienced a similar episode of lower back pain approximately one year earlier after sleeping in the cabin of his truck.

13. Respondents referred claimant to Annu Ramaswamy, M.D., for an IME on December 9, 2008. Dr. Ramaswamy testified as an expert in Internal Medicine and Occupational Medicine. Dr. Ramaswamy testified:

> When [claimant] had the tarp incident, I couldn't even put forth a diagnosis for that tarp incident based on the history it lasted seconds. So I can't even state … that that led to a diagnosis. If one herniates a disk, it doesn't cause pain for two seconds, and then … completely resolves. That's not the normal physiology of disk pathology and disk inflammation.
>
> So if I can't come forth wit a diagnosis for the tarp incident and if I know [claimant's] got degeneration of the lumbar spine … and I have a history of waking up in a sleeper cab, which … there's no forces. There's no mechanism of injury. Also, even getting out of his truck, there's not a mechanism of injury, again, that causes an

> acute disk herniation. Therefore, I can't state that there's a … work-related condition at this time.

Like Dr. Goldman, Dr. Ramaswamy opined it medically improbable that claimant sustained an injury either from lifting the tarp or from awaking in pain in his sleeper cab. The medical opinions of Dr. Goldman and Dr. Ramaswamy are alike credible and persuasive.

> 14. Claimant failed to show it more probably true than not that he sustained a lower back injury arising out of his employment. While claimant's lower back condition manifested while he was in travel status during the course of his employment, there was no persuasive evidence showing it more probably true that his condition was the result of an injury arising out of the duties of his employment. The Judge credited the medical opinions of Dr. Goldman and Dr. Ramaswamy in finding it medically improbable that claimant sustained an injury either from lifting the tarp or from awaking in pain in his sleeper cab.

CONCLUSIONS OF LAW

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

Claimant argues he has proven by a preponderance of the evidence that he sustained an injury arising out of his employment. The Judge disagrees.

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), 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), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that his injury arose out of the course and scope of his employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). 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 claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

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). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. 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 (Colo. App. 2000).

The Act distinguishes between the terms "accident" and "injury." The term "accident" refers to an unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), *supra*. By contrast, an "injury" refers to the physical trauma caused by the accident. Thus, an "accident" is the cause and an "injury" the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable injury. A compensable industrial accident is one, which results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

Here, the Judge found claimant failed to show it more probably true than not that he sustained a lower back injury arising out of his employment. Claimant thus failed to prove by a preponderance of the evidence that he sustained a compensable injury.

The Judge found that claimant's lower back condition manifested while he was in travel status during the course of his employment. The Judge found it medically improbable that claimant sustained an injury either from lifting the tarp or from awaking in pain in his sleeper cab. The Judge thus found no persuasive evidence showing it more probably true that the duties of claimant's employment proximately caused a lower back injury.

The Judge concludes claimant's claim for workers' compensation benefits under the Act should be denied and dismissed.

ORDER

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

1. Claimant's claim for workers' compensation benefits under the Act is denied and dismissed.

DATED: _February 26, 2009__

Michael E. Harr,
Administrative Law Judge

ISSUES

- Is the issue of the legal validity of potential defenses to a prospective claim for permanent total disability benefits ripe for hearing?
- If the issue is ripe, would the prospective claim for permanent total disability benefits be barred by the defenses of claim preclusion, issue preclusion, and/or claim closure?

FINDINGS OF FACT

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

27. The claimant filed a claim for workers' compensation benefits alleging that she sustained an occupational disease as a result of her employment as a meat wrapper. Essentially, the claimant asserted that she had pre-existing cervical disc disease that was aggravated by her employment. The employer contested the claim and the matter proceeded to hearing before ALJ Friend on August 26, 2004.

28. On September 24, 2004, ALJ Friend issued Findings of Fact, Conclusions of Law, and Order (FFCL) denying and dismissing the claim for benefits. Relying on the expert opinion of respondents' independent medical examiner, Dr. Robert Watson, M.D., ALJ Friend found the claimant "failed to establish by a preponderance of the evidence that her condition was caused, aggravated, or accelerated as a result of her employment" as a meat wrapper. ALJ Friend explicitly concluded that the "claim is not compensable."

29. The claimant appealed the September 24, 2004, FFCL to the Industrial Claim Appeals Office (ICAO). On February 24, 2005, the ICAO entered its Final Order affirming ALJ Friend's FFCL. The claimant appealed the ICAO's Final Order to the Court of Appeals. However, on December 15, 2005, the Court of Appeals issued its opinion affirming the order of the ICAO. The claimant concedes that no appeal was taken from the decision of the Court of Appeals.

30. In May 2005 the claimant filed a Petition to Reopen the claim based on error, mistake, and fraud. The essence of the claimant's petition was the allegation that, at the hearing before ALJ Friend, Dr. Watson testified falsely or incorrectly that the medical literature does not support an

inference that the claimant's job duties aggravated her pre-existing degenerative disc disease. However, in FFCL dated November 9, 2005, ALJ Harr denied the petition to reopen. ALJ Harr found that the evidence failed to demonstrate that Dr. Watson misled ALJ Friend. Further, ALJ Harr ruled that if the claimant had exercised due diligence she could have produced evidence to contradict Dr. Watson's opinions at the hearing before ALJ Friend. ALJ Harr's order was not appealed.

31. On November 5, 2008, the claimant filed the Application for Hearing that is the subject of the hearing held on February 3, 2009. The claimant listed the issues of "compensability," disfigurement, and "whether claimant is precluded from seeking permanent total disability." The respondent filed a Response to Application for Hearing listing several other issues including issue preclusion, claim preclusion, and claim closure.

32. At hearing, claimant's counsel represented that the only real issue for determination is whether, if the claimant applies for a hearing on the issue of permanent total disability (PTD) benefits, the respondents' "defenses" of issue preclusion, claim preclusion and claim closure would impose a legal bar to adjudication of the PTD claim. The respondent replies that the issue presented by the claimant is not ripe for determination. However, the respondent also argues that if the issue is ripe then the affirmative defenses create a bar to the prospective claim for PTD benefits.

CONCLUSIONS OF LAW

RIPENESS OF ISSUE PRESENTED FOR DETERMINATION

The claimant contends that the legal viability of the respondents' defenses to a potential claim for PTD benefits is "ripe" for determination. The claimant reasons that the defenses of issue preclusion, claim preclusion and claim closure present "threshold" legal issues concerning whether or not she "can even proceed to court." Thus, the claimant asserts that considerations of "judicial economy" favor a conclusion that consideration of the defenses is ripe. The claimant further reasons that because all facts relevant to the defenses are known, the defenses are fit for adjudication. Finally, the claimant asserts that if she is forced to file an application for hearing raising the issue of PTD benefits before adjudicating the soundness of the respondent's defenses, she faces "substantial costs" that will result from the necessity of procuring expert witnesses to address the substantive issues. The claimant desires to avoid these expenses if the claim for PTD benefits is to be denied based on the respondent's legal defenses.

The respondent contends that the issue presented to the ALJ, as currently framed by the claimant, is not ripe for adjudication. The respondent reasons that to date the claimant has not established a compensable claim, and did not seek

to do so at the hearing on February 3, 2009. Rather, from the respondent's perspective the claimant is seeking to adjudicate the viability of potential defenses to a claim for benefits that has not yet been made, let alone proven. The respondent reasons that the "entire matter is speculative, hypothetical and unripe." The ALJ agrees with the respondent.

Generally, the term "ripeness" refers to whether an issue is "real, immediate, and fit for adjudication." Our courts have held that under this doctrine "adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which may never occur." *Olivas-Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178 (Colo. App. 2006) (holding claim for permanent total disability is ripe for adjudication when respondents file FAL admitting for permanent impairment). In determining ripeness of an issue courts have considered the hardship to the parties if adjudication is withheld. In addition, courts consider whether the issue is fit for adjudication in the sense that there is an adequate record to permit effective review. *Stell v. Boulder County Department of Social Services,* 92 P.3d 910 (Colo. 2004).

The ALJ has only such jurisdiction as is created by the provisions of the Workers' Compensation Act (Act). *Lewis v. Scientific Supply Co., Inc.,* 897 P.2d 905 (Colo. App. 1995). The ALJ notes that several provisions of the Act imply that an ALJ does not have statutory jurisdiction to enter orders concerning issues that are not "ripe" for hearing. Section 8-43-211(2)(d), C.R.S., provides that any person filing an application for hearing on "issues which are not ripe for adjudication at the time such request or filing is made" may be assessed attorney fees and costs incurred by the opposing party. Section 8-43-203(2)(b)(II), C.R.S., requires a party to object to an FAL and file an application for hearing on disputed issues "that are ripe for hearing" or accept closure of such issues. *See Peregoy v. Industrial Claim Appeals Office,* 87 P.3d 261 (Colo. App. 2004). Section 8-43-207.5(1), C.R.S., grants prehearing administrative law judges the power to determine "ripeness of legal, but not factual issues, for formal adjudication on the record before the director or an administrative law judge." Finally, and most importantly, § 8-43-207(1), C.R.S., grants an ALJ authority to conduct hearings "to determine any *controversy* concerning any issue arising under articles 40 to 47 of this title." (Emphasis added).

Consistent with this conclusion, the Court of Appeals has held that the doctrine of "ripeness" precludes an ALJ from considering the issue of penalties against an insurer for filing an allegedly frivolous appeal while that appeal is still pending in the court system. *BCW Enterprises v. Industrial Claim Appeals Office,* 964 P.2d 533 (Colo. App. 1997). It follows that a "controversy concerning any issue arising under the Act," that justifies a hearing under § 8-43-207(1), refers to a "ripe" dispute. If the issue is not "ripe" it does not present a "controversy" sufficient to warrant exercise of the ALJ's statutory power to conduct a hearing.

Here, the ALJ concludes that the issue the claimant presents for adjudication is not "ripe" and does not merit the entry of an order resolving the underlying legal question. First, the issue of whether the defenses of claim preclusion, issue preclusion and/or claim closure would bar the entry of an award of PTD benefits is purely hypothetical. This is true because the claimant has not presented any claim for PTD benefits, and has not raised any such claim by filing an application for hearing seeking PTD benefits. Moreover, the claimant has never proven, nor did she seek to prove at the hearing on February 3, 2009, that she satisfies the threshold elements of a compensable claim set forth in § 8-43-301(1), C.R.S.

It follows that question of whether the affirmative defenses cited by the claimant would bar proof of a claim for PTD benefits is neither "real" nor "immediate." Rather, the claimant seeks what can only be described as an advisory ruling concerning the validity of potential defenses to a claim that has not yet been made, and which may never be made. *Cf. Heron v. City and County of Denver,* 159 Colo. 314, 411 P.2d 314 (Colo. 1966) (action for declaratory judgment to invalidate permit statute was no properly before court because plaintiff had never sought to obtain a permit to which statute applied; "there must be a justiciable issue or legal controversy extant, not a mere possibility that at some future time such question may arise").

Moreover, the ALJ is not persuaded that the claimant will sustain any "hardship" if consideration of the issue is withheld at this juncture of the proceedings. The ALJ notes that should the claimant apply for a hearing on PTD benefits the respondents would be obliged to raise all affirmative defenses in their response or risk waiving such defenses. See *Leewaye v. Industrial Claim Appeals Office,* 178 P.3d 1254, 1257 (Colo. App. 2007) (treating claim closure as a statutory rather than jurisdictional matter); *Kersting v. Industrial Commission*, 39 Colo. App. 297, 567 P.2d 394 (1977) (affirmative defense must be pled and proven or it is waived). At that point the respondents raise their affirmative defenses the claimant would be entitled to file a motion for summary judgment under OACRP 17 seeking an order dismissing the defenses as invalid as a matter of law (much as the claimant seeks to do here). Compare CRCP 56 (h) (after last required pleading party may move for determination of question of law, and court may determine issue if there is no material issue of fact). Moreover, the ALJ sees no reason why such a motion could not be filed and ruled upon before the claimant incurred substantial expenses to prove the underlying claim for PTD benefits. Indeed, all that OACRP 17 requires is that a motion for summary judgment seek resolution of "any endorsed issue for hearing."

In contrast, if the issue is treated as "ripe" for adjudication the respondents will be required to expend litigation resources to promote defenses against a claim for PTD benefits that may never be made. Similarly, the ALJ will be required to expend judicial resources and time to evaluate the validity of potential defenses to a claim that may never be made. In the ALJ's view, a conclusion that

the issue raised by the claimant is ripe would not promote the statutory objectives of quick and efficient delivery of benefits to the claimant, at a reasonable cost to the employer, without the necessity of litigation. Section 8-40-102(1), C.R.S. To the contrary, concluding that the issue raised by the claimant is ripe would encourage the litigation of hypothetical issues and the issuance of advisory rulings at substantial cost to the litigants and the administrative courts. *Heron v. City and County of Denver, supra* (courts should not be converted into "legal aid bureaus" to answer questions that have not yet arisen and which may never arise).

In these circumstances the ALJ concludes that the issue raised by the claimant is not currently ripe for hearing, and the application for hearing must be dismissed without prejudice. In light of this conclusion the ALJ need not address the other issues raised by the parties.

ORDER

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

1. The claimant's Application for Hearing is dismissed without prejudice.

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

DATED: February 26, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-756-971

ISSUES

The issues determined herein are whether the claim was closed by final admission of liability ("FAL") and claimant's petition to reopen.

FINDINGS OF FACT

1.On April 14, 2008, claimant suffered an admitted industrial injury to his right shoulder and neck.

2.Claimant was briefly hospitalized with a back strain and then released.

3.On April 16, 2008, Physician's Assistant Schultz examined claimant and diagnosed thoracic strain, lumbar strain, and right shoulder strain. P.A. Schultz prescribed medications and physical therapy and excused claimant from work.

4.P.A. Schultz and Dr. Nanes continued to follow claimant's recovery. Dr. Sandell performed electromyography testing, which was normal. Dr. Davis evaluated the shoulder and noted a chronic defect in the sternoclavicular joint. On July 14, 2008, Dr. Davis expected claimant to reach maximum medical improvement ("MMI") in about one month.

5.On August 13, 2008, Dr. Nanes reexamined claimant, who complained of continuing neck and right shoulder pain about 70% of the time. Dr. Nanes determined that claimant was at MMI with no impairment. Dr. Nanes released claimant to return to work without restrictions.

6.On August 22, 2008, the insurer filed a FAL denying liability for permanent disability benefits and denying post-MMI medical benefits. The FAL had attached the single page August 13, 2008, report by Dr. Nanes. Dr. Nanes did not attach any worksheets to the report. The insurer attached all of the pages of the medical report.

7.On September 8, 2008, claimant returned to work at his regular job. He tried to carry the 30-pound camera on his left shoulder rather than his right shoulder.

8.On September 25, 2008, claimant filed a petition to reopen based upon a change of condition. Claimant did not attach or provide any updated medical report demonstrating a change of condition.

9.Claimant alleges that he has more pain and spasm in the right shoulder and neck and also started having pain in his left shoulder as a result of carrying the camera on that shoulder.

10. Claimant has failed to prove by a preponderance of the evidence that he suffered a change of condition after MMI as a natural consequence of his work injury. He had residual pain in his right shoulder at MMI. He still has residual pain. Although no recent medical report is required, the absence of such a report makes it difficult for the finder of fact to find any change of condition. Additionally, the record evidence does not demonstrate that any additional treatment is reasonably necessary. If no treatment is necessary, there is no need to reopen the claim. Claimant had no restrictions on use of his right shoulder.

Any symptoms in the left shoulder are not a natural consequence of the admitted right shoulder injury.

CONCLUSIONS OF LAW

1.Claimant first argues that the FAL was ineffective to close the claim because no worksheets of the treating physician were attached, citing *Bargas v. Special Transit*, W.C. No. 4-534-551 (Industrial Claim Appeals Office, June 4, 2004). That case, however, only requires the insurer to include the entire report of the physician, if that report is the basis for the FAL. Claimant admitted that no case held the FAL ineffective due to a failure of the treating physician to produce additional reports. Respondents are correct that they must attach the entire report to the FAL pursuant to statute and rule. They are not required to obtain an additional report. In fact, under the rules, the insurer must timely file the FAL after receipt of the MMI report. Consequently, the FAL closed the claim.

2.Claimant has petitioned to reopen the claim. Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. *See Ward v. Ward*, 928 P.2d 739 (Colo. App. 1996) (noting that change in condition has been construed to mean a change in the physical condition of an injured worker). Reopening is appropriate when the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Dorman v. B & W Construction Co.*, 765 P.2d 1033 (Colo. App. 1988). Claimant has the burden of proving these requirements, *see Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). Claimant must prove that his change of condition is the natural and proximate consequence of the industrial injury, without any contribution from another separate causative factor. *Vega v. City of Colorado Springs,* W.C. No. 3-986-865 & 4-226-005 (ICAO, March 8, 2000). As found, claimant has failed to prove by a preponderance of the evidence that he suffered a change of condition after MMI as a natural consequence of his work injury.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen is denied and dismissed.

DATED: February 27, 2009

Martin D. Stuber
Administrative Law Judge