OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-760-472

ISSUES

The issues presented included compensability, pre-existing condition, causation, medical benefits and temporary total disability benefits from May 6, 2008 to July 22, 2008.

FINDINGS OF FACT

1. Claimant alleges that on May 6, 2008, while she was working for Respondent-Employer as the lead custodian that she slipped and fell on the bleachers. She alleges she fell onto her back and suffered injury to her left lower extremity, including her ankle and foot. She also alleged she injured her upper back area.

2. Claimant testified her ankle injury extends from her ankle all down the left side through the toes on the left side and on the underside in the middle of her foot. Claimant testified she injured her back on the left side between her neck and her middle back. She described the pain on a scale from 0 to 10 to be 10.

3. Claimant testified that she originally saw Dr. Peterson on May 6, 2008, for her foot. She also testified that she returned on May 7, 2008 when her husband saw bruising on her back.

4. Claimant testified she was injured in a motor vehicle accident in 2003, a slip and fall accident in February 2007, and a slip and fall in October 2007.

5. Claimant testified that on January 14, 2003 she was a pedestrian and was struck by a vehicle traveling 60 miles per hour. The Claimant testified she injured both knees, her back, which she described as her "whole back" on both sides and in the middle, her right hip, her arm, her shoulder on the left, her left hand and her left foot.

6. Claimant testified that during the February 5, 2007 work injury that she slipped and fell and injured her left hand, left hip, and left back. She testified that on October 11, 2007 she slipped and fell and injured her neck and upper back on the left.

7. Claimant testified that her upper back injury and her left foot injury were slightly different after the alleged May 6, 2008 injury. Claimant testified "I feel on one place where the bone is I feel sharp pain and bracing problem". With respect to Claimant's left foot injury, the Claimant testified it was different because she injured only the front toe and the toe on the inside in the 2003 accident.

8. Claimant testified that she has asked her doctors to help her be determined disabled. She testified she told Dr. Peterson it's too dangerous for her to work. She testi-

fied she believes she cannot work, and that her whole body hurts and she should be left in peace to rest.

9. Medical records indicate that the Claimant injured her left foot in the May 2003 motor vehicle accident. Dr. Jinkins treated the Claimant for her motor vehicle accident and diagnosed the Claimant with a left foot contusion with possible tarsal tunnel syndrome. She complained to Dr. Jinkins of numbness in her left foot, which involved all five digits.

10. Dr. Timothy Sandell treated the Claimant for her 2003 motor vehicle accident. The Claimant reported to Dr. Sandell that she had weakness in her left lower extremity and described twisting her left ankle while she was merely standing. She had mild tenderness over the lateral aspect of her left foot. In addition, Dr. Sandell noted treatment to the Claimant's left foot including diagnostic injections of the sesamoids in the left foot. Dr. Sandell also noted that the Claimant complained that "everything hurts" including her foot and that she related left foot pain along the medial aspect of the foot and the medial aspect of the great toe. Dr. Sandell notes that the Claimant stated to him, "I need more therapy."

11. Pain diagrams from January 23, 2003, show that the Claimant diagramed that she injured her left foot on the outside aspect of the foot. Claimant consistently diagramed pain in her left foot on pain diagrams dated March 7, 2003; March 28, 2003; April 8, 2003; July 15, 2003; August 5, 2003; and September 9, 2003. Claimant specifically diagramed pain on the underside of her foot on October 3, 2003 and October 16, 2003. Claimant continued to diagram pain to her left foot into 2004 and in 2007 as well.

12. Claimant diagramed left upper back pain beginning October 16, 2003 and by 2007 her entire left side of her back up through her neck was diagramed as having pain.

13. Claimant saw Dr. Baer for her October 11, 2007 injury. He noted hip pain, mid thoracic pain as well as left shoulder pain that runs down the arm. Dr. Baer documented that the Claimant had chronic pain for five years and that the Claimant stated "she wants me to help her not to work." Dr. Baer felt that the Claimant's prognosis was extremely poor. On November 14, 2007 when Dr. Baer saw the Claimant again she was complaining of left shoulder and arm pain, pain going down the mid back all the way to the low back, neck pain and left foot pain. During this visit Dr. Baer reported "she wants me to help her not to work anymore". She told Dr. Baer "no one has fallen like I have fallen." Dr. Baer noted that the Claimant "again, just kind of wants out of work. She says she cannot do it any longer". In his discharge report of January 2, 2008, Dr. Baer noted that the Claimant related symptoms due to her motor vehicle accident. Dr. Baer related her chronic pains to that incident and noted that distribution of her pain was in the same areas that her pains were after her motor vehicle accident in 2003. He felt it was difficult to believe there was anything new to this injury outside of what she had in the past.

14. Claimant was seen by Dr. Brodie for her October 11, 2007 injury as a Division IME Examiner. Dr. Brodie noted that the Claimant complained of increased left foot pain and left lower extremity pain after falling on the bleachers in May of 2008. Dr. Brodie also noted that the symptomology documented by various providers in conjunction with Social Security Benefits, suggested that a potential for secondary gain psychological factors were affecting the case. Dr. Brodie apportioned the Claimant's problems to the motor 2003 vehicle accident as well.

15. Claimant was seen by Dr. Joel Boulder for the October 11, 2007 injury. The Claimant told Dr. Boulder that with respect to the February 2005 injury, she treated at Concentra but never got better. Dr. Boulder noted that the Claimant injured her left foot in the 2003 motor vehicle accident.

16. The Claimant saw Dr. Peterson with respect to her October 11, 2007 injury. Dr. Peterson testified at a deposition that he cared for Claimant in the past and the pattern in the prior cases and in the case for the May 6, 2008 alleged injury was similar. He testified there was very little physical evidence that would support a claim of ongoing persistent pain. Dr. Peterson testified that the examination of the Claimant's ankle after the May 6th alleged incident revealed no edema, no deformity and no ecchymosis. He noted that range of motion should have been decreased and that palpation was positive for pain everywhere on her foot. Dr. Peterson further testified that the Claimant told him, "It is just too dangerous for me to work". He testified that this was a spontaneous comment by Claimant. Dr. Peterson testified that there was no real medical reason for delayed recovery. Dr. Peterson testified that based upon his care for Claimant and conversations he had with her and his evaluation of her physically, she should have gotten better.

17. Dr. Peterson testified that he agreed with Dr. Roth's final conclusions that the majority of the Claimant symptoms were more consistent with her prior 2003 injury and he testified that he agreed with Dr. Roth that there may have been an event but that there is no injury that requires treatment at this time.

18. Dr. Peterson's medical records reveal that the Claimant "seems to believe that she is simply permanently and completely disabled and that I can help her get disability." Dr. Peterson's reports document that the Claimant also complains she had never recovered after her 2003 car accident.

19. The Claimant was referred to Dr. Quick to assist with claim closure after the May 2008 alleged injury. Dr. Quick agreed with Dr. Baer that the Claimant's complaints were likely chronic and pre-existing. The Claimant was also seen by Dr. Hattem who concurred that the Claimant's chronic pain was most likely due to the Claimant's 2003 motor vehicle accident. Dr. Hattem called the Claimant's treating physician Dr. Sandell and he reported that she had been treated for chronic pain since 2003 and that the motor vehicle accident involved her left foot. Dr. Hattem advised the Claimant to seek further treatment with Dr. Sandell and she complained that her current pain was related to the May 6th injury and would not return to see Dr. Sandell. In response to correspondence,

Dr. Hattem stated that the Claimant was at maximum medical improvement on July 15, 2008 without any permanent impairment.

20. The Claimant was seen by Dr. Henry Roth who testified at hearing. Dr. Roth testified he reviewed voluminous reports in connection with the IME he performed. Dr. Roth testified that medical records he reviewed documenting the 2003 MVA revealed injury to the left foot, and left scapular region. He testified he emphasized Claimant's allegations that the left scapular pain is "new." He testified the pain had been documented in the scapular region for years.

21. Dr. Roth testified that when the Claimant was placed at MMI for the 2003 motor vehicle accident, after three years of treatment there was no change in her condition. He testified that the last record he reviewed concerning Claimant's left foot, included a description of diffuse discomfort including lateral ankle pain.

22. Dr. Roth emphasized Dr. Boulder's October 15, 2007 medical report as it identified what had previously been documented as injury including tenderness over the left side of the scapula, left trapezius, and left latissimus dorsi. He emphasized this location of pain, and emphasized that during the time period immediately preceding the May 6, 2008 claim, there was much treatment and no improvement, similar to the 2003 motor vehicle accident. Dr. Roth testified that the physicians treating the Claimant for prior conditions placed her at MMI, and referred her back to her treating physicians for the motor vehicle accident in 2003 around January 14, 2008. He testified Claimant's condition was really the same in 2008 as it was in 2003, and that it remained the same into May of 2008.

23. Dr. Roth testified that Claimant returned to Dr. Peterson for the May 6, 2008 injury alleging a bruise on her scapula. This bruise was not present two weeks later on May 15, 2008 when Claimant saw Dr. Brodie for a Division IME, but the bruise reappeared according to the report of Dr. Peterson dated May 19, 2008.

24. Dr. Roth testified that based upon review of the medical records and examination, the Claimant has been complaining of back, hip, shoulder, scapular, abdominal, cervical, low back, left foot, and bilateral upper and lower extremity injuries since 2003. In comparing pain diagrams, Dr. Roth testified that the pain diagram drawn in November 2007 and the one drawn at his office in September 2008 are substantially the same, both noting upper scapular pain on the left, and left foot pain.

25. Dr. Roth testified that Claimant says she hurts everywhere, complaining that every bone and joint hurts and that this is not a medically treatable condition traceable to the May 6, 2008 incident. He testified there are no objective physical findings after the May 6, 2008 event. He testified Dr. Peterson's entry of May 6, 2008 showed no physical findings. There was no deformity, no edema, no ecchymosis, no redness and no warmth. He testified that when Dr. Brodie evaluated her ankle May 15, 2008 there was no mention of findings concerning the ankle in his report. When Dr. Roth evaluated her on September 19, 2008 he found a normal ankle exam.

26. Dr. Roth testified that there was no treatment that would improve any condition relating to the May 6, 2008 incident. He testified there is no tissue pathology to correct. He testified that MRIs of the left foot show a possible strain or a degenerative process but not a new location of injury. He testified that the Claimant reported an incident to him and he gives her the benefit of the doubt that an event occurred, but that it was medically probable that the event resulted in no injury that required treatment. He testified it was reasonable for the Claimant to undergo medical evaluation. However, Dr. Roth testified it was medically probable that any treatment rendered for the May 6, 2008 claim was for pre-existing injuries.

CONCLUSIONS OF LAW

1. An 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. (2006). 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 than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1977).

2. The Workers' Compensation Act creates a distinction between the terms accident and injury. The term accident refers to an unexpected, unusual or undersigned occurrence. C.R.S. §8-40-201(1). In contrast, an injury refers to the physical trauma caused by the accident. In other words, an accident is the cause and an injury is the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).

3. 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. *H&H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund v. State Compensation Insurance Authority*; 768 P.2d 751 (Colo. App. 1988).

4. The Claimant cannot carry her burden of proof in this claim. The medical evidence establishes that Claimant was treating for injuries to her left foot and left scapular region since 2003. Dr. Jinkins treated the Claimant for her 2003 motor vehicle accident and diagnosed the Claimant with a left foot contusion with possible tarsal tunnel syndrome. She complained to Dr. Jinkins of numbness in her left foot which involved all five digits. The Claimant reported to Dr. Sandell that she had weakness in her left lower extremity and described twisting her left ankle while she was merely standing. She had mild tenderness over the lateral aspect of her left foot. In addition, Dr. Sandell noted treatment to the Claimant's left foot including diagnostic injections of the sesamoids in the left foot. Dr. Sandell also noted that the Claimant related left foot pain along the medial aspect of the foot and the medial aspect of the great toe.

5. The medical documentation in the claim supports that any treatment for a May 6, 2008 event was not due to new injury, but was for pre-existing injuries. All doctors agree that the Claimant did not improve with treatment. All treating doctors tried to redi-

rect the Claimant back for treatment of her 2003 motor vehicle accident. No doctor has documented objective medical findings of left foot, or ankle injury on exam. There is inconsistent and unclear documentation concerning a bruise on Claimant's left scapular region, but the overwhelming evidence supports a pre-existing origin of this pain.

6. Claimant is clear that it is too difficult for her to work, that she wants to be disabled and that she has asked her doctors to help her be disabled. All doctors indicate there are secondary gain issues, and Dr. Peterson specifically notes there is no motivation for Claimant to improve. Dr. Brodie the DIME doctor for the October 2007 claim stated that the Claimant's pre-existing injuries were not caused by the October 2007 incident, but were due to the motor vehicle accident in 2003, and noted that the Claimant had secondary gain issues.

7. The ALJ finds the Claimant not to be credible.

8. As a result, Claimant has failed to establish she sustained an injury requiring treatment as a result of the May 6, 2008 event and as a result her claim is denied and dismissed.

ORDER

It is therefore ordered that:

Claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

DATE: December 31, 2008
/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-757-041

ISSUES

The issues to be determined by this decision are:

1) Compensability;
2) Medical Benefits;
3) Average Weekly Wage;
4) Temporary Total and Temporary Partial Disability Benefits;
5) Change of Physician; and
6) Penalties for Failure to Timely Report Injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as a table worker on October 16, 2007. Claimant was assigned to the Fulfillment Department. Claimant's normal job duties included inserting pamphlets into magazines. Claimant worked ten to twelve hour shifts.

2. SR, Employer's Environmental Health and Safety Manager, testified that the Fulfillment Department is Employer's light duty department. If an employee is placed on light duty, whether due to a work related injury or not, they are placed in this department. Claimant worked full time in the Fulfillment Department.

3. Claimant admitted and SR confirmed that Claimant's position did not require any forceful grasping. Claimant admitted there were no handles or triggers that she had to forcefully grasp. She also admitted that she did not have to do any heavy lifting. SR testified that there were other employees assigned to the tasks involving heavy lifting. Claimant's usual job duties did not include working on the polybagging machine.

4. Claimant claimed that she would put 30,000 inserts into magazines in a twelve hour shift. SR testified that, at most, a person in Claimant's position would put in only a couple hundred inserts per shift.

5. SR testified that when Claimant was first hired she requested wrist guards from him indicating that she had sore hands and wrists before working for Employer. She also informed him that before working for Employer she worked as a dental technician. Claimant admitted in her testimony that part of her job duties included cleaning, polishing and bleaching teeth which require the use of hand held tools. She maintained this position for over fourteen years.

6. Claimant testified that on January 19, 2008, she had to work on the polybagging machine and it was broken. Claimant testified that this event occurred on a Sunday. However, according to Claimant's timecard, Claimant worked on the polybagging machine on January 18 and 19, 2008, which was a Friday and Saturday. Claimant claims that on a Sunday she came into work at 7:00 a.m. in the morning and spent several hours discussing the best process for manually polybagging the magazines. Claimant admitted that no actual work was done in the three hours she spent at work that morning. Claimant claimed that she came back to work at 10:00 p.m. that night and worked until 5:00 a.m. However, Claimant's timecard indicates that Claimant returned to work at 4:57 p.m. on the day she worked as a polybag helper. Claimant also claimed she worked thirteen hours that shift on the polybagging machine. However, Claimant's timecard shows she worked on the polybagging machine from 4:57 p.m. until 2:57 a.m. with a fifty minute break during that time period. Between 2:57 a.m. and 3:58 a.m., Claimant took a one-hour break and then finished the last hour on her shift doing her normal job duties of hand collating. Overall, Claimant only spent nine hours working with the polybagging machine.

7. Claimant testified that while she was working on the polybagging machine, she would have to move her arms in a circular motion with her thumbs pointing outwards. The movement, however, did not involve any sort of forceful gripping with her hands.

8. Claimant testified that while working on the polybagging machine she hand-bagged at least 4200 magazines. She further testified that the hand-bagging method was not even one-third as fast as the normal machine would work when not broken. SR testified with certainty that the most a polybagging machine could bag in one shift when working at full capacity was 5000 magazines. It is unlikely that Claimant hand-bagged 4200 magazines during the nine hours she worked, as the hand-bagging process was not even one-third as fast as the machine normally worked.

9. Claimant initially testified that only she and one other employee worked on the polybagging machine on the day of her alleged injury. Claimant later testified that there were at least nine employees working together on the polybagging machine that day.

10. Claimant claims that her hands began to hurt after working on the polybagging machine. She testified that she informed a supervisor. SR testified that all supervisors know and were specifically trained to immediately inform him of any reported injuries on the job. The supervisor never reported the injury to SR. SR also testified that injury reporting procedures were covered in Claimant's orientation when she was first hired and Claimant was informed that in the event she suffered an injury, she was to report it to her supervisor or SR. SR testified that the required injury reporting notices were posted in locations in which the Claimant would have had an opportunity to see them on a regular basis. SR testified that Claimant did not report the injury to him until April 11, 2008. SR indicated that this was the first time he had heard of Claimant's alleged injury. He also testified that the reason the First Report of Injury notes that the supervisor was informed of the injury is because he fills out the incident reports according to what the injured workers tell him and before any investigation is performed.

11. Claimant testified that she could not report her injury to SR because he worked the day shift while she worked the night shift. SR testified that all employees were informed to contact him at any time of the day if they were injured. He testified that he receives calls in the middle of the night when employees are injured on a night shift. Claimant testified that she was told during orientation to report any injuries to SR.

12. SR testified that when Claimant finally reported the alleged injury to him, Claimant did not know when the injury occurred. SR asked Claimant to sit down with a calendar and determine exactly which day the injury occurred.

13. Claimant testified that she did not report her injury to SR until April because she was waiting for her insurance to go into effect. When she inquired into the status of her insurance she was told to talk to SR about her medical complaints.

14. After Claimant reported her injury to SR on April 11, 2008, she was sent to Employer's designated provider, Clarence Henke, M.D. Dr. Henke noted that Claimant complained of a gradual onset of right and left thumb pain that developed over the past several months. He noted that: "No direct injury to her fingers or hands are reported." Claimant testified that Dr. Henke only spent five minutes with her, only looked at her

right hand, and ignored her thumbs altogether. Dr. Henke's report indicates that he examined both her hands including both her thumbs. The report noted that Claimant had "Right thumb MC-P joint swelling and tenderness present to palpation. Left thumb MC-P joint tenderness present to palpation." Dr. Henke took range of motion measurements and sent Claimant for x-rays of both thumbs. Dr. Henke, who is also a board certified radiologist, noted that according to Claimant's x-rays, Claimant had rheumatoid arthritis in the MC-P joints in both thumbs. In Dr. Henke's opinion, Claimant's pain was caused by her bilateral thumb rheumatoid arthritis condition. He stated that Claimant's condition was not caused by her work-related duties and should be managed by her private care physician.

15. Claimant was seen by Susan Thielen, PA-C, at Cherry Creek Family Practice, after Dr. Henke released Claimant to see her personal care physician. On May 6, 2008, Claimant reported to PA Thielen that she had to place 50,000 magazines into bags manually with three co-workers over a twelve-hour period. She claimed she noticed pain in her hands following that incident. Claimant reported at this appointment that she had pain in her right wrist and elbow and had popping of the fourth digit on the left hand. PA Thielen referred Claimant to a hand surgeon for left trigger finger as well as for an EMG of her right wrist. No opinion was given at that time as to whether Claimant's condition was related to her employment.

16. Claimant saw Thomas Mordick, M.D., on May 8, 2008. Dr. Mordick noted that Claimant reported having triggering of both thumbs since January 2008. He also noted that she was having triggering of the left ring finger as well. Dr. Mordick noted there were prominent trigger nodules on both thumbs and the left ring finger. She also had a trigger nodule on the right ring finger that was asymptomatic. Dr. Mordick gave no opinion on the work-relatedness of Claimant's condition. On May 12, 2008, Claimant had a trigger release injection performed by Dr. Mordick.

17. Claimant underwent an EMG by Patricia Soffer, M.D., on May 14, 2008. Dr. Soffer's report indicated that Claimant reported the date of onset of her symptoms as January 2008. Claimant stated to Dr. Soffer that she worked a fourteen hour shift manually putting books into plastic bags and was unable to bend her thumbs by the end of the shift. She also complained of numbness and paresthesias of the right third digit and elbow. Dr. Soffer indicated that Claimant's EMG test showed that Claimant had moderate right carpal tunnel syndrome. No opinion was given concerning the work-relatedness of the condition.

18. PA Thielen again saw Claimant on May 22, 2008. PA Thielen noted that Claimant had been diagnosed with carpal tunnel and trigger finger. PA Thielen indicated that "this appears to be work related" and that Claimant should see a worker's compensation physician. She also noted that Claimant had been seen by a workers' compensation physician who had already released her.

19. Claimant returned to see Dr. Mordick on May 27, 2008. Dr. Mordick noted that Claimant had moderate carpal tunnel syndrome on the right. He noted that Claimant

wished to proceed with surgical intervention for both her carpal tunnel and her trigger finger on the right thumb. No opinion was given as to the work-relatedness of Claimant's conditions.

20. On May 28, 2008, Claimant went to see Dr. Henke for a repeat visit. Dr. Henke was unavailable and Brian Beatty, D.O, saw Claimant. Dr. Beatty noted that Claimant had been sent to see Dr. Mordick where she was determined to have carpal tunnel syndrome involving her right hand and trigger fingers involving the left hand that was felt to be work-related. That statement by Dr. Beatty is incorrect. Dr. Mordick did not opine on the work-relatedness of Claimant's conditions. Dr. Beatty noted that Claimant's main complaints were pain at the IP joints in the thumbs. Dr. Beatty noted on examination that Claimant had tenderness to palpation over the palmer surface of the ring fingers at the MP joints with some mild triggering. He also noted tenderness over the IP joints of the thumbs bilaterally. He diagnosed Claimant with bilateral ring trigger fingers and bilateral thumb sprain. Dr. Beatty felt that Claimant's trigger fingers involving the ring fingers and the pain in the thumbs bilaterally were work-related. He did not believe the carpal tunnel was work-related. Dr. Beatty noted that Claimant's trigger fingers bilaterally were consistent with repetitive work activities of grasping. However, Dr. Beatty's report fails to note Claimant's alleged mechanism of injury or describe her work activities.

21. Claimant testified that, prior to her surgery, Employer did not accommodate her restrictions. SR testified that Claimant was incorrect and that Employer did, in fact, accommodate her restrictions as it is the company's practice to accommodate all employee's restrictions whether they are due to a work-related injury or not. He testified that since Claimant was already working in a light duty position, they placed her in an ultra light duty position during which time all she had to do was push a button on a computer to print labels.

22. On August 27, 2008, Claimant underwent the right carpal tunnel release and right trigger thumb release performed by Dr. Mordick.

23. Claimant testified that up until the day of her surgery, she did not lose any time from work except for one day. She testified that she was off work due to her surgery from August 27, 2008, through September 10, 2008, when she returned to work at full duty and full wages.

24. On October 6, 2008, Dr. Mordick released Claimant to full duty.

25. John Burris, M.D., evaluated claimant on June 23, 2008. Claimant reported to Dr. Burris that her job involved placing books into plastic bags on an assembly line. Claimant indicated that on an average day she would insert around four thousand articles into the plastic bags. Claimant reported that one of the machines broke on January 19, 2008 and she had to work a thirteen-hour shift. She claimed that after working this shift she developed pain in both of her thumbs. On the day of the visit, Claimant did not report having any pain. She did report an inability to bend her left thumb. Dr. Burris noted that Claimant had been taking glucosamine for "sore joints" for over a year. On

examination, Dr. Burris noted that Claimant displayed prominence of the metacarpal phalangeal (MP) joints over both thumbs along with mild tenderness in those areas. He also noted that she had Heberden's nodes at the base of the distal phalanx of the dorsal aspect on all digits. Dr. Burris explained in his testimony that Heberden's nodes are outgrowths of bone at the joints caused by arthritis. He indicated that these nodes take years to develop and are not consistent with cumulative trauma. Dr. Burris indicated in his report that Claimant had signs of pre-existing arthritis. He noted that provocative testing as well as the deformities of her hand were consistent with that diagnosis. Based on Claimant's history and Dr. Burris' review of her records, he could not see a clear mechanism of injury from Claimant's described work events. He agreed with Dr. Henke that Claimant's pre-existing issues could explain all her present complaints.

26. Dr. Burris noted that Dr. Henke's history of Claimant's injury indicated that there was a gradual onset of right and left thumb pain when packing books into bags that developed over several months. No specific event or injury was reported to Dr. Henke.

27. Dr. Burris indicated that he did not see a clear mechanism from what Claimant described to him that would explain Claimant's current complaints. He noted that Claimant's testimony at hearing did not change his opinion.

28. Dr. Burris indicated that most cases of trigger finger are idiopathic. However, he stated that trigger finger is associated with arthritic conditions. He said there is evidence that suggests it is related to forceful grasping maneuvers that he described as forceful holding on to tools. He opined that Claimant's job duties did not involve any forceful gripping. In his opinion, Claimant's trigger finger condition was related to her pre-existing arthritis.

29. Dr. Burris testified that arthritis in one joint, like the MP joint, can cause problems in other joints. He also testified that, even though it can cause pain other joints, the joints with the arthritis may not be painful. Arthritis in one joint can cause trigger finger in another joint.

30. Dr. Burris opined that Claimant's carpal tunnel syndrome was not work-related. Claimant's job duties were not such that it could cause Claimant to develop carpal tunnel syndrome. In Dr. Burris' opinion, it was not more likely than not that Claimant suffered an aggravation of her pre-existing arthritis at work.

31. Claimant claimed that she spent only five minutes with Dr. Burris. She testified that Dr. Burris asked her to hold her hands up and that was the extent of the appointment and no other conversation occurred. Dr. Burris' testimony and report indicate otherwise. Dr. Burris testified that he normally spends about one-half hour with patients during an examination and that he likely spent at least one-half hour with the Claimant.

32. Claimant testified that no other doctor mentioned anything to her about arthritis in her hands before Dr. Henke diagnosed her with it on April 11, 2008. However, Claimant

also testified that she did not go see a physician for some time prior to being seen by Dr. Henke for any reason whatsoever.

33. SR testified that just a few weeks before the hearing, Claimant came to him requesting to be laid off due to the pain in her hands. She indicated that she lived with her daughter and wanted to stay home with her grandchildren. Claimant was asked to attend a meeting concerning her request at which time she indicated she wanted to see her surgeon one more time first. The next day Claimant went to see Dr. Mordick and she was again released to full duty. Claimant then informed Employer that she felt fine and did not want to be laid off anymore.

CONCLUSIONS OF LAW

1. "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." 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); *People v M.A.,*104 P.3d 273, 275 (Colo.App. 2004).

2. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.*, 919 P.2d 207, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO, April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO, April 22, 2003). "In the course of" employment refers to the time, place, and circumstances of the injury. *Id*. There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n*, 165 Colo. 106, 108-09, 437 P.2d 542 (1968).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. Section 8-41-301 (1)(c), C.R.S.*; Faulkner v. Indus. Claim Appeals Off.*, 12 P.3d 844, 846 (Colo.App. 2000). The question of causation is one of fact for the determination by the ALJ. *Faulkner supra,* at 846.

4. An increase in pain or other symptoms associated with a prior injury does not compel a finding that a claimant sustained a compensable aggravation or new injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965, 968 (Colo.App. 1985); *Martinez v. Monfort, Inc.*, W.C. No. 4-284-273 (ICAO, August 6, 1997); *Witt v. Keil*, W.C. No. 4-225-334 (ICAO, April 7, 1998); *Parra v. Ideal Concrete*, W.C. Nos. 3-963-659 and 4-179-455

(ICAO, April 8, 1998). The mere fact that symptoms appear during an employment event does not require a conclusion that the employment was the cause of the symptoms, or that the employment aggravated or accelerated a preexisting condition. Instead, the appearance of symptoms may be the logical and recurrent consequence of a preexisting condition *Jiron v. Express Personnel Services*, W.C. No. 4-456-131 (ICAO, February 25, 2003); *F.R. Orr Construction v. Rinta*, 717 P.2d 965, 968 (Colo.App. 1985).

5. In deciding whether a claimant has met her 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. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo.App. 2002). When considering 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). The decision need not address every item contained in the record. Incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

6. An occupational disease is "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." Section 8-40-201(14), C.R.S. (2008).

7. An occupational disease is present if "employment conditions act upon an employee's pre-existing weakness or hypersensitivity so as to produce a disabling condition which would not have existed absent the employment conditions." *Masdin v. Gardner-Denver-Cooper Indus.*, 689 P.2d 714, 717 (Colo.App. 1984). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or aggravate – to some degree – the disability for which compensation is sought. *Anderson v. Brinkhoff*, 839 P.2d 819, 824 (Colo. 1993). Where the disease for which a claimant is seeking compensation is produced solely by some extrinsic or independent cause, it is not compensable. *Id.* at 824. Further, where an occupational exposure is not a "necessary precondition" to the development of the disease, a claimant sustains an occupational disease only to the extent that the conditions of the employment contributed to the disability. *Id.* at 824; *Masdin v. Gardner-Denver-Cooper Indus.*, 689 P.2d at 717. The purpose of this rule "is to ensure that the disease results from the claimant's occupational exposure to hazards of the disease and not hazards which the claimant is equally exposed to outside of employment." *Saenz-Rico v. Yellow Freight System, Inc.*, W.C. No. 4-320-928 (January 20, 1998); *see also Stewart v. Dillon Co.*, W.C. No. 4-257-450 (November 20, 1996). Therefore, where there is more than one cause of a claimant's disease, re-

spondents are only liable only for that part of claimant's condition that is related to work. *Anderson v. Brinkhoff,* 839 P.2d 819; *see also Martin v. Montrose Memorial Hospital*, W.C. No. 4-348-316 (ICAO, July 10, 1998): *Saenz-Rico v. Yellow Freight System, Inc.*, W.C. No. 4-320-928 (ICAO, January 20, 1998); *Higgs v. Union Carbide Corp.*, W.C. No. 4-283-187 (ICAO, October 16, 1997).

8. Claimant has failed carry her burden of proving that she suffered either a compensable injury or an occupational disease. The evidence shows that claimant's condition is related to her pre-existing and underlying non-work-related arthritis. Claimant claims she first began to feel pain after she worked one shift on the polybagging machine on January 19, 2008. However, claimant did not report the injury until April 11, 2008, almost three months later. When she reported the injury she was unable to state when she supposedly injured herself. At hearing, she testified that she injured herself on a Sunday. However, the evidence shows that the only day she worked on the polybagging machine was during a shift that started on a Friday night, not Sunday. Further, claimant's history to the first physician who treated her differs from the history she began to give later on in the claim. Claimant initially told Dr. Henke, who saw her the day she reported her injury, that she had a gradual onset of right and left thumb pain that developed over several months. It was only after she was told her condition was not work-related that she began to give a history of the pain starting immediately after she worked one shift on the polybagging machine.

9. Dr. Henke examined claimant immediately after she reported her alleged injury. After his examination and review of x-rays, he determined that she had rheumatoid arthritis and that this was not caused by her work-related duties. Claimant was sent to Dr. Mordick by Claimant's personal care provider, PA Thielen. At no point during his course of treatment did Dr. Mordick opine that claimant's condition was work-related. Dr. Mordick merely diagnosed her with trigger finger and carpal tunnel syndrome and treated those symptoms. Dr. Beatty later evaluated claimant and opined that while Claimant's carpal tunnel syndrome was not work-related, her trigger finger was work-related. However, Dr. Beatty did not take a history regarding Claimant's job duties. He only indicated that trigger finger was consistent with repetitive work activities of grasping. Dr. Beatty did not take into account the effect Claimant's pre-existing arthritis had on her current condition.

10. Dr. Burris evaluated Claimant and reviewed Claimant's medical records. Dr. Burris, who notably was on the Division's Upper Extremity Cumulative Trauma Task Force, credibly opined that Claimant's condition was related to her pre-existing arthritis and not her work duties. He indicated that Claimant's provocative testing as well as the visible deformities in her hands were consistent with that opinion. He noted that the type of deformities in Claimant's hands take years to develop and were not consistent with cumulative trauma. Dr. Burris explained that the arthritis in the MP joints of Claimant's thumbs and fingers can cause problems in other joints. He opined that Claimant's arthritis in this case did cause her trigger finger. He also indicated that while the arthritic condition itself may not be painful, the problems in the other joints caused by the arthritis, like trigger finger, might be painful.

11. Dr. Burris further opined, and agreed with Dr. Beatty, that Claimant's carpal tunnel syndrome was work-related. Dr. Burris indicated that Claimant's job duties were not the type that would have caused Claimant to develop carpal tunnel syndrome. The only medical provider to opine that Claimant's carpal tunnel syndrome was work-related was Claimant's personal care provider, PA Thielen.

12. When Claimant was first hired, she reported to SR that her hands and wrists were sore before she began working for the employer and requested wrist guards from SR. Prior to working for the employer, Claimant had been employed as a dental technician for over fourteen years. Claimant worked full time in Employer's designated light duty department. At one point after she reported her injury, she was placed on ultra light duty pushing a button on a computer to print labels for the Fulfillment Department. And, even though she was on ultra light duty, Claimant continued to complain of pain in her fingers and wrists. If Claimant's condition had been caused by or aggravated by her work duties, Claimant's condition should have improved during that time frame rather than progress or worsen.

13. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury or occupational disease on January 19, 2008. Claimant has failed to show that her work duties caused or aggravated her current condition. The evidence shows that Claimant's condition was caused by her pre-existing arthritis and not her work activities. The mere fact that Claimant's symptoms appeared during her employment does not require a conclusion that her employment caused the symptoms or aggravated her pre-existing condition. In this case, Claimant's symptoms are the natural consequence of her pre-existing condition.

14. Other issues are not reached because of the determination that Claimant has not established a compensable injury.

ORDER

It is therefore ordered that the claim is denied and dismissed.

DATED: *December 31, 2008*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-755-186

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered an industrial injury during the course and scope of her employment with Employer on March 26, 2008.

2. Whether Claimant has proven 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 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a sales associate and cashier. Employer is a sporting goods store located in Littleton, Colorado.
2. Claimant testified that on March 26, 2008 at approximately 4:45 p.m. she was moving a bat tower with Operations Manager Josh Yelenick through a hallway door in Employer's store. Claimant testified that the bat tower was approximately 10 feet tall and weighed at least 150 pounds.
3. Claimant held the top of the bat tower while Mr. Yelenick tipped it forward toward her. During the course of the process, Mr. Yelenick requested the assistance of another employee, Eugene Robbins, to assist in maneuvering the bat tower through the door. While Mr. Yelenick pushed the bat tower from below and Mr. Robbins pushed it from the side, Claimant held the weight of the tower and guided the top of it through the doorway. However, the wheels on Mr. Yelenick's end of the bat tower struck the threshold of the doorway and caused the tower to "jar." Claimant then lost her grip on the top of the bat tower and it fell toward her. Claimant explained that the bat tower struck her on the right side of the head and pushed the left side of her head into the wall behind her.
4. Claimant stated that after the incident she went to the restroom to compose herself and examine her head for any injuries. Claimant explained that she then left the restroom and attempted to locate Mr. Yelenick to tell him that she had injured her head while attempting to move the bat tower.
5. Claimant was unable to locate Mr. Yelenick. She then recalled asking her supervisor Autumn Kay about Mr. Yelenick's location. However, Claimant did not inform Ms. Kay that she had suffered an injury while moving the bat tower. Claimant then proceeded to the check out area of Employer's store and cashed out two customers. She subsequently left work for the day.
6. Claimant drove from Employer's store in Littleton to her home in Aurora. She could not remember the drive home, but recalled lying down in the front seat of her vehicle when she reached her apartment complex. Claimant then exited her vehicle, went into her apartment, reclined on the sofa and fell asleep for approximately three hours.
7. The sound of a ringing telephone awakened Claimant. The telephone call was from her mother. Claimant testified that she had become dizzy, nauseous, and sensitive to light. She informed her mother that she had suffered a head injury while working.
8. Claimant's mother and stepfather, Fred Winther, drove to her apartment. Her parents discovered her in the bathroom of her apartment complaining of a headache, nausea, blurred vision, and vomiting.

9. Claimant's parents contacted Employer and were informed by Store Manager Jason Davis that Claimant was required to return to Employer to complete workers' compensation paperwork before she could seek medical attention. Because of Claimant's "pale and wobbly" condition Mr. Winther testified that he declined to take Claimant to Employer's store. He instead transported Claimant to the Emergency Room at Parker Adventist Hospital.

10. In contrast to Claimant's testimony, Mr. Yelenick testified that on March 26, 2008 he asked Claimant to help him move a bat tower. Mr. Yelnick stated that he and Claimant moved the bat tower without incident. He specifically noted that there was no violent movement of the bat tower. He also explained that, after the move, Claimant did not provide any indication that she had been struck by the bat tower or injured in any way.

11. Ms. Kay testified that at about 4:50 p.m. on the date of the incident she encountered Claimant in the hallway outside of a manager's office. She asked Claimant what she needed, and Claimant responded that she had a headache. Ms. Kay offered Claimant medical assistance but she declined. Ms. Kay stated that Claimant asked to remain at Employer's store to help customers and then went back to work assisting and cashing out customers. Ms. Kay testified that Claimant did not report an injury involving the bat tower. Moreover, Claimant's behavior appeared normal and she had no indications of an injury or slurred speech.

12. Store Manager Jason Davis testified that at about 4:30 on March 26, 2008, he asked Mr. Yelenick to move the bat tower to a new location. He recalled that at about 5:00 p.m. Claimant approached him and advised him that one of the displays she was working on was not completed. Mr. Davis testified that at no time during his conversation with Claimant did she state that she had been struck in the head by the bat tower. He also explained that during his interactions with Claimant she behaved normally and did not exhibit any symptoms of a recent injury.

13. At the emergency room Claimant reported that she had been hit in the right temple by an object that she was carrying and struck the left side of her head on a wall. Claimant informed the emergency room physician that she experienced blurred vision, dizziness and vomiting. The physician was unable to locate any palpable contusion, swelling, abrasion, or laceration and characterized Claimant's symptoms as "bizarre." Emergency room physician Sally A. Coates, M.D. noted that she "was not convinced that [Claimant] truly has disconjugate gaze" and that Claimant's weakness was strongly "effort related." Dr. Coates also stated that Claimant had a normal head CT scan. Nevertheless, Dr. Coates concluded that Claimant had suffered a concussion.

14. Speech and Language Pathologist Susie Peterson testified that she tested Claimant at the Parker Adventist Hospital. Ms. Peterson noted that Claimant performed poorly on the tests that involved visual acuity, but performed with 100% accuracy on the Long Term Memory Tests. Ms. Peterson concluded that, as a result of the testing, Claimant suffered from moderate to severe defects and visual issues consistent with head trauma.

15. On March 28, 2008 Claimant underwent a brain MRI. The MRI did not reveal any evidence of a a traumatic head injury.

16. After her discharge from Parker Adventist Hospital, Respondents directed Claimant to Union Medical Center. Authorized Treating Physician (ATP) Shauna Wright, DO

examined Claimant. On March 31, 2008 Dr. Wright diagnosed Claimant with the following: 1) post concussion syndrome with headache; 2) left posterior shoulder girdle pain; 3) visual changes; 4) history of anxiety, depressive disorder; 5) history of head contusion with no obvious signs; and 6) complaints of neck pain. Dr. Wright commented that, during her evaluation, Claimant's eyelids would intermittently "start to come down" as they had during Claimant's March 26, 2008 emergency room visit. Dr. Wright placed Claimant on temporary work restrictions. Claimant then became "very upset" and used profanities because she believed she should have been prohibited from working. Dr. Wright subsequently referred Claimant to ophthalmologist Todd L. Maus, M.D.

17. On April 2, 2008 Claimant visited Dr. Maus for an evaluation. Dr. Maus conducted a clinical examination of Claimant and diagnosed her as follows: "closed head injury with blurred vision. As I discussed with [Claimant] and her family, I see no ocular pathology to explain her blurred vision, other than having a closed head injury. With review of the reports of the MRI scan and the CT scan, I do feel that hopefully her vision symptomatology will improve with time."

18. Based on a referral from Dr. Wright, Claimant visited Michael E. Bertocchi, M.D. for an evaluation. In an April 14, 2008 note Dr. Bertocchi commented that Claimant had no "obvious neurologic defects" and questioned whether Claimant was "malingering." He also stated that Claimant did not exhibit any evidence of an acute brain injury or concussion.

19. In April 2008 Employer terminated Claimant from employment. However, she subsequently obtained employment as a manager of a photo studio in a retail store.

20. Claimant explained that her symptoms have steadily improved. She still has frequent headaches, sleeplessness and light sensitivity. However, her nausea, nystagmus and cognitive impairments have subsided.

21. Kevin J. Reilly, Psy.D. testified at the hearing in this matter as an expert in Neuropsychology. Dr. Reilly stated that on June 5, 2008 he administered a significant battery of tests to measure Claimant's cognitive abilities, symptom validity and current mental status. In addressing the overall validity of the testing, Dr. Reilly noted that Claimant's results reflected "significant exaggeration/negative response bias." He commented that Claimant's pattern of performance was consistent with an individual who was attempting to "simulate cognitive deficits" and fell "well below the level of individuals with documented severe brain damage." Dr. Reilly thus determined that the results of the evaluation were not valid and did not constitute an accurate measure of Claimant's "neurocognitive capacities." He concluded that Claimant exhibited symptoms of somataform disorder and symptom magnification. Dr. Reilly also testified that he found no credible objective evidence to support Claimant's allegation that she suffered a traumatic brain injury. He persuasively noted that Claimant's specific recollection of details surrounding the March 26, 2008 incident and events that occurred within a short time of the incident were inconsistent with what would have been expected from an individual who suffered a traumatic brain injury. Dr. Reilly also commented that he disagreed with the opinions and conclusions of Ms. Peterson. He testified that the tests administered by Ms. Peterson are not designed to constitute a diagnostic assessment,

but are instead used to determine a proper treatment plan after a diagnosis has been made.

22. Stephen A. Moe, M.D. testified at the hearing in this matter as an expert in General and Forensic Psychiatry. Dr. Moe evaluated Claimant on June 18, 2008. His evaluation involved a detailed discussion concerning Claimant's history, recollection of the March 26, 2008 incident, symptoms and mental status. Dr. Moe concluded that it was "highly improbable" that Claimant suffered a mild traumatic brain injury or concussion on March 26, 2008 and it was "still more unlikely" that Claimant's current symptoms were related to the industrial incident. He explained that Claimant has "exhibited medically unexplained symptoms" that were the product of both "somatization and intentional exaggeration" and that "malingering" was "an important cause of her symptoms." Dr. Moe stated that the effects of a concussion are "most pronounced" immediately after the incident. Nevertheless, Claimant was able to recount the events that occurred at Employer's store immediately after the incident and her symptoms after leaving the store reflected "very severe post-concussion symptoms." Dr. Moe concluded that "anger and the seeking of vengeance" were important factors in Claimant's reports of symptoms.

23. Claimant has failed to demonstrate that it is more probably true than not that she suffered a traumatic brain injury or concussion during the course and scope of her employment with Employer on March 26, 2008. Claimant explained that while moving a bat tower with coworkers the tower struck her on the right side of the head and pushed the left side of her head into the wall behind her. She stated that she completed her tasks for Employer, drove to her apartment and subsequently developed dizziness, nauseous, and light sensitivity. In contrast, the testimony of Claimant's coworkers reflects that Claimant did not report an injury prior to leaving Employer's store, interacted normally and had no indications of any injury. Furthermore, emergency room physicians were unable to locate any palpable contusion, swelling, abrasion, or laceration on Claimant's head and characterized her symptoms as "bizarre." Finally, a CT scan and an MRI of Claimant's head did not reveal any evidence of a traumatic brain injury.

24. The persuasive expert testimony of doctors Reilly and Moe also reveals that it is unlikely that Claimant suffered a head injury as a result of the March 26, 2008 incident. Dr. Reilly noted that Claimant's testing results reflected "significant exaggeration/negative response bias." He commented that Claimant's pattern of performance was consistent with an individual who was attempting to "simulate cognitive deficits" and fell "well below the level of individuals with documented severe brain damage." He concluded that Claimant exhibited symptoms of somataform disorder and symptom magnification. Dr. Reilly also testified that he found no credible objective evidence to support Claimant's allegation that she suffered a traumatic brain injury. He also testified that the tests administered by Ms. Peterson are not designed to constitute a diagnostic assessment, but are instead used to determine a proper treatment plan after a diagnosis has been made. Dr. Moe's testimony supports Dr. Reilly's conclusions. Dr. Moe opined that it was "highly improbable" that Claimant suffered a mild traumatic brain injury or concussion on March 26, 2008 and it was "still more unlikely" that Claimant's current symptoms were related to the industrial incident. He explained that Claim-

ant has “exhibited medically unexplained symptoms” that were the product of both “somatization and intentional exaggeration” and that “malingering” was “an important cause of her symptoms.” Dr. Moe concluded that “anger and the seeking of vengeance” were important factors in Claimant’s reports of symptoms. Finally, it is notable that both doctors Reilly and Moe opined that Claimant’s specific recollection of details surrounding the March 26, 2008 incident and events that occurred within a short time of the incident were inconsistent with what would have been expected from an individual who had suffered a traumatic brain injury.

CONCLUSIONS OF LAW

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

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

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (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. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a traumatic brain injury or concussion during the course and scope of her employment with Employer on March 26, 2008. Claimant explained that while moving a bat tower with coworkers the tower struck her on the right side of the head and pushed the left side of her head into the wall behind her. She stated that she completed her tasks for Employer, drove to her apartment and subsequently developed dizziness, nauseous, and light sensitivity. In contrast, the testimony of Claimant's co-workers reflects that Claimant did not report an injury prior to leaving Employer's store, interacted normally and had no indications of any injury. Furthermore, emergency room physicians were unable to locate any palpable contusion, swelling, abrasion, or laceration on Claimant's head and characterized her symptoms as "bizarre." Finally, a CT scan and an MRI of Claimant's head did not reveal any evidence of a traumatic brain injury.

6. As found, the persuasive expert testimony of doctors Reilly and Moe also reveals that it is unlikely that Claimant suffered a head injury as a result of the March 26, 2008 incident. Dr. Reilly noted that Claimant's testing results reflected "significant exaggeration/negative response bias." He commented that Claimant's pattern of performance was consistent with an individual who was attempting to "simulate cognitive deficits" and fell "well below the level of individuals with documented severe brain damage." He concluded that Claimant exhibited symptoms of somataform disorder and symptom magnification. Dr. Reilly also testified that he found no credible objective evidence to support Claimant's allegation that she suffered a traumatic brain injury. He also testified that the tests administered by Ms. Peterson are not designed to constitute a diagnostic assessment, but are instead used to determine a proper treatment plan after a diagnosis has been made. Dr. Moe's testimony supports Dr. Reilly's conclusions. Dr. Moe opined that it was "highly improbable" that Claimant suffered a mild traumatic brain injury or concussion on March 26, 2008 and it was "still more unlikely" that Claimant's current symptoms were related to the industrial incident. He explained that Claimant has "exhibited medically unexplained symptoms" that were the product of both "somatization and intentional exaggeration" and that "malingering" was "an important cause of her symptoms." Dr. Moe concluded that "anger and the seeking of vengeance" were important factors in Claimant's reports of symptoms. Finally, it is notable that both doctors Reilly and Moe opined that Claimant's specific recollection of details surrounding the March 26, 2008 incident and events that occurred within a short time of the incident were inconsistent with what would have been expected from an individual who had suffered a traumatic brain injury.

ORDER

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

Claimant's request for workers' compensation benefits is denied and dismissed.

DATED: January 2, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-730-118

ISSUES

¬ Did the claimant prove by a preponderance of the evidence that on July 31, 2005, she sustained injury arising out of and in the course of her employment?
¬ If the claimant proved a compensable injury, did she prove by a preponderance of the evidence that she is entitled to medical benefits and permanent partial disability benefits as compensation for the injury?
¬ Is the claim for benefits barred by the statute of limitations?
¬ If the claim is compensable are the respondents entitled to imposition of a penalty for late reporting of the injury?
¬ Did the respondents prove by a preponderance of the evidence that the claimant is subject to the imposition of a penalty under § 8-43-304(1), C.R.S., based on the claimant's violation of an order of PALJ Eley?

FINDINGS OF FACT

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

1. The claimant alleges that she sustained compensable injuries on July 31, 2005, while performing services arising out of and in the course of her employment as a dietary supervisor at the employer's residential care facility. The claimant first commenced work for this employer in 2000. The claimant usually worked from 9:00 a.m. to approximately 6:30 p.m.
2. On July 25, 2004, the claimant suffered an injury when she slipped and fell while working for the employer. The claimant injured both knees, left arm, neck and head. Robert Campbell, PA-C, initially treated the claimant on July 27, 2004. PA Campbell diagnosed claimant with a closed head injury, cervical strain, contusion to bilateral knees, and contusions to the left arm and toes. After examination, he released claimant to modified duty. Restrictions included no lifting, pushing, pulling and carrying in excess of 5 pounds, and no kneeling, crawling and squatting.
3. On July 30, 2004, the claimant began receiving treatment from Dr. Caroline Gellrick, M.D.
4. On November 17, 2004, Dr. Gellrick examined the claimant. At that time, the claimant complained of pain in her leg, shoulder, head and neck. Dr. Gellrick noted that claimant's cervical spine MRI showed degenerative disk disease with protrusion. She also noted that claimant had a PCL tear in the knee and was to see Dr. Lindberg for evaluation of the knee. Dr. Lindberg did not feel that claimant had instability in her knee and did not want to do surgery to repair the PCL. Dr. Aylor had also seen the claimant

for an injection in the cervical spine. Claimant also attended physical therapy. Dr. Gellrick noted that claimant complained of low back pain, shoulder pain and arm pain as well as headaches and dizziness. It should also be noted that Dr. Gellrick described in great detail the accident in which claimant was injured. Dr. Gellrick diagnosed claimant with a "multifactorial pain problem" that included a right shoulder strain, contusion, and bursitis; cervical strain; closed head injury with resultant dizziness; lumbar contusion with lumbosacral strain and spasm with SI dysfunction; and right knee PCL tear. Dr. Gellrick continued the claimant on modified duty

5. Dr. Gellrick again examined the claimant on January 5, 2005. The claimant reported that she had persistent neck pain, dizziness with a constant headache, shoulder pain, numbness, and knee pain. The claimant did not feel that she had improved. Dr. Gellrick planned to await the result of a consultation with a physiatrist, Dr. Douglas Hemler, M.D. Dr. Gellrick continued to restrict the claimant to modified duty.

6. On February 23, 2005, Dr. Gellrick noted that claimant still had complaints of headaches, neck pain, dizziness, knee pain and low back pain. Dr. Gellrick also noted the claimant had temporomandibular joint dysfunction (TMJ) from her fall and that she was being followed by a dentist, Dr. Stranahan, for this problem. She further noted that claimant still had vertigo causing her to feel like the room was spinning. Dr. Gellrick referred the claimant for an ENT evaluation for her vestibular dysfunction to determine if otolith repositioning treatment and vestibular rehabilitation was needed.

7. On June 15, 2005, claimant reported to Dr. Gellrick that she still had right leg pain with swelling, right shoulder pain with numbness and tingling, neck pain, headaches, dizziness and TMJ pain.

8. Ms. Nancy Wilt testified for the respondents. Ms. Wilt was the Food Services Director for the employer in 2005, but she no longer works for the employer.

9. Ms. Janice Baker testified for the respondents. Ms. Baker is the Assistant Food Services Director for the employer and was employed in that position in July 2005.

10. On June 16, 2005, claimant attended a meeting with Ms. Wilt and Ms. Baker regarding the employer's Fresh Eyes review. Fresh Eyes was a program designed to improve the services delivered by the employer to its clients. Through this review it was noted that several areas under the claimant's supervision needed improvement. During the meeting, claimant and the other attendees of the meeting were assigned tasks to complete in order to improve service. Each person, including the claimant, set their own target date for completion of the tasks. The claimant indicated that her tasks would be completed no later than June 24, 2005. Claimant was also informed at this meeting that the employer had noticed problems with her over-ordering food supplies for the kitchen. A letter memorializing the June 16, 2005, meeting was written by Ms. Wilt and signed by claimant.

11. The claimant believed the employer's Fresh Eyes program was placing unreasonable expectations upon her and that the employer was requiring her to work outside the restrictions imposed by Dr. Gellrick. The claimant testified that she had given Ms. Wilt a letter about her inability to meet the requirements under the Fresh Eyes review. Ms. Wilt credibly testified that she never received such a letter from claimant.

12. On June 30, 2005, the claimant received a verbal counseling regarding her failure to complete her requirements under the Fresh Eyes review. The majority of claimant's assigned tasks had not been completed at that time. The claimant was also in-

formed that the employer found that she was continuing to over-order supplies for the kitchen. Based on her failure to make accurate food orders, the claimant's responsibility for ordering was given to Ms. Baker.

13. On July 15, 2005, Ms. Wilt sent a memo to the claimant regarding the claimant's lifting and physical restrictions. The memo advised the claimant that she was not to lift any item that exceeded her lifting restrictions. The memo reiterated the fact that claimant was told on June 16, 2005, during the Fresh Eyes meeting, that she was not to lift beyond her lifting restrictions. It had been brought to Ms. Wilt's attention, however, that claimant had been working outside her restrictions without requesting assistance as directed. On July 15 the claimant was again directed to not lift anything in excess of her restrictions. The claimant was specifically told that if she lacked the staff to handle any lifting that she was to wait until additional staff could be provided to her. Ms. Wilt and Ms. Baker both credibly testified that they never required or forced claimant to work outside her restrictions.

14. The claimant returned to see Dr. Gellrick on July 27, 2005, a mere four days prior to the alleged industrial injury of July 31, 2005. The claimant continued to complain of knee pain, dizziness, and right arm pain and weakness. The claimant stated that she still had pain that reached a level of 8/10 on a 10-point scale. Dr. Gellrick noted that claimant had vertigo symptoms with dizziness, and that Dr. Barone had examined her for this condition. Dr. Barone diagnosed the claimant with sixth nerve palsy, which was pre-existing, plus the vertigo, which was a found to be related to the industrial head contusion. Dr. Barone requested a vestibular MRI and possible canalith repositioning in the future. Dr. Gellrick also noted that claimant continued to have problems with her neck with weakness in the right upper extremity with C6 radiculopathy. Dr. Gellrick recorded that Dr. Hemler had recommended a referral to Dr. Vraney for a surgical consultation concerning the cervical problems. Dr. Gellrick continued the claimant on her modified duty.

15. At hearing, the claimant testified that on July 31, 2005, she was doing inventory in a walk-in freezer. The claimant stated that she pulled a box of pork chops weighing 35 to 40 pounds off of a shelf located above her head. The claimant recalled that the box fell, struck the left side of her head and knocked her to the ground. The claimant testified that as a result of this incident she was dizzy, she believed she lost consciousness, that the left side of her face was painful, her neck was painful, and she hit her right knee and right shoulder. The claimant testified on cross-examination that she believed the incident occurred "around dinner time," which was approximately 4:30 p.m. to 7:00 p.m.

16. The claimant testified that immediately after the alleged injury she wrote some notes concerning the events, and that these notes were produced as Respondents' Exhibit P. The claimant stated that soon after the incident she called her husband to come and take her home. The claimant recalled notifying the front desk that she was injured. The claimant stated she did not notify her supervisors, Janice Baker and Nancy Wilt because it was "too late in the evening." However, the claimant recalled leaving voice mail messages for Ms. Baker and Ms. Wilt on their office phones. The claimant also recalled that she tried to phone Ms. Baker at home but failed to reach her. The claimant stated that she did not know Ms. Wilt's home number.

17. At hearing, the claimant called David Graham as a witness. Mr. Graham, a former employee of the employer, testified the claimant called him into work on July 31, 2005, because another employee was absent. Mr. Graham testified that in the evening, between 6:30 p.m. and 7:30 p.m., he was preparing food when he heard a "thump" in the freezer where the claimant was working. He testified that he believes a box hit the claimant and knocked her to the floor. However, Mr. Graham admitted that he did not actually witness the claimant get hit by a box, and he did not know what caused the noise he heard. He stated that he went into the freezer and saw the claimant on the floor. Mr. Graham testified that claimant got up and apparently called her husband on the telephone. Mr. Graham recalled the claimant's husband came to pick her up shortly thereafter.

18. On cross-examination, Mr. Graham admitted that, prior to his testimony, he had met with the claimant on two occasions, and had exchanged three emails with her. These meetings and emails concerned the claim for benefits in this case. Mr. Graham also admitted that he prepared a written statement prior to his testimony and submitted the statement to the claimant for her review. According to Mr. Graham the claimant made changes to the written statement, particularly with regard to dates. Mr. Graham admitted that he was referring to the written statement during his hearing testimony. Mr. Graham also admitted the claimant helped him get into culinary school and that she had written him a letter of recommendation.

19. At hearing the claimant testified that on August 1, 2005, she returned to the employer's facility and completed an incident report, admitted as claimant's Exhibit 17. According to the claimant she put copies of this report on the desks of Ms. Baker and Ms. Wilt, and also under the door of Renee Bebout, the facility director. On this document the time of injury is listed as approximately 4:15 p.m.

20. On August 1, 2005, the claimant reported to Exempla where Dr. Gellrick examined her. The claimant reported to Dr. Gellrick that she had a headache and was dizzy. She complained that her shoulder and neck hurt. The claimant stated that on the previous day she was lifting 35-40 pound boxes when she felt immediate pain. The August 1 note contains no mention that the claimant was struck in the head by a falling box or that she was knocked to the floor.

21. The claimant returned to Dr. Gellrick on August 3, 2005. The claimant reported to that she had a headache and was dizzy. She also continued to complain of right shoulder pain, neck pain, TMJ pain, and an earache. Dr. Gellrick specifically noted in the August 3 note that there was "no new head injury." Because of the dizziness Dr. Gellrick restricted the claimant to performing seated work.

22. On August 10, 2005, the claimant reported to one of her physical therapists that she was "cleaning out closets at work and flared up" her head and neck symptoms. The August 10 note contains no mention that the claimant was struck in the head by a falling box or that she was knocked to the floor.

23. On June 24, 2008, Dr. Gellrick testified by deposition. Dr. Gellrick considered the claimant's medical records from the 2004 injury, the medical records from July and August 2005, as well as the treatment the claimant received after August 2005. Dr. Gellrick credibly opined that on July 31, 2005, there could have been an exacerbation of the claimant's pre-existing cervical symptoms if the claimant lifted boxes in excess of her weight restrictions. However, based on the documentation, Dr. Gellrick credibly tes-

tified the claimant probably did not suffer any new injury on July 31, 2005. Dr. Gellrick credibly opined that there was no significant change in the claimant's symptoms after July 31, 2005, and that she was "comfortable leaving it under the claim we were treating."

24. On January 27, 2006, Dr. Gellrick examined the claimant for the purpose of assigning an impairment rating. Dr. Gellrick indicated that the impairment rating was being done in connection with claimant's July 25, 2004, injury. Dr. Gellrick explicitly detailed the claimant's injury as well as the course of treatment received for that injury. There is no mention in the report of any second injury occurring on July 31, 2005. Dr. Gellrick noted that she had received information indicating that claimant had previous injuries to the neck as well as pre-existing symptoms of vertigo from a prior work injury. She noted that the symptoms compensable to claimant's 2004 claim were: "1) Cervical strain, recurrent, aggravating underlying degenerative disk disease with evidence of right upper extremity symptomatology; 2) Torn proximal cruciate ligament of the right knee; 3) TMJ dysfunction, aggravated due to her fall on the job; 4) Status post right arm contusion with resultant mild, ulnar nerve elbow contusion, trauma; 5) Right shoulder impingement with acromioclavicular joint arthritis." She noted that other symptoms from the past that were aggravated were her vertigo and the left knee upon which she previously had an operation.

25. On February 6, 2006, the claimant returned to Dr. Gellrick to complete her impairment rating. Dr. Gellrick placed the claimant at maximum medical improvement. In terms of maintenance treatment, Dr. Gellrick indicated that claimant needed to finish up the TMJ treatment with Dr. Stranahan. Dr. Gellrick noted that there could be residual dental impairment depending on what Dr. Stranahan found. She indicated that claimant would need a brace for her knee for life and may need a cane as necessary. She also noted that claimant would need continuing medication. Dr. Gellrick again opined that claimant's vertigo was pre-existing and that she would not consider any impairment rating for that condition. Dr. Gellrick assigned claimant a 16% upper extremity impairment rating for her shoulder and elbow conditions. Dr. Gellrick assigned a 31% whole person rating for all the claimant's injuries.

26. On March 31, 2006, the claimant, who was then represented by an attorney, executed documents settling the claim for her July 25, 2004, injury. The claimant agreed to accept $40,000 to settle the claim on a full and final basis. The settlement documents provide that claimant's injuries included: "facial bones, fingers, toes, neck, bilateral knees, bilateral shoulders, bilateral elbows, left ankle, bilateral arms, left eye, left leg, head, left hand, back, myofascial disorder, degenerative spine disease of the neck, degenerative arthritis, left ear, headaches, ulnar nerve, bilateral temporomandibular joints, carpal tunnel and vertigo." These settlement documents provide that by signing the documents the claimant is forever waiving any right to additional benefits in relation to the injuries involved in the claim, including permanent disability benefits and medical benefits. The Director of the Division of Workers' Compensation approved the settlement documents by order dated April 13, 2006.

27. The claimant saw Dr. Gellrick on January 17, 2007. At that time, the claimant reported that her neck was worse and that her arm was going numb. She complained of persistent headaches and dizziness. The claimant also complained of numbness on the left side of her face and a lack of facial expression. Dr. Gellrick noted that claimant "re-

minded" her of an injury where she fell down on the job in July of 2005, and suffered a "re-aggravation" of her cervical strain. In the note of January 17, 2007, Dr. Gellrick stated that this incident was "well documented in the record." However, Dr. Gellrick admitted in her June 2008 deposition testimony that, after reviewing her records, there was no actual documentation of the claimant reporting a fall in 2005. Dr. Gellrick also credibly testified that there was no mention of a fall in July of 2005 in any of the records dated between August 2005 and January 17, 2007. Dr. Gellrick testified that, in retrospect, it was her opinion that in July 2005 the claimant had suffered a mere "temporary flare-up of her cervical spine symptomatology."

28. The claimant did not file a claim for benefits alleging an injury in July 2005 until July 2007.

29. The claimant failed to prove it is more probably true than not that she sustained any new injury on July 31, 2005, or any industrial aggravation of her pre-existing conditions. The claimant's testimony that on July 31, 2005, she was struck by a falling box and knocked to the floor is not credible. The claimant's testimony concerning the time of the alleged injury is significantly contradicted by documents that she herself wrote. Although the claimant testified the injury occurred "close to dinner," in her answers to interrogatories the claimant wrote that the injury occurred at approximately 2:00 p.m. and that she stayed at work until 9:00 p.m. Respondents' Exhibit P, the handwritten notes the claimant allegedly prepared soon after the injury, state that the box of meat fell and struck the claimant at approximately 2:30 p.m., and she continued working for a substantial amount of time thereafter. In the incident report the claimant wrote that the incident happened at about 4:15 p.m.

30. The claimant's testimony concerning her alleged reporting of the incident is also contradicted by persuasive and credible evidence. Although the claimant stated she reported the injury to the "front desk," a "Staff Tracking Note" dated July 31, 2005, at 2:45, states the claimant will not be in "today" because she has a headache and is dizzy. This notation contains no mention of any work-related injury. Although the claimant testified that she put copies of the incident report on the desks of Ms. Wilt and Ms. Baker, both credibly denied that they received any such report. Further, Ms. Baker credibly testified that the claimant's personnel filed did not contain the incident report. Although the claimant stated that she left voice mail messages for Ms. Baker and Ms. Wilt concerning the injury, both credibly denied receiving any voice mail messages.

31. The claimant's testimony that she sustained an injury on July 31, 2005, is further contradicted by credible medical reports and evidence. The contemporaneous medical records from August 1, 3 and 10, 2005, mention a possible elevation in the claimant's symptoms, but do not contain any history that the claimant reported she was hit on the head by a box and knocked to the floor. The ALJ finds that if such an event had actually occurred the claimant would have reported it to Dr. Gellrick in August 2005. However, as Dr. Gellrick credibly testified after reviewing her records, no such report is recorded.

32. The ALJ finds the claimant has a substantial motive to falsify her testimony concerning the alleged injury of July 31, 2005. As demonstrated by the records and credible testimony of Dr. Gellrick, the injuries the claimant allegedly sustained on July 31, 2005, and the symptoms she reported thereafter, are very similar to the injuries and symptoms the claimant experienced from the July 25, 2004, workers' compensation injury. Indeed Dr. Gellrick treated the claimant for some of these symptoms four days

prior to the alleged injury of July 31, 2005. On March 31, 2006, the claimant agreed to settle the claim for the July 2004 injury on a full and final basis, and waived any right to receive further medical and disability benefits. Thus, in order for the claimant to receive any additional treatment and benefits for the symptoms she continues to complain of, she is required to show an industrial injury that occurred after July 25, 2004, and that was not settled. Importantly, the claimant did not file a claim for the alleged injury of July 31, 2005, until 2007, long after the July 2004 claim had been settled. This pattern of circumstances causes the ALJ to discredit the claimant's testimony.

33. The ALJ finds that the testimony of the claimant's corroborating witness, David Graham, is not credible and persuasive. First, Mr. Graham admits he did not see the claimant hit by a box or fall to the ground. He merely claims he heard a noise and went into the cooler where he saw the claimant on the ground. Mr. Graham testified that the incident occurred in the evening, but, as found, his recollection concerning the time of the event is inconsistent with several of the claimant's own written statements about when the accident happened. Further, Mr. Graham communicated with the claimant by email and in person before the hearing, and he prepared a written statement that he submitted to the claimant before the hearing. The claimant made some changes to the written statement, and Mr. Graham referred to this statement during the testimony. Finally, the claimant assisted Mr. Graham in obtaining admission to culinary school, giving Mr. Graham an apparent interest in testifying favorably to the claimant.

34. Finally, the ALJ is persuaded by Dr. Gellrick's credible testimony that, at most, the claimant sustained an exacerbation of her pre-existing symptoms on July 31, 2008, and that this exacerbation did not constitute a new injury. The ALJ finds that if the claimant experienced an exacerbation of her numerous symptoms on July 31, 2005, that elevation in symptoms was most probably a natural and proximate result of her pre-existing conditions and the July 2004 injury, not a new injury.

35. The respondents propounded interrogatories to the claimant, and the answers were originally due no later than February 21, 2008. However, the respondents agreed to give the claimant an extension of time to answer the interrogatories until March 7, 2008.

36. The claimant did not answer the respondents' interrogatories by March 7, 2008, but instead filed a motion requesting a 40-day extension of time to file the answers. On March 18, 2008, PALJ Eley entered an Order denying the request for a 40-day extension of time, finding that the interrogatories were "not particularly complicated," and that 26 days had elapsed since the answers were originally due. PALJ Eley also ordered the claimant to answer interrogatories concerning financial information, including any application for social security benefits, although he limited this to information received "from and after July 1, 2004." PALJ Eley ordered the claimant to answer the interrogatories within seven business days of March 18, 2008, or by March 25, 2008. PALJ Eley's order contained an express warning that if the claimant violated "this or any other order, she could be assessed a penalty of up to $500 per day for every day the violation continued."

37. The claimant did not comply with PALJ Eley's order to provide answers to the respondents' interrogatories until April 22, 2008.

38. At some point in time, the claimant requested PALJ Eley to reconsider his Order of March 18, 2008. The documents submitted by the parties and received into evidence

do not show the reasons for the claimant's request for reconsideration. PALJ Eley denied the claimant's motion for reconsideration on April 18, 2008. The ALJ finds that the claimant has offered no credible or persuasive evidence demonstrating a reasonable factual basis for her delay in complying with PALJ Eley's order and requesting reconsideration, and presented no reasonable explanation of why she might have been entitled to or expected such relief.

39. The ALJ finds the claimant violated PALJ Eley's discovery order for a period of 27 days (March 26, 2008, through April 21, 2008 inclusive). The ALJ finds the claimant's conduct was somewhat reprehensible because, as PALJ Eley noted, the interrogatories were relatively straightforward and did not require complicated answers. On the other hand, PALJ Eley did find it necessary to limit the scope of the respondents' request for financial information. The respondents did not make any compelling case that they were significantly damaged by the claimant's delay in answering the interrogatories. Indeed, as evidenced by this order they successfully defended against the claim for benefits. There was no persuasive evidence offered concerning penalties imposed for similar misconduct. Based on consideration of the pertinent evidence the ALJ concludes the claimant should be required to pay a penalty of $10 per day for 27 days, or a total of $270.

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).

COMPENSABILITY OF ALLEGED INJURY OF JULY 31, 2005

The claimant alleges that she sustained compensable injuries on July 31, 2005, when she was struck by a falling box and knocked to the floor while performing services arising out of and in the course of her employment. The ALJ concludes the claimant failed to prove that she sustained a compensable injury on July 31, 2005.

The claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks compensation were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the alleged injury. *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). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As determined in Findings of Fact 29 through 34, the claimant failed to prove it is more probably true than not that on July 31, 2005, she sustained an injury arising out of and in the course of her employment. The ALJ has found that the claimant's testimony concerning the alleged injury is not credible because it is inconsistent with reports of injury that the claimant herself prepared (Finding of Fact 29), is inconsistent with credible evidence concerning the claimant's reporting of, or failure to report the injury (Finding of Fact 30), is contradicted by the contemporaneous medical reports (Finding of Fact 31), and is probably the product of improper motive (Finding of Fact 32). The ALJ has also found that the testimony of the claimant's corroborating witness is not credible and persuasive because of apparent bias in favor of the claimant. (Finding of Fact 33). Finally, the ALJ is persuaded by the credible testimony of Dr. Gellrick that if the claimant sustained any elevation of her symptoms on July 31, 2005, the increase in symptoms was a logical and recurrent consequence of her prior industrial injury in July 2004 and of her pre-existing conditions, not a new industrial injury. (Finding of Fact 34).

It follows that the claim for benefits in W.C. No. 4-730-118 must be denied and dismissed. In light of these findings and conclusions the ALJ need not address the claimant's entitlement to benefits, the affirmative defense of statute of limitations, or any possible penalty for late reporting of the injury.

PENALTY FOR FAILURE TO OBEY PALJ ELEY'S DISCOVERY ORDER

The respondents seek the imposition of a penalty against the claimant, pursuant to § 8-43-304(1), C.R.S., based on her alleged failure to comply with PALJ Eley's Order of March 18, 2008. The respondents allege the claimant should be penalized for 27 days based on the fact that PALJ Eley required the claimant to answer the interrogatories by March 25, 2008, but no answers were provided by the claimant until April 22, 2008. The ALJ concludes the claimant is subject to penalties for violation of PALJ Eley's order.

Section 8-43-304(1) authorizes the imposition of penalties of not more than $500 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." This provision applies to orders entered by a PALJ. Section 8-43-207.5, C. R. S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Industrial Claim Appeals Office,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an *order* to take some action, penalties may be imposed under § 8-43-304(1), even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001); *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001).

If the ALJ determines that there was a failure, neglect or refusal to comply with an order, the ALJ must determine whether the action or inaction constituting the violation was objectively unreasonable. The reasonableness of the violator's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (I.C.A.O. August 2, 2006), *but see, Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of "unreasonableness"). However, there is no requirement that the violator knew that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether a person acted in an objectively reasonable manner when violating an order presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005). The party seeking imposition of a penalty establishes a prima facie showing of unreasonable conduct by proving there was a violation of an order. If such a prima facie showing is made, the burden of persuasion shifts to the alleged violator to show that her conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra, Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999). In this regard, the ALJ notes that no provision of the Act stays the effectiveness of a PALJ's interlocutory order pending review of the order, or pending resolution of a re-

quest for reconsideration of the order. *See Kennedy v. Industrial Claim Appeals Office, supra.*

The ALJ has discretion to assess a penalty of up to $500 per day for each day an order was violated. The ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* W.C. No. 4-619-954 (I.C.A.O. May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. When determining the penalty the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by a party and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products v. Industrial Claim Appeals Office,* 126 P.3d 323 (Colo. App. 2005).

As found in Findings of Fact 36 and 37, the claimant failed to comply with PALJ Eley's order to provide interrogatory answers to the respondents by March 25, 2008. The ALJ concludes the claimant's conduct constitutes failure to comply with an order within the meaning of § 8-43-304(1). Because the respondents made a prima facie showing that the claimant violated the order, the burden of persuasion shifted to the claimant to show that her failure to comply with the order was objectively reasonable. As determined in Finding of Fact 38, the claimant offered no credible or persuasive evidence that demonstrates an objectively reasonable basis for failing to comply with the order. The ALJ notes that in light of the holding in *Kennedy v. Industrial Claim Appeals Office, supra,* there was no reasonable legal basis for believing that requesting reconsideration of PALJ Eley's order would delay the effectiveness of the order, or relieve the claimant of responsibility for timely compliance with the order. The ALJ concludes the claimant failed to comply with the order for a period of 27 days consisting of the period from March 26, 2008, through April 21, 2008, inclusive.

For the reasons stated in Finding of Fact 39, the ALJ concludes the claimant should be penalized $10 per day for 27 days. The total penalty is $270. Pursuant to § 8-43-304(1), seventy-five percent of the penalty ($202.50) shall be paid to the respondents, and twenty-five percent ($67.50) to the subsequent injury fund.

ORDER

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

1. The claim for workers' compensation benefits in W.C. No. WC 4-730-118 is denied and dismissed.

2. The claimant shall pay a penalty of $270. The claimant shall pay seventy-five percent of the penalty ($202.50) to the respondents. The claimant shall pay twenty-five percent of the penalty ($67.50) to the subsequent injury fund.

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

DATED: December 31, 2008

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-732-596

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease during the course and scope of her employment with Employer.

2. 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 occupational disease.

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

4. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits from June 10, 2007 until terminated by statute.

FINDINGS OF FACT

1. Employer operates a hotel chain across the United States. On March 12, 2005 Claimant accepted a position with Employer as an Assistant to the General Manager in a hotel located in Denver, Colorado.

2. During her first two weeks of employment Claimant was required to undergo training sessions at a facility in Thornton, Colorado. While attending the training sessions Claimant exhibited symptoms of a severe cold.

3. As part of Claimant's employment package, Employer furnished Claimant with an apartment in its Denver hotel that was located directly above the management office. Clamant moved into the apartment in approximately mid-April 2007. General Manager Omarya Creazzo, who was hired at approximately the same time as Claimant, toured the apartment with Claimant. Both parties were informed that there had been water damage to the apartment in January 2007. Employer subsequently repaired the water damage. Because of the repairs, the apartment had new drywall in many areas, new carpeting and fresh paint. The apartment consisted of two bedrooms, a bathroom, a living room and a kitchen.

4. The water damage to Claimant's apartment had occurred on January 16, 2008 when a sprinkler line in the attic of the apartment had frozen and burst. The burst not only caused water damage to portions of Claimant's apartment but also to the management office below the apartment.

5. Employer's Regional Facilities Manager Michael Joseph Searcy testified that he was immediately notified of the water damage and contacted restoration vendor Servpro to mitigate the damage. Mr. Searcy explained that, later on the day of the damage, a representative of Servpro reviewed the loss and notified him of the potential cost of the restoration. Mr. Searcy subsequently authorized the restoration. The restoration involved the placement of air movers and water extraction equipment in the damaged areas beginning on the date of the loss. Servpro also extracted damaged carpeting, removed damaged drywall and disposed of debris. Mr. Searcy stated that the restoration was completed on January 22, 2007 and that he was never notified of any problems with the restoration project.

6. After the restoration was completed, Mr. Searcy awarded the construction repair assignment to Kings Construction. Mr. Searcy prepared the Work Order for Kings Construction. The requested work included removing all damaged sheet rock, installing new carpet, disposing of furniture and equipment, applying treatment for water intrusion, painting, mudding, taping, and generally restoring the damaged area to Employer's standards. Kings Construction completed the repair work on March 1, 2007.

7. Claimant moved into the apartment with her cat. She noticed drywall dust on the mirrors and on the carpet in the second bedroom. Claimant also stated that the hatch above the attic in the second bedroom was open. She testified that she began having symptoms in the apartment that increased when she entered the second bedroom. Claimant's symptoms included burning eyes, ringing ears, an itchy throat and coughing.

8. Claimant also began to experience symptoms when she visited the management office that was located directly below her apartment. Her symptoms included sneezing, coughing, watery eyes, and sensitivity to fragrances. Claimant asserted that she did not experience the preceding symptoms and sensitivities prior to her employment with Employer.

9. Claimant asserted that, during her employment, her speech and thoughts were not clear, she experienced weakness, she could not climb the stairs, and she felt dizzy. Nevertheless, Claimant performed her job duties for Employer until June 27, 2007.

10. From June 27, 2007 through June 29, 2007 Claimant was unable to work because she was crying and experiencing "anxiety attacks." Claimant explained that the incidents were caused by her grief after experiencing the loss of three loved ones during the prior year.

11. On June 29, 2007 Claimant visited the Emergency Room at Denver Health Medical Center for treatment. Claimant reported "she had 2 insect bites over the last few weeks. Bee sting 5 days ago, and was experiencing light-headedness, dizziness, blurred speech, [and] a dull headache." The treating physician commented that there was "no clear etiology -consider viral tntxn viral mosquito bite (i.e. west Nile) although no cases in Denver yet."

12. On July 3, 2007 Claimant again did not report to work and visited family physician Gregory A. Kaczmarczyk, M.D. for an evaluation. Claimant explained that "she had gotten three bug bites and that her symptoms had gotten worse with each bite." She described symptoms that included speech difficulties, stuttering, confusion, dizziness and fatigue. Dr. Kaczmarczyk noted that Claimant "does have a diagnosed history of bipolar disorder and she, several months ago, discontinued all her medications for that and any other psychiatric condition." He concluded that some of her symptoms could be psychiatric in origin.

13. On July 10, 2007 Claimant began a formal leave of absence with Employer. The leave of absence lasted for 12 weeks.

14. On July 12, 2007 Claimant visited internist Anisa Moore, M.D. for an additional evaluation. Claimant explained that she suffered from disorientation, dizziness, slurred speech, confusion, fatigue and lightheadedness. Dr. Moore commented that Claimant had normal laboratory results, a normal head CT scan and a normal neurological exam. She noted that Claimant used illegal drugs but that Claimant had not specified the drugs. Dr. Moore concluded "[a]gree with neuro eval for possible seizure d/o, though suspect psychiatric etiology complicated by illicit drug use."

15. Claimant subsequently underwent an MRI. Although the MRI revealed a small meningioma, a neurosurgeon determined that the abnormality did not contribute to Claimant's symptoms. Claimant also underwent an EEG that did not reveal any seizure activity.

16. In mid-July 2007 Claimant vacated the apartment in Employer's hotel. Nevertheless, Claimant's symptoms persisted. She testified that she continued to have reactions around store cleaning aisles. She also had an acute asthma attack while in Wichita, Kansas, when she went into a dentist's office and had to leave immediately because new carpeting had recently been installed. Finally, Claimant also noted that she had an asthma attack when she entered a restaurant bathroom and had to immediately leave based on severe coughing and wheezing symptoms.

17. While Claimant was taking her leave of absence she transmitted e-mails to Ms. Creazzo stating that she had been researching her symptoms on the internet. Claimant concluded that she had all of the symptoms of "sick building syndrome." Claimant attributed her condition to the faulty repair work after the water release in January 2007 and the existence of toxic mold growth in her apartment.

18. On August 28, 2007 Claimant underwent a complete allergy assessment. The assessment was consistent with previous blood work and revealed that Claimant was not allergic to the 15 common mold spores found in Colorado. However, the testing confirmed that Claimant was allergic to cats.

19. On August 8, 2007 Claimant visited endocrinologist Sowmya Surya, M.D. with complaints of bug bites, confusion, catatonic seizures, absence spells, aphasia, night sweats, irritable moods, headaches, dizziness and fatigue. Dr. Surya noted that Lyme's disease, multiple sclerosis, and West Nile Virus had been ruled out as possible diagnoses. He concluded that there was nothing abnormal about Claimant from an endocrine perspective.

20. On September 10, 2007 Tom Barczak, an expert in Mold and Moisture Assessments, conducted a mold and moisture assessment on Claimant's apartment. Mr. Barczak's Assessment involved three parts: (1) air sampling; (2) visual inspection; and (3) moisture testing. Mr. Barczak testified that the type of testing he conducted has been found to be the most reliable and accepted method of mold assessment testing in the scientific community. Based upon his three-part inspection, Mr. Barczak opined, to a reasonable degree of scientific probability, that there was no mold source inside the apartment that had adversely affected Claimant's health.

21. First, his visual inspection of all areas of the apartment did not reveal the existence of any ongoing water release or evidence of a prior water release. Second, his moisture readings did not detect the presence of any moisture in any of the tested areas. Finally, air sampling only reflected the presence of the types of mold typically found in Colorado. Mr. Barczak concluded that the airborne mold spores identified in the apartment were similar in type and lower in total concentration relative to an outdoor air sample. He further noted that he took a surface lift sample of the HVAC diffuser in the master bedroom and did not identify mold growth on the metal diffuser.

22. During the fall of 2007 Claimant visited ear, nose and throat specialist Timothy Pingree, M.D. for two examinations. Claimant complained of symptoms that included fatigue, brain fog, aphasia, throat swelling, cognitive impairment, personality changes, respiratory problems, nasal discharge, postnasal drainage and pressure in her head. She attributed her symptoms to mold exposure at work and noted that she had improved since she vacated the apartment. Dr. Pingree diagnosed Claimant with Chronic Fungal Rhinosinusitis and ordered various blood tests. He provided Claimant with Petri dishes to test the apartment for mold. Claimant and her boyfriend subsequently conducted the Petri dish testing in the apartment.

23. The blood testing that Dr. Pingree ordered revealed that Claimant's Cardiac C-Reactive protein was twice as high as normal and that she had experienced class three or higher exposure to molds consisting of Penicillium notatum, Cladosporium Herbarum, and Candida Albicans. The lab results for the Petri dishes that Claimant placed in her apartment reflected double-digit numbers of colonies of Cladosporum and

double-digit numbers of colonies of Penicillium. Dr. Pingree concluded that the testing showed significant amounts of potentially pathogenic molds.

24. Dr. Pingree subsequently opined that the C-Reactive protein marker concerned him but was not a specific marker for a mold infection. Moreover, the three molds to which Claimant had been exposed were common to Colorado. Nevertheless, Dr. Pingree determined that Claimant had been exposed to toxic mold in her apartment and the exposure contributed to her symptoms.

25. On January 17, 2008 Claimant visited infectious disease specialist Susan R. Mason M.D. for an evaluation. Claimant's symptoms included fogginess, body swelling, seizure-like-activity, and overwhelming fatigue. Dr. Mason noted that Claimant's blood work showed no evidence of a fungal infection and that a CT scan of Claimant's sinuses was normal.

26. Claimant testified that her symptoms have now moved into her GI system and that she is receiving treatment at the University of Colorado. The medical records from the University of Colorado reveal that Claimant reported to their facility on February 5, 2008 with abdominal pain of unclear etiology. A subsequent CT scan of the abdomen and pelvis was negative. An April 14, 2008 report noted that Claimant had a " history of cocaine and marijuana but has not used in 2 months."

27. On August 27, 2008 Dr. Pingree testified through an evidentiary deposition in this matter. Dr. Pingree stated that there was a "correlation between exposure to mold-infested rooms and [Claimant's] symptoms." He thus maintained that Claimant suffered from "eosinophilic fungal rhinosinusitis or biotoxin illness" and demonstrated clinical improvement when she was able to avoid mold-infested areas.

28. Dr. Pingree acknowledged that he had not been provided with many medical reports to assist him in understanding Claimant's medical history and had not reviewed Mr. Barczak's Mold Testing Assessment. He also conceded that he was unaware that Claimant had removed herself from Employer's apartment in July 2007 and that he would have expected improvement of her symptoms after she vacated the environment. After reviewing Mr. Barczak's Mold Assessment Study and the Petri dish testing, Dr. Pingree acknowledged that Mr. Barczak's testing was a more reliable and accepted method of mold assessment testing in the medical community. Dr. Pingree commented that he only uses the Petri dish data as a screening test. He finally stated that symptoms of cocaine abuse can include: infected and inflamed nostrils, a runny nose, nosebleeds, congestion, sinus headaches, pressure, purulent drainage, brain fog, alleged seizure activity and concentration problems.

29. Mr. Barczak testified at the hearing in this matter. He explained that he reviewed the Petri dish testing that had been recommended by Dr. Pingree. Mr. Barczak commented that Petri dish, gravity-type testing is not generally accepted in the scientific community as a reliable method for determining the presence of dangerous levels of a mold source. He testified that Petri dish testing does not control the methodology

used by the person collecting the air into the dishes. He reviewed a videotape of the Petri dish testing performed by Claimant and her boyfriend. He observed Claimant's boyfriend scraping hardened dust into one of the Petri dishes and placing another Petri dish in the attic. Mr. Barczak remarked that the attic is an inappropriate location for testing because Claimant did not live there. Furthermore, based on the placement of the three Petri dishes, there was no Petri dish comparison with the outside air. Mr. Barczak commented that Petri dish testing is limited to identifying the type of mold that falls onto a gel and cannot quantify the levels of the identified mold spores.

30. Lawrence Repsher, M.D. testified at the hearing in this matter as an expert in occupational and environmental lung disease, internal medicine and pulmonology and inhalation toxicology. Dr. Repsher concluded that there was no objective evidence that Claimant suffered from asthma, fungal rhinosinusitis or any other respiratory tract disease related to her work for Employer. He also determined that there was no evidence that Claimant suffered from an environmental exposure to airborne fungal spores. Dr. Repsher explained that Claimant instead suffers from psychiatric disorders including somatization syndrome and malingering. He commented that there is no medical disease or condition that explains Claimant's myriad of symptoms. Dr. Repsher supported his opinion that Claimant's condition was not caused by toxic levels of mold spores by relying on several articles from the medical literature. Finally, Dr. Repsher concurred with Mr. Barczak's opinions that the type of mold spore testing he performed provided qualitative and quantitative information while Petri dish testing can only provide information as to what type of mold spores fall into the dish.

31. Claimant has failed to establish that it is more probably true than not that she sustained an occupational disease during the course and scope of her employment with Employer. Claimant's myriad of symptoms was not caused, accelerated, intensified or aggravated by any occupational exposure to toxic mold spores while she was working for Employer. Any toxic mold exposure that Claimant suffered cannot be fairly traced as a proximate cause to her occupancy of the apartment provided by Employer.

32. Claimant has failed to demonstrate that she was subjected to toxic levels of mold in the apartment that Employer provided. Mr. Searcy credibly testified that, after a January 2007 water release into Claimant's apartment and the surrounding area, Employer contracted with Servpro to ensure expert mitigation services and water removal. He also explained that the affected area was subsequently repaired and reconstructed to Employer's standards. Moreover, the testimony and scientific testing conducted by Mr. Barczak constitutes the most credible and reliable evidence with respect to the lack of unsafe levels of mold spores in Claimant's apartment. Mr. Barczak's test results reflected the existence of a higher number of mold spores in the outside air than in Claimant's apartment. Furthermore, Mr. Barczak's testing did not reveal any signs of prior leakage or moisture problems that could have explained Claimant's myriad of symptoms.

33. The medical testimony also reflects that Claimant's symptoms were not caused by an exposure to toxic levels of mold in her apartment. A complete allergy as-

sessment was consistent with previous blood work and revealed that Claimant was not allergic to the 15 common mold spores found in Colorado. Claimant also had a normal MRI, a normal EEG and there was nothing abnormal about Claimant from an endocrine perspective. Claimant's blood work showed no evidence of a fungal infection and a CT scan of her sinuses was normal. Finally, Dr. Repsher summarized that there was no objective evidence that Claimant suffered from asthma, fungal rhinosinusitis or any other respiratory tract disease that was related to her work for Employer. He also credibly determined that there was no evidence that Claimant suffered from an environmental exposure to airborne fungal spores while occupying her apartment. Dr. Repsher instead attributed Claimant's condition to psychiatric disorders including somatization syndrome and malingering.

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).

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 ALJ. *Faulkner, 12 P.3d at 846*.

5. The test for distinguishing between and accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

7. As found, Claimant has failed to establish by a preponderance of the evidence that she sustained an occupational disease during the course and scope of her employment with Employer. Claimant's myriad of symptoms was not caused, accelerated, intensified or aggravated by any occupational exposure to toxic mold spores while she was working for Employer. Any toxic mold exposure that Claimant suffered cannot be fairly traced as a proximate cause to her occupancy of the apartment provided by Employer.

8. As found, Claimant has failed to demonstrate that she was subjected to toxic levels of mold in the apartment that Employer provided. Mr. Searcy credibly testified that, after a January 2007 water release into Claimant's apartment and the surrounding area, Employer contracted with Servpro to ensure expert mitigation services and water removal. He also explained that the affected area was subsequently repaired and reconstructed to Employer's standards. Moreover, the testimony and scientific testing conducted by Mr. Barczak constitutes the most credible and reliable evidence with respect to the lack of unsafe levels of mold spores in Claimant's apartment. Mr. Barc-

zak's test results reflected the existence of a higher number of mold spores in the outside air than in Claimant's apartment. Furthermore, Mr. Barczak's testing did not reveal any signs of prior leakage or moisture problems that could have explained Claimant's myriad of symptoms.

9. As found, the medical testimony also reflects that Claimant's symptoms were not caused by an exposure to toxic levels of mold in her apartment. A complete allergy assessment was consistent with previous blood work and revealed that Claimant was not allergic to the 15 common mold spores found in Colorado. Claimant also had a normal MRI, a normal EEG and there was nothing abnormal about Claimant from an endocrine perspective. Claimant's blood work showed no evidence of a fungal infection and a CT scan of her sinuses was normal. Finally, Dr. Repsher summarized that there was no objective evidence that Claimant suffered from asthma, fungal rhinosinusitis or any other respiratory tract disease that was related to her work for Employer. He also credibly determined that there was no evidence that Claimant suffered from an environmental exposure to airborne fungal spores while occupying her apartment. Dr. Repsher instead attributed Claimant's condition to psychiatric disorders including somatization syndrome and malingering.

ORDER

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

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

DATED: January 6, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-718-292

ISSUES

¬ Did the claimant prove by a preponderance of the evidence that the treatment and transportation provided by the Cunningham Fire Protection District on December 22, 2007, was proximately caused by the industrial injury of March 16, 2007?

¬ Did the claimant prove by a preponderance of the evidence that the treatment and transportation provided by the Cunningham Fire Protection District on December 22, 2007, constituted reasonable and necessary treatment for the industrial injury of March 16, 2007?

¬ Did the claimant prove by a preponderance of the evidence that the treatment and transportation provided by the Cunningham Fire Protection District on December 22, 2007, was "emergency treatment" so as to render it "authorized" medical treatment?

FINDINGS OF FACT

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

1. The claimant sustained an admitted back injury on March 16, 2007. The claimant first underwent surgery for this injury on May 4, 2007. This surgery consisted of a lumbar laminectomy at L4-5 including excision of a disc fragment and decompression of the nerve root.

2. Following this surgery the claimant initially experienced some improvement in his low back and right leg pain. However, by July 17, 2007, he reported to Dr. Rachel Basse, M.D., an authorized treating physician (ATP), that he had right buttock pain measured at 5 on a scale of 10 (5/10) and right leg pain graded at 7-8/10.

3. At some point the claimant began seeking emergency room treatment for pain that he associated with his industrial back injury. The claimant admitted during his testimony that he may have visited the emergency room 15 to 20 times prior to December 22, 2007.

4. One emergency room visit occurred on September 7, 2007. On that date the Cunningham Fire Protection District (CFPD) emergency unit responded to the claimant's home. The claimant's chief complaint was severe lumbar spine pain radiating to the right flank and right leg. The claimant, through an interpreter, advised the responding unit that he had undergone back surgery in May.

5. The claimant underwent a second back surgery in October 2007. This surgery was a repeat laminectomy and discectomy at L4-5.

6. Dr. Basse examined the claimant on December 18, 2007. The claimant reported that he initially improved after the second surgery but he then experienced an increase in symptoms that he associated with "the cold weather." Dr. Basse noted that when the claimant's pain levels were high he considered going to the emergency room because on a previous visit he received an injection that provided pain relief for two or three days. Dr. Basse "discouraged" the claimant from going to the emergency room for pain treatment. Dr. Basse continued prescriptions for various medications including oxycodone. Dr. Basse recommended a repeat MRI to reassure the claimant that there was no recurrent disc pathology.

7. The claimant speaks Bosnian. On December 22, 2007, the CFPD again responded to a call for emergency services at the claimant's residence. The claimant testified that his son's girlfriend was present on December 22 and provided translation between Bosnian and English for the emergency responders.

8. The December 22, 2007, CFPD report reflects that the claimant's chief complaint was chest pain that "began today" and was radiating into the right chest. The pain became increasingly worse until it became "unbearable." The claimant told the emergency responders that he had undergone back surgery in October but "this pain is different." The claimant was short of breath. The emergency responders gave the claimant nitroglycerine tablets and his pain reportedly receded from 10/10 to 4/10. The claimant was transported to the Medical Center of Aurora (MCA).

9. Dr. Steven A. Furer treated the claimant at MCA. Dr. Furer noted the claimant's history was the abrupt onset of chest pain during light activity five and one-half hours previously. Dr. Furer also noted the claimant was complaining about right leg pain "from his chronic back pain," and constipation.

10. The claimant was given Dilaudid and Zofran. Dr. Furer reported that the claimant's symptoms were "gone" and he was having no more pain. The claimant underwent an EKG and laboratory tests. Dr. Furer considered myocardial infarction, instable angina, angina, pulmonary embolism and pneumonia to be unlikely as the cause of the reported chest pain. Dr. Furer's clinical impression was abdominal pain, chronic back pain, and atypical chest pain. The claimant was discharged home "in good condition."

11. The claimant has continued to report to his physicians that he has disabling and severe back and leg pain. On December 27, 2007, the claimant advised Dr. Brian Reiss, M.D., his surgeon, that his pain had increased "to the point where it was similar to where it was prior to his surgery."

12. On April 28, 2008, the claimant underwent a psychological evaluation by Dr. Rebecca Hawkins, Ph.D., licensed clinical psychologist. Although the report of this evaluation is not contained in the record, Dr. Jeffrey Wunder, M.D., summarizes the report in his independent medical examination (IME) report dated November 3, 2008. Dr. Wunder noted that Dr. Hawkins performed psychological testing that indicated the claimant has "high disability behavior and somatic over focus." Dr. Wunder also recorded that Dr. Hawkins noted "symptom use for dependency gratification" and a high level of "catastrophic thinking."

13. On September 22, 2008, Dr. Hawkins again examined the claimant. At that time Dr. Hawkins noted the claimant's wife reported that on a nightly basis the claimant requested her "to take him to the ER for pain management, though she now just refuses to do so."

14. Dr. Wunder performed an IME at the respondents' request. Dr. Wunder examined the claimant, reviewed medical reports, and reviewed surveillance videotapes of the claimant. In his IME report, Dr. Wunder assessed the claimant with chronic low back pain, status post L4-5 laminectomy and discectomy x 2, and symptom magnification conscious type. Dr. Wunder described the claimant's presentation at the November

3, 2008, IME as "quite concerning on several levels." Specifically, Dr. Wunder noted the claimant "ranted about how incompetent his doctors were." Dr. Wunder noted that upon examination the claimant engaged in "extreme" pain behavior, ambulated with a severe limp leaning heavily on a cane, and "that each minimal touch would provoke significant pain response." The claimant's lumbar range of motion was "braced and guarded," and he refused to squat. The claimant exhibited 5/5 Wadell findings. Dr. Wunder opined that the claimant's presentation at the IME was "dramatically different" than that portrayed in the videotapes. According to Dr. Wunder's "Surveillance Video Report," the videotapes portray the claimant on May 6, 2008, May 7, 2008, and September 11, 2008. Dr. Wunder states the videotapes show the claimant ambulating without a limp, and sometimes without a cane, squatting, engaged in repetitive and prolonged bending, and demonstrating full forward bending without apparent pain behaviors. Dr. Wunder opined that the claimant exhibits "within reasonable medical probability, a large component of conscious symptom magnification." Dr. Wunder further opined that that the emergency services provided by the CFPD were not reasonable, necessary, and related to the industrial injury of March 16, 2007.

15. The claimant failed to prove it is more probably true than not that the need for the emergency treatment and transportation provided him on December 22, 2007, was proximately caused by the industrial injury of March 16, 2007. The symptoms the claimant reported on December 22, 2007, were primarily chest pain of sudden onset. The ALJ credits the CFPD report stating that the claimant told the emergency providers that the pain he was experiencing on December 22, 2007, was different than the injury-related back and leg pains he had previously experienced. It is also clear from the type of emergency treatment provided at by the CFPD that the emergency providers' primary concern was that the claimant was suffering from cardiac symptoms. Similarly, at the MCA the claimant underwent a work-up for cardiac symptoms. Although Dr. Furer ultimately opined that the claimant's chest pain was probably not related to an acute coronary syndrome, he was unable to provide a firm diagnosis of the chest pain other than "atypical chest pain." The claimant failed to prove that the chest pain, which was the reason for the transport to the CFPD, was related to the chronic back and right leg pain caused by the industrial injury.

16. The ALJ finds it is more probably true than not that the December 22, 2007, transport to the MCA was most likely caused by the claimant's personal need to seek attention from others by consciously dramatizing his physical symptoms. The ALJ credits the results of psychological testing performed by Dr. Hawkins indicating that the claimant demonstrates high "disability behavior" and "somatic over focus," and the use of symptoms for "dependency gratification." The opinions of Dr. Hawkins are supported by the claimant's admission that he sought emergency room treatment 15 to 20 times prior to December 22, 2007, and the statement of the claimant's wife to Dr. Hawkins that after December 22, 2007, he continued to request emergency treatment on a "nightly basis." These opinions and test results are corroborated by the credible opinion of Dr. Wunder that the claimant engages in conscious symptom magnification. Dr. Wunder's report demonstrates that the pain behaviors and physical limitations exhibited by the

claimant during medical examination differ dramatically from his behavior and limitations when he does not know he is being observed.

17. To the extent the claimant's testimony is inconsistent with these findings, and to the extent it might support a different conclusion concerning the cause of the need for emergency treatment on December 22, 2007, his testimony is not credible and persuasive. The ALJ finds the claimant's testimony incredible considering the credible opinions of Dr. Hawkins and Dr. Wunder.

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 EMERGENCY TREATMENT

The claimant seeks an order requiring the respondents to pay for the cost of the emergency services, including the ambulance fee and related expenses, provided by the CFPD when it transported the claimant to MCA on December 22, 2007. The respondents contend the claimant failed to prove that the need for these services is causally related to the industrial injury of March 16, 2007. The ALJ agrees with the respondents.

The claimant was required to prove by a preponderance of the evidence that the condition for which he sought medical treatment on December 22, 2007, was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms after an industrial injury does not require the ALJ to conclude that the industrial injury caused the symptoms and consequent need for treatment, or that the injury aggravated or accelerated any pre-existing condition. Rather, the occurrence of the symptoms may be the result of or natural progression of a pre-existing condition that is unrelated to the employment, or may be attributable to some intervening cause. *See Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002); *.F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995). 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 medical 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).

As determined in Findings of Fact 15, 16, and 17, the ALJ concludes the claimant failed to prove it is more probably true than not that the need for the emergency transport to the MCA on December 22, 2007, was proximately caused by the industrial injury of March 16, 2007. The evidence found credible and persuasive by the ALJ demonstrates that the need for the emergency transportation was precipitated by chest pain, and that the claimant failed to show that this chest pain was related to the industrial injury. Indeed, the chest pain that the claimant experienced was not similar to the pain he previously experienced as a result of the industrial injury to the low back. Moreover, the ALJ finds that the pain reported by the claimant on December 22, 2007, which caused the CFPD to transport him to the MCA, was most probably the result of the claimant's personal need to dramatize physical symptoms in order to fulfill his psychological dependency needs.

The claim for payment of the services rendered by the CFPD on December 22, 2007, must be denied because the claimant failed to prove the requisite causal connection between the need for the treatment and the industrial injury. In light of this determination, the ALJ need not reach the question of whether the disputed treatment was "reasonable and necessary" within the meaning of the Act. Likewise, the ALJ need not consider whether the transport was truly "emergency treatment" so as to render it "authorized" under the Act.

ORDER

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

1. The claim for payment for medical treatment rendered by the Cunningham Fire Protection District on December 22, 2007, is denied and dismissed.

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

DATED: January 6, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-590-561, WC 4-734-194, WC 4-706-617, WC 4-726-573, WC 4-712-600, and WC 4-726-574

ISSUES

The issues determined herein are petition to reopen WC 4-590-561; petition to reopen WC 4-712-600; compensability of WC 4-734-194, WC 4-706-617, WC 4-726-573, and WC 4-726-574; and liability for the treatment by Dr. Griffis.

FINDINGS OF FACT

1. Claimant was employed by the First Employer and drove a truck transfer unit. On August 26, 2003, claimant suffered an admitted accidental industrial injury (WC4-590-561). Claimant's right hand was crushed by the tailgate of the trailer. He suffered open comminuted fractures of the middle and ring fingers as well as a significant laceration of the index finger.
2. Claimant was treated in the emergency room. On August 29, 2003, Dr. Peveto, the authorized treating physician, examined claimant, who reported right hand and left shoulder pain. Dr. Peveto diagnosed a crush injury to the right hand and a left shoulder strain. All of the treatment then focused on the right arm and no further mention was made of the left shoulder until January 20, 2004, when Dr. Clinkscales noted that claimant was reporting left shoulder and back pain as well as the continued extreme right hand pain.
3. Claimant returned to work in a modified job for the First Employer sorting documents until his employment was eventually terminated.
4. A February 20, 2004, electromyography and nerve conduction study ("EMG") showed ulnar neuropathy at the right elbow.

5. On February 24, 2004, Dr. Peveto reexamined claimant, who reported left elbow and wrist pain, which he attributed to driving his car. Dr. Peveto diagnosed left arm problems due to overcompensating for the limitations of the right arm.
6. On March 23, 2004, Dr. Peveto diagnosed right shoulder myofascial problems as well as right cubital tunnel syndrome (the ulnar entrapment at the elbow).
7. In February and March 2004, Dr. Shockney provided psychological evaluation and treatment. Dr. Shockney diagnosed major depression and a possible personality disorder. After reviewing surveillance videotape, Dr. Shockney noted that claimant might have a factitious disorder or might be malingering.
8. On May 17, 2004, claimant had bilateral EMG studies, which were normal.
9. Claimant returned to Georgia and obtained medical treatment in that state, including provision of bilateral wrist splints.
10. On February 16, 2005, Dr. Griffis performed an independent medical examination ("IME"). Dr Griffis performed EMG testing and noted right elbow neurological entrapment findings. He diagnosed crush injury to the right hand and mild thoracic spine strain. He thought that claimant was at maximum medical improvement ("MMI"), but would need post-MMI medical treatment.
11. On May 3, 2005, claimant began employment for the Second Employer, driving an automated trash truck. He had to push buttons to lift and empty the trash cans. He occasionally had to get out of his truck to move a trash can so that the automated trash truck could pick up the can. Claimant worked for the Second Employer until April 8, 2006.
12. On June 7, 2005, Dr. Richman performed a Division IME ("DIME") in WC 4-590-561. Claimant reported no history of any left shoulder symptoms at the DIME. Dr. Richman determined that claimant was not at MMI and needed orthopedic surgeon evaluation of the right wrist.
13. On August 15, 2005, Dr. Griffis became the authorized treating physician. He prescribed Avinza and referred claimant for an orthopedic evaluation.
14. On September 21, 2005, Dr. Clinkscales evaluated claimant, who reported bilateral elbow and wrist pain. Dr. Clinkscales concluded that claimant had irritation of the ulnar and medical nerves, but did not think that the irritation was related to the original 2003 work injury. In any event, Dr. Clinkscales recommended against surgery on claimant's wrist.
15. On December 14, 2005, claimant sought treatment at Penrose Hospital due to pain on his entire left side, which he reported had existed since he had injured his left-side ribs while twisting getting out of his trash truck for the Second Employer. Claimant was diagnosed with a kidney stone.
16. On December 29, 2005, Pinnacol Assurance filed a final admission of liability ("FAL") in WC 4-590-561 for permanent disability benefits and post-MMI medical benefits.
17. On February 13, 2006, claimant reported to the Second Employer that he suffered pain to his chest or rib area while getting out of his trash truck.
18. Claimant continued to work his regular job duties for the Second Employer. Dr. Griffis continued to provide post-MMI medical treatment for the admitted injury from the First Employer. On February 21, 2006, claimant reported increased right arm pain and

Dr. Griffis increased claimant's dose of oxycontin. On March 20, 2006, Dr. Griffis reexamined claimant, who reported "fairly good pain relief" from the increased oxycontin.

19. On April 8, 2006, claimant terminated his employment from the Second Employer because he was "burned out" or because he was tired of the equipment breaking down.

20. On April 17, 2006, claimant passed a preemployment physical examination at Emergicare. On April 18, 2006, he began work for the Third Employer driving a truck to haul lime to the mines in Cripple Creek. He had to hook up a 25-foot hose to empty the lime from the truck. The empty hose sections weighed only about 20 pounds, but sections full of lime could weigh hundreds of pounds. If the hose became clogged, claimant had to lift the section of the hose to clear it. Claimant had to shift the truck a lot and had to steer on the curvy road to Cripple Creek.

21. On April 24, 2006, Dr. Griffis reexamined claimant, who reported that his new job driving to Cripple Creek was causing an increase of arm pain and neck pain. Dr. Griffis increased the oxycontin dose and recommended that claimant also start Motrin. Claimant stated that he was already looking for a new job.

22. On May 1, 2006, hearing was held on the amount of permanent disability benefits in WC 4-590-561. On May 16, 2006, an order determined the amount of such benefits. On June 21, 2006, Pinnacol Assurance filed a FAL for the permanent disability benefits and for post-MMI medical benefits.

23. On May 2, 2006, claimant suffered an eye injury while working for the Third Employer. Dr. Reasoner provided care for that injury. Claimant did not provide Dr. Reasoner with any history of continuing right arm problems.

24. On May 21, 2006, claimant injured his ankle in a four-wheeler accident. Claimant testified that his daughter was the one injured, but Mr. Yetter testified persuasively that claimant admitted that claimant was the one injured and that Mr. Yetter observed claimant limping after May 21, 2006. Claimant missed work from May 23 through June 5, 2006, due to the four-wheeler accident and to travel to attend to family matters. On June 6, 2006, claimant returned to work for the Third Employer for one day. On June 7, 2006, claimant called the Third Employer and stated that he was in jail due to domestic violence and that he was quitting his job to move to Georgia. Claimant never reported to the Third Employer, while still employed, that he had suffered a right arm injury due to the work for the Third Employer. Claimant testified that he quit the Third Employer upon physician advice because he was no longer able to do the job duties. That testimony is not credible.

25. Instead of moving to Georgia, claimant began work for the Fourth Employer on June 14, 2006, as a tire technician. He worked until August 2, 2006, when he left due to a conflict with a coemployee. His job duties required heavy lifting and use of tire irons to change tires on commercial and passenger vehicles.

26. On June 18, 2006, claimant sought treatment at Penrose Hospital due to increased right wrist pain. He was prescribed a wrist splint.

27. On June 21, 2006, Dr. Griffis reexamined claimant, who reported the hospital treatment. Dr. Griffis noted that this appeared to be a new work injury and that claimant would be making a claim against his current employer. Dr. Griffis treated claimant for his chronic pain, which he deemed to be due to the original work injury with the First Employer in 2003.

28. On July 5, 2006, Dr. Griffis reexamined claimant, who reported continued severe right elbow and wrist pain. Dr. Griffis noted that he now realizes that claimant had similar complaints as of his first examination on February 16, 2005. Therefore, Dr. Griffis attributed the right arm pain to the original work injury in 2003. Dr. Griffis recommended injections to treat the tendonitis. On July 10, 2006, Dr. Griffis injected the right elbow, but the pain did not resolve. On July 13, 2006, Dr. Griffis injected claimant's right wrist.
29. On July 14, 2006, claimant filed a petition to reopen WC 4-590-561 due to an alleged change of condition.
30. On August 2, 2006, claimant terminated his employment with the Fourth Employer. On August 3, 2006, Dr. Griffis reexamined claimant, who reported that he had stopped taking the oxycontin for two days and suffered withdrawal symptoms requiring treatment at Penrose Hospital. Claimant reported left arm itching.
31. On August 14, 2006, claimant began work as a tire technician for the Fifth Employer. He worked until February 9, 2007. His duties were similar to those for the Fourth Employer.
32. On August 21, 2006, Dr. Griffis reexamined claimant and injected the right elbow. On September 19, 2006, claimant reported that the last elbow injection helped relieve the elbow pain, but he suffered right wrist pain. Dr. Griffis injected the right wrist.
33. On October 18, 2006, Dr. Griffis switched claimant from oxycontin to a morphine product due to reported itching. Dr. Griffis continued to examine claimant on at least a monthly basis.
34. On October 24, 2006, hearing was held on claimant's petition to reopen WC 4-590-561 due to a change of condition. By order dated November 13, 2006, claimant's petition to reopen was denied. The order found that claimant had required maintenance medications after MMI due to the ongoing pain from the 2003 injury and Pinnacol Assurance had admitted liability for that treatment. The order found that the driving work for the Third Employer caused an immediate increase in pain symptoms and that claimant also had sought emergency room treatment immediately after starting work as a tire technician for the Fourth Employer. The order found that claimant had failed to prove by a preponderance of the evidence that he suffered a change of condition as a natural and proximate consequence of the 2003 work injury. At the most recent December 5, 2008, hearing, claimant even admitted that his right arm was no worse than when he left the First Employer. The November 13, 2006, order also found that claimant had failed to prove that any additional benefits could be awarded to claimant if the 2003 claim was reopened. The order contained absolutely no statement that any occupational disease had arisen. Left upper extremity problems were not an issue in the October 24, 2006 hearing.
35. Dr. Griffis then continued to provide the same post-MMI medical care for the original 2003 injury. On November 21, 2006, Dr. Griffis noted that claimant's chronic right upper extremity pain was constant and unremitting.
36. On December 6, 2006, claimant filed workers' claims for compensation against the Third and Fourth Employers due to right arm pain and low back pain.
37. On December 15, 2006, Dr. Griffis completed a physician's report noting that claimant had suffered a flareup in right elbow and right wrist tendonitis from driving a large truck. Dr. Griffis diagnosed right humeral lateral epicondylitis and right wrist ten-

donitis. Dr. Griffis estimated that claimant would be at MMI in March 2007 due to the injury from "May 19, 2006."

38. On December 18, 2006, Dr. Griffis reexamined claimant, who reported left arm pain. Dr. Griffis concluded that claimant probably has been overcompensating with the left arm because of the right arm pain. Dr. Griffis prescribed a right wrist splint.

39. On January 17, 2007, Dr. Griffis reexamined claimant and changed some antidepressant medications.

40. At some point in early January 2007, claimant resigned from the Fifth Employer effective February 9, 2007. Claimant continued to work his regular job as a tire technician. On January 24, 2007, claimant awoke with left shoulder pain and reported to the Fifth Employer that he had suffered a left shoulder injury on January 23, 2007.

41. On January 24, 2007, Dr. Malis examined claimant, who reported left arm pain from his elbow to his shoulder blade. Claimant reported that the mechanism of injury was lifting large truck tires and felt pain in his left shoulder begin abruptly. Claimant reported that Dr. Griffis was treating claimant for right arm injury and that he was taking narcotics. Dr. Malis diagnosed left shoulder strain and left elbow pain. Dr. Malis imposed restrictions and prescribed physical therapy.

42. Dr. Malis continued to treat claimant for the left arm injury while Dr. Griffis continued to treat claimant for the original 2003 right arm injury. On February 13, 2007, claimant denied to Dr. Malis that he suffered any previous problem with the left shoulder. Dr. Malis determined that claimant was at MMI and released him to return to regular duty for an unrelated December 4, 2006, head injury. On February 19, 2007, Dr. Jinkins provided an orthopedic evaluation of claimant's left shoulder. Dr. Jinkins diagnosed post-traumatic subacromial impingement syndrome. Dr. Jinkins injected the left shoulder and recommended a magnetic resonance image ("MRI") of the left shoulder. Because Liberty Mutual Insurance Company denied the claim against the Fifth Employer, on March 19, 2007, Concentra discharged claimant from further medical care.

43. On February 13, 2007, claimant began work for the Sixth Employer. He drove an 18-wheeler primarily on highways to deliver pieces of concrete. He did not have to shift very much. He did not have to lift or chain down a load. He did not have to shift as much as he did when driving for the Third Employer on the runs to Cripple Creek. Claimant worked for the Sixth Employer until May 21, 2007, when he was terminated due to a customer complaint about claimant's driving safety.

44. On May 21, 2007, the same date of his termination by the Sixth Employer, claimant sought care from Dr. Griffis and complained of a "terrible flare up in right upper extremity pain." Dr. Griffis noted positive Tinel's signs at the right elbow and right wrist and recommended an EMG of the right arm. The May 30, 2007, EMG showed moderately severe right cubital tunnel syndrome. A June 12, 2007, EMG of the left arm showed moderately severe left cubital tunnel syndrome. On June 11, 2007, Dr. Griffis injected the right elbow. On June 18, 2007, Dr. Griffis injected claimant's left <u>shoulder</u>. Claimant subsequently reported that the left shoulder injection provided no relief.

45. In the meantime, on April 23, 2007, claimant filed a petition to reopen WC 4-590-561 due to an alleged error by the Judge: "The Administrative Law Judge confused the rules of traumatic injury with the rules of occupational disease. Having decided that Claimant suffered a traumatically induced occupational disease, the case needs to be reopened such that these subsequent employers will receive due process protection."

At no time thereafter did claimant file an amended petition to reopen or move to add any other basis for the reopening.

46. On June 5, 2007, hearing was held on claimant's claim against the Fifth Employer and Liberty Mutual Insurance Company for an alleged January 23, 2007, left shoulder injury. By order dated June 26, 2007, the Judge denied the claim. The order found that claimant's testimony was not credible about an alleged January 23, 2007, injury. The order noted that claimant initially reported to the Fifth Employer that he was unsure if the injury arose at work or at home. The order also noted that the medical records showed that claimant complained of left upper extremity pain in December 2006 before the alleged work injury. The order found that claimant started work for the Fifth Employer on August 14, 2006. The order made no finding that the shoulder injury predated claimant's employment with the Fifth Employer.

47. On June 19, 2007, claimant filed a workers' compensation claim against the Fourth Employer.

48. Dr. Griffis continued to treat claimant. On July 12, 2007, Dr. Griffis noted that claimant was no longer working and, as a result, his pain is not as severe. On September 20, 2007, Dr. Griffis reexamined claimant and noted that the insurer had not been paying for the treatment by Dr. Griffis. Dr. Griffis noted that he was treating claimant for his right upper extremity work injury. He informed claimant that, unless the insurer paid the bills, he would no longer be able to treat claimant. Claimant stopped taking the prescribed pain medications in December 2007.

49. On September 27, 2007, Dr. Aschberger performed a medical records review for the Third Employer and Pinnacol Assurance. Dr. Aschberger concluded that claimant had chronic bilateral upper extremity problems from the 2003 injury and that the work for the Third Employer did not permanently aggravate either the right hand or the left shoulder. Dr. Aschberger also noted that any exacerbation from the work for the Third Employer had resolved because claimant was able to return to heavy and repetitive work lifting tires.

50. On October 22, 2007, claimant filed a petition to reopen the claim against the Fifth Employer and Liberty Mutual Insurance Company based upon an error by the Judge who, "erred or was mistaken in finding the shoulder injury predated Claimant's employment with [the Fifth Employer]."

51. On November 19, 2007, claimant sought care from Dr. Hoffman at Peak Vista Community Health. Claimant reported a history of two months of right elbow and left elbow pain. He reported that he had been receiving treatment until about two or three months before that date. Dr. Hoffman was uncertain of the specific diagnosis for claimant's sensory neuropathy.

52. Claimant moved to Georgia. He worked for Advantage Car Rental until February 2008. He then worked for Redfish, driving a bulk mail truck. On March 14, 2008, he began work for Collins Industries as an over-the-road truck driver. Claimant had to strap down loads. This work was more demanding than the driving jobs for the Third Employer or the Sixth Employer.

53. On January 3, 2008, Dr. Griffis reexamined claimant for the first time since September 2007. Dr. Griffis stated that he had previously diagnosed claimant with left cubital tunnel syndrome and left rotator cuff tendonitis. He also had suspected a left rotator

cuff tear and recommended an MRI. Dr. Griffis renewed prescription medications and recommended that he see claimant regularly.

54. On January 22, 2008, Dr. Griffis wrote to claimant's attorney. He concluded that claimant had right elbow and right wrist tendonitis ever since the 2003 injury and treatment for the chronic right upper extremity pain was due to the injury with the First Employer. Dr. Griffis noted the flare up of right elbow and wrist pain in July 2006 as well as the flareup in May 2007. Dr. Griffis concluded that the right cubital tunnel syndrome diagnosed in May 2007 was the responsibility of the employer he was working for at the time. (Claimant was unemployed at the time, after being terminated by the Sixth Employer just before the EMG testing in May and June 2007). Dr. Griffis also concluded that the left shoulder injury was due to the work claimant performed as a tire technician for the Fifth Employer.

55. On March 10, 2008, Dr. Phillips, a Georgia physician, examined claimant, who reported a history of the 2003 right hand injury and ongoing treatment since that time as well as an August 2007 left shoulder injury lifting tires.

56. On May 6, 2008, Dr. Griffis wrote two letters. In one letter, Dr. Griffis estimated that claimant's current medications were 70% due to right upper extremity problems and 30% due to left upper extremity problems. Dr. Griffis also estimated that 70% of the treatment of the right upper extremity was due to the 2003 injury with the First Employer and 30% was due to the May 2007 cubital tunnel syndrome. In the other letter, Dr. Griffis concluded that the right cubital tunnel syndrome was the result of driving and shifting while working for the Sixth Employer.

57. On July 7, 2008, Dr. Brodie performed a medical records review for the Sixth Employer and Pinnacol Assurance. Dr. Brodie concluded that the 2003 injury caused right cubital tunnel syndrome, which then flares with subsequent activities such as truck driving and installing tires. He concluded that claimant suffered a left upper extremity injury involving the shoulder, elbow, and hand in January 2007, which had not resolved. As a result, claimant overcompensated with right hand use in May 2007, causing an increase in his right hand symptoms. Dr. Brodie, however, acknowledges that the left upper extremity symptoms might be due to overcompensation for the continuing right hand symptoms from the 2003 accident. Dr. Brodie concluded that, in either case, it was improbable that claimant sustained a substantial permanent aggravation of his right upper extremity symptoms while working for the Sixth Employer. Dr. Brodie notes that there are malingering concerns about claimant. He was involved in litigation to reopen his 2003 claim and he also sought treatment on May 21, 2007, at the exact time of his termination of employment by the Sixth Employer. Furthermore, on May 21, 2007, claimant did not report to Dr. Griffis that work activities with the Sixth Employer caused the flareup of symptoms. Dr. Brodie criticized the causation analysis by Dr. Griffis because Dr. Griffis relied on a nonspecific temporal relationship and ignored all of the other employers between February 16, 2005 and May 30, 2007. Dr. Brodie noted, however, that the tire technician work for the Fifth Employer involved substantially increased upper extremity use. Dr. Brodie concluded that the EMG changes in May and June 2007 either were the natural course of the 2003 injury or they result from work performed before the Sixth Employer. Dr. Brodie disagreed with Dr. Griffis that claimant had only ulnar neuritis before the work for the Sixth Employer because Dr. Brodie thinks that claimant's symptom complex long ago constituted cubital tunnel syndrome. Finally, Dr.

Brodie noted that claimant's medication needs did not substantially change from 2003 to 2007 and the symptoms did not substantially change.

58. On September 29, 2008, Dr. Brodie provided an addendum to his records review, but did not change his conclusions.

59. On September 3, 2008, Dr. Aschberger performed an IME for all of the employers. Claimant provided a history that he had moved to Georgia in February 2008 and was no longer receiving any treatment for his upper extremities. Claimant reported that his work for the Third Employer aggravated his right arm, but his condition returned to baseline. Claimant reported that his left shoulder was injured on April 16, 2006, but Dr. Aschberger pointed out that claimant sought treatment on that day for right arm pain. Claimant also reported that his left arm symptoms began in February 2007 while working on truck tires. Dr. Aschberger diagnosed chronic right upper extremity pain with a possible sympathetic component, bilateral elbow ulnar neuropathy, left shoulder rotator cuff irritation, and diffuse musculoskeletal complaints. Dr. Aschberger concluded that he still had no evidence that the work for the Third Employer permanently exacerbated claimant's condition.

60. On October 1, 2008, Dr. Bisgard examined medical records and responded to inquiries from the First Employer and Pinnacol Assurance. Dr. Bisgard concluded that claimant's left shoulder problems were not related to the 2003 injury to the right arm. She noted that, if the left arm problems were due to overcompensating for the right arm injury, claimant would have manifested left arm symptoms long before his tire technician work for the Fifth Employer. Dr. Bisgard also concluded that claimant no longer needed medications for his original 2003 work injury because he was no longer using any medications prescribed by the treating physician, Dr. Griffis.

61. Claimant testified that his right arm symptoms are the same as when he left the First Employer. He testified that the work for the Third Employer made his right arm symptoms worse, but that worsening was only temporary. Claimant testified that his left arm problems started with the tire technician work for the Fifth Employer. Claimant also testified that he suffered prior left shoulder symptoms since 2005 due to overcompensating, but the injury with the Fifth Employer made the left shoulder symptoms worse and made him unable to straighten his left arm at the elbow.

62. Claimant's checkered work history complicates the determination of liability. Claimant's behaviors also have caused medical providers to question whether he is malingering. Claimant's testimony is not reliable. On the stand, claimant seems believable enough. The problem is that his allegations conflict, particularly about the onset of certain symptoms or the onset of flare-ups of symptoms. His testimony conflicts with the medical records. Those records do not indicate left arm problems since 2005. He initially reported a left shoulder strain at the time of the serious right hand injury, but nothing more was said until January and February 2004. After leaving the First Employer, claimant reported left elbow and wrist problems while driving his own car. Nothing more is said about the left arm during 2005, including at the time of the DIME. He clearly had ongoing chronic right arm problems and received admitted treatment by Dr. Griffis for years. Curiously, claimant has sought medical treatment for flare-ups immediately after losing employment. After quitting the lime-hauling job with the Third Employer on June 7, 2006, claimant reported that his driving job caused increased pain, leading Dr. Griffis initially to conclude on June 21, 2006, that claimant suffered a new injury. Dr. Griffis

subsequently retracted that opinion and attributed the right elbow and wrist problems to the original 2003 injury. Then, on May 21, 2007, claimant was terminated by the Sixth Employer and immediately reported to Dr. Griffis that he had a severe flareup. EMG testing led Dr. Griffis to conclude that claimant suffered cubital tunnel syndrome as a result of the truck driving work for the Sixth Employer. That conclusion makes no sense. After all of the other work claimant performed with more upper extremity use, it makes little sense that the straight truck driving work for the Sixth Employer caused the elbow entrapment.

63. Claimant has failed to prove by a preponderance of the evidence that his petition to reopen WC 4-590-561 should be granted due to error because "The Administrative Law Judge confused the rules of traumatic injury with the rules of occupational disease. Having decided that Claimant suffered a traumatically induced occupational disease, the case needs to be reopened such that these subsequent employers will receive due process protection." The November 13, 2006, order involved absolutely no confusion of traumatic injury with occupational disease. The order contained absolutely no statement that any occupational disease had arisen. The order in no way determined the liability of any subsequent employer. The order did not in any way deny claimant ongoing medical treatment for his admitted right arm injury. The order merely denied reopening to award the already admitted medical benefits. Claimant petitioned to reopen the second time on this one very specific allegation of error by the Judge. At no time thereafter did claimant file an amended petition to reopen or move to add any other basis for the reopening. Claimant's petition did not allege that the November 13, 2006, order was mistaken in finding that, as of the October 24, 2006 hearing, claimant had not suffered a change of condition as a natural consequence of the 2003 injury. The current proceeding does not involve any petition to reopen the 2003 claim on the basis of change of condition or on the ground of an error or mistake other than the very limited one alleged in the petition. Claimant did not petition to reopen on the ground that he had newly discoverable evidence, or even that he just had newly discovered evidence. He failed to prove the limited ground alleged.

64. Claimant also has failed to prove by a preponderance of the evidence that his petition to reopen WC 4-712-600 should be granted due to error or mistake because the judge made a "finding the shoulder injury predated Claimant's employment with [the Fifth Employer]." The June 26, 2007, order made no such finding. The order found that claimant's testimony was not credible about an alleged January 23, 2007, injury. The order noted that claimant initially reported to the Fifth Employer that he was unsure if the injury arose at work or at home. The order also noted that the medical records showed that claimant complained of left upper extremity pain in December 2006 before the alleged work injury. The order made no finding that the shoulder injury predated claimant's employment with the Fifth Employer. The order merely found that claimant was not credible that he injured his left shoulder on January 23, 2007. Again, claimant did not petition to reopen the denied claim on the ground of any error or mistake other than the very limited allegation in the petition. He did not allege that the order mistakenly found no injury on January 23, 2007. Claimant did not petition to reopen on the ground that he had newly discoverable evidence, or even that he just had newly discovered evidence. Whether claimant actually injured his left arm while stacking tires for the

Fifth Employer is not an issue in this order. He also failed to prove the limited ground alleged in this petition.

65. Claimant has failed to prove by a preponderance of the evidence that he suffered an occupational disease to his arms in WC 4-734-194 as a result of his work driving the automated trash truck for the Second Employer. He continued to get the regular post-MMI treatment from Dr. Griffis as a result of the 2003 accidental injury. He worked full-time at his regular job until he decided to quit. He needed no additional medical care and was not disabled as a result of work for the Second Employer. He finally alleged an injury to his left ribs on February 13, 2006, while twisting getting out of his truck, even though he had already sought emergency room care for that alleged incident in December 2005. That incident turned out to be a kidney stone. Once again, claimant's allegations conflict with the medical records.

66. Claimant has failed to prove by a preponderance of the evidence that he suffered an occupational disease to his arms in WC 4-706-617 as a result of his work driving the lime hauling truck for the Third Employer. He continued to get the regular post-MMI treatment from Dr. Griffis as a result of the 2003 accidental injury. He immediately alleged a flareup of right arm pain, but that flareup caused no disability and no need for additional medical care. Claimant even admitted that the work for the Third Employer caused only a temporary exacerbation. A temporary aggravation of a preexisting condition can be an occupational disease, but only if it causes disability or the need for medical treatment. The work for the Third Employer caused neither. Dr. Griffis retracted his initial conclusion that claimant suffered a new injury and recognized that claimant's right arm problems were continuing from the 2003 injury.

67. Claimant has failed to prove by a preponderance of the evidence that he suffered an occupational disease to his arms in WC 4-726-573 as a result of his work as a tire technician for the Fourth Employer. He continued to get the regular post-MMI treatment from Dr. Griffis as a result of the 2003 accidental injury. Again, Dr. Griffis initially concluded on June 21, 2006, that claimant had suffered a new injury. That opinion was early in the period of claimant's employment with the Fourth Employer. Dr. Griffis subsequently changed his opinion and attributed the right arm problems to the First Employer. Claimant admitted at hearing that he suffered no injury while employed by the Fourth Employer.

68. Claimant has failed to prove by a preponderance of the evidence that he suffered an occupational disease to his arms in WC 4-726-574 as a result of his work driving the local haul truck for the Sixth Employer. He continued to get the regular post-MMI treatment from Dr. Griffis as a result of the 2003 accidental injury. He also received some treatment from Concentra for the alleged left shoulder injury until that claim was denied. During that period of employment from February 13 to May 21, 2007, claimant was petitioning to reopen both the 2003 claim and was pursuing his claim against the Fifth Employer for the alleged January 2007 left shoulder injury. At hearing, claimant admitted that he did not suffer any injury due to his work for the Sixth Employer. Claimant did not report to Dr. Griffis that he suffered any flareup of his right arm problem until the very day that his employment was terminated. Dr. Griffis subsequently performed the EMG testing and diagnosed bilateral cubital tunnel syndrome. Dr. Brodie is persuasive that Dr. Griffis erroneously attributed causation of the bilateral cubital tunnel syndrome

based upon an imprecise temporal relationship and without explaining the biological mechanism by which the work for the Sixth Employer caused the elbow problems.

69. The preponderance of the evidence demonstrates that the right cubital tunnel syndrome, as well as the ongoing right hand and wrist pain problems, are natural consequences of the admitted 2003 accidental injury with the First Employer. Pinnacol Assurance has admitted and paid for continuing post-MMI medical treatment for that right arm condition. Contrary to the opinion of Dr. Bisgard, claimant probably does need ongoing pain medications due to his right arm injury. Dr. Griffis did not cease treatment; claimant merely moved to Georgia. Dr. Griffis reexamined claimant and again prescribed pain medications. That opinion is the more persuasive.

70. The evidence does not show that the left arm problems are a natural consequence of the admitted right arm injury in 2003. The overcompensation concept championed by Dr. Brodie is plausible, but Dr. Bisgard has a valid concern that left elbow symptoms should appear long before January 2007 if they are due to overcompensation from the chronic right arm problems. Claimant had some minor and intermittent left shoulder, elbow, and wrist complaints before he reached MMI for the 2003 injury. The early 2004 medical records contain abbreviated references to left shoulder, elbow, and wrist problems. He received bilateral wrist splints in Georgia in October 2004, but no further references are made to left arm problems until the September 2005 reference by Dr. Clinkscales to bilateral elbow and wrist problems. He required no specific authorized treatment for the left upper extremity problems. Of course, claimant's pain medications for his right upper extremity problems would have a natural tendency to control the pain from any left arm problems. The tire technician work for the Fifth Employer appears the most logical cause for left arm problems that became paramount in early 2007. Claimant, however, alleged a discrete left <u>shoulder</u> injury on January 23, 2007, rather than a left elbow cubital tunnel entrapment due to the work for the Fifth Employer. His claim for the January 23, 2007, injury was denied.

71. The estimate by Dr. Griffis in May 2008 that 70% of claimant's treatment was for the right arm and 30% was for the left arm is not persuasive. Similarly, his May 2008 estimate that 70% of the right arm treatment was due to the 2003 injury and 30% was due to work for the Sixth Employer is not persuasive. Dr. Griffis did not provide support for the percentages. The treatment for the right arm has always been attributable to the 2003 injury. Unless Dr. Griffis can specifically attribute some treatment only to the left arm, there is no basis to apportion the treatment to any injury other than the 2003 right arm injury.

CONCLUSIONS OF LAW

1. Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of fraud, an overpayment, an error, a mistake, or a change in condition. Claimant, as the petitioner, has the burden of proving one of these grounds. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). Reopening of a closed claim may be granted based on any mistake of fact that calls into question the propriety of a prior or-

der, even in a case where benefits were properly denied on the then existing evidence. Section 8-43-303(1), C.R.S.; *Standard Metals Corp. v. Gallegos,* 781 P.2d 142 (Colo. App. 1989). When a party seeks to reopen based on mistake the ALJ must determine "whether a mistake was made, and if so, whether it was the type of mistake that justifies reopening." *Travelers Insurance Co. v. Industrial Commission,* 646 P.2d 399, 400 (Colo. App. 1981). When determining whether a mistake justifies reopening, the Judge may consider whether it could have been avoided through the exercise of available remedies and due diligence, including the timely presentation of evidence. *See Industrial Commission v. Cutshall,* 164 Colo. 240, 433 P.2d 765 (1967); *Klosterman v. Industrial Commission,* 694 P.2d 873 (Colo. App. 1984); *Bradley v. Ampex Corp.,* W.C. No. 4-211-540 (May 12, 1998). The Judge's power to reopen does not mean the claimant gets a second chance to "tailor" the story in order to overcome the failure at the first hearing to prove a causal relationship between work and the alleged injury. *Maryland Casualty Co. v. Kravig*, 153 Colo. 282, 385 P.2d 669 (1963). The reopening section also cannot be used to circumvent an adjudication denying the claim for benefits. *Coven v. Industrial Commission*, 694 P.2d 366 (Colo. App. 1984).

2. In WC 4-590-561, the First Employer and Pinnacol Assurance argue that the petition to reopen should be dismissed because claimant did not attach the petition to his application for hearing. That was not a procedural requirement. There is no argument that claimant failed to file the petition to reopen. Nevertheless, claimant must prove the allegations set forth in his petition to reopen. As found, claimant has failed to prove by a preponderance of the evidence that his petition to reopen WC 4-590-561 should be granted due to error because "The Administrative Law Judge confused the rules of traumatic injury with the rules of occupational disease. Having decided that Claimant suffered a traumatically induced occupational disease, the case needs to be reopened such that these subsequent employers will receive due process protection." As found, the November 13, 2006, order involved absolutely no confusion of traumatic injury with occupational disease. The order contained absolutely no statement that any occupational disease had arisen. The order in no way determined the liability of any subsequent employer. The order did not in any way deny claimant ongoing medical treatment for his admitted right arm injury. The order merely denied reopening to award the already admitted medical benefits. Claimant petitioned to reopen the second time on this one very specific allegation of error by the Judge. At no time thereafter did claimant file an amended petition to reopen or move to add any other basis for the reopening. Claimant's petition did not allege that the November 13, 2006, order was mistaken in finding that, as of the October 24, 2006 hearing, claimant had not suffered a change of condition as a natural consequence of the 2003 injury. The current proceeding does not involve any petition to reopen the 2003 claim on the basis of change of condition or on the ground of an error or mistake other than the very limited one alleged in the petition. Claimant did not petition to reopen on the ground that he had newly discoverable evidence, or even that he just had newly discovered evidence. He has failed to prove the ground alleged in his petition to reopen.

3. Similarly, claimant also has failed to prove by a preponderance of the evidence that his petition to reopen WC 4-712-600 should be granted due to error or mistake be-

cause the judge made a "finding the shoulder injury predated Claimant's employment with [the Fifth Employer]." The June 26, 2007, order made no such finding. The order found that claimant's testimony was not credible about an alleged January 23, 2007, injury. The order noted that claimant initially reported to the Fifth Employer that he was unsure if the injury arose at work or at home. The order also noted that the medical records showed that claimant complained of left upper extremity pain in December 2006 before the alleged work injury. The order made no finding that the shoulder injury predated claimant's employment with the Fifth Employer. The order merely found that claimant was not credible that he injured his left shoulder on January 23, 2007. Again, claimant did not petition to reopen the denied claim on the ground of any error or mistake other than the very limited allegation in the petition. He did not allege that the order mistakenly found no injury on January 23, 2007. He did not petition to reopen on the ground that he had newly discoverable evidence, or even that he just had newly discovered evidence. Whether claimant actually injured his left arm while stacking tires for the Fifth Employer is not an issue in this order. Claimant has failed to prove the ground alleged in his petition to reopen.

4. In the other four claims, claimant is alleging that he suffered occupational diseases to his upper extremities. 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). In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

5. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned

> by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). An accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). In contrast, an occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). Under the statutory definition, the hazardous conditions of employment need not be the sole cause of the disease. A claimant is entitled to recovery if he or she demonstrates that the hazards of employment cause, intensify, or aggravate, to some reasonable degree, the disability. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). As found, claimant failed to prove that he suffered an occupational disease to his upper extremities in WC 4-734-194, WC 4-706-617, WC 4-726-573, and WC 4-726-574. He clearly suffered chronic right arm pain from his 2003 admitted injury. He received regular treatment for that chronic pain after MMI. None of his employment activities with any of the other four employers caused disability or the need for additional medical care.

6. Pinnacol Assurance is liable in WC 4-590-561 for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury, including authorized treatment after MMI. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission*. The court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment. If the claimant reaches this threshold, the court stated that the ALJ should enter "a general order, similar to that described in *Grover*." In this claim, Pinnacol Assurance admitted liability for the post-MMI medical treatment. Under *Milco Construction v. Cowan*, Pinnacol Assurance then remained free to contest the reasonable necessity of any specific future treatment. No petition to reopen WC 4-590-561 is necessary to determine authorization or reasonable necessity of any medical treatment. Claimant requested an order for payment of the bills of Dr. Griffis, but he failed to produce any evidence about those outstanding bills. In WC 4-590-561, Pinnacol Assurance is liable for the reasonably necessary medical treatment to cure or relieve the effects of claimant's 2003 injury. The record evidence fails to show that there are any past due bills to be paid by Pinnacol Assurance. As found, the preponderance of the evidence demonstrates that the First Employer and Pinnacol Assurance are liable for the post-MMI medical treatment by authorized providers for the right

arm injury. The preponderance of the evidence fails to demonstrate that the First Employer and Pinnacol Assurance are liable for any future treatment for the left arm. Nevertheless, pursuant to the FAL for post-MMI medical benefits, Pinnacol Assurance is liable for continuing treatment of the right arm. Unless there is a basis to distinguish treatment for the left arm from treatment for the right arm, Pinnacol Assurance is liable for all of the post-MMI medical treatment by authorized providers.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen WC 4-590-561 is denied and dismissed.

2. Claimant's petition to reopen WC 4-712-600 is denied and dismissed.

3. Claimant's claims for compensation and benefits in WC 4-734-194, WC 4-706-617, WC 4-726-573, and WC 4-726-574 are denied and dismissed.

4. In WC 4-590-561, Pinnacol Assurance shall pay for all of claimant's reasonably necessary post-MMI medical treatment by authorized providers, including Dr. Griffis, for the right arm injury. Pinnacol Assurance is not liable for any future treatment solely for the left arm. Unless there is a basis to distinguish treatment for the left arm from treatment for the right arm, Pinnacol Assurance is liable for all of the post-MMI medical treatment by authorized providers, including Dr. Griffis.

DATED: January 7, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-759-098

ISSUES

Was Claimant responsible for his termination of employment from the Respondent-Employer?

FINDINGS OF FACT

1. On January 23, 2008, the Claimant was employed as a Lead Glazer for the Respondent Employer, Binswinger Glass. A General Admission of Liability was filed in this case on July 31, 2008 admitting for meds only from January 23, 2008. The General Admission of Liability of July 31, 2008 states in the remarks section, "Admitting rotator

cuff tendonitis and left type IV SLAP lesion tear. Not at MMI. We are not admitting to TTD as IW was term for cause."

2. A subsequent General Admission of Liability dated August 29, 2008 admitting for the date of injury of January 23, 2008 and an average weekly wage of $560.03. Temporary total disability was admitted and has been paid since August 21, 2008. The remarks section of the General Admission of Liability of August 29, 2008 states, "Average weekly wage admitted based on attached wage history. Waiting period paid. Admitting to rotator cuff tendonitis and left type IV SLAP lesion tear. Not at MMI."

3. On January 23, 2008, at approximately 10:30 a.m., Claimant was unloading glass weighing approximately 150 pounds. He felt a pop in his shoulder and immediately told the other employees that he was working with that this had occurred and that he was in pain. The fellow employees of Binswinger Glass who were present at the time were Kelly Ramos, Gabe, Joe and four out of state people whose names the Claimant could not recall.

4. Immediately after being injured Claimant spoke with Kelly Ramos who was the lead person in charge at the time. Mr. Ramos told Claimant and his crew to take an early lunch and to come back later and to speak with Matt O'Grady. The Claimant and his crew went back to the motel that the Claimant was paying for in Cripple Creek. The Claimant decided to lie down in his room, took some Ibuprofen that he carried with him and lay down in the bed for approximately 45 minutes. All of Claimant's crew, including Kelly Ramos, Gabe and Joe, then went back to the jobsite, but Matt O'Grady was in a meeting upon their return. Claimant attempted to do some caulking while Mr. O'Grady was in the meeting, but was unable to do so because of the pain.

5. When Mr. O'Grady came out of the meeting the Claimant explained to him that his arm had popped while he was lifting glass and he was in a lot of pain. Mr. O'Grady told him that it would make no sense to go to any hospitals around Cripple Creek because there were none in the area. Mr. O'Grady told him to take a company truck and go to Pueblo to go to a hospital. The Claimant immediately drove to Parkview Emergency Room on January 23, 2008 and sought medical treatment. The Claimant had an examination, x-rays were taken, he was prescribed medication and the ER doctor released him wearing a sling. The ER doctor gave Claimant instructions that he was to have no use of his left arm. Claimant was also told to rest the extremity as much as possible and to follow up with Dr. Bruce Taylor on Monday, January 28, 2008.

6. The Claimant used the splint as he was prescribed and given at the Emergency Room. Claimant was given prescriptions for Hydrocodone and for Motrin. Claimant drove home after leaving the ER. He had his fiancé go to pick up the medications. Claimant sat in a chair and watched television for the rest of the evening and went to bed early. Claimant was in a lot of pain at the time and was unable to move his left arm at all.

7. On January 24, 2008 Claimant called by telephone and spoke with Scott Finley from Respondent-Employer. Claimant informed Mr. Finely at that time that he had injured himself at work, that he had been to the Emergency Room and the Emergency Room doctor told him to not use his left arm. He also informed Mr. Finley that he should not be working unless he could not use his left arm and that his left arm was currently in a splint. The Claimant informed Mr. Finley that he was to follow up with Dr. Bruce Taylor on Monday, January 28, 2008. Mr. Finley stated words to the effect of, "Fine, call me back after you see the doctor on Monday."

8. Claimant did follow up with Dr. Bruce Taylor's clinic, Pueblo Orthopedic Clinic, on January 28, 2008. The Claimant did not see Dr. Bruce Taylor on January 28, 2008 but saw the Nurse Practitioner, Greg Graham. According to the records, on January 28, 2008 Mr. Graham wrote the following, "Over the last few days [Claimant] states that his shoulder has remained painful. It has not gotten much better. He has had it in a sling most of the time. It does cause him quite a bit of pain to do any movement of the shoulder." Further, Nurse Practitioner Graham's notes indicate that the Claimant was given an injection with anesthetic and steroids for pain relief. Claimant was given a note from NP Graham, stating "No use of the left arm at work. F/U in one month."

9. Immediately after receiving this note from NP Graham the Claimant went to the Respondent-Employer's office at West 6th Street and attempted to give this note to Mr. Finley. Claimant was asked to do so by NP Graham because the Pueblo Orthopedic Clinic had called Scott Finley and attempted to get a workers' compensation number without a positive response. Claimant arrived at the Respondent-Employer's office at approximately 4:00 to 4:30 p.m. and spoke directly with Mr. Finley. Claimant asked Mr. Finley for a workers' compensation number. Claimant told by Mr. Finley that the Claimant did not injure himself at work and that Respondent-Employer would not file a workers' compensation claim. Claimant attempted to give Mr. Finley the note from Pueblo Orthopedic Clinic but Mr. Finley refused to accept it.

10. After this meeting with Mr. Finley on January 28, 2008 the Claimant drove home. It was at some later time that Claimant noticed a telephone message on his machine at home. The message indicated that it was left at approximately 4:00 to 4:53 p.m. To the best of Claimant's recollection Mr. Finley stated in the message that, "Since you are not going to work that you are fired." Claimant has had no further conversations with Mr. Finley since the date of that meeting. Claimant has had no further conversations with Mr. O'Grady with the Respondent-Employer since that point forward either.

11. The Claimant did not return to the Pueblo Orthopedic Clinic until May 16, 2008. He continued to use the sling that was given to him at the Emergency Room on January 23, 2008 for approximately two more months. Claimant did not return to Pueblo Orthopedic Clinic because he could not afford to pay for any additional medical treatment and he was told that he needed a workers' compensation number to go forward with the workers' compensation process. Claimant did not know how to go forward with the workers' compensation process. He did go so far as consulting with various attorneys on how to do so with no success.

12. The Claimant's shoulder was in such pain that he did not look for any other jobs during this time period.

13. The Claimant had an MRI of his left shoulder and a follow up with Dr. Bruce Taylor on June 11, 2008. Dr. Taylor told Claimant on June 11, 2008 that based on the MRI that he would probably need surgery and would refer the Claimant to Dr. Weinstein. Dr. Taylor told Claimant on May 16, 2008 and also on his visit to Dr. Taylor on June 11, 2008, that Claimant was to continue to have no use of his left arm.

14. The Claimant saw Dr. David Weinstein on January 23, 2008 and a decision was made at that time to go forward with surgery. The Claimant did have surgery with Dr. Weinstein on August 21, 2008. Dr. Weinstein told Claimant to continue to have no use of his left arm up to the time of surgery. A General Admission of Liability was filed in this case on August 29, 2008 paying full temporary total disability from the date of the surgery of August 21, 2008 and continuing.

15. The duties that were required of Claimant as a Lead Glazer could not have been performed while his arm was in a sling. Claimant could not perform the job of the Lead Glazer not being able to use his left arm. The job of the Lead Glazer required a lot of lifting and activities that could not be performed unless the Claimant was able to use both arms. Respondent-Employer never provided Claimant with a letter indicating that he could return at modified duty. Claimant had received no communication from Respondent-Employer at any time after speaking with Mr. Finley on January 28, 2008. Claimant was informed that he was terminated in a telephone message from Mr. Finley on January 28, 2008 because he was unable to work because of his restrictions.

16. The ALJ finds Claimant to be more credible than other witnesses to the facts as he had better recall of the events.

CONCLUSIONS OF LAW

1. CRS §8-42-105(4) and CRS §8-42-103(1)(g) contain identical language stating that in cases "where it is determined that a temporary disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributed to the on the job injury". In *Colorado Springs Disposal v. Industrial Claims Appeals Office* 58 P.3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable to the prior 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 for the termination statutes. In that context, "fault" requires that the Claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *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 on the totality of circumstances *Id*. The question whether the Claimant acted volitionally or exercised a degree of control over the circumstances that lead to his termination is one of fact for the ALJ. *Knepfler v Kenton Manor* W.C. #4-557-781 (March 17, 2004).

2. The dispositive issue in determining whether the Claimant was at fault for his discharge is whether he committed some volitional act or exercised some degree of control over the circumstances of his termination. *Knepfler v Kenton Manor* W.C. #4-557-781 (March 17, 2004). In this case, the ALJ finds that that the Claimant provided notice to the Respondent-Employer of his work restrictions both after seeing Parkview Hospital on January 23, 2008 and after seeing the authorized treating physician, Dr. Bruce Taylor's clinic on January 28, 2008. Since the Claimant has an admitted claim and since the Claimant was treating with the authorized treating providers who placed him on restrictions, the burden shifts to the Respondents to show that Claimant was responsible for his termination, *Auto Compensation Insurance Authority v. Industrial Claims Appeals Office* 18 P.3d790 (Colo. App. 2000); *A. & R. Concrete v. Lightner* 759 P.2d 831 (Colo. App. 1988).

3. The context of "fault" requires that the Claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in his termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) opinion after remand 908 P.2d 1185 (Colo. App. 1985). In this particular case, the ALJ finds that the Claimant did not act volitionally and did not exercise control over circumstances leading to his termination. The Claimant had been placed on physical restrictions from authorized treating providers that prevented him from returning to work. In view of the circumstances of this case the burden was on the Respondent-Employer to offer Claimant a modified job within his restrictions pursuant to a Rule VI letter and the record is clear that the Respondent-Employer never offered the Claimant a modified job.

4. Respondents have failed to establish by a preponderance of the evidence that Claimant was responsible for his termination.

ORDER

It is therefore ordered that:

1. The Respondent-Insurer shall pay Claimant for Claimant's wage loss from January 24, 2008 through August 20, 2008 at the temporary total disability rate.
2. The Respondent-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.

DATE: January 7, 2009
/s/ original signed by:

Donald E. Walsh

Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-765-555

ISSUES

The issues for determination are compensability, dates of temporary disability, and responsibility for termination. Medical benefits, average weekly wage and other issues not determined by this order, are reserved.

FINDINGS OF FACT

1. Employer is a corporation that is in the business of drilling for gas.

2. Claimant worked for Employer as a floor hand and as a motorman. Claimant's jobs at Employer involved heavy labor and required Claimant to hammer lines together for gas and steam lines, tighten bolts, make connections, set slips, throw tongs, make sure the rig was clean and motors were running right and climb up and down stairs. Claimant did not have difficulty performing the duties of his employment prior to July 3, 2008.

3. On July 3, 2008, while working for Employer, Claimant suffered a work-related injury to his neck. Claimant was throwing tongs when he felt a pop in his neck. Claimant did not feel an immediate onset of pain and did not seek medical care at that time.

4. Claimant finished his shift and returned to the man-camp and went to sleep. When Claimant woke, he felt extreme pain in his neck with pain radiating down his back and into his arm. Claimant reported to work for his next scheduled shift and reported his work injury to the driller, RR, who told him to report the injury to the tool pusher and supervisor, GN. GN had Claimant fill out an accident report. Claimant asked GN if he could go see a doctor. GN told Claimant he needed to wait and see if his neck got better.

5. GN put Claimant on light duty for his next shift on July 4, 2008. On July 5, 2008, another rig manager had Claimant throw LCM, or sawdust, for his entire shift. This activity increased Claimant's neck pain symptoms.

6. On July 5, 2008, at the end of Claimant's shift, GN called a meeting with the entire crew and began shouting at Claimant, telling Claimant he did not want to lose his safety pay and asking Claimant if he had hurt himself at home. Claimant felt intimidated by GN. Claimant initially denied hurting himself at home After this thirty minute meeting, Claimant stated that his neck injury had occurred at home. Claimant was then

allowed to leave. When Claimant reported to work for his next shift on July 6, 2008, GN told Claimant he was fired for filing a false accident report.

7. Claimant continued to have sharp pains in his neck and underneath his left shoulder blade, with pain radiating down to his elbow in his left arm. On July 9, 2008, Claimant told one of the other rig managers he needed to go see a doctor and was directed to go see Craig Stagg, M.D., at St. Mary's Occupational Health Center on July 10, 2008. In the Complete History form Claimant filled out on his initial visit to Dr. Stagg, dated July 9, 2008, he circled the words describing his neck pain as "shooting, stabbing, sharp, continuous." Claimant also described his neck pain as interfering with his daily functions of "general activities, normal work routine, sleep, enjoyment of life, ability to concentrate and appetite." Dr. Stagg's July 10, 2008, clinical note indicates that Claimant complained of pain in his neck with radiation into the right upper extremity (this was corrected to the left upper extremity in Dr. Stagg's clinical note dated September 8, 2008). Dr. Stagg's diagnosis on July 10, 2008, was "acute cervical strain." Claimant continued to treat with Dr. Stagg regarding his work-related injury. Each time Claimant saw Dr. Stagg, he complained of pain in his left neck and left upper back with radiation down to his left elbow and occasional tingling in his long and ring fingers of his left hand. Also, during physical therapy, Claimant complained of neck pain.

8. Dr. Stagg ordered x-rays of Claimant's cervical spine. X-rays of Claimant's cervical spine showed some degenerative changes.

9. On July 17, 2008, Dr. Stagg ordered an MRI of Claimant's cervical spine, which showed a disc bulge at C6-7, eccentric to the left, with disc material that could irritate the left C7 nerve. Dr. Stagg put Claimant on modified duty with 30-pound lifting restrictions. Claimant continued to have pain symptoms in his neck that limited his activities. Claimant felt he could not get a job within his 30-pound lifting restrictions, as well as the fact that Claimant's neck pain and symptoms were constant.

10. Dr. Stagg's diagnosis on October 6, 2008, was "cervical strain, improving." Dr. Stagg released Claimant to full duty with no restrictions. Claimant continues to treat with Dr. Stagg and will be receiving additional physical therapy.

11. Claimant did report neck pain to medical providers shortly after the work injury and during physical therapy. On his initial visit to Dr. Stagg, dated July 10, 2008, clinical notes stated, "He states that on the 3rd (of July, 2008) he was throwing some slips when he developed pain in his neck area with radiation into the right (later corrected to the left) upper extremity." On his initial visit to Olsson Physical Therapy, dated September 15, 2008, therapy notes stated, "patient tossing drilling tongs to his left. He felt a sharp pain accompanied by a pop in his neck." Claimant's testimony is plausible, reasonable and supported by the evidence. His testimony is credible.

12. RR worked for the Employer for almost five (5) years and was a driller on the rig Claimant was working on when Claimant's neck injury occurred. Claimant and RR frequently drove together from the man camp to work, a 45-minute drive. RR ob-

served that on the days following the reported work injury, Claimant continued to complain to him his neck was really bothering him and that he was not sure, but that he thought he must have hurt his neck throwing tongs. The testimony of RR is plausible, reasonable and supported by the evidence. The testimony of RR is credible.

13. Claimant showed it more probably true than not that he sustained a compensable injury to his neck on July 3, 2008, while in the course and scope of his employment.

14. Claimant's supervisor and tool pusher, GN, testified that two other crew members came to GN and told him Claimant had told them he hurt himself at home. GN testified that, after a ten to fifteen minute meeting with Claimant, Claimant stated he had lied and that he had hurt himself at home while sleeping wrong on a friend's couch. On July 9, 2008, GN told Claimant that because he had lied about being injured on the job that he was going to let him go, and terminated him. Claimant testified that he told his supervisor he did not know for sure how he was injured but that while initially being questioned for thirty minutes in an intimidating and threatening manner he told his supervisor he guessed he hurt himself at home.

15. Claimant's testimony was credible and persuasive and to the extent there are conflicts between Claimant's testimony and the testimony of Respondents' witness the ALJ credits Claimant's testimony. Claimant's testimony was plausible, supported by the testimony of RR and supported by the medical records. Claimant has established by a preponderance of the evidence that he sustained an injury to his neck on July 3, 2008, while throwing tongs in the course and scope of his employment for Employer. Claimant did not lie when he reported a work-related injury and was not responsible for the termination of his employment.

16. Claimant's treating physician, as a result of his work-related injury, placed Claimant on work restrictions. Claimant was unable to work from July 5, 2008, to October 5, 2008, due to the pain, symptoms and limitations resulting from his work- related injury. Claimant showed it more probably true than not that he was temporarily and totally disabled from July 5, 2008, to October 5, 2008, and is entitled to temporary disability benefits for this period.

CONCLUSIONS OF LAW

1. Claimant has the burden of proving by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with Employer. 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).

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

flicting 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. 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. Claimant's testimony was credible and, to the extent there are conflicts between Claimant's testimony and the testimony of Respondents' witnesses, the ALJ credits Claimant's testimony. Claimant's testimony was plausible, and was supported by the testimony of RR and the medical records.

5. Claimant proved by a preponderance of the evidence that he sustained a work-related injury to his neck during the course and scope of his employment. The claim is compensable.

6. To prove entitlement to temporary disability benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that Claimant left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain temporary disability 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 Claimant's 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 that impair the Claimant's ability to perform his regular employment effectively and properly. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998). There is no statutory requirement that Claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony may be sufficient to establish temporary disability. *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo.App. 1997).

7. Temporary total disability benefits continue until one of the following occurs: Claimant reaches maximum medical improvement; Claimant returns to regular or modified employment; an attending physician gives Claimant a written release to return to regular employment; or, an attending physician gives Claimant a written release to return to modified employment, such employment is offered in writing and Claimant fails to begin that employment. Section 8-42-105, C.R.S.

8. As a result of this injury, Claimant suffered injuries and had physical conditions and work restrictions that prevented him from doing his regular job with Employer from July 5, 2008, to October 5, 2008. On October 6, 2008, Claimant's authorized treating physician returned him to full duty.

9. Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S., (termination statues) provide that where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury. Respondents have the burden of proving by a preponderance of the evi-

dence that Claimant was responsible for his termination. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 20 P.3d 1209 (Colo.App. 2000).

10. By enacting the termination statutes, the General Assembly sought to preclude an injured worker from recovering temporary disability benefits where the worker is at fault for the loss of regular or modified employment, irrespective whether the industrial injury remains the proximate cause of the subsequent wage loss. *Colorado Springs Disposal v. Martinez*, 58 P.3d 1060 (Colo.App. 2002) (court held termination statutes inapplicable where Employer terminates an employee because of employee's injury or injury-producing conduct). An employee is "responsible" if the employee precipitated the employment termination by a volitional act, which an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (ICAO, Sept. 27, 2001). The fault determination depends upon whether Claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo.App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo.App. 1995).

11. It ismore probably true than not that Claimant was not responsible for his termination. Respondents have not proved by a preponderance of the evidence that Claimant was responsible for termination of his employment

12. Insurer is liable to Claimant for temporary total benefits from July 5, 2008, to October 5, 2008. Insurer is also liable for interest at the statutory rate. Section 8-43-410, C.R.S. Average weekly wage is not an issue, and no order enters on the rate of temporary disability benefits to be paid.

ORDER

It is therefore ordered that:

1. The claim is compensable.
2. Claimant was not responsible for the termination of his employment.
3. Insurer is liable for temporary total disability benefits from July 5, 2008, through October 5, 2008. Insurer shall pay 8% interest on all benefits not paid when due.
4. Issues not expressly decided herein are reserved for future determination.

DATED: *January 7, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-757-324

ISSUES

¬ Which claimants shall be considered dependents of the decedent 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

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

1. The decedent was killed in an airplane crash arising out and in the course of his employment. The death occurred in the State of Colorado on April 15, 2008. The respondents have admitted liability for death benefits under the Colorado Workers' Compensation Act.

2. The parties stipulated that the decedent's average weekly wage is $1,153.85, the maximum permitted by law. The parties further stipulated that death benefits are to be paid at the rate of $753.41 per week. The parties further stipulated that EM, LM an NM receive social security benefits at the rate of $361 per person, per month. The parties stipulated that the social security benefits may be offset against any applicable death benefits pursuant to statute.

3. On April 15, 2008, the decedent was married to claimant EM. EM and the decedent resided together in their family home in Fort Benton, Montana. EM and the decedent were married on April 4, 1998.

4. There is no credible or persuasive evidence that the decedent and EM were living apart at the time of the decedent's death, or that EM was not dependent on the decedent for support.

5. On April 15, 2008, the decedent had three children by a prior marriage. These children were CM, GM, and LM. CM was born May 21, 1998, and was 19 years of age at the time of the decedent's death. GM was born May 2, 1990, and was 17 years of age at the time of the decedent's death. LM was born September 14, 1995, and was 12 years of age at the time of the decedent's death.

6. The natural or biological mother of GM, CM and LM was deceased on April 15, 2008. At the time of the decedent's death GM, CM and LM resided with the decedent and EM at the family home in Montana. GM, CM and LM had resided with the decedent and EM since their marriage in 1998.

7. EM has considered adopting LM, but so far has been unable to complete an adoption because of various legal complications. LM has relatives in South Africa on her mother's side of the family. LM's paternal grand parents live nearby in Montana.

8. NM is the natural or biological child of the decedent and EM. NM was born October 4, 2002, and was 5 years of age at the time of the decedent's death. At the time of death NM resided with the decedent and EM at the family home in Montana.

9. At the time of the decedent's death, GM was in high school. GM graduated from high school on May 18, 2008. There is no credible or persuasive evidence that GM continued his education in any full-time accredited school. EM credibly testified that in November 2007 GM joined the Montana National Guard and went to boot camp in July 2008. At the time of the hearing GM was in military training.

10. At the time of the decedent's death CM was residing in the family home in Montana. He was receiving some support from the decedent. At the time of his father's death CM was enrolled in a flight-training program with Vetter Aviation in order to obtain a commercial pilot's license. This program required CM to engage in bookwork and flight training for approximately 15 hours per week. Until shortly before his father's death, CM also worked at a manufacturing company. Approximately one week prior to the decedent's death, CM quit work at the manufacturing company with the intention of traveling to Colorado to work with his father.

11. The ALJ finds that at the time of the decedent's death CM was not engaged in a course of study as a "full-time student" at an "accredited school." There is no credible and persuasive evidence concerning whether or not Vetter Aviation was in some way "accredited" to provide flight training. In any event, the ALJ finds that CM was not a "full-time" student at Vetter Aviation. The claimant's combined study and flight training required a maximum of 15 hours per week, and he was able to work another job until he quit shortly before the decedent's death. The ALJ finds that CM was, at most, a part-time student at the time of the decedent's death.

12. EM credibly testified that the respondents have been paying death benefits since the injury. Prior to the hearing in December 2008, EM has applied the benefits to family expenses, including food and clothing for the children. EM credibly testified that she has applied the death benefits in much the same way as she applied the family income before the decedent's death.

13. EM credibly testified that she is not aware of any reason why LM should receive a greater portion of the death benefits than NM, nor is she aware of any reason why NM should receive a greater share than LM.

14. EM credibly testified that she has treated LM as her own child and feels that she is in the best position to manage the death benefits for the benefit of all of the eligible recipients. In this regard the ALJ notes that neither of LM's natural parents is currently living, and that LM has lived with EM since she was 3 years old. Further, while in Montana LM lives in close proximity to her paternal grand parents.

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 EM

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 EM is presumed to be wholly dependent on the decedent. As found, EM 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 EM was not dependent on the decedent for support.

DEPENDENCY OF GM, LM AND NM

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 GM was presumed to be wholly dependent on the deceased for the period from April 15, 2008, through his graduation from high school on May 18, 2008. Subsequent to May 18, 2008, GM. Who turned 18 on May 2, 2008, was no longer presumed to be a dependent and has not shown that he is entitled to any death benefits after that date. The question of whether GM received an appropriate share of death benefits paid by the insurer for the period prior to May 19, 2008, was not addressed by the evidence nor considered by the ALJ. If any such issue exists, it is reserved for future determination.

The ALJ concludes that LM and NM are presumed to be wholly dependent on the deceased. Both 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.

DEPENDENCY OF CM

The ALJ concludes that CM is not presumed to be wholly dependent on the decedent under § 8-41-501(1)(b). As found, CM was 19 years of age at the time of the decedent's death.

The ALJ further concludes that CM is not presumed to be wholly dependent on the decedent under § 8-41-501(1)(c). As determined in Finding of Fact 11, CM was not a "full-time student" at the time of the decedent's death. Further, the evidence does not demonstrate that the Vetter Aviation school was "accredited." Therefore, CM is not, and never has been a dependent of the decedent for purposes of awarding death benefits.

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 LM, MN, and EM, 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.

The ALJ concludes that from April 16, 2008, through May 18, 2008, EM, GM, LM, and NM are entitled to equal shares of the death benefits. Commencing May 19, 2008, EM, LM and NM are entitled to equal shares of the death 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 EM 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 EM 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.

The ALJ recognizes that although LM is not the natural mother of LM, LM has lived with and been cared for by EM since she was very young. The ALJ also credits EM's testimony that she has treated LM as if she were her own daughter, and that LM lives in close proximity to her paternal grand parents. EM has continued to provide for

LM since the death of her father. In these circumstances the ALJ concludes that EM is in the best position to receive and apply the death benefits for all dependents, including LM.

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. Claimants EM, GM, LM and NM are dependents of the decedent from April 15, 2008, through May 18, 2008, and are eligible to receive death benefits for this period of time. Death benefits for this period of time shall be apportioned equally among these dependents.
3. Claimants EM, LM and MN are dependents of the decedent commencing May 19, 2008, and continuing until their dependency is terminated according to the Act. Commencing May 19, 2008, EM LM and MN shall be entitled to receive equal shares of the death benefits.
4. The death benefits shall be paid to EM, and shall be applied for the benefit of the eligible dependents, and in accordance with the apportionment directed in this order.

DATED: January 7, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-711-498 & 4-718-376

ISSUES

By Pre-Hearing Conference Order of Pre-Hearing ALJ ("PALJ") Thomas DeMarino dated April 25, 2008, these claims were consolidated to be heard at the same time on the following issues, as stated by the parties at the commencement of the hearing on October 22, 2008:

1. Compensability of Claimant's claim for an injury on December 14, 2006 in W.C. No. 4-718-376

2. Claimant's claim for medical benefits for the lumbar spine, abdomen, and psychological related either to the admitted injury of July 1, 2006 in W.C. No. 4-711-498 or, in the alternative, to the claimed injury of December 14, 2006 in W.C. No. 4-718-376. Claimant specifically seeks payment for medical treatment received through Rose Medical Center.

The PALJ's Order held all timelines and time requirements following Dr. Gellrick's December 28, 2007 DIME report in W. C. No. 4-711-498 in suspension pending determination of the issue of compensability in W.C. No. 4-718-376.

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury on July 1, 2006 while employed as a janitor for Employer. Claimant presented to the emergency room at St. Anthony's Hospital on the day of injury. Claimant reported to the emergency room physician that while cleaning for her employer, she got a janitor bucket stuck in an elevator when the elevator doors closed on her, striking her right shoulder and right lower extremity. She denied any loss of consciousness or head trauma at that time to the emergency room physician. Claimant was diagnosed by the emergency room physician, Dr. J. Michael Caruso, M.D. with right shoulder pain, right cuboid fracture, shoulder and chest wall contusion.

2. Claimant reported to the employer-designated physicians at Mile Hi Occupational Medicine on July 3, 2006, accompanied by a representative of Leprino Foods, Jim Thomas. On that date, Claimant filled out a questionnaire, and gave a history that her injury occurred when she had her foot under a mop bucket and while trying to get it unstuck in the gap between the elevator and the floor, the elevator door closed and she fell out of the elevator while her foot was still under the bucket. Claimant was treated by physician assistant Donald Downs on that date, Physicians Assistant Downs noted that claimant was complaining of pain in her right ankle, right shoulder with difficulty raising her right shoulder, and pain on the right side of her head. At that time, she denied any neck pain or upper back pain, and had no abdominal complaints. PA Downs diagnosed a right foot cuboid fracture unspecified and associated ankle sprain, with a right shoulder contusion and head contusion.

3. Claimant followed up with Dr. Miller at Mile Hi Occupational Medicine on July 24, 2006, after commencing physical therapy. At that appointment, Claimant reported that she was doing much better, but continuing to experience pain in her right ankle. Her only diagnosis at that time was a right ankle sprain, slowly improving. Claimant continued to follow-up with Dr. Miller on July 31, 2006, August 7, 2006 and August 10, 2006, with her only complaints of right ankle pain, and her only diagnosis of right ankle sprain. On August 10, 2006 Claimant was released to return to regular duties and her physical therapy was discontinued.

4. On August 24, 2006 Claimant was examined by Dr. Kerry Kamer, D.O at Mile Hi Occupational Medicine. Dr. Kamer noted good improvement in Claimant's symptoms with minimal residual right ankle discomfort. Dr. Kamer further noted that Claimant was working regular duties without complications. Dr. Kamer's assessment was right ankle sprain – resolving.

5. Claimant followed up with PA Downs on September 22, 2006, accompanied by her daughter who served as an interpreter. At that visit, Claimant reported continued ankle pain, worsened by standing or walking on it for long periods of time, complaints of continued headache, and complaints that her leg felt hot from the knee down to the ankle, and cold from the knee up to the hip. The Physicians' Assistant's examination revealed a full range of motion of her hip and back, with no tenderness, and a benign examination of her knee. PA Downs opined, and it is found, that the Claimant's headaches were not related to her occupational injury of July 1, 2006, and referred her to her family physician. He further opined that her knee, hip and ankle symptoms that she reported were not reproducible and were without explanation at that point and he referred Claimant to a foot and ankle specialist.

6. Claimant initially saw the foot and ankle specialist, Dr. Ng, on October 5, 2006. At that evaluation, the Claimant complained only of pain in her right ankle and peroneal tendon. Dr. Ng diagnosed ATFL scarring and peroneus longus tendinosis. Dr. Ng performed an injection of Claimant's ankle on October 19, 2006 due to continued ankle complaints, despite no signs of an inversion laxity. At that evaluation, Claimant did mention complaints of knee and back pain and Dr. Ng commented that they were most likely, compensatory. Dr. Ng saw Claimant again on November 2, November 30, 2006 and January 11, 2007. At each of these visits, Dr. Ng commented or considered that Claimant's pain complaints were out of proportion to the clinical examination.

7. Dr. Miller saw the Claimant on October 26, 2006 in follow up. Claimant reported increased ankle pain, and difficulty sleeping, with nausea, vomiting and a fever the previous night. Dr. Miller diagnosed a right ankle sprain, but noted a normal objective exam on that date. Dr. Miller opined, and it is found, that claimant's nausea, vomiting and fever were likely not related to her occupational injury.

8. Dr. Miller and PA Downs placed the Claimant at MMI as of November 29, 2006. PA Downs noted that Claimant had no objective findings at this point and her only complaint was continued pain. Claimant reported continued pain around the right ankle. PA Downs noted the original history of the injury with complains on twisting the ankle and foot and contusing the right shoulder and head. There were no complaints of low back pain. She was released to return to work with no permanent work restrictions.

9. Ruben Estrada, a co-employee of Claimant, observed the Claimant enter the men's locker room on December 13, 2006. During that shift, he prepared a written note for his supervisor, Ron Villarosa. When Claimant arrived for her shift on December 14, 2006, Ron Villarosa asked her to meet with both he and Mike Falbo to discuss her entering the men's locker room the prior shift.

10. Prior to December 13, 2006, Claimant had been advised at a meeting on or about November 30, 2006 that she was not to enter the men's locker room and that this directive applied to all hours of the day, without exceptions.

11. Claimant attended the meeting with Ron Villarosa and Mike Falbo on December 14, 2006 shortly after arriving at work, and due to her conduct, was placed on immediate suspension and sent home. She did not complete her shift that evening. Claimant left the premises under the direction of Ron Villarosa and went home. According to the

credible testimony of Ron Villarosa, and Mike Falbo, at no time, before or after this meeting, did Claimant report any injury or request medical treatment, other than to state that she had a stomach ache. Claimant did not go to the hospital or seek any other medical care to address any physical complaints or injury. Claimant did have health insurance in effect on December 14, 2006.

12. Claimant testified that on December 14, 2006 she arrived for work between 5:30 and 6:00, p.m. She testified that she immediately went to get the floor cleaning machine from the second floor to take it to the first floor to fill it with water. She filled the machine with water in the first floor closet and put it in reverse to get it out of the closet. Claimant testified that when the machine was put into reverse, it charged her with all of its strength, and hit her in the abdomen, pinning her against the wall. Claimant further stated that the machine actually "jolted" or "jumped" backward, pinning her against the wall and causing severe, immediate abdominal pain. She further testified that one of the hoses connected to the floor cleaning machine was attached with string, and the string came loose when the machine pinned her against the wall, causing water to spill on the floor. As she tried to walk away from the machine, she slipped on the water and her legs split open and she fell to the floor. Claimant testified that she hit her buttocks and right elbow when she fell, had pain in her low back and was in a lot of pain with just moving with intense abdominal pain. Claimant later testified that she ran to get towels to stop the spilled water from running into the laboratory room and then proceeded to clean up the water with a mop and the towels. She then took the machine back upstairs to finish her cleaning, but claimed she did not complete her shift because she was in too much pain.

13. Ruben Estrada regularly uses and conducts maintenance on the floor cleaning machine. The machine operates very slowly in reverse, and does not have the ability to "jump" or "jolt" in reverse. The machine must be operated in reverse with both hands, and the instant one hand is removed from the controls, or the machine makes contact with an object, it automatically stops. The machine moves slower in reverse than in forward and cannot be put in a higher or faster gear for reverse.

14. On February 8, 2007 Claimant presented at the Presbyterian-St. Luke's Medical Center. On that date, Claimant was accompanied to the hospital by family members, including her 15 year-old daughter. Claimant reported a right ankle injury occurring 8 months prior at work and was now complaining of problems with her knee and hip. Claimant specifically denied any neck pain, back pain, headache, head injury, or dizziness. Claimant made no mention of any December 14, 2006 injury at work. Claimant gave a history of pelvic pain in the suprapubic area that had been present for 6 to 8 months and last evaluated in December 2006.

15. On March 12, 2007, Claimant had presented to Clinica Tepayc for an annual pelvic exam and gave a history of bilateral, left greater than right, pelvic pain for 3 months. No history was given by Claimant at the time of this evaluation of an injury to her abdomen or low back on December 14, 2006 but did state she had injured her right knee at work 1 year prior and was seeing a specialist.

16. Claimant saw Dr. Ng in follow up on March 9, 2007 for complaint of continued ankle pain. Claimant did not give this physician any history of having sustained an injury on December 14, 2006 involving her low back and abdomen. Claimant did mention that she had recently injured her knee.

17. Claimant sought treatment from St. Joseph's Hospital on April 13, 2007 and was evaluated by Dr. Leonardo Alfaro, M.D. for complaint of left inguinal hernia. Dr. Alfaro obtained a history from Claimant of longstanding left-sided lower quadrant pain. Dr. Alfaro noted a prior injury, erroneously stated as from a car accident, to the ankle, knee, hip and head. Dr. Alfaro stated it was difficult to correlate the timing with the onset of this left-sided pain. The record of this visit with Dr. Alfaro does not contain a history of any injury on December 14, 2006 as testified to by Claimant.

18. Claimant was seen in follow up by Dr. Miller on March 19, 2007. At that time, Claimant presented with severe complaints of pain in her right knee and right ankle, and further reported pain in her low back and lower abdominal wall. Claimant specifically denied any new accidents or injuries since her November 29, 2006 visit. Claimant did not mention any December 14, 2006 injury with the employer involving her low back or abdomen.

19. Claimant presented for treatment and evaluation at HealthOne Rose Medical Center on June 19, 2007. Claimant was accompanied by her daughter who acted as an interpreter. Claimant was seen for a chief complaint of chronic back and neck pain with onset 11 months ago. A history was obtained of a fall in July 2006 and that the patient was seen at St. Anthony's Central. There was no history given of other injury.

20. Claimant was seen by Dr. Mark Grushan, M.D. at Rose Medical Center on November 27, 2008. Dr. Grushan had reviewed an MRI of the lumbar spine showing an L5-S1 disc bulge. Dr. Grushan's assessment was chronic pain due to chronic degenerative changes in the lower back and the hips and annular tear of one of the discs.

21. Claimant was seen for a Division-sponsored IME with Dr. Gellrick on May 29, 2007. Claimant was accompanied to this evaluation by Sandra Garcia, her oldest daughter, who acted as an interpreter as well as there being a professional interpreter present that the physician described as "excellent". At that evaluation, Dr. Gellrick was asked to make a diagnosis and assessment concerning the Claimant's head, right upper extremity, right lower extremity, abdominal pain, low back, cervical spine, sleep disorder, and depression. Claimant reported to Dr. Gellrick the history and mechanism of the July 1, 2006 injury when she was pushing a large bucket of water from an elevator, the bucket's wheels got stuck in the crevice between the elevator and the floor. Claimant did not report any December 14, 2006 injury to Dr. Gellrick at this time and specifically denied any problem with other injuries except for a hernia and related no new injuries to Dr. Gellrick. Dr. Gellrick opined, and it is found, that the conditions related to the July 1, 2006 injury were right ankle severe strain with compensatory problems with the right knee and a right cranial contusion. Dr. Gellrick opined and it is found, that Claimant's cervical and lumbar spine pain, left inguinal hernia, and abdominal dysfunction were not

causally related to the July 1, 2006 injury. Dr. Gellrick found that depression was not present on clinical examination. Dr. Gellrick did opine Claimant's right knee pain was likely due to compensatory reaction to her ankle dysfunction. Dr. Gellrick determined that Claimant was not at MMI.

22. Claimant returned to Dr. Gellrick for a follow-up DIME on December 28, 2007. Claimant mentioned at this time an injury with her employer on December 14, 2006 wherein she went to push the reverse button of a floor waxing machine and the weight of the machine went backwards and hit her directly in the abdomen, making her abdomen and back much worse. Dr. Gellrick again opined, and it is found, that Claimant's lumbar spine and right hip conditions were not related to the July 1, 2006 injury. Dr. Gellrick placed Claimant at MMI for all related issues. Dr. Gellrick stated that psychiatric review was beyond the scope of this examination but that, if the depression was determined by a bilingual psycholgist to be related to Claimant's July 1, 2006 date of injury then maintenance treatment of 3 to 4 sessions to alleviate stress and depression was appropriate.

23. Claimant was seen by Dr. Peter J. Vicente, PhD on February 18, 2008 for psychological evaluation upon the referral of Dr. Kamer at Mile Hi Occupational Medicine. The evaluation was conducted in Spanish although Dr. Vicente noted that the patient was somewhat fluent in English. Dr. Vicente stated that Claimant presented with a Pain Disorder with psychological and medical factors secondary to the work injury of July 1, 2006. Dr. Vicente further opined, and it is found, that Claimant's overall presenting pain disability may be seen as directly attributable to the July 1, 2006 injury. Dr. Vicente did not recommend any psychological behavioral treatment.

24. Claimant was seen for a non Division-sponsored IME by Dr. David W. Yamamoto, M.D. on May 23, 2008. Dr. Yamamoto examined Claimant and reviewed medical records submitted to him. Dr. Yamamoto specifically commented "Interestingly, the December 14, 2006 injury was not documented and there is no mention of this in the records until the follow-up DIME by Dr. Gellrick on December 28, 2007." Dr. Yamamoto expressed an opinion that Claimant likely did injure her low back on December 14, 2006, assuming that this is an accurate history that this injury occurred on the job.

25. Jim Thomas, Senior Safety Specialist for Employer accompanied Claimant to her medical appointments for her July 1, 2006 occupational injury through October 2006, and they conversed about her condition in English. Claimant made no mention to Mr. Thomas of low back, hip or neck complaints. Mike Falbo also conversed with the Claimant in English on an almost daily basis at the time clock to engage in small-talk with Claimant.

26. When Mike Falbo met with the Claimant and Ron Villarosa on December 14, 2006 at which time he placed the Clamant on suspension for her conduct, at no time did Claimant advise him of any injury on December 14, 2006, or request any medical treatment. During this meeting, Ruben Estrada, the lead worker on Claimant's shift, was present and available to interpret, if necessary.

27. Sandra Garcia, the oldest daughter of Claimant, interpreted for Claimant on many of the times Claimant was seen by Dr. Miller. Ms. Garcia was also present to interpret on both occasions when Claimant was evaluated by Dr. Gellrick and for the examinations by Dr. Ng. Prior to September 2008 when she started an internship, Ms. Garcia attended almost all of Claimant's medical appointments.

28. The ALJ resolves the conflict between the testimony of Ruben Estrada, Ron Villarosa and Mike Falbo and that of Claimant concerning the events and occurrences on December 14, 2006 in favor of the testimony of Mr. Estrada, Mr. Villarosa and Mr. Falbo as being more credible and persuasive. The ALJ finds the testimony of Claimant concerning the happening of an injury on December 14, 2006 and the alleged mechanism of that injury not to be credible.

29. The ALJ finds the opinions of Dr. Gellrick regarding which physical medical conditions are causally related to the July 1, 2006 injury to be the most credible and persuasive. The physical conditions causally related to the July 1, 2006 injury are as stated by Dr. Gellrick in her May 29, 2007 report as found above.

30. The ALJ finds the opinion of Dr. Vicente to be credible and persuasive regarding the existence of any psychological symptoms or depression related to the July 1, 2006 injury. As of February11, 2008 when she was examined by Dr. Vicente, the Claimant was not in need of any psychological treatment related to the July 1, 2006 injury.

31. The ALJ finds that Claimant was not refused medical treatment for her depression by the authorized physicians. At the time she was evaluated by Dr. Vicente, no psychological treatment was considered necessary. When last seen by Dr. Miller on October 29, 2007, Claimant was discharged from treatment because Dr. Miller felt no further treatment was necessary.

32. Claimant's medical treatment with HealthOne Rose Medical Center beginning June 2007 was not upon referral from the authorized physicians and was outside of the chain of referral from the authorized physicians.

33. Claimant filed a Workers' Claim for Compensation with the Division of Workers' Compensation on March 22, 2007. In that Claim, Claimant stated that she had to work without restrictions during the months of August through October and had difficulty pushing the wax machine and by October began noticing pain in her abdomen and low back. Claimant's statements conflict with her testimony that she injured her abdomen and low back on December 14, 2006 when using the floor machine.

CONCLUSIONS OF LAW

34. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

35. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be

dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

36. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a 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). It is within the discretion of the ALJ to credit all, part or none of a witnesses testimony, *El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993, *rehearing denied*).

37. As found, the Claimant's testimony concerning the alleged injury of December 14, 2006 is not credible. In reaching this finding and conclusion, the ALJ considered the probability of the Claimant's testimony concerning the mechanism of the injury and the testimony of the Employer's witnesses. The ALJ has also placed significant weight on the contents of the numerous medical records of several physicians from whom Claimant sought treatment for a variety of complaints after December 14, 2006. These records consistently fail to contain any history of the December 14, 2006 injury. The ALJ also places weight upon the fact that while Claimant claimed she was in significant pain after the specific event with the floor machine she apparently continued with her duties until summoned for the meeting with Mr. Villarosa and Mr. Falbo at which time she was suspended and during which meeting she failed to make any mention of an injury even though she had previously sustained an injury on July 1, 2006 and would be familiar with the requirements to report such an injury. The ALJ is not persuaded by Claimant's testimony that she was not allowed to report the injury. Further, as found above, Claimant's testimony concerning an injury on December 14, 2006 involving her abdomen and low back conflict with her statements in the Workers' Claim for Compensation filed with the Division on March 22, 2007.

38. Claimant testified that the medical reports created after December 14, 2006 are inaccurate in that they do not contain any mention of her December 14, 2006 date of injury due to a language barrier issue and her inability to speak English. The ALJ finds Claimant's testimony in this regard incredible and unpersuasive. As found above, Claimant has consistently had the assistance of family members or professional interpreters at medical appointments. Claimant, as stated by Dr. Vicente and the testimony of Employer's witnesses, is at least somewhat fluent in English.

39. The claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The ALJ concludes that the Claimant has failed to prove, by a preponderance of the evidence, that she sustained an injury arising out of and in the course of her employment with Employer on December 14, 2006.

40. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury, including treatment to maintain Claimant's condition after a finding of MMI, Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An authorized treating physician may refer the claimant to another physician and no special request needs to be made if it is part of the normal progression of authorized treatment. Treatment that is not within the chain of referral from an authorized physician is not compensable, *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985). However, if the physician selected by the respondents refuses to treat the claimant for non-medical reasons, and the respondents fail to appoint a new treating physician, the right of selection passes to the claimant, and the physician selected by the claimant is authorized. *See Ruybal v. University Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988); *Tellez v. Teledyne Waterpik,* W.C. No. 3-990-062, (March 24, 1992), *aff'd., Teledyne Water Pic v. Industrial Claim Appeals Office,* (Colo. App. 92CA0643, December 24, 1992) (not selected for publication).

41. As found, the authorized physicians did not refuse to provide treatment for Claimant's depression for non-medical reasons. Claimant was referred from an authorized physician, Dr. Kamer, to Dr. Vicente for evaluation of her psychological condition. Dr. Vicente found at that time that no further treatment was necessary. Claimant's treatment at HealthONE Rose Medical Center was outside of the chain of referral from the authorized physicians, and is therefore not compensable.

42. As found above, the opinion of the DIME physician, Dr. Gellrick, is considered persuasive regarding the physical conditions related to the July 1, 2006 injury. Respondents argue that Claimant must overcome the DIME opinion concerning causation by clear and convincing evidence. It is axiomatic that a DIME opinion may be only be overcome by clear and convincing evidence. C.R.S. sec. 8-42-107(8), *Magnetic Engineering, Inc. v. Industrial Claims Appeals Office,* 5 P.3d 385 (Colo. App. 2000). This includes not only an opinion concerning MMI and PPD, but also whether or not a particular condition is related to an industrial injury. *Kreps v. United Airlines,* W.C. Nos. 4-565-545 & 4-618-577 (January 13, 2005), *Cordova v. Industrial Claims Appeals Office,* 55 P.3d 186, 189-190 (Colo. App. 2002). *See also Egan v. Industrial Claims Appeals Office,* 971 P.2d 664 (Colo. App. 1998); *Qual-Med, Inc. v. Industrial Claims Appeals Office*, 961 P.2d 590 (Colo. App. 1998). The ALJ disagrees with Respondents regarding the burden of proof to be assigned Claimant. Here, Claimant is not seeking to overcome the DIME physician's opinion on MMI as that issue was specifically held in suspension by the PALJ's April 25, 2008 order. Claimant is seeking payment for medical treatment at Rose Medical Center beginning in June 2007 that occurred prior to Dr. Gellrick's determination of MMI in December 2007. Claimant's request for medical benefits is therefore not a constructive challenge to the DIME physicians' opinion. See, *Story v. Indus. Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995). The DIME physician's opinion is not entitled to presumptive weight with regard to the Claimant's entitlement to a particular medical benefit where Claimant is not challenging the determination of MMI by the DIME physician. *Moore v. American Furniture Warehouse,* W.C. No. 4-665-024 (June 27, 2007). Thus, Claimant bears the burden to prove, by a preponderance of the evidence, that her low back and abdominal complaints are causally related to the injury of

July 1, 2006. The ALJ concludes, based upon the opinions of Dr. Gellrick, that Claimant has failed to sustain her burden of proof that her low back and abdominal conditions are causally related to the July 1, 2006 injury. The report of Dr. Yamamoto relates Claimant's low back condition to the alleged December 14, 2006 injury and not to the admitted July 1, 2006 injury.

43. The ALJ concludes that Claimant's psychological condition related to the July 1, 2006 is a Pain Disorder as assessed by Dr. Vicente. When Dr. Vicente performed his evaluation in February 2008 he was aware of the evaluation of Dr. Severn and his diagnosis of PTSD and Major Depression. Based upon the evaluation of Dr. Vicente, the ALJ concludes that the treatment that Claimant received from Dr. Severn was not causally related to the July 1, 2006 injury. Dr. Vicente's opinion on the need for psychological treatment related to the July 1, 2006 injury is more persuasive than that of Dr. Gellrick who acknowledges that a psychological evaluation was beyond the scope of her examination of Claimant.

ORDER

It is therefore ordered that:

Claimant's claim for compensation and benefits for an injury of December 14, 2006 in W.C. No. 4-718-376 is denied and dismissed.

Claimant's claim for medical benefits for treatment of her low back, abdomen and psychological condition, specifically treatment at Rose Medical Center, in W.C. No. 4-711-498 is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED: January 7, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-729-272

ISSUES

The issues to be determined by this decision are compensability, temporary total/partial disability benefits and penalties. The parties stipulated that the hearing would not go forward on average weekly wage because this issue should be resolvable.

FINDINGS OF FACTS

1. On July 13, 2007, Claimant filed a claim for workers' compensation for an alleged back injury occurring on June 9, 2007.

2. Employment records showed that Claimant did not work on June 9, 2007.

3. On July 27, 2007, Insurer filed a notice of contest.

4. Claimant was made aware that he did not work on June 9, 2007, during a settlement conference. On September 27, 2008, Claimant filed a "corrected workers' compensation claim" and changed the date of injury from June 9, 2007, to June 5, 2007.

5. The W.C. Number for both the July 13, 2007, workers' compensation claim and the September 27, 2008, corrected workers' compensation claim is 4-729-272.

6. The DOWC chronological history shows that Claimant's "corrected workers' compensation claim" was not actually filed at the Division of Workers' Compensation.

7. At hearing, the ALJ accepted a copy of a document entitled "Corrected Claim for Workers' Compensation" which had writings contained under the section marked "For Division use only." Claimant contends that this proves he did actually file a corrected claim and that Insurer assigned a different internal Pinnacol claim number to the "corrected claim."

8. Insurer Claims Representative, JJ, testified that she contacted the DOWC twice. First, after receiving Claimant's corrected claim for worker's compensation, JJ contacted the DOWC to inquire as to whether or not another notice of contest had to be filed. JJ was advised by DOWC that Claimant had not filed a corrected claim for worker's compensation. Even if he did file a corrected claim, the DOWC advised JJ that unless a new worker's compensation number is generated by the DOWC, insurer did not have to restate its position by filing another notice of contest.

9. Claimant applied for hearing initially on the sole issue of penalties for Respondents' alleged failure to file a notice of contest or admission in response to Claimant's corrected claim for workers' compensation.

10. Upon receipt of the penalty application, JJ contacted the DOWC a second time and again inquired as to whether or not Insurer needed to file a new notice of contest. For the second time, "Joyce" from the DOWC informed JJ that Claimant did not file a corrected claim with the DOWC. Nonetheless, Joyce advised that the only Workers' Compensation number assigned to Claimant's claim was 4-729-272 and the notice of contest was filed by Insurer for 4-729-272 and Insurer did not need to file another notice of contest until and unless another claim was filed by Claimant that was assigned a W.C. number other than 4-729-272. JJ documented this phone call with the DOWC.

11. Claimant testified that he injured his back on June 5, 2007, moving a desk up some stairs. Claimant testified that the desk began to fall down the stairs, that he

pushed the desk to the left, and that he sat down to the right. Claimant testified that he experienced pain in his right lower back and down his leg. Claimant testified that he told the dispatcher, CB, of the incident the next day. CB testified that Claimant did tell her of the incident the day before, and stated that he did not want to file a claim because he was fearful he would be fired. Claimant testified that he asked for help to do his work after the incident, but that Employer required him to continue to do his usual work as a mover. Claimant testified that he asked the owner of the company, FG, if he could see a doctor and FG denied his request. Claimant testified that if he reported his injury he believed he would lose his job. Claimant testified that he was told on three occasions that he would lose his job if he reported his back condition as work-related.

12. Claimant continued to work his regular job and did not seek medical care or file a claim for workers' compensation until after he was terminated from Employer on July 5, 2007.

13. On July 2 and 3, 2007, Claimant moved a customer's belongings into storage from Colorado to Wyoming. Claimant worked nine hours on July 2 and 3, 2007.

14. Employer conducted moves for customers on July 4, 2007.

15. Employer has an Employee "work line" system that all movers must comply with. All movers, including Claimant, are required to call into work every day to find out if they are on the work schedule and if so, the location of the move.

16. Claimant testified that July 4, 2007, was not a scheduled work day. FG testified that Claimant was required to call in on July 4, 2007, to see if he was assigned any jobs. FG testified that there was a job assignment for Claimant on July 4, 2007, that Claimant failed to appear for that job assignment, and that Claimant's employment was then terminated. Claimant testified that on July 5, 2007, he asked FG to refer him to a doctor for his back and that FG stated that he "didn't need any excuses and lies" and fired him.

17. FG testified that he is the owner of Employer. He testified that Claimant never told him of a back injury until after he had terminated Claimant for failure to appear for work on July 4, 2007. He testified that he never threatened Claimant for reporting an injury.

18. On June 11, 2007, two days after the alleged June 9, 2007, and six days after the "corrected" June 5, 2007, alleged injury, Claimant underwent a commercial driver fitness determination at Concentra Medical Center. Claimant did not complain of low back pain or injury. Under "health history" Claimant marked "no" next to back pain. Claimant also marked "no" for the question of whether he has had "any illness or injury in the last 5 years." Claimant passed the physical.

19. Claimant testified that he did not tell the physician who conducted the commercial driver fitness test about his back injury because he was worried Employer would fire him. Claimant testified that he told the nurse from the commercial driver fitness test

about the work-related back injury but he does not know why the nurse did not document this information. The ALJ rejects this testimony as not credible.

20. Dr. Primack credibly testified that in his experience as a physician who performed commercial driver fitness tests, the physician and nurse must communicate. It is the nurse's job to obtain information from the test taker and then to communicate that information to the physician. Not only is it the nurse's job to communicate the correct history to the physician performing the commercial driver fitness test, but the nurse can jeopardize her license if she fails to communicate the correct history to the physician. The ALJ is persuaded by this testimony.

21. Claimant's alleged fears that Employer would fire him if he filed a claim for the back injury are not credible. In May 2007, Claimant went to the emergency room after suffering a work injury to his teeth. Claimant did not report the teeth injury to Employer until after going to the emergency room. Claimant admitted that he did not notify Employer of the teeth injury until after he went to the emergency room. Claimant also admitted that Employer did not fire him after learning of the prior claim but instead, Employer accepted that claim. Claimant was unable to explain why he was concerned about being fired if he pursued a claim for the alleged back injury in light of the fact that he was not fired for filing a claim for a May 2007 teeth injury.

22. After passing the DOT physical on June 11, 2007, Claimant worked his regular job as a mover for Employer. Claimant worked 4.75 hours on June 12, 7.5 hours on June 13, 2 hours on June 13, 10 hours on June 15, 2.5 hours on June 16, 14 hours on June 18 and 19, 3 hours on June 21, 12.25 hours on June 22, 5 hours on June 23, 7 hours on June 26, 10 hours on June 30, and 6.75 hours on July 1, 2007.

23. Claimant's first medical appointment for the alleged back injury was on July 9, 2007, with Brian Mathwich, M.D.

24. Dr. Mathwich took a history from Claimant that on June 9, 2007, Claimant was carrying an office desk upstairs when he noted pain in his back. The pain was minor at first but over the next several hours began to increase. Dr. Mathwich also documented Claimant's claim that he reported the injury to his supervisor the next day but was told to take medication and continue working.

25. Claimant testified that his back pain has been bad since the date of onset. Nonetheless, during the July 9, 2007, visit, Claimant told Dr. Mathwich that a week prior he was moving a bed with a fellow co-worker and felt a very sharp pain in his right lower back.

26. On July 13, 2007, Claimant filed a claim for Workers' Compensation stating that on June 9, 2007, he was carrying a desk up some stairs when his back buckled and he felt pain in the back and right leg.

27. E. Jeffrey Donner, M.D., examined Claimant on July 17, 2007. Claimant told Dr. Donner of a work injury lifting a desk on June 6, 2007. Dr. Donner's impression was "work-related back, right buttock and leg pain consistent with herniated disc and right L5 radiculopathy." Dr. Donner recommended an MRI scan, an epidural steroid injection, and, if necessary, surgical intervention.

28. On March 18, 2008, Colorado Human Services took a history from Claimant that he was injured in June 2007 while "moving a piano with his employment. 3 teeth lost and injured back."

29. Claimant underwent an IME with Scott Primack, D.O. Claimant gave a history to Dr. Primack that he was carrying an office desk with co-workers sometime in June 2007 when the coworkers lost stability of the desk and Claimant fell down a flight of stairs with the desk. Claimant told Dr. Primack that he fell off to the right and the desk fell off to the left and Claimant had several teeth knocked out.

30. Dr. Primack testified that he specifically questioned Claimant about the mechanism of injury. According to Dr. Primack, Claimant did not give any history about lifting a desk upstairs and developing gradual low back pain that progressively worsened over the next several hours as he told Dr. Mathwich.

31. Claimant denied telling Dr. Primack that he injured his back after falling down stairs with an 800-pound desk that also resulted in several teeth being knocked out.

32. Claimant denied telling Colorado Human Services that he lost 3 teeth and injured his back while moving a piano at work.

33. Claimant stated that the reason various records indicate a date of injury of June 5, 6 or 9, 2007, is that Claimant is not good with remembering dates.

34. Claimant testified that, following the work injury, he continued to work and suffered another back injury while lifting a bed at work. However, Claimant told Dr. Primack that after the alleged work injury, he continued to move furniture at work but he did not experience any aggravation of any type or any additional discomfort other than the fact that he fell down a flight of stairs, his teeth came out, and he had low back pain.

35. Claimant testified that, on several occasions between the alleged injury date and the date of his termination, he attempted to report the injury to FG. Claimant also claims that on several occasions he asked FG if he could see a physician. According to Claimant, FG threatened to fire Claimant on each occasion.

36. FG denied threatening to fire Claimant if Claimant filed a claim for workers' compensation. FG explained that, because he is the owner of a moving company that involves heavy lifting, his employees suffer work injuries on occasion. FG testified that he never threatened to fire any employees, including Claimant, for filing a workers' compensation claim. FG credibly testified that if he was going to fire Claimant for filing a

workers' compensation claim, he would have done so after Claimant filed the first claim for the May 2007 teeth injury.

37. Former coworker, CB, testified that she observed Claimant at work limping and asked him if he hurt his knee. According to CB, Claimant responded that he had hurt his back. CB testified that she asked Claimant if he wanted to file a claim and Claimant responded "no."

38. CB testified further that on June 7, 2007, she received a phone call from a customer complaining that Claimant was one of the movers from Employer that showed up to move her belongings the day before, on June 6, 2007. According to CB, this customer complained because Claimant was so injured that the customer's husband had to do all of the work. CB testified that Employer gave this customer a discount in response to the complaint.

39. FG testified that there was an incident where a customer complained because a deaf mover was sent to move the customer's belongings. The customer complained because the deaf mover could not hear the customer's instructions and the mover did not work quickly enough for her. FG gave this customer a discount.

40. FG credibly explained that, as the owner of a moving company franchise in a competitive market, he would never send an injured employee on a job. The reason for this is that his company performs at a high customer satisfaction rate. He would never send an injured worker, including Claimant, on any move because a customer would not be satisfied if an employee could not perform the job. FG testified that he would not have sent Claimant out on the move if he were injured.

41. Dr. Primack documented Claimant's claim that he told Employer about the injury on the date of the injury but was told by the secretary to "finish unloading the house."

42. Dr. Primack credibly testified that if Claimant injured his back on June 5, 2007, as claimed, Claimant would have been physically unable to continue working his regular moving job until July 3, 2007.

43. Dr. Primack credibly testified that if Claimant sustained a June 5, 2007, back injury as claimed, he would not have passed the June 11, 2007, DOT physical. Certainly, the DOT physical findings would not reflect that Claimant did not have "any injuries in the last 8 years" and that Claimant had "no" low back pain. Dr. Primack credibly testified that Claimant's explanation that he told the DOT nurse about his back injury but the nurse failed to document it or to communicate it to the DOT physician was not believable. Claimant's claim that he intentionally did not tell the DOT physician about the injury because he was worried about being fired but he did tell the DOT nurse is also not believable.

44. Claimant told Dr. Primack that when he walks he limps. He has to constantly move because of pain. He cannot sit for more than 10 minutes. He cannot stand for more than 5 to 10 minutes.

45. Claimant was seen on surveillance videos on July 27, 2007, and August 1, 2007. Claimant was observed bending to obtain mail and standing, walking and sitting with no apparent distress. Claimant saw Dr. Donner on July 17, 2007, complaining of constant back pain shooting into his foot with the degree of pain being an eight on a scale of one to ten with ten being most severe. Claimant also saw Dr. Mathwich on July 20, 2007, and indicated that movement of the low back, primarily flexion, caused pain. Dr. Mathwich gave Claimant restrictions, including no bending. Claimant's subjective complaints to his providers, including Dr. Primack, are not consistent with his level of functioning when Claimant was unaware that he was being observed.

46. Moreover, Dr. Primack conducted a clinical examination that revealed no areas of deformities, limitation of motion or tenderness per the spine/musculoskeletal examination and no neurological abnormalities. These findings are inconsistent with a symptomatic herniated disc.

47. Dr. Primack persuasively explained that Claimant did not sustain a work- related back injury. This opinion is based upon all the circumstances, including the lack of exam findings on Dr. Primack's exam, the inconsistencies regarding Claimant's level of functioning on video compared to Claimant's subjective complaints, the multiple changes by Claimant regarding the date of injury being June 9, 2007, then June 6, 2007, and then June 5, 2007, the fact that Claimant did not seek medical care or report the injury until after Employer terminated him, Claimant's ability to work his regular moving job for multiple hours, including overtime, which involved heavy lifting and bending for close to one month after the alleged injury, that Claimant passed a DOT physical on June 11, 2007, only several days after the alleged injury, and the inconsistencies regarding the mechanism of injury, including that Claimant fell down a flight of stairs with a desk, that Claimant was walking upstairs when his back bucked causing severe pain and that after walking upstairs with a desk Claimant felt minor pain which progressively worsened.

48. Moreover, Claimant's testimony that he feared he would be fired if he reported the injury to Employer is not credible considering that one month prior to the alleged injury, Claimant sustained an admitted injury that resulted in an emergency room hospital visit and dental surgery for which Employer accepted liability and did not fire Claimant. Claimant's claim that he told the DOT nurse about the work injury but not the DOT physician because he feared losing his job is also not credible.

49. The testimony of Claimant's witnesses, including Claimant, is not credible. Claimant has failed to establish by a preponderance of the evidence that he suffered an injury on June 5, 2007, in the course and scope of employment.

CONCLUSIONS OF LAW

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

2. In accordance with Section 8-43-201, C.R.S., this decision contains the 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 Davidson v. I.C.A.O.*, 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. I.C.A.O.*, 5 P.3d 385 (Colo.App. 2000).

Credibility:

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 (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1206 (Colo.App. 2005).

4. Testimony from Claimant and CB is not credible and to the extent there were conflicts between Claimant's testimony and testimony of Respondents' witnesses, the ALJ credits the testimony of Respondents' witnesses. As found, testimony from Claimant and CB was contradicted by the persuasive opinions of Dr. Primack and the testimony from FG. Testimony from Claimant and CB was implausible, inconsistent, and unsupported by the medical records.

5. The ALJ credits the testimony of Dr. Primack who credibly explained that if Claimant was injured as claimed, he would have been unable to work his regular job for four weeks, and he would not have presented without any injury or physical limitations for a DOT physical on June 11, 2007.

6. The ALJ credits the medical opinions of Dr. Primack. His opinions are persuasive and supported by the record, as is the testimony from FG.

Compensability:

7. For a claim to be compensable, Claimant has the burden of proving that he suffered a disability that was proximately caused by an injury or that he needs medical treatment. Section 8-41-301(1)(c), C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Claimant failed to prove either element. To have a "disability" Claimant must either miss three or more days of work as a result of the injury or suffer permanent impairment, neither of which happened here. Sections 8-42-105, and 8-42-107, C.R.S.,

8. Compensability is also not established unless Claimant proves the need for medical treatment is a "[N]atural and proximate consequence of the . . . industrial injury, without any contribution from a separate, causative factor." *Valdez v. United Parcel Serv.*, 728 P.2d 340 (Colo.App. 1986). The failure to establish a causal connection between the injury and the need for medical treatment is fatal to a claim for compensation. *Kinninger v. Industrial Claims Appeal Office*, 759 P.2d 766 (Colo.App. 1988). To establish the causation connection, Claimant must establish that the need for "medical treatment is proximately caused by the injury, and is not simply a direct and natural consequence of the pre-existing condition" or subsequent injury. *Merriman v. Indus. Comm.*, 210 P.2d 448, 450 (Colo. 1949); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo.App. 1990).

9. Based upon the medical records, the testimony and reports of Dr. Primack and FG, and Claimant's incredibility, the ALJ find that Claimant did not sustain a compensable work injury. Claimant changed the date of injury from June 9 to June 5. 2007, after learning that he did not work on June 9, 2007. December 30, 2006. Moreover, contrary to Claimant's testimony that he experienced severe and sharp pain following the June 5, 2007, injury, six days later, on June 11, 2007, Claimant denied suffering from any injury during the previous eight years and he also denied having back pain. Finally, Claimant continued working on the date of the alleged injury and worked his regular job as a mover for long hours, lifting heavy furniture for almost 4 weeks after the alleged injury. It was not until after Claimant was terminated on July 5, 2007, that he filed a claim and sought medical treatment.

10. For the ALJ to find a compensable claim, the ALJ must accept Claimant's testimony and reject the testimony of FG and Dr. Primack. There is no persuasive evidence that suggests Claimant is credible and all of the other fact and medical witnesses are not credible. Thus, the ALJ denies compensability.

Penalties:

11. Claimant asserted penalties pursuant to Sections 8-43-203(1)(a) and 8-43-101, C.R.S., for Insurer's alleged failure to timely admit or deny claim. Section 8-43-203(1)(a), C.R.S., provides that an insurer shall notify the DOWC and Claimant within 20-days after a report is, or should have been filed, with the DOWC pursuant to Section 8-43-101, C.R.S., whether liability is denied or contested.

12. Pursuant to Section 8-43-101, C.R.S., Employer filed a First Report of Injury on July 11, 2007 for Claimant's alleged back injury. Claimant filed a Workers' Compensation Claim on July 13, 2007.

13. On July 27, 2007, 17-days after the Employer filed the first report and 15-days after Claimant filed the claim, Insurer timely filed a Notice of Contest for this claim.

14. On September 28, 2007, Claimant filed a "Corrected Workers' Compensation Claim." The corrected claim was filed for the same injury except that Claimant changed the date of injury from June 9 to June 5, 2007, after Claimant learned that he did not work on June 9, 2007.

15. Claimant submitted into evidence what the ALJ accepted as a business record which was a letter from Insurer with an attached Claim for Workers' Compensation that had a different internal Pinnacol number assigned to it other than the Pinnacol internal number of 3276175 assigned to this claim. Claimant contends that Insurer had a duty to file a "corrected" notice of contest in response to Claimant's "corrected workers' compensation claim."

16. Insurer Claims Representative, Jill Jennings, credibly testified that she contacted the DOWC on two occasions to determine if Insurer had to file a "corrected" notice of contest. Both times, Claimant was advised by the DOWC that unless a new Workers' Compensation number is generated by the Division, there is no need for Insurer to restate its position. The DOWC also advised JJ that there was only one W.C. Number assigned to this claim and that is W.C. No. 4-729-272.

17. The position taken by respondents in W.C. No. 4-729-272 is set forth in the Notice of Contest timely filed on July 27, 2007.

18. Section 8-43-202, C.R.S., requires Insure to notify the Division of Workers' Compensation whether a claim is admitted or contested within 20-days of receipt of a report of injury. Claimant made a written report on July 13, 2007. Insurer filed a Notice of Contest on July 27, 2007. The Notice of Contest was timely filed. There is no provision in the Workers' Compensation for a "corrected" report of injury. Claimant has failed to show that Insurer violated the W.C. Act. Claimant's request for a penalty is denied.

ORDER

It is therefore ordered that:

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

2. Claimant's claim for penalties pursuant to Sections 8-43-203(1)(a) and 8-43-101, C.R.S., for Insurer's alleged failure to timely admit or deny claim is denied and dismissed.

DATED: *January 7, 2009*

Bruce C. Friend
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-629-529

ISSUES

The sole issue determined herein is permanent partial disability ("PPD") benefits. The parties stipulated that claimant was entitled to continuing medical benefits after maximum medical improvement ("MMI").

FINDINGS OF FACT

1. Claimant sustained an admitted lifting injury on September 13, 2004. As a result of the lifting injury, claimant was diagnosed with a left inguinal hernia. Claimant initially treated with Peter Clothier, M.D., who referred claimant for a surgical evaluation. Claimant treated with Trent Hovenga, M.D., a general surgeon, who recommended surgery to repair the left inguinal hernia.

2. Dr. Hovenga performed a left inguinal herniorraphy on October 14, 2004. The surgery revealed a "hernia sac" that was "pushed back" into the abdominal cavity. The hernia repair was completed by placing a plug into the "defect" and suturing in a pre-cut piece of mesh into the floor of the groin.

3. Following the surgical repair of the hernia, claimant had no recurrent hernia or bulging at the site of the surgical repair. Dr. Hovenga assured claimant that his "hernia has not returned." Claimant, however, did begin having a burning pain in the groin.

4. Evaluations confirmed the pain was not a recurrent hernia. Claimant underwent a course of Cipro by Kent Thayer, M.D. for possible prostatitis.

5. On November 29, 2006, Dr. Hovenga examined claimant and noted that the left side was intact and there was no "defect."

6. A computed tomography ("CT") scan on February 5, 2007 confirmed that claimant's hernia had not returned.

7. Dr. Baptist determined that claimant was at MMI. Dr. Struck performed a Division Independent Medical Examination ("DIME") and determined that claimant was not at MMI.

8. In June 27, 2007, Dr. Scott performed an IME for the insurer. Dr. Scott found no recurrent hernia, but diagnosed left ilioinguinal nerve irritation. He concluded that claimant was not at MMI and needed treatment for the nerve irritation. Respondents reopened the claim so that Dr. Hovenga could provide additional treatment.

9. On August 29, 2007, Dr. Hovenga diagnosed chronic left groin pain. Dr. Hovenga referred claimant to Dr. Benecke, who diagnosed claimant with ilioguinal and iliohypogastric neuralgia, but no recurrent hernia. Dr. Benecke provided claimant with Lidoderm patches and a selective nerve block. Despite the efforts to treat the nerve pain, it persisted.

10. Dr. Hovenga determined that claimant's condition was stable. Because Dr. Hovenga is not Level II accredited by the Division of Workers' Compensation and does not perform impairment ratings, he referred claimant to Dr. Hall for an impairment rating.

11. On February 6, 2008, Dr. Hall examined claimant and diagnosed post-herniorraphy with neuropathic pain. He found no obvious defect in the abdominal wall, but he found a defect upon palpation. Dr. Hall rated claimant's permanent impairment at 15% using Table 6 on page 196 of *American Medical Association Guides to Evaluation of Permanent Impairment, Third Edition Revised.* Dr. Hall determined that claimant suffered class II impairment of 15% whole person, the maximum for class II.

12. On March 14, 2008, Dr. Mark Paz, M.D. performed an IME for respondents. Dr. Paz also found no evidence of any recurrent hernia. Dr. Paz found no "palpable defect" in the abdominal wall, noting that the scar tissue was not a "defect." Because claimant had no recurrent hernia, Dr. Paz concluded that Table 6 of the *American Medical Association Guides to Evaluation of Permanent Impairment, Third Edition Revised* did not apply. Dr. Paz also concluded that no impairment rating could be given for impairment of the ilioinguinal nerve because claimant did not have a decrease in sensation of that nerve.

13. On June 18, 2008, Dr. Hattem performed a DIME. He did not have available any medical records after September 22, 2004 and before March 22, 2007. He determined that MMI was December 1, 2004. Dr. Hattem found no palpable defect in the supporting structure of the abdominal wall. Therefore, Dr. Hattem determined that no rating was appropriate under Table 6 of the *American Medical Association Guides to Evaluation of Permanent Impairment, Third Edition Revised.* He noted that the three classes of hernia impairment in this paradigm require a palpable defect to be present. Claimant's ongoing pain is due to a neuropathy rather than to a persistent or recurrent hernia. Dr. Hattem determined impairment for claimant's ongoing ilioinguinal and iliohypogastric nerve pain, pursuant to Table 7, page 114 of the *American Medical Association Guides to Evaluation of Permanent Impairment, Third Edition Revised.* Dr. Hattem determined 3% whole person impairment for iliohypogastric sensory neuropathy and 4% whole person impairment of the ilioinguinal nerve. The two ratings combined for 7% whole person impairment.

14. On August 25, 2008, the insurer filed a Final Admission of Liability for PPD benefits based upon 7% whole person impairment and for post-MMI medical benefits.

15. On August 29, 2008, Dr. Hovenga wrote a letter stating that he would rate claimant at 15% whole person impairment pursuant to class II of Table 6. Dr. Hovenga thought that claimant had a "palpable defect" as used in that Table.

16. Claimant suffers daily left groin pain, although the severity varies with activity. He no longer runs or rides horses. He has problems with standing, pulling, or having sex.

17. At hearing, Dr. Hovenga testified that he thinks the mesh and scar tissue from the surgery is a "palpable defect." He explained that his November 29, 2006, note of "no defect" referred only to the absence of a hole. He testified that a "defect" is anything not normal. Dr. Hovenga noted that he could palpate the scar tissue and the mesh. Dr. Hovenga admitted that different physicians could have different interpretations of the *American Medical Association Guides to Evaluation of Permanent Impairment, Third Edition Revised.*

18. Dr. Hall testified that he considered a "defect" to be any abnormal tissue that was not smooth and consistent. He disagreed with Dr. Hattem's approach to determining the permanent impairment rating. Dr. Hall noted that hernias almost always result in surgery, so Table 6 of the *American Medical Association Guides to Evaluation of Permanent Impairment, Third Edition Revised* must be intended to deal with continuing symptoms from surgical repairs. He analogized the rating to that for herniated discs that are surgically repaired with residual symptoms. He admitted that all of the examples provided in the explanation of Table 6 involve recurrent or persistent hernias, but he did not think that the examples were exclusive of other impairment that could be rated under Table 6. Dr. Hall questioned whether claimant truly had neuropathic pain. He agreed that claimant had pain, but could not say that claimant's pain generator was the ilioinguinal or iliohypogastric nerve. He reiterated that claimant deserved the maximum Table 6, class II rating of 15% whole person.

19. Dr. Paz testified at hearing that most hernia repair patients are not entitled to a Table 6 rating unless the hernia persists. He interprets the term "defect" in Table 6 to mean an opening through which the abdominal contents protrude. He admitted that the scar tissue and mesh could be a "defect" from the normal condition and that one could palpate that "defect." Dr. Paz noted that all of the examples provided in the explanation of Table 6 involve recurrent or persistent hernias.

20. Claimant has not shown by clear and convincing evidence that the DIME's rating for permanent impairment is incorrect. The evidence does not demonstrate that it is highly probable that Dr. Hattem's determination that claimant has no "palpable defect" is incorrect. The criteria for Table 6 appear to require an unrepaired, failed, or recurrent hernia must be present and not merely scar tissue and mesh from the surgical repair.

The examples with Table 6 all refer to existing hernias rather than surgically repaired hernias with no recurrence. Based upon the criteria, claimant has no permanent impairment for a hernia defect. Dr. Hovenga and Dr. Hall have a difference of opinion with the DIME and Dr. Paz about how to interpret Table 6. That difference of opinion does not demonstrate that it is highly probable that the DIME's rating is incorrect. Dr. Hattem's determination of impairment for neuropathic pain in the amount of 7% is not clearly incorrect. Consequently, claimant has 7% whole person impairment due to the work injury.

CONCLUSIONS OF LAW

1. 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). 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. Claimant argues that the issue in this case has been resolved in *Welch v. Denver West Remediation & Construction*, *LLC,* W.C. No. 4-449-365 (ICAO April 27, 2004). That case, however, merely affirmed the Judge's determination that the Table 6, class II rating by the DIME had not been overcome by clear and convincing evidence.

ORDER

It is therefore ordered that:

1. The insurer shall pay for all of claimant's reasonably necessary medical treatment by authorized providers after MMI.

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

DATED: January 8, 2009 /s/ original signed by:_____

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-678-516

ISSUES

The issues for determination are reopening and medical benefits.

FINDINGS OF FACT

1. Claimant injured his knee approximately thirty years ago. Claimant required extensive surgery for that injury. Claimant subsequently developed severe post-traumatic arthritis in the left knee. Claimant was able to function well on the knee despite the arthritis until March 6, 2006.
2. Claimant suffered this compensable injury to his left knee on March 6, 2006. Dr. Weingarten performed surgery. Dr. Weingarten recommended a total knee replacement. Claimant was diagnosed with multiple myeloma. That diagnosis kept Claimant from undergoing the recommended total knee replacement.
3. Claimant was placed at maximum medical improvement (MMI) on May 15, 2007. A Division independent medical examination (DIME) report agreed that Claimant had reached MMI. Claimant did not challenge the DIME finding that he was at MMI or the permanent rating that apportioned part of the impairment to Claimant's pre-existing condition and part to this compensable injury.
4. Claimant underwent a stem cell transplant for his multiple myeloma. The multiple myeloma is in remission and is no longer a barrier to the recommended total knee replacement surgery. There has been a change in Claimant's condition that justifies reopening, if the recommended surgery is needed because of this compensable injury and not the knee injury thirty years ago.
5. Dr. Kawasaki stated that a total knee replacement is necessary to cure and relieve Claimant from the effects of the injury thirty years ago and not from this compensable injury. Dr. Coville examined Claimant on April 16, 2008, and stated that Claimant is not a good candidate for surgery. The opinion of Dr. Kawasaki not persuasive.
6. Dr. Healy stated that the compensable injury resulted in a permanent aggravation of the preexisting condition and accelerated the need for the surgery. Dr. Healey stated that the total knee replacement is necessary to cure and relieve the effects of this compensable injury. The opinions of Dr. Healy are credible and persuasive.

CONCLUSIONS OF LAW

1. 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. 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 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).

3. 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 proved by a preponderance of the evidence that he has had a change in medical condition. There has been a change in Claimant's condition that justifies reopening because the multiple myeloma is in remission and is no longer a barrier to the recommended total knee replacement surgery. Claimant's testimony in this regard is credible and persuasive.

4. Dr. Healey's findings after MMI that Claimant had a bone marrow transplant for his multiple myeloma and is being followed by an oncologist support the Claimant's testimony and are persuasive.

5. Claimant has proved by a preponderance of the evidence the need for a total knee replacement to cure and relieve the effects of this compensable injury. Dr. Weingarten, the treating physician, recommended the need for total knee replacement during treatment of this compensable injury.

6. This compensable injury resulted in the permanent aggravation of the preexisting condition and accelerated the need for the surgery. The recommended surgery is needed because of this compensable injury and not the knee injury of thirty years ago. The recommended surgery is reasonable and necessary to cure and relieve the effects of the compensable injury. Section 8-42-101, C.R.S. The opinions and recommendations of Dr. Healey and Dr. Weingarten are credible and persuasive. The opinions of Dr. Kawasaki and Dr. Coville to the contrary are not persuasive.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen is granted.

2. Insurer is liable for additional medical treatment to cure and relieve Claimant from the effects of the compensable injury.

3. Issues not determined by this order are reserved.

DATED: *January 8, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-685-013

ISSUES

The sole issue determined herein is permanent total disability ("PTD") benefits. The parties stipulated to an average weekly wage of $287.84. Claimant requested in her position statement that the Judge take judicial notice of the definition of "empiric" in *Dorland's Illustrated Medical Dictionary*, 26th ed. That request is denied. The definition

was disputed and was the subject of testimony at hearing. Judicial notice pursuant to CRE 201 is improper.

FINDINGS OF FACT

1. Claimant is 40 years old and has a third grade education in Mexico. She has limited English skills, but can speak and understand some English. She immigrated to the United States in 1997. She is an undocumented worker.
2. On July 1, 2004, claimant began work in the packaging department for the employer. She ran a paper feeder.
3. Claimant began to have bilateral wrist, elbow, and shoulder pain in May 2005. She continued working her regular job duties.
4. On January 18, 2006, Dr. Kiernan examined claimant, who reported the history of pain in her wrists, forearms, and shoulders. Dr. Kiernan diagnosed bilateral carpal tunnel syndrome ("CTS"), bilateral forearm strain, and bilateral shoulder strain. He prescribed physical therapy and imposed restrictions against lifting over 10 pounds or reaching overhead or away from the body more than occasionally. The physical therapy helped claimant's shoulder pain, but her wrist and forearm pain persisted.
5. On March 6, 2006, Dr. Kiernan noted that bilateral wrist injections helped. He then diagnosed only bilateral CTS.
6. Claimant worked until April 29, 2006. Thereafter, the employer terminated her employment.
7. Surgery was delayed, but eventually, Dr. Devanny performed a left CTS surgery on July 20, 2006, and the right CTS surgery on August 31, 2006.
8. On September 14, 2006, Dr. Kiernan released claimant to work with no restrictions on her left hand, but prohibited right hand use.
9. On September 25, 2006, Dr. Kiernan noted that claimant complained of diffuse pain in her forearms and arms. On October 5, 2006, Dr. Kiernan noted that claimant's complaint of shoulder pain was not consistent with her physical examination. He referred her for repeat electromyography ("EMG") testing. The November 8, 2006, EMG showed only borderline bilateral CTS, greatly improved since the earlier testing pre-surgery.
10. The December 6, 2006 functional capacity evaluation ("FCE") was invalid for material handling.
11. On December 11, 2006, Dr. Kiernan determined that claimant was at maximum medical improvement ("MMI"). He determined impairment of 10% of the left arm and 8% of the right arm due to loss of wrist range of motion. Dr. Kiernan imposed restrictions of "carry and repeated lift of 10 pounds, occasional lift of 20 pounds and push/pull load of 50 pounds. These are all to be done 2 hand. Additionally, the patient is to perform occasional 2-hand reach away from the body and reach overhead of 10 pounds, not to exceed 32 times per day."
12. On February 5, 2007, Ms. Picket performed a vocational evaluation for claimant. Ms. Picket concluded that claimant had no skills to perform work that did not require reaching more than 32 times per day. She concluded that claimant was unable to return to work and earn wages.

13. On February 21, 2007, Dr. Striplin performed an independent medical evaluation ("IME") for respondents. Dr. Striplin noted non-physiologic findings on examination. He concluded that no objective basis existed to impose restrictions on claimant.

14. On August 29, 2007, Dr. Soffer performed a Division IME ("DIME"). She agreed that claimant was at MMI on December 11, 2006. She determined impairment of 7% of the left arm and 4% of the right arm based upon wrist range of motion. She agreed with the restrictions by Dr. Kiernan.

15. Claimant became pregnant. She sought medical care due to depression. During her pregnancy, she also obtained wrist splints. She reported that her arms improved during her pregnancy. She gave birth on May 28, 2008. Thereafter, her arm pain worsened.

16. On May 22, 2008, Mr. Renfro performed a vocational evaluation for respondents. He used the restrictions by Dr. Kiernan, but he interpreted the 32 time limit on overhead lifting as a material handling restriction. Mr. Renfro concluded that claimant is capable of performing jobs in a light or sedentary physical demand capacity. Jobs within claimant's physical abilities and language abilities include a fast food worker, Mexican restaurant light food prep worker, advertising sign holder, lunchroom aide, laundry folder and presser, before and after school attendant, companion, ticket taker, crossing guard, game room attendant, dietary aide, golf range attendant, cashier, greeter, and turn down attendant. Mr. Renfro concluded that claimant was able to return to work and earn wages.

17. At hearing, Mr. Renfro testified that claimant's only work injury involved her wrists. Consequently, non-material-handling reaching was irrelevant. He also explained the origin of the 32 times per day concept for occasional activity. That concept has not been peer-reviewed and is unreliable as a basis for restrictions. Mr. Renfro's testimony is persuasive that the limitation on reaching overhead to 32 times per day is only in connection with the 10-pound weight lifting restriction. Claimant has no restriction against reaching away from her body.

18. At hearing, Ms. Picket testified consistently with her report that claimant was unable to obtain and retain employment. She did not agree with Mr. Renfro's interpretation of the restrictions by Dr. Kiernan. She agreed that Spanish-speaking jobs exist in the Colorado Springs labor market, but she did not think that claimant would be able to maintain entry-level employment due to the reaching limitations.

19. Dr. Striplin testified at hearing. He explained that claimant's non-physiologic findings on examination made no sense, including her 60 millimeter two-point discrimination. Dr. Striplin did not find claimant credible, so he did not diagnose any elbow or shoulder problems.

20. The records show that claimant initially reported pain running from her wrists all the way to her shoulders. The therapy helped the shoulder pain, but she continued to have the wrist and forearm pain. At that point, Dr. Kiernan specified the diagnosis as CTS. He no longer diagnosed elbow and shoulder strain. Dr. Kiernan became concerned about claimant's symptom magnification. He suspected that the FCE would be invalid. His restrictions against overhead lifting are part of his material handling restrictions. Claimant is not limited in reaching away from her body.

21. Because claimant is not limited in reaching away from her body, she is able to obtain and maintain entry-level employment. The vocational opinions of Mr. Renfro are

credible and persuasive. Claimant is able to obtain and maintain employment despite her admitted work injury. She is able to earn wages and is not entitled to PTD benefits.

CONCLUSIONS OF LAW

1. Under the applicable law, 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. The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). The ALJ must consider claimant's commutable labor market and other similar concepts regarding the existence of employment that is reasonably available to the claimant under his or her particular circumstances. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). As found, claimant has failed to prove by a preponderance of the evidence that she is unable to earn any wages in the same or other employment.

ORDER

It is therefore ordered that:

1. Insurer shall pay benefits for all admitted periods based upon an average weekly wage of $287.84.

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

DATED: January 12, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-743-250

ISSUES

The issues determined herein are compensability, temporary total disability ("TTD") benefits, late reporting penalty, and requested reduction pursuant to section 8-42-112(1)(d), C.R.S. The parties stipulated to medical benefits. The parties stipulated that claimant was disabled from his usual occupation commencing November 21, 2007. In their position statements, both parties stipulated that claimant's average weekly wage was $520.63.

FINDINGS OF FACT

1. On February 27, 2002, claimant suffered a previous work injury to his low back. He did not work from 2002 to 2005. Claimant received permanent work restrictions of lifting to 20 pounds, carrying 10 pounds, and pushing and pulling 40 pounds. Claimant received continuing medical care through 2004 until he settled that workers' compensation claim. Thereafter, claimant received additional treatment through his personal physician.

2. In 2005, claimant worked for Gonzales Concrete for three months. Claimant then began work as a concrete finisher for the employer.

3. The employer did not have claimant complete an application for employment. The employer asked claimant no questions about his prior work history or about any prior injuries or restrictions. The employer just asked if claimant knew how to do the type of concrete work the job required. Mr. Cullen testified that he probably would not have hired claimant if he had known of claimant's preexisting work restrictions. That might be true, but he failed to ask.

4. On November 19, 2007, claimant and his fellow crew members had to use a jackhammer to break up old concrete. This was not a common job duty. Claimant performed a lot of the jackhammering. After lunch, claimant experienced low back pain. He commented to a coemployee, Mr. Borquez, about his low back pain. Claimant was unable to continue jackhammering. At the end of the day, Mr. Cullen returned to the job site and used the jackhammer.

5. On November 19, 2007, claimant did not report to Mr. Cullen that he had injured his low back at work. Claimant thought the pain would resolve.

6. On November 20, 2007, claimant returned to work. Mr. Borquez observed that claimant appeared to be in pain and was unable to bend. Nevertheless, claimant did the regular job duties. Claimant did not report his injury on that day.

7. On November 21, 2007, no work was scheduled due to weather. Claimant appeared at the employer's premises to pick up his paycheck. He still did not report his work injury. No additional work was scheduled until Monday, November 26, 2007.

8. Over the long Thanksgiving Day weekend, claimant's condition worsened and he found it difficult even to move.

9. Early on the morning of Monday, November 26, 2007, claimant called Mr. Cullen and reported his work injury and reported that he was unable to return to work that day. The employer referred claimant for medical care at CCOM.

10. On November 28, 2007, Physician's Assistant Schultz examined claimant, who reported a history of acute low back pain after using the jackhammer. P.A. Schultz noted that the injury was work-related and that the objective findings were consistent with the history. P.A. Schultz referred claimant for a magnetic resonance image ("MRI").

11. The November 30, 2007, MRI showed L2-3 and L3-4 protrusion with L3 nerve root compression.

12. On December 20, 2007, Dr. Nanes examined claimant, who reported worsening of his condition. Dr. Nanes diagnosed a strain. He prescribed medications and referred claimant for an orthopedic evaluation.

13. On April 28, 2008, Dr. Nanes ceased treatment because the insurer had denied the claim. Dr. Nanes imposed restrictions against lifting, crawling, kneeling, squatting, or climbing. Claimant then sought treatment from his personal physician.

14. At hearing, respondents submitted surveillance videotape of claimant taken on May 1, 2008. The videotape showed claimant walking with an altered gait and frequently putting his hand on his lower back. In the videotape, claimant's wife drove the truck, unloaded all of the groceries, and closed the door of the truck for claimant.

15. Claimant did not call the employer on a daily basis after reporting his injury. At hearing, Mr. Cullen admitted that he did not expect claimant to return to work in light of his back injury. The employer did not terminate claimant's employment. At hearing, Mr. Cullen admitted that he still considered claimant to be an employee.

16. On May 20, 2008, Dr. Richman performed an independent medical examination of claimant. Claimant reported a history of jackhammering, leading to low back pain, left greater than right. Dr. Richman concluded that claimant suffered a new injury that was consistent with the reported mechanism. Dr. Richman noted that the previous injury was to the lumbosacral junction or sacroiliac joints rather than to the L2-3 or L3-4 level. Dr. Richman found no exaggerated pain behaviors.

17. On June 5, 2008, Dr. Richman wrote a letter recommending that claimant continue his same 2003 restrictions of lifting to 20 pounds, carrying 10 pounds, and pushing and pulling 40 pounds.

18. Dr. Nanes testified by deposition that the April 2002 MRI was normal. The 2007 MRI showed the disc protrusion and L3 nerve root compression. Dr. Nanes testified that the injury was consistent with jackhammer use, although he also noted that such use usually causes problems with upper extremities rather with the low back. Dr. Nanes testified that claimant's disc injury was not the natural consequence of the earlier 2002 injury. He agreed with continuing a 20-pound lifting restriction.

19. Claimant has proven by a preponderance of the evidence that he suffered an accidental injury to his low back arising out of and in the course of his employment on November 19, 2007. Claimant's testimony is credible and is supported by the testimony of Mr. Borquez and the medical records. Contrary to respondents' argument, the immigration status of Mr. Borquez does not demonstrate that his testimony is incredible. Similarly, claimant's use of a translator at the hearing does not demonstrate that his testimony is incredible. Claimant's unusual use of the jackhammer on the day of injury

caused the acute low back injury. He ceased use of the jackhammer due to the back pain. He mentioned his back pain to his coemployees, although he did not immediately report the injury to his supervisor. Dr. Richman is persuasive that the mechanism of injury is consistent with the symptoms. Claimant returned to work the following day, but continued to suffer back pain.

20. Respondents failed to prove by a preponderance of the evidence that claimant was responsible for termination of his employment. The employer admitted at hearing that claimant's employment had never been terminated and he was still considered to be an employee.

21. Claimant failed to report his November 19 injury until November 26, 2007, even though he knew that he was injured as a result of the work accident.

22. Respondents failed to prove by a preponderance of the evidence that claimant willfully misled the employer about claimant's physical ability to perform the job. The employer never asked about physical abilities, but only asked about skill levels. Claimant, in fact, was able to perform all of the job duties for two and one-half years until his work injury.

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). 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). In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found, claimant has proven by a preponderance of the evidence that he suffered an accidental injury to his low back arising out of and in the course of his employment on November 19, 2007.

2. 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). The parties stipulated that the in-

surer was liable for the treatment by CCOM, the MRI, and claimant's out of pocket expenses.

3. The parties stipulated that claimant was unable to return to the usual job commencing November 21, 2007, due to the effects of the work injury. 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).

4. Because claimant's injury was after July 1, 1999, sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. apply. Those identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, claimant causes his wage loss through his own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo.App. 2002). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). Thus, the fault determination depends upon whether claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). As found, respondents failed to prove by a preponderance of the evidence that claimant was responsible for termination of his employment. Consequently, section 8-42-105(4), C.R.S., is inapplicable to bar claimant's entitlement to TTD benefits.

5. Section 8-43-102(1), C.R.S., required claimant to make a written report of his work injury within four days. As found, claimant failed to report his November 19 injury until November 26, 2007. Consequently, claimant is penalized for late reporting of his injury in the amount of one day's TTD benefits for each day during the period November 23 through 25, 2007.

6. Respondents' requested reduction in indemnity benefits pursuant to section 8-42-112(1)(d), C.R.S. Respondents alleged that claimant willfully misled the employer concerning claimant's physical ability to perform the job and claimant was subsequently injured as a result of the physical ability about which he allegedly willfully misled the employer. As found, respondents failed to prove by a preponderance of the evidence that claimant willfully misled the employer about claimant's physical ability to perform the job.

7. Claimant requested attorney fees from respondents due to frivolous or groundless defense of a claim. The statute does not authorize attorney fees for frivolous or groundless defense of a claim. Respondents cross moved for attorney fees due to the lack of statutory authorization for attorney fees for frivolous or groundless defense of a claim. Respondents' cross-motion similarly lacks any statutory authorization. Both motions for attorney fees are denied and dismissed.

ORDER

It is therefore ordered that:

1. Pursuant to the stipulation of the parties, the insurer shall pay for all of claimant's reasonably necessary medical treatment from authorized providers, including CCOM, the MRI, and claimant's out of pocket expenses.

2. The insurer shall pay to claimant TTD benefits at the rate of $347.09 per week commencing November 21, 2007.

3. Claimant is penalized for late reporting of his injury in the amount of one day's TTD benefits for each day during the period November 23 through 25, 2007.

4. Respondents' request for a reduction in indemnity benefits pursuant to section 8-42-112(1)(d), C.R.S., is denied and dismissed.

5. Claimant's motion for attorney fees from respondents is denied and dismissed. Respondents' cross-motion for attorney fees is denied and dismissed.

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

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

DATED: January 13, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-764-367

ISSUES

Claimant alleges he sustained an injury in the course of his employment with Employer. Employer admits Claimant sustained an injury resulting in the need for medical

care and disability, but denies Claimant was an employee. Employer admits that he did not have worker's compensation insurance on the date of the injury, but denies that he had any employees.

The issues for determination are compensability (employment), medical benefits, average weekly wage, temporary disability benefits, permanent partial disability benefits, disfigurement, and penalty for failure to insure.

FINDINGS OF FACT

1. Claimant sustained an injury on April 4, 2008. The injury was to Claimant's right index finger. The injury occurred while using a hoist at the residence of Ivan Schneider, the owner of Employer. Claimant received care for the injury from North Colorado Medical Center and Dr. Stephen Seiler at Greeley Medical Center. Claimant's right index finger was amputated between the middle and distal phalanx.

2. Claimant testified that he was employed by Employer for eight months; that he was paid $100 per day in cash; that he usually worked six days per week; that Mr. Schneider kept vehicles used in his business around his personal residence, that at the time of the accident he was working on a vehicle of Mr. Schneider's that was used in his business; and that, at the urging of Mr. Schneider, he told personnel in the emergency room that he was not employed.

3. Mr. Schneider testified that he did not employ Claimant, that he did not pay Claimant $100 per day or any other amount, that he did not keep vehicles used in his business around his residence; and that at the time of the accident Claimant was working on Claimant's personal vehicle.

4. The conflicting testimony of Claimant and of Mr. Schneider was not supported or refuted by any other testimony or by any documents submitted into evidence.

5. The testimony of Claimant is not persuasive. Claimant has failed to establish by a preponderance of the evidence that his injury occurred in the course and scope of his employment for Employer.

CONCLUSIONS OF LAW

Claimant has the burden to establish by a preponderance of the evidence that he sustained his injury in the course and scope of his employment with Respondent. Section 8-41- 301(1)(c), C.R.S. Claimant has not established by a preponderance of the conflicting evidence that he was employed by Respondent, or that he was working on a vehicle of Respondent when the accident occurred. Claimant has not established by a preponderance of the evidence that he sustained an injury in the course and scope of his employment with Respondent. Other issues are not reached.

ORDER

It is therefore ordered that the claim is denied and dismissed.

DATED: *January 12, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-704-954

ISSUES

¬ Did claimant prove by a preponderance of the evidence that she is entitled to temporary disability benefits from November 14, 2006, through April 23, 2007?

¬ Did respondents prove by a preponderance of the evidence that claimant is responsible for termination of her employment such that her wage loss may not be attributable to her industrial injury?

FINDINGS OF FACT

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

1. Employer hired claimant as a probationary employee on October 21, 2006, to work as a process helper. Claimant attended orientation, where she learned she would not qualify to join the union until after successfully completing her 30-day probationary period. At orientation, employer instructs probationary new-hires that they lack protected rights through the union, that employer may terminate them for any absence, and that they are at-will employees. Claimant understood she was hired as a probationary employee for the first 30-day period. Claimant worked the swing shift from 4:00 p.m. to midnight. Accepting the parties' stipulation, claimant's average weekly wage was $323.50. On November 14, 2006, employer terminated claimant for excessive absenteeism.

2. Claimant sustained an admitted injury on November 6, 2006, while working as a lab technician. Claimant's lab technician duties involved obtaining and testing samples of liquids. Claimant missed a step and fell onto her outstretched right arm while walking down stairs at work.

3. Employer referred claimant to the Fort Morgan Medial Group, where she was treated Jacques Y. LeBlanc, M.D., and Robert Thiel, M.D. Dr. LeBlanc evaluated claimant on November 7, 2006. Claimant complained of right knee and lower and upper

back pain, between her shoulder blades. Dr. LeBlanc diagnosed right knee pain and back pain.

4. Employer referred claimant to Dr. Thiel for a second opinion evaluation on November 8, 2006. Dr. Thiel referred claimant for physical therapy and released her to return to work under restrictions. Claimant returned to modified work folding filter papers. Dr. Thiel placed claimant at maximum medical improvement as of April 23, 2007.

5. Claimant understood she was a probationary employee during the 30-day trial period and that any absenteeism during her probationary period could result in termination. A reasonable probationary employee understands, or should understand, that employer was not required to administer progressive discipline or warning notices before terminating such employees. This is set forth in the collective bargaining agreement given probationary employees at the time of hire. A reasonable probationary employee should understand that, while certain absences might otherwise seem reasonable for employees under a collective bargaining agreement, those same absences might result in termination for probationary employees. The Judge infers that the purpose of a probationary period is to allow an employee to prove herself – to demonstrate her resolve to be a reliable employee who will not engage in excessive absenteeism.

6. Employer's Office Coordinator, Cheryl Burdette, investigated claimant's absenteeism at the request of claimant's supervisor. Crediting Ms. Burdette's testimony, claimant had the following absences during her probationary period: On October 27, 2006, claimant was absent for 1.5 hours to attend a doctor's appointment; on October 29th, claimant was absent for 8 hours to attend the funeral of her roommate; on November 2nd, while claimant called to say she could not find a babysitter and would be late to work, she failed to show for her entire shift; on November 5th, claimant was 20 minutes late for work; on November 8th, claimant was absent for 1.5 hours to attend her daughter's medical appointment; and on November 13th, claimant was absent to care for her sick daughter. Although claimant was also absent for a period of time on November 13th to attend the appointment with Dr. Thiel, workers' compensation medical appointments are not considered an absence that would result in termination. Based upon Ms. Burdette's research, employer terminated claimant for excessive absenteeism. Crediting Ms. Burdette's testimony, employer may terminate probationary employees for one absence during the 30-day trial period.

7. As found, claimant knew or should have known that each absence during her probationary period could result in her termination. Crediting her testimony, claimant requested permission on October 27, 2007, to attend a personal medical appointment for a hand condition that was unrelated to her work. Claimant scheduled this appointment during her work hours. There was no evidence otherwise showing that claimant could not schedule the appointment during non-work hours. Claimant thus exercised some degree of control in deciding to risk her probationary employment by electing to schedule her medical appointment during her shift. Claimant's decision to miss work to attend the appointment during her probationary period was volitional, es-

pecially since she understood that any future absence during her 30-day probationary period could result in her termination.

8. As found, claimant knew or should have known that each absence during her probationary period could result in her termination. With this knowledge, claimant nonetheless elected to attend the funeral of her former roommate on October 29, 2007. Crediting her testimony, claimant felt equivocal about attending the funeral, reasoning that, when a person passes away, that person is merely gone. Claimant explained that she could as easily have gone to work at her newly acquired job. Claimant thus exercised some degree of control in deciding to risk her probationary employment by electing to take the entire workday to attend the funeral. Claimant's decision to miss work to attend the funeral during her probationary period was volitional, especially in light of her absence on October 27th to attend an appointment and her knowledge that any future absence during her 30-day probationary period could result in her termination.

9. As found, claimant knew or should have known that each absence during her probationary period could result in her termination. Claimant called employer on November 2nd to state she was running late because her babysitter was running late due to family health issues. Claimant later learned the babysitter would not be available at all to care for her child. Claimant failed to offer any persuasive evidence showing she made any effort to find an alternative babysitter. While claimant testified she called employer a second time to say she could not make it in to cover her shift, the Judge credits the testimony of Ms. Burdette in finding claimant failed to call to inform employer that she could not make it to work. The initial unavailability of claimant's babysitter likely was beyond her control. However, claimant more probably exercised some degree of control over the circumstances by failing to find an alternative for childcare and by failing to call to explain her absence for her entire shift. As a reasonable probationary employee, claimant knew or should have known that her decision to no-call-no-show for the remainder of her shift on November 2nd after calling to say she would appear late could lead to termination of her employment. Claimant thus exercised some degree of control in deciding to risk her probationary employment by failing to call or show for the remainder of her shift on November 2nd. Claimant's conduct on November 2nd was volitional, especially in light of her absence October 27th to attend an appointment, her absence on October 29th to attend the funeral, and her knowledge that any future absence during her 30-day probationary period could result in her termination.

10. As found, claimant knew or should have known that each absence during her probationary period could result in her termination. Crediting her testimony, claimant was 20 minutes later for her shift on November 5, 2007, because of a dead battery in her car. There was no persuasive evidence showing it likely claimant had some degree of control over the circumstances of finding her car had a dead battery. Claimant's 20-minute absence on November 5th was not volitional.

11. As found, claimant knew or should have known that each absence during her probationary period could result in her termination. Crediting her testimony, claimant was absent from her shift for 1.5 hours on November 8, 2007, to take her daughter

to a medical appointment. Claimant scheduled her daughter's appointment during her work hours. There was no evidence otherwise showing that claimant could not schedule the appointment during non-work hours. Claimant thus exercised some degree of control in deciding to risk her probationary employment by electing to take a portion of her workday to attend her daughter's medical appointment, especially since she was late on November 5th due to a dead battery. Claimant's decision to miss work on November 8th to attend the appointment during her probationary period was volitional, especially in light of her absence October 27th to attend an appointment, her absence on October 29th to attend the funeral, her no-call-no-show absence on November 2nd, her non-volitional absence on November 5th, and her knowledge that any future absence during her 30-day probationary period could result in her termination.

12. As found, claimant knew or should have known that each absence during her probationary period could result in her termination. Claimant was absent from her entire shift on November 13, 2007, to care for her sick daughter. There was no persuasive evidence otherwise showing that claimant could not find alternative childcare to care for her sick daughter. Claimant thus exercised some degree of control in deciding to risk her probationary employment by electing to take an entire shift to care for her daughter's illness. Claimant's decision to miss work on November 13th to stay home with her sick daughter during her probationary period was volitional, especially in light of her absence October 27th to attend an appointment, her absence on October 29th to attend the funeral, her no-call-no-show absence on November 2nd, her absence on November 5th, her absence on November 8th, and her knowledge that any absence during her 30-day probationary period could result in her termination.

13. Respondents showed it more probably true than not that, under the totality of the circumstances, claimant was responsible for her termination due to excessive absenteeism. Claimant should reasonably have known that one absence, much less 5 or 6 absences, during the first 24 days of her 30-day probationary period was excessive, unreasonable, and likely would result in termination. The Judge found that, with the exception of her absence due to a dead battery on November 5th, claimant exercised some degree of control over her pattern of absenteeism. The Judge found that claimant's absenteeism was volitional. Respondents thus proved by a preponderance of the evidence that claimant was responsible for termination of her probationary employment.

CONCLUSIONS OF LAW

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

A. Temporary Disability Benefits:

Claimant argues she has proven by a preponderance of the evidence that she is entitled to temporary disability benefits from November 14, 2006, through April 23, 2007. By contrast, respondents argue they have proven by a preponderance of the evidence

that claimant was responsible for termination of her employment such that her wage loss may not be attributable to her industrial injury. The Judge agrees with respondents.

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), *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*.

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

To prove entitlement to temporary total disability (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). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Sections 8-42-103(1)(g) and 8-42-105(4), *supra*, (termination statutes) provide that, where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-

job injury. The termination statutes apply to injuries occurring on or after July 1, 1999. 1999 Colo. Sess. Laws, ch. 90 at 266. Respondents shoulder the burden of proving by a preponderance of the evidence that claimant was responsible for his or her termination. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 20 P.3d 1209 (Colo. App. 2000).

By enacting the termination statutes, the General Assembly sought to preclude an injured worker from recovering temporary disability benefits where the worker is at fault for the loss of regular or modified employment, irrespective whether the industrial injury remains the proximate cause of the subsequent wage loss. *Colorado Springs Disposal v. Martinez*, 58 P.3d 1061 (Colo. App. 2002) (court held termination statutes inapplicable where employer terminates an employee because of employee's injury or injury-producing conduct). An employee is "responsible" if the employee precipitated the employment termination by a volitional act which an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). Thus, the fault determination depends upon whether claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995).

Here, the Judge found that respondents showed it more probably true than not that claimant was responsible for her termination due to excessive absenteeism. Respondents thus proved by a preponderance of the evidence that claimant was responsible for her termination.

As found, respondents showed it more probably true than not that claimant was responsible for her termination due to excessive absenteeism. The Judge found that claimant understood she was a probationary employee during the 30-day trial period and that she should have understood from her orientation that any absenteeism could result in termination. The Judge found that a reasonable probationary employee under the same circumstances understands, or should understand, that employer was not required to administer progressive discipline or warning notices before terminating such employees. This is set forth in the collective bargaining agreement given probationary employees at the time of hire. A reasonable probationary employee should understand that, while certain absences might otherwise seem reasonable for employees under a collective bargaining agreement, those same absences likely would result in termination for probationary employees.

Claimant should reasonably have known that one absence, much less 5 or 6 absences, during the first 24 days of her 30-day probationary period was excessive, unreasonable, and likely would result in termination. The Judge found that, with the exception of her absence due to a dead battery on November 5th, claimant exercised some degree of control over her pattern of absenteeism. The Judge found that claimant's absenteeism was volitional. Respondents thus proved by a preponderance of the evidence that claimant was responsible for termination of her probationary employment.

The Judge concludes that claimant's request for TTD benefits from November 14, 2006, through April 23, 2007, 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 request for TTD benefits from November 14, 2006, through April 23, 2007, is denied and dismissed.

2. Issues not expressly decided herein are reserved to the parties for future determination.

DATED: _January 12, 2009__

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-689-933

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he suffered Permanent Total Disability (PTD) as a result of an admitted lower back injury that he sustained on June 14, 2006 during the course and scope of his employment with Employer.

2. Whether Claimant is entitled to a disfigurement award.

FINDINGS OF FACT

1. Claimant is a 50 year-old male who lives in Denver, Colorado. Employer is a non-profit organization that manages and leases the National Western Complex in Denver, Colorado. Employer has 34 full-time employees and approximately 800 temporary employees during the National Western Stock Show event that is held every January.

2. Claimant was a full-time employee for Employer in the buildings and grounds department. He primarily performed maintenance duties. On June 14, 2006 Claimant suffered an admitted industrial injury to his lower back during the course and scope of his employment with Employer.

3. Claimant initially received conservative treatment for his injury but continued to experience lower back symptoms. During his treatment, he continued to work for Employer performing modified duties. Because conservative treatment failed, Claimant underwent a microdiskectomy at L5 on March 12, 2007. Approximately two weeks after surgery Claimant resumed his modified employment with Employer.

4. On June 27, 2007 John J. Aschberger, M.D. determined that Claimant had reached Maximum Medical Improvement (MMI) for his lower back injury. He assigned Claimant a 12% whole person impairment rating. Insurer filed a Final Admission of Liability (FAL) consistent with Dr. Aschberger's determinations.

5. On September 10, 2007 Dr. Aschberger rescinded his determination that Claimant had reached MMI. He commented that Claimant had suffered recurrent flare-ups and was concerned that Claimant could not perform his job duties. Dr. Aschberger noted that Claimant could benefit from additional stabilization and strengthening exercises. He did not expect a change in Claimant's impairment rating but commented that Claimant might require more stringent restrictions.

6. On March 4, 2008 Dr. Aschberger again placed Claimant at MMI. He assigned Claimant a 16% whole person impairment rating. Insurer subsequently filed a FAL consistent with Dr. Aschberger's determinations.

7. Claimant's Authorized Treating Physician (ATP) Christian O. Updike, M.D. and Dr. Aschberger recommended a Functional Capacity Evaluation (FCE) to assess Claimant's capabilities. On March 21, 2008 Claimant underwent the FCE. The FCE revealed that Claimant could work at the "medium" physical demand level for a complete eight-hour day. His functional limitations included the following: (1) a leg lift capability of 40 pounds; (2) a shoulder lift capability of 40 pounds; (3) an overhead lift capability of 20 pounds; (4) a specific carry capacity of 40 pounds; and (5) a unilateral carry capacity of 40 pounds.

8. On March 26, 2008 Dr. Aschberger reviewed the results of the FCE with Claimant. Dr. Aschberger stated that Claimant had a projected work capacity in the medium duty category. He recommended lifting restrictions of 20 to 40 pounds on an occasional basis and less than 20 pounds frequently. Dr. Aschberger also commented that Claimant should not engage in repetitive bending and twisting.

9. On April 7, 2008 Dr. Updike reviewed the results of the FCE with Claimant and noted that Claimant was "in general agreement with them." He assigned Claimant permanent restrictions that included lifting in excess of 40 pounds on a rare basis and lifting less than 20 pounds on a frequent basis. Dr. Updike also noted that Claimant should limit his bending.

10. Claimant continued to perform modified duty assignments for Employer. His tasks included janitorial work, mopping, sweeping, pulling weeds, picking up trash,

cleaning windows and office duties. Employer's buildings and grounds maintenance manager testified that Claimant's duties aided Employer in maintaining and producing events at its facility.

11. On April 25, 2008 Claimant and two other employees underwent a drug test. Claimant's test was positive for the presence of THC. Pursuant to Employer's zero tolerance policy, Claimant was terminated from employment. Employer's Vice-President of Administration testified that Claimant's termination was unrelated to his industrial injury and that he would have continued to perform modified employment in the absence of the positive drug test.

12. Vocational expert Roger J. Ryan conducted a vocational evaluation of Claimant, filed two reports and testified at the hearing in this matter. He stated that he reviewed Claimant's work, educational and medical histories. Mr. Ryan considered Claimant's permanent physical restrictions as outlined by doctors Updike and Aschberger and also reviewed the results of Claimant's FCE. He stated that Claimant had lifting restrictions that included 40 pounds occasionally and 20 pounds frequently. Claimant was also required to limit bending and twisting.

13. In evaluating Claimant's employability, Mr. Ryan noted that Claimant had worked as a painter, stocker, welder and security guard. Claimant had completed a carpentry apprenticeship program and had experience operating heavy equipment that included loaders, backhoes and tractors. In reviewing Claimant's education, Mr. Ryan noted that Claimant had obtained his GED and earned approximately 42 college credits. Claimant thus possesses a number of transferable job skills.

14. Mr. Ryan considered the Denver metropolitan area as Claimant's commutable labor market and contacted a number of prospective employers. He identified 20 possible positions for Claimant including cashier, production assembler, night auditor, sales clerk, unarmed security guard, storage facility rental clerk and courier. Mr. Ryan subsequently transmitted the job opportunities to doctors Updike and Aschberger and asked them to identify the positions that were appropriate for Claimant. Dr. Aschberger approved 14 of the positions and Dr. Updike approved 19 of the positions. Mr. Ryan thus persuasively concluded that Claimant is capable of earning wages in his commutable labor market.

15. Vocational expert John A. Macurak also conducted a vocational evaluation of Claimant. He concluded that Claimant was incapable of securing and maintaining regular employment in his commutable labor market as a result of his June 14, 2006 industrial injury. Mr. Macurak noted that Claimant's prior work experience was limited to building maintenance repair, carpentry and construction worker positions. Mr. Macurak reasoned that Claimant would be unable to transfer his skills and abilities into modified light to medium duty work demands. He thus determined that Claimant was incapable of earning any wages.

16. Based on the persuasive testimony of vocational expert Mr. Ryan and considering a number of "human factors," Claimant has failed to establish that it is more

probably true than not that his June 14, 2006 industrial injury constituted a significant causative factor and rendered him unable to earn any wages in the same or other employment. The FCE revealed that Claimant could work at the "medium" physical demand level for a complete eight-hour day. Doctors Aschberger and Updike imposed permanent physical lifting restrictions on Claimant that included 40 pounds occasionally and 20 pounds frequently. Claimant was also required to limit bending and twisting.

17. Initially, Claimant continued to perform modified duties for Employer after he reached MMI and before he was terminated. He was thus capable of earning wages from Employer. Moreover, Mr. Ryan reviewed Claimant's employment, educational and medical histories. Mr. Ryan identified 20 possible positions in Claimant's commutable labor market that were within his physical restrictions. The positions included cashier, production assembler, night auditor, sales clerk, unarmed security guard, storage facility rental clerk and courier. Dr. Aschberger approved 14 of the positions and Dr. Updike approved 19 of the positions. Mr. Ryan thus persuasively concluded that Claimant was capable of earning wages in his commutable labor market. Although Mr. Macurak determined that Claimant was incapable of earning any wages, he acknowledged that Claimant had earned wages with Employer after reaching MMI and failed to consider that doctors Updike and Aschberger approved a number of positions that were suitable for Claimant. Accordingly, because employment is reasonably available to Claimant, he is capable of earning wages in some amount.

18. As a result of Claimant's industrial injury he incurred disfigurement that consists of an approximately two inch long vertical scar on his back. The scar begins approximately one inch above Claimant's belt line and was the result of Claimant's March 12, 2007 microdiskectomy at L5. The disfigurement is serious, permanent and normally exposed to public view. Claimant is thus entitled to a total disfigurement award of $500.

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).

PTD Benefits

4. Prior to 1991 the Act did not define PTD. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 553 (Colo. 1998). Under the prevailing case law standard the ability of a claimant to earn occasional wages or perform certain types of gainful work did not preclude a finding of PTD. *Id.* at 555. A PTD determination prior to 1991 "turned on the claimant's loss of earning capacity or efficiency in some substantial degree in a field of general employment." *Id.*

5. In 1991 the General Assembly added a definition of PTD to the Act. *See* §8-40-201(16.5)(a), C.R.S. Under §8-40-201(16.5)(a), C.R.S. PTD means "the employee is unable to earn any wages in the same or other employment." The new definition of PTD was intended to tighten and restrict eligibility for PTD benefits. *Bymer*, 955 P.2d at 554. A claimant thus cannot obtain PTD benefits if he is capable of earning wages in any amount. *Id.* at 556. Therefore, to establish a claim for PTD a claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. *See* §8-43-201, C.R.S.

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

7. In ascertaining whether a claimant is able to earn any wages, the ALJ may consider various "human factors," including a claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Bymer*, 955 P.2d at 556; *Holly Nursing v. ICAO,* 992 P.2d 701, 703 (Colo. App. 1999). The critical test, which must be conducted on a case-by-case basis, is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Bymer,* 955 P.2d at 557. Ultimately, the determination of whether a

Claimant suffers from a permanent and total disability is an issue of fact for resolution by the ALJ. *In Re Selvage,* W.C. No. 4-486-812 (ICAP, Oct. 9, 2007).

8. As found, based on the persuasive testimony of vocational expert Mr. Ryan and considering a number of "human factors," Claimant has failed to establish by a preponderance of the evidence that his June 14, 2006 industrial injury constituted a significant causative factor and rendered him unable to earn any wages in the same or other employment. The FCE revealed that Claimant could work at the "medium" physical demand level for a complete eight-hour day. Doctors Aschberger and Updike imposed permanent physical lifting restrictions on Claimant that included 40 pounds occasionally and 20 pounds frequently. Claimant was also required to limit bending and twisting.

9. As found, Claimant continued to perform modified duties for Employer after he reached MMI and before he was terminated. He was thus capable of earning wages from Employer. Moreover, Mr. Ryan reviewed Claimant's employment, educational and medical histories. Mr. Ryan identified 20 possible positions in Claimant's commutable labor market that were within his physical restrictions. The positions included cashier, production assembler, night auditor, sales clerk, unarmed security guard, storage facility rental clerk and courier. Dr. Aschberger approved 14 of the positions and Dr. Updike approved 19 of the positions. Mr. Ryan thus persuasively concluded that Claimant was capable of earning wages in his commutable labor market. Although Mr. Macurak determined that Claimant was incapable of earning any wages, he acknowledged that Claimant had earned wages with Employer after reaching MMI and failed to consider that doctors Updike and Aschberger approved a number of positions that were suitable for Claimant. Accordingly, because employment is reasonably available to Claimant, he is capable of earning wages in some amount.

Disfigurement

10. Section 8-42-108, C.R.S. provides that a claimant may obtain additional compensation if he is seriously disfigured as the result of an industrial injury. The statute affords an ALJ "great discretion" in fashioning a disfigurement award. *In Re Castro,* W.C. No. 4-739-748 (ICAP, Dec. 31, 2008). As found, as a result of Claimant's industrial injury he incurred disfigurement that consists of an approximately two inch long vertical scar on his back. The scar begins approximately one inch above Claimant's belt line and was the result of Claimant's March 12, 2007 microdiskectomy at L5. The disfigurement is serious, permanent and normally exposed to public view. Claimant is thus entitled to a total disfigurement award of $500.

ORDER

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

1. Claimant has failed to demonstrate that he is entitled to receive PTD benefits.

2. Respondents are financially responsible to Claimant for a disfigurement award in the amount of $500.00.

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

DATED: January 12, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-445-965

ISSUES

The sole issue determined herein is whether claimant's claim was closed by a final admission of liability ("FAL").

FINDINGS OF FACT

1. On December 3, 1999, claimant suffered an admitted work injury to his low back.

2. Dr. Leppard provided authorized medical treatment. She referred claimant to Dr. Jenks for epidural steroid injections.

3. On January 2, 2002, Dr. Leppard determined that claimant was at maximum medical improvement ("MMI"). She determined 25% whole person impairment.

4. On February 20, 2002, the insurer filed a FAL for permanent disability benefits. The FAL omitted any position on post-MMI medical benefits. The insurer used Division of Workers' Compensation form 145 for injuries after August 5, 1998. The FAL provided claimant with notice that his claim will be closed unless, within 30 days, he files a written objection, applies for hearing on disputed issues, and filed a Notice and Proposal for a Division Independent Medical Examination ("DIME") to challenge MMI or whole person impairment.

5. On March 15, 2002, claimant objected to this FAL.

6. On March 21, 2002, the insurer filed an amended FAL that admitted liability for an additional $1,287.55 in permanent disability benefits and also admitted for post-MMI medical benefits. The insurer used Division of Workers' Compensation form 4 for inju-

ries before August 4, 1998. The FAL provided notice to claimant that his case would automatically close as to the issues admitted in the FAL unless he filed an objection within 60 days and filed a Notice and Proposal for a DIME within 30 days to dispute MMI or the impairment rating.

7. Claimant did not file an objection to the amended FAL and he did not file a Notice and Proposal for a DIME.

8. On February 2, 2004, claimant filed a petition to reopen based upon a change of condition. He applied for hearing on the petition to reopen, withdrew that application, and filed another application. He filed amended petitions to reopen on December 3, 2005 and January 13, 2006.

9. On July 16, 2008, claimant filed the current application for hearing on the petition to reopen. At hearing, claimant asserted that the amended FAL failed to close the claim.

10. The Insurer's March 21, 2002 amended FAL failed to provide the correct statutory notice to close the claim. The insurer used the Division approved form for injuries before the August 5, 1998 amendment to the statute. The amended FAL did not inform claimant that, within 30 days, he must object to the FAL and apply for hearing on any disputed ripe issues.

CONCLUSIONS OF LAW

1. Pursuant to section 8-43-203(2)(b)(II), C.R.S., claimant's claim for compensation and benefits was not closed by the amended FAL on March 21, 2002. Section 8-43-203(2)(b)(II), C.R.S., as amended for injuries after August 5, 1998, provides:

> An admission of liability for final payment of compensation shall include a statement that this is the final admission by the workers' compensation insurance carrier in the case, that the claimant may contest this admission if the claimant feels entitled to more compensation, to whom the claimant should provide written objection, and notice to the claimant that the case will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing, including the selection of an independent medical examiner pursuant to section 8-42-107.2 if an independent medical examination has not already been conducted. If an independent medical examination is requested pursuant to section 8-42-107.2, the claimant is not required to file a request for hearing on disputed issues that are ripe for hearing until after completion of the division's independent medical examination. This information shall also be included in the admission of liability for final payment of compensation. The respondents shall have thirty days after the date of mailing of the report from the division's independent medical examiner to file a revised final

> admission or to file an application for hearing. The claimant shall have thirty days after the date respondents file the revised final admission or application for hearing to file an application for hearing, or a response to the respondents' application for hearing, as applicable, on any disputed issues that are ripe for hearing. The revised final admission shall contain the statement required by this subparagraph (II) and the provisions relating to contesting the revised final admission shall apply. When the final admission is predicated upon medical reports, such reports shall accompany the final admission.

Although the February 20, 2002, FAL provided claimant with the correct statutory notice, he objected to that FAL. The insurer then filed a new FAL. That FAL superseded the first FAL. *Leewaye v. Industrial Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007).

2. The insurer's amended March 21, 2002, FAL failed to provide the correct statutory notice. The FAL did not inform claimant that he must object to the FAL within 30 days and apply for hearing on any ripe issues. The FAL incorrectly provided the old notice to the claimant required by the statute before the August 5, 1998 amendment to the statute. In 1998, the legislature enacted H.B. 98-1062, which added a new timeline and procedure for the selection of the DIME physician. *1998 Colo. Sess. Laws*, Ch. 313, p. 1427. This new section 8-42-107.2, C.R.S., required that claimant file the Notice and Proposal for a DIME within thirty days after the filing of the FAL. The amendment was effective on August 5, 1998. The Division of Workers' Compensation developed two separate forms for notices to claimants with injuries before or after August 5, 1998. The insurer simply used the wrong form for the second FAL. Nevertheless, the March 21, 2002, FAL did not provide the notice that the statute required before the claim could close by virtue of the FAL. As noted in *Leewaye, supra,* claimants could be confused by overlapping objection periods in two FALs. The problem is compounded when the objection periods and notices to claimants are not even worded the same. The statute shows that the General Assembly intended for claimants to receive a FAL with accurate notice provided by the insurer. The Division of Workers' Compensation has consistently taken administrative steps to implement this legislative purpose. *Lobato v. Industrial Claim Appeals Office*, 105 P.3d 220 (Colo. 2005). The defective FAL did not comply with the statute and did not serve to close claimant's claim. *See* Phillips & Phillips, *Colorado Workers' Compensation Practice and Procedure*, 2d ed., section 13.45; *Johnson v. McDonald*, 697 P.2d 810 (Colo. App. 1985). Because the claim is not closed, the issues regarding the petition to reopen are moot.

ORDER

It is therefore ordered that:

1. No benefits were requested and none are ordered herein. All matters not determined herein are reserved for future determination.

DATED: January 13, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-751-365

ISSUES

¬ Did the claimant prove by a preponderance of the evidence that the claim should be reopened because the insurer committed an error or mistake by failing to admit liability for disfigurement benefits in the final admission of liability?

¬ Did the claimant prove by a preponderance of the evidence that the claim should be reopened because the insurer committed an error or mistake by failing to provide the claimant with a copy of the final admission of liability translated into the Spanish language?

¬ Did the claimant prove by a preponderance of the evidence that the claim should be reopened based on error or mistake in light of the fact that she did not understand the legal effect of the final admission of liability?

¬ Is the claimant entitled to disfigurement benefits, and if so, in what amount?

FINDINGS OF FACT

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

1. On February 18, 2008, the claimant sustained an admitted injury arising out of and in the course and scope of her employment at the employer's meat packing facility. The Employer's First Report of Injury stated that the claimant was running meat through a "cuber machine" when some meat got stuck in the mechanism. The claimant removed a guard from the machine to get the meat unstuck, and her right hand got caught in the machine when it accidentally became operational.

2. The claimant was taken to Denver Health Medical Center where x-rays revealed intraarticular fractures on both sides of the distal interphalangeal joint of the ring finger with some comminution. There was a fracture of the proximal dorsal aspect of the middle phalanx of the ring finger. There were comminuted fractures of the proximal and middle phalanges of the small finger with displaced bone fragments, and a possible nondisplaced distal tuft fracture of the long finger.

3. On February 21, 2008 Dr. Michael Ladwig, M.D., one of the claimant's treating physicians, reported that the claimant "purportedly" suffered a complete amputation of the 5th digit and underwent percutaneous pinning of the 4th digit fracture. Dr. Ladwig did not remove the dressing.

4. On February 26, 2008 Dr. Ryan Koonce, M.D., noted that there was some question "intraoperatively" about the vascular viability of the claimant's ring finger, as well as extensive soft tissue damage. Dr. Koonce examined the split thickness skin graft on the dorsum of Claimant's ring finger, and he determined it to be viable and intact.

5. The parties stipulated that the claimant speaks no English. At the hearing the claimant used a Spanish interpreter to translate her testimony.

6. On February 28, 2008, Dr. Ladwig referred the claimant to a Spanish-speaking therapist. The written referral form contains a notation that Anthony Moore authorized the referral.

7. Anthony Moore is the insurance adjuster assigned by the insurer to handle the claim for benefits in connection with the claimant's admitted injury.

8. On February 28, 2008, Mr. Moore spoke with the claimant over the telephone. Mr. Moore used a Spanish/English interpreting service to facilitate his conversation with the claimant. The claimant advised Mr. Moore that her ring finger had been reconstructed, but the "pinky" was amputated at the base of the hand.

9. On March 18, 2008, Mr. Moore again used the Spanish/English interpreting service to speak with the claimant over the telephone. Mr. Moore and the claimant discussed an alleged safety rule violation resulting in a "deduction" from her temporary total disability (TTD) benefits.

10. On March 25, 2008 Dr. Ron Carbaugh, Psy.D., noted the claimant had been referred for a psychological assessment, and authorization for this visit was obtained through the insurer. Dr. Carbaugh opined the claimant was in need of psychological treatment related to her injury, and he stated that she would likely work best with Dan McKenna, MA, who is bilingual. Dr. Carbaugh stated that his report would be forwarded to the insurer "for authorization."

11. On April 15, 2008, Mr. McKenna conducted a counseling session with the claimant. The claimant expressed embarrassment about the appearance of her injured hand and fear that she would not be able to continue her work. Mr. McKenna reported that the session was conducted in Spanish.

12. On June 9, 2008, Dr. Ladwig discharged the claimant. On June 13, 2008, Dr. Ladwig completed a report in which he stated the claimant reached maximum medical improvement (MMI) on June 10, 2008, with an 18% upper extremity impairment, which converted to 11% whole person impairment.

13. Mr. Moore credibly testified that he received Dr. Ladwig's MMI report and impairment rating on June 19, 2008. Mr. Moore credibly testified that he believed it was

his responsibility to file a Final Admission of Liability (FAL) within 30 days of receiving Dr. Ladwig's report.

14. By July 3, 2008, Mr. Moore was aware the claimant had sustained permanent disfigurement of her right hand, including amputation of the small finger at its base. Further, as shown by Mr. Moore's use of an interpreter during his telephone conversations with the claimant, he was aware the claimant spoke only Spanish and did not understand English.

15. Mr. Moore did not want to file an admission of liability for the claimant's disfigurement. Because Mr. Moore considered the claimant's amputation to be unusual, he preferred that an administrative law judge employed by the state evaluate the disfigurement. Based on his experience, Mr. Moore believed he would not be able to get a judge to evaluate the disfigurement within the thirty days he had to file the FAL.

16. On July 3, 2008, Mr. Moore telephoned the employer and spoke with someone named "Margaret." Margaret works in the employer's human resource department and speaks English and Spanish.

17. Mr. Moore explained to Margaret that he desired for the claimant to apply for a hearing concerning the issue of disfigurement, and explained the procedure for doing so. Margaret called the claimant in and explained to her, in Spanish, how to apply for a hearing on disfigurement.

18. On July 7, 2008, Mr. Moore prepared and mailed an FAL. The FAL contains the claimant's name and the workers' compensation claim number. The FAL admits for medical benefits, TTD benefits, and permanent partial disability (PPD) benefits based on Dr. Ladwig's 18% upper extremity impairment rating. In the blank space next to the words "Disfigurement (total)," Mr. Moore entered "None."

19. The FAL was mailed to the claimant on July 7, 2008. The FAL contains the standard Notice to Claimant that if the claimant disagrees with the benefits admitted that the claimant must file a written objection within 30 days and file an application for hearing on disputed issues, and file a notice and proposal to select a DIME physician if desired. The FAL was written in English and contains no Spanish translation.

20. On July 10, 2008, the claimant filed an Application for Hearing – Disfigurement Only, requesting a "determination of additional compensation for permanent disfigurement."

21. The claimant admitted that she received the FAL, and at the same time received a check for $4438.70. The amount of the check equals the amount of admitted PPD benefits. The claimant credibly testified that she did not understand the FAL because she does not read English. The claimant did not understand that her claim would close unless she objected to the FAL and filed an application for hearing within thirty days. The claimant admitted that prior to receiving the FAL she had a conversation with

Mr. Moore concerning the fact that her TTD benefits had been reduced because the insurer received information that she violated a safety rule.

22. Following these events the claimant retained counsel. Claimant's counsel entered his appearance on August 27, 2008. The claimant credibly testified that her attorney explained the effect of the FAL to her.

23. On August 28, 2008, claimant's counsel filed a Petition to Reopen alleging "error" and "mistake."

24. It is more probably true than not that if the claimant had acted with due diligence to have the FAL translated into Spanish so that she could understand it, she could have avoided the closure of all issues (other than disfigurement) by filing a timely written objection and application for hearing, or by requesting a DIME. The ALJ finds the claimant acted unreasonably when she received the FAL because there is no credible or persuasive evidence that she asked someone to translate the FAL into Spanish so that she could understand it. Neither is there any credible and persuasive evidence that the claimant timely requested the adjuster, her employer, or a coworker to explain the significance of the FAL. At the time the FAL was filed the claimant knew she was involved in a matter having legal significance, as shown by her conversations with the Mr. Moore and Margaret, her receipt of medical and temporary disability checks, and the fact she received a check at the same time as the FAL. Nevertheless, the claimant did not attempt to have anyone explain or translate the FAL so that she could understand it.

25. The ALJ does not find any credible or persuasive evidence that Mr. Moore, the insurer or the employer ever misled, or attempted to mislead the claimant, concerning the contents or legal significance of the FAL.

26. As determined during the course of the hearing, the question of whether the claim may be reopened based on the respondents' alleged mistake in claiming a reduction in benefits based on a safety rule violation is reserved for future determination.

27. Pre-hearing administrative law judge (PALJ) Jaynes considered photographs of the claimant's disfigurement. On August 26, 2008, PALJ Jaynes described the disfigurement as "amputation of right pinky finger," and awarded $1,500 as compensation. The order provided it would become final unless reconsideration was requested within 20 days. The claimant timely requested reconsideration of the disfigurement issue by filing the application for hearing on August 27, 2008.

28. At the hearing the ALJ viewed the claimant's disfigurement caused by the industrial injury. The claimant has disfigurement of a part of her body normally exposed to public view. The disfigurement consists of the following: (1) The small or pinky finger of the right hand is completely amputated; (2) The right ring finger is bent in a downwards angle at the distal joint; (3) There is scarring on the outside of right hand where the small finger would have been if not amputated. The scar is approximately three inches in length and runs onto the top of the right hand; (4) The second joint of the right

ring finger is significantly enlarged displaying a swollen appearance; (5) The right ring finger displays a lump or bump between second joint and the metacarpal joint; (6) The top of the right ring finger displays a scar that is irregularly shaped and approximately one inch in diameter; (7) There is a scar on the palm face of the right ring finger that runs the entire length of the finger approximately three inches long; (8) There is a scar on the inside of the right wrist that is approximately one inch in length.

29. At hearing the ALJ ruled that the issue of whether the claim should be re-opened based on the respondents' alleged mistake in claiming a reduction in benefits based on a safety rule violation would be reserved for future determination.

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).

REOPENING BASED ON FAILURE TO ADMIT FOR DISFIGUREMENT

The claimant contends that she established an error or mistake sufficient to reopen her claim based on Mr. Moore's action in failing to admit for disfigurement benefits when he filed the FAL. The claimant argues that the "correct way to file the final admission was to leave disfigurement blank or admit for an amount." The respondents argue that there was no error or mistake since no rule or statute required Mr. Moore to admit

for disfigurement. Alternatively, the respondents argue that the issue of disfigurement remains open because the claimant timely requested a hearing. In such circumstances, the respondents argue that even if Mr. Moore erred or made a mistake by failing to admit for disfigurement, it is not the type of error mistake that justifies reopening the entire claim. The ALJ agrees with the respondents' second argument.

Section 8-43-203(2)(b)(II), C.R.S., provides that a claim will be automatically closed "as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the admission in writing and request a hearing on any disputed issues that are ripe for hearing." An FAL that is not challenged in accordance with the statutory procedures constitutes an "award" for purposed of the reopening statute. Consequently an unchallenged FAL is binding as to the issues admitted and resolved by the FAL unless the claim is reopened as to those issues. Section 8-43-203(2)(d), C.R.S., *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). Conversely, issues not addressed by an FAL remain "open" for adjudication. *Dalco Industries, Inc. v. Garcia,* 867 P.2d 156 (Colo. App. 1993).

An "award" may be reopened on the grounds of "error" or "mistake." Section 8-43-303, C.R.S. The party seeking to reopen bears the burden of proof to establish grounds to reopen. *See Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000). A claim need not be reopened if, as a result of the reopening, no additional benefits can be awarded. *Richards v. Industrial Claim Appeals Office, supra.*

The term "mistake" refers to any mistake whether one of law or fact. *Renz v. Larimer County School District Poudre R-1,* 924 P.2d 1177 (Colo. App. 1996). The authority to reopen is discretionary provided the statutory criteria have been met. *Berg v. Industrial Claim Appeals Office, supra*. In order to reopen based on mistake the ALJ must determine that there was a mistake that affected the prior award. If there was a mistake the ALJ must determine whether, under the circumstances, it is the type of mistake that justifies reopening the claim. *Travelers Insurance Co. v. Industrial Commission,* 646 P.2d 399 (Colo. App. 1981). Factors the ALJ may consider when determining whether a mistake warrants reopening include the potential for injustice if the mistake is perpetuated, and whether the party seeking to reopen could have avoided the mistake by the exercise of due diligence in the handling or adjudication of the claim. *Klosterman v. Industrial Commission,* 694 P.2d 873 (Colo. App. 1984); *Travelers Insurance Co. v. Industrial Commission, supra*.

The ALJ concludes that at the time the claimant filed the petition to reopen this claim, the issue of "disfigurement" remained open. Specifically, the claimant filed an application for hearing on the issue of disfigurement within 30 days of the date the FAL was filed. Filing the application for hearing on disfigurement sufficed as a written objection to the FAL with respect to the issue of disfigurement, and also fulfilled the statutory requirement to file an application for hearing. Section 8-43-203(2)(b)(II); *see Stefanski v. Industrial Claim Appeals Office,* 128 P.3d 282 (Colo. App. 2005) (any pleading that adequately notifies the employer that the claimant does not accept the FAL constitutes

substantial if not actual, compliance with obligation to provide written objection), *aff'd. on other grounds, Sanco Industries v. Stefanski,* 147 P.3d 5 (Colo. 2006).

The ALJ concludes that even if Mr. Moore erred or committed a mistake by failing to admit liability for disfigurement, that is not the type of error or mistake that justifies reopening every other issue addressed in the FAL. In this regard the ALJ notes the claimant received timely notice of the FAL, and does not claim that she was actually prevented from acting in a timely fashion to contest issues other than disfigurement. As determined in Finding of Fact 24, had the claimant acted with due diligence to have the FAL translated into Spanish so that she could understand it, she could have avoided the closure of all issues (other than disfigurement) by filing a timely written objection and application for hearing, or by requesting a DIME. Similarly, if the claimant had asked the adjuster, her employer, or a coworker to assist her in understanding the significance of the FAL she could have avoided closure. However, there is no credible or persuasive evidence that the claimant acted reasonably by seeking or obtaining any assistance. Finally, the claim remains open on the issue of disfigurement. Therefore, the claimant will not suffer any real injustice as a result of Mr. Moore's alleged mistake in failing to admit for disfigurement benefits.

REOPENING BASED ON FAILURE TO PROVIDE FAL IN SPANISH

The claimant contends that the "respondents had a constitutional and legal obligation to provider her with a final admission in Spanish." The claimant reasons that this obligation followed from the fact that Mr. Moore knew she did not read or speak English. The claimant contends the failure of the insurer to provide a copy of FAL in Spanish constitutes and error or mistake sufficient to reopen the claim. The ALJ disagrees that the insurer committed any "error" or "mistake."

Insofar as the claimant is arguing that Mr. Moore erred or made a mistake by failing to provide a copy of the FAL in Spanish, the ALJ finds the claimant failed to prove that the insurer committed any error or mistake. The claimant alleges that the insurer had a legal or constitutional duty to have the FAL translated into Spanish. However, the claimant cites no statute, rule or other authority that would impose such a duty on the insurer.

In *Romero v. American Worldwide, Inc.,* W.C. No. 4-637-244 (ICAO August 14, 2007), the Panel determined that a claimant was not "deprived of due process" where he was unable to read and write the English language, and as a result failed timely to object to a written FAL. The Panel noted that the ALJ found the claimant had "relatives who could help him with reading," and therefore, "had the resources to have the final admission of liability read and explained to him."

Significantly, the *Romero* Panel cited *People v. Villa-Villa,* 983 P.2d 181 (Colo. App. 1999) in support of its conclusion. In *Villa-Villa* the defendant was charged with "driving after judgment prohibited." Proof of "actual knowledge of the order of revocation as a habitual offender" was an essential element of the offense charged. The evidence showed that the revocation notice had been sent to the defendant in English.

The defendant proposed to call an expert witness to testify that he lacked comprehension of the letter because it was written in English and the defendant's primary language was Spanish. The Court of Appeals held that the trial court correctly ruled that the proffered testimony was irrelevant as a matter of law. The Court of Appeals stated that regardless "of whether the defendant could read English, once he received the notice, it became his duty to have the letter translated." The court cited with approval several authorities from other jurisdictions for the proposition that, "English-only notices put defendants on inquiry notice and place a burden on the defendants to have the notices interpreted to discern their meaning."

If there is no duty to give legal notices in Spanish when failure to abide by such notices can result in criminal penalties, it is doubtful that there is any duty for an insurer to translate an FAL into Spanish in the context of a workers' compensation claim. As stated by the Panel in *Romero*, "to the extent that the claimant seeks an institutional remedy regarding the sufficiency of the notice provisions contained in final admissions of liability, such relief must be sought through legislative or, possibly, quasi-legislative means."

Finally, the ALJ notes that OACRP 21, governing the use of interpreters in workers' compensation hearings, provides that "a party that does not adequately speak or understand English, or any party who calls a witness who does not adequately speak or understand English, must arrange for a foreign language interpreter to be present at any hearing." The ALJ considers this rule to be indicative of a policy that in workers' compensation cases litigation costs associated with interpreters and translations are considered to be the responsibility of the litigants themselves. The ALJ considers costs of interpretation that are incurred in furtherance of litigation to be an entirely different issue than costs of interpretation that must be incurred to provide statutorily mandated reasonable and necessary medical treatment. *See Jarosinski v. Industrial Claim Appeals Office,* 62 P.2d 1082 (Colo. App. 2002).

It follows that Mr. Moore and the insurer did not commit any "error" or "mistake" of fact or law when they failed to provide the claimant with a Spanish copy of the FAL. Therefore, the ALJ concludes the claimant failed to prove any basis to reopen.

The claimant also advances a somewhat different theory in support of reopening. The claimant, citing *Sickler v. City Market,* W.C. No. 4-638-377 (ICAO July 25, 2008), argues that because she did not understand her rights to object to the FAL, and the respondents could have avoided the problem by filing an FAL in Spanish, hermisunderstanding rises to the level of mistake or error sufficient to reopen the claim. Thus, in this argument the claimant alleges that the mistake was her own.

The ALJ concludes that, although the claimant may have been "mistaken" concerning her rights and obligations with respect to contesting the FAL, that mistake is not the type of mistake that justifies reopening the issues that were closed as a result of the failure timely to contest the FAL. As determined in Finding of Fact 24, the ALJ finds the claimant failed to exercise due diligence with respect to ascertaining the legal significance of the FAL. There is no credible and persuasive evidence that the claimant

sought any assistance in understanding the significance of the FAL, despite the fact that she knew she was involved in a workers' compensation claim, and she knew there were legal ramifications to her claim. Indeed, the claimant had consulted about the claim with Mr. Moore and Margaret, the employer's human resources person. These consultations had been conducted through an interpreter or, with Margaret, in Spanish. Further, as determined in Finding of Fact 25, there is no credible or persuasive evidence that the Mr. Moore, the insurer or the employer ever misled the claimant concerning the contents or legal significance of the FAL.

The ALJ does not consider *Sickler v. City Market* to constitute legal authority that is contrary to the result reached here. Indeed, the Panel that decided *Sickler* expressly noted that the questions of whether "there was a mistake made, and if so, whether it was the type of mistake, which justifies reopening a case, is to be made by the ALJ" in the exercise of his or her discretion. The *Sickler* Panel merely ruled that there was no abuse of discretion shown when the ALJ reopened the claim under the specific facts discussed in the order.

DISFIGUREMENT

The claimant seeks an award of disfigurement benefits. The claimant argues that she should receive an award of $8000 because she has sustained "extensive body scars" and the loss of a limb.

Section 8-42-108(1), C.R.S., permits the ALJ to award up to$4000 for disfigurement of "parts of the body normally exposed to public view. Section 8-42-108(2), C.R.S. provides that the ALJ "may allow" up to $8000 as compensation for various types of disfigurement including "extensive body scars" or "stumps due to loss or partial loss of limbs."

The ALJ infers that the General Assembly's use of the term "may" means that the ALJ's authority to award extra compensation in any of the circumstances described in § 8-42-108(2) is discretionary. That is, if the ALJ determines that any of the circumstances listed in subsection (2) exists, the ALJ is permitted to exceed the $4000 limit established in subsection (1) if the ALJ considers such extra compensation to be warranted in light of the particular disfigurement in question.

The ALJ assumes, for the sake of argument, that the disfigurement described in Finding of Fact 28 qualifies as "extensive body scars" for purposes of § 8-42-108(2)(b). Similarly, the ALJ assumes that the complete amputation of the claimant's small finger qualifies as the complete or partial loss of a "limb" for purposes of § 8-42-108(2)(c). Thus, the claimant could qualify for an award of up to $8000.

However, in the exercise of his discretion, the ALJ concludes that an appropriate award for the disfigurement described in Finding of Fact 28 is $3,800.

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. Issues not resolved by this order, including whether the claim should be reopened based on the respondents' action in claiming a reduction in benefits for an alleged safety rule violation, are reserved for future determination.

3. The claimant's petition to reopen W.C. 4-751-365 is denied and dismissed.

4. The insurer shall pay the claimant disfigurement benefits in the amount of $3,800.

DATED: January 13, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-677-703

ISSUES

The issues for determination are maximum medical improvement (MMI) and temporary disability benefits.

FINDINGS OF FACT

1. Claimant suffered an admitted injury on April 4, 2005, when she tripped and fell on concrete. Claimant had immediate back and foot pain. Claimant was at Lutheran Hospital when the injury occurred and she immediately sought medical care in their emergency room.

2. Claimant was subsequently sent to Concentra for treatment of her injuries. Dr. Plotkin became her primary care physician. Claimant also received care from a number of other doctors and therapists through referrals from Dr. Plotkin. This included podiatrists and an orthopedic surgeon for her foot problems, physiatrists for her musculoskeletal problems, and a psychologist and psychiatrist for the emotional effects of the injury.

3. Dr. Castro, an authorized treating physician, placed Claimant at MMI on April 23, 2007. Dr. Castro gave Claimant "a few more visits of physical therapy to wrap up and advance her home program." Dr. Castro further stated, "Beyond that, I would not recommend any further treatment." Dr. Castro did not release Claimant to return to work without restrictions.

4. Dr. Plotkin, an authorized treating physician, examined Claimant on June 19, 2007. Dr. Plotkin stated that Claimant had reached MMI. Dr. Plotkin noted that Claimant "may require some additional injections which can be performed on a maintenance basis." Other maintenance care that Dr. Plotkin recommended included medications and chronic pain management from Dr. Castro, maintenance medications from himself, maintenance physical therapy, chronic pain counseling with Jan Thurn, and two maintenance rechecks with Dr. Stone. Dr. Plotkin restricted Claimant from no lifting, pushing or pulling greater than ten pounds; walk and stand as tolerated; sit and change positions as needed.

5. Respondents filed a Final Admission on June 7, 2007, admitting for Dr. Castro's impairment rating and medical care after MMI. Claimant requested a DIME. Dr. Bennett Machanic performed the DIME on July 10, 2008. He found that Claimant was not at MMI.

6. Respondents timely filed an Application for Hearing on August 15, 2008, as required by Section 8-43-203(2)(b)(II), C.R.S. Claimant filed a response to the hearing application on August 22, 2008, and the hearing was set for December 4, 2008. A hearing notice was sent to the parties by the OAC on September 4, 2008, which confirmed the hearing date of December 4, 2008.

7. Claimant has received treatment for her compensable injuries since being placed at MMI. Dr. Lindenberg examined Claimant on May 22, 2007, and injected her left foot. On June 12, 2007, he injected both her right and left lower extremity. Dr. Lindenberg examined Claimant on June 27, 2007. The doctor recommended further diagnostic tests, which were negative. On July 3, 2007, he injected her left side.

8. Janice Thurn, Ph.D., Licensed Psychologist, examined Claimant and recommended eight to ten therapy sessions. Dr. Thurn provided treatment to Claimant on

June 13, 2007, June 26, 2007, July 25, 2007, August 25, 2007, and November 14, 2007.

9. Dr. Entin, a psychiatrist, performed a psychiatric pain evaluation on August 1, 2007. He adjusted Claimant's medications and followed up with her on August 29, 2007, September 26, 2007, October 23, 2007, January 15, 2008, March 11, 2008, April 7, 2008, July 28, 2008, and September 16, 2008. Dr. Entin has managed Claimant's psychotropic medications, as well as her pain medications, since she was released from care with Dr. Castro.

10. Claimant attempted to return to Dr. Plotkin for treatment, but she was unable to see the doctor because he was on leave from the clinic. Claimant tried to get additional care at Concentra and she had appointments with two other Concentra doctors. They refused to provide Claimant with care. She finally sought care on her own with other doctors in order to try and improve her medical condition and return to work.

11. Claimant began treatment at Mapleton Hill Orthopaedics on November 16, 2007. Several MRIs were taken and reviewed. She received a series of injections. Her orthotics were adjusted.

12. The most recent record shows Claimant received an injection with good pain relief on May 13, 2008. Claimant received chiropractic care from Dr. Kennedy from March 3, 2008, to May 8, 2008. Dr. Kennedy noted that Claimant's response to care was favorable.

13. Dr. Ryan examined Claimant on June 28, 2007. He stated that Claimant was not at MMI for her intermetatarsal bursitis, plantar fasciitis, her cervical and lumbar conditions, or her psychological condition.

14. Dr. Shaw examined Claimant on September 4, 2007. Dr. Shaw stated that Claimant was clearly at maximum medical improvement.

15. Dr. Machanic, the DIME physician who stated that Claimant was not at MMI, recommended an EMG nerve conduction study to determine if Claimant has tarsal tunnel syndrome. Dr. Machanic also stated that a psychiatrist should sort out what is related to the compensable accident.

16. On October 28, 2008, the Division of Workers' Compensation indicated that it had received the DIME report and that nothing further was to be done with the DIME at that time. The Division noted that the DIME physician had determined that Claimant was not at MMI.

17. Dr. Ryan gave Claimant comprehensive work restrictions on June 28, 2007. Claimant testified that Dr. Plotkin agreed with these restrictions, except for the estimate of how much Claimant would be absent if she returned to work.

18. Claimant tried to return to work, both before and after Dr. Castro and Dr. Plotkin said Claimant was at MMI. During the time Claimant was being treated by Dr. Plotkin, she would fax Employer a copy of her restrictions after each doctor's appointment. She also sent the Employer the restrictions that were given to Claimant at the time Dr. Plotkin put Claimant at MMI. Employer repeatedly informed Claimant that she could not return to work with her restrictions.

CONCLUSIONS OF LAW

1. Respondents requested at the commencement of the hearing that the hearing not go forward. Counsel argued that the DIME was not complete until October 28, 2008, when the DIME unit filed a letter with the parties that the DIME had found Claimant to be "Not at MMI", and thus a new hearing application filed by Respondents should be the one on which a hearing was held.
2. Claimant's counsel objected to the continuance of the hearing. She argued that the hearing application had been filed by Respondents pursuant to statute (Section 8-43-203(2)(b)(II), C.R.S.) and they had adequate time to prepare for hearing; a continuance had not been requested by Respondents prior to the day of hearing although it had been more than thirty days since the DIME Unit had mailed its letter; Claimant had an expert witness prepared to testify if necessary; and Claimant was prepared to go forward at that time. Since Respondents provided no good cause to support the request to continue the hearing, the request was denied by the ALJ.
3. "The medical impairment rating of the DIME physician is binding on the parties and the ALJ unless overcome by clear and convincing evidence." Section 8-42-107(8)(c), C.R.S. Clear and convincing evidence is evidence demonstrating that it is "highly probable" that the DIME physician's rating is incorrect. *American Compensation Insurance Co. v. McBride*, 107 P.3d 973, 980 (Colo.App. 2004). "Such evidence must be unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1150 (Colo.App. 2002).
4. The opinion of the DIME physician, Dr. Machanic, is supported by the opinion of Dr. Ryan as well as by Claimant's course of treatment since she was placed at MMI in April 2007. The opinions of Dr. Shaw, Dr. Castro, Dr. Plotkin, and others do not convince the ALJ that it is highly probable the opinion of the DIME physician was incorrect.

Insurer has not overcome the opinion of the DIME physician by clear and convincing evidence. Claimant is not at MMI at this time.

5. Insurer paid Claimant temporary total disability benefits through April 22, 2007. On April 23, 2007, Dr. Castro did not release Claimant to return to work without restrictions. On June 19, 2007, Dr. Plotkin restricted Claimant from no lifting, pushing or pulling greater than ten pounds; walk and stand as tolerated and sit as needed; and change positions as needed. Claimant is not at MMI and she has not been released to return to work.

6. Claimant requested a DIME and she was found not to be at MMI by the DIME doctor. Claimant's right to TTD benefits continued when none of the other conditions under Section 8-42-105(3), C.R.S., applied to the Claimant.

7. "Temporary disability benefits are payable where the claimant is disabled from performing his regular employment as a result of the industrial injury and suffers an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). . . . [W]here the respondents admit liability for temporary disability benefits they inherently admit the existence of a causal connection between the injury and the temporary wage loss." *In re Rakestraw*, W.C. No. 4-384-349 (ICAO, 10/3/2005).

8. Claimant testified that she tried to return to employment with Employer on a number of occasions. However, it could not accommodate Claimant's restrictions, including her permanent restrictions after she was declared to be at MMI by Dr. Castro and Dr. Plotkin.

9. Claimant is not at MMI, and she has permanent restrictions that cannot be accommodated by Employer. Claimant is entitled to ongoing temporary total disability benefits until terminated pursuant to law.

ORDER

1. The opinion of the DIME physician that the Claimant is not at MMI can only be overcome by clear and convincing evidence. Section 8-42-107(8)(b), C.R.S. Since that was not done in this case, Claimant is not at MMI.

2. Insurer is liable for temporary total disability benefits continuing past April 22, 2007, until terminated pursuant to law. Section 8-42-101, C.R.S. Insurer may apply any payments of permanent disability benefits to the temporary disability benefits owed. Insurer shall pay Claimant interest on any benefits not paid when due.

3. Issues not determined by this order are reserved.

DATED: *January 13, 2009*

Bruce C. Friend
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-540-676

PROCEDURAL HISTORY

On August 13, 2008, claimant filed an Application for Hearing, seeking a hearing on his Petition to Reopen his claim for Permanent Total Disability benefits. Respondents filed a Response to Application for Hearing on August 20, 2008, raising a number of affirmative defenses, including a statute of limitations defense.

At the close of claimant's evidence in his case-in-chief, respondents moved to dismiss claimant's Petition to Reopen under C.R.C.P. 41(b)(1). Respondents argued that claimant's Petition to Reopen is time-barred by §8-43-303, C.R.S. (2008). The Judge granted respondents' motion to dismiss.

ISSUES

¬ Did respondents prove by a preponderance of the evidence that claimant's petition to reopen his claim is time-barred?

FINDINGS OF FACT

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

1. Employer operates a public utility that provides electric power to customers. Claimant's date of birth is April 12, 1949; his age at the time of hearing was 59 years. Claimant worked for employer from 1982 until May 31, 2005, when he terminated his employment and began receiving long-term disability benefits.

2. Claimant suffered a work-related injury to his lower back on August 22, 2001. R. James McLaughlin, M.D., is an authorized treating physician (ATP). Dr. McLaughlin diagnosed a lumbar strain, with degenerative joint disease, and placed claimant at maximum medical improvement (MMI) on May 3, 2002. Dr. McLaughlin rated claimant's permanent medical impairment at 7% of the whole person, after apportionment.

3. Insurer filed a Final Admission of Liability (FAL) on May 13, 2002, admitting liability for permanent partial disability (PPD) benefits in the amount of $20,619.04 based upon Dr. McLaughlin's 7% rating. Insurer paid claimant the $20,619.04 sum at a weekly rate of $354.91 over the period of time from May 3, 2002, through June 12, 2003. Insurer's indemnity payment print-out (Respondents' Exhibit K) shows that insurer issued claimant the final payment of the $20,619.04 in PPD benefits by check dated June 11, 2003. Claimant failed to object to the May 13, 2002, FAL. Claimant's claim closed by operation of law.

4. Based upon a recommendation for additional curative treatment, respondents agreed to reopen claimant's claim for additional medical benefits. On May 5, 2004, insurer filed a General Admission of Liability, admitting liability only for additional medical benefits.

5. Dr. McLaughlin subsequently placed claimant back at MMI as of October 21, 2004. Dr. McLaughlin determined that claimant's permanent medical impairment had increased by an additional 3% of the whole person. On December 22, 2004, insurer filed a FAL, admitting liability for additional PPD benefits.

6. The Division of Workers' Compensation (division) issued a letter on January 7, 2005, disagreeing with insurer's calculation of claimant's PPD award and directing insurer to file a revised FAL.

7. Insurer filed a revised FAL on January 26, 2005, admitting liability for PPD benefits consistent with the division's calculation. In the revised FAL, insurer showed that it had previously paid in full claimant's prior PPD award of $20,619.04, which was based upon Dr. McLaughlin's initial rating of 7% of the whole person. Insurer also shows its calculation of claimant's additional award of PPD benefits in the amount of $8,526.67, which was based upon Dr. McLaughlin's 3% whole person rating. Insurer's revised FAL further reflects an admission for claimant's total award of PPD benefits in the amount of $29,145.71 ($20,619.04 + $8,526.67 = $29,145.71), representing an award based upon impairment of 10% of the whole person.

8. The Benefit History section of the revised FAL however misrepresents the payment history of the overall PPD award of $29,145.71. It fails to reflect that insurer had previously paid the prior PPD award in the amount of $20,619.04 at the weekly rate of $354.91 from May 3, 2002, through June 12, 2003. The Benefit History section of the revised FAL instead shows payment of the overall PPD award of $29,145.71 at the weekly rate of $354.91, running from the second MMI date of October 21, 2004, through May 17, 2006.

9. Under the revised FAL, insurer actually owed claimant additional PPD benefits in the amount of $8,256.67, not in the amount of $29,145.71. At the weekly rate of $354.91, insurer paid out the PPD award of $8,256.67 over a period of twenty-four weeks and two days, from the MMI date of October 21, 2004, through April 8, 2005. Crediting insurer's indemnity payment print-out (Respondents' Exhibit K), insurer issued the final payment of the $8,256.67 by check or about April 13, 2005.

10. On December 7, 2007, claimant filed his Petition to Reopen, alleging a change in condition and error or mistake. Claimant supported his Petition to Reopen with a December 3, 2007, report from Psychiatrist Kenneth D. Krause, M.D.

11. Claimant filed his December 7, 2007, Petition to Reopen 6 years and 108 days after his date of injury of August 22, 2001. December 7, 2007, is 2 years and 209 days after April 13, 2005, the last date claimant's PPD benefits became due or payable.

CONCLUSIONS OF LAW

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

Respondents argue they have proven by a preponderance of the evidence that claimant's petition to reopen his claim is time-barred under the provisions of §8-43-303. 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 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*.

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).

Section 8-43-303(1), *supra*, provides:

> At any time **within six years after the date of injury**, the director or an administrative law judge may … review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition ….

Section 8-43-303(2)(a), *supra*, further provides:

> At any time **within two years after the date the last** temporary or **permanent disability benefits** … excluding medical **benefits become due or payable**, the director or administrative law judge may … review and reopen an award on the ground of … an error, a mistake, or a change in condition ….

(Emphasis added).

Here, the Judge found claimant filed his Petition to Reopen on December 7, 2007. Claimant filed his Petition to Reopen 6 years and 108 days after his date of injury of August 22, 2001, and 2 years and 209 days after April 13, 2005, the last date claimant's PPD benefits became due or payable. Claimant filed his Petition to Reopen outside the time limits allowed under §§8-43-303(1) and (2)(a). Respondents thus proved by a preponderance of the evidence that claimant's Petition to Reopen is time-barred, such that the Judge lacks jurisdiction to reopen claimant's claim.

The Judge concludes claimant's December 7, 2007, Petition to Reopen 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 December 7, 2007, Petition to Reopen is denied and dismissed, with prejudice.

2. Issues not expressly decided herein are reserved to the parties for future determination.

DATED: _January 13, 2009_

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-760-740

ISSUES

The issues determined herein are compensability and average weekly wage. The parties stipulated that claimant would be entitled to intermittent periods of temporary disability benefits, but they did not stipulate or litigate any specific time periods.

FINDINGS OF FACT

1. Claimant has been employed as a maintenance technician with Employer since December 2007. Employer operates the apartment complex where Claimant works and lives. Claimant's job duties include grounds keeping, snow shoveling, preparing apartments for new renters, moving evicted tenants and performing repairs and maintenance on apartment units. The job is physically demanding, requiring heavy lifting and carrying and frequent bending, stooping, and crouching.

2. Claimant usually works 40 hours a week with occasional overtime. His base average weekly wage calculated over 16 weeks is $484.75, as stipulated by both parties.

3. As of April 9, 2008, claimant was enrolled in the employers' health insurance plan.

4. Claimant experienced occasional preexisting low back pain due to construction work, but did not obtain medical care for any preexisting problem.

5. On October 5, 2007, claimant was involved in a motor vehicle accident, but was not injured. He was parked when another vehicle turned and clipped his vehicle. Claimant did not seek medical treatment following that accident. In January 2008, claimant settled his claim against the auto insurer.

6. Between April 4 and 9, 2008, as part of his job duties for the employer, claimant helped move his household goods into a new residence and then moved his supervisor's household goods into a new residence. The move of the supervisor took approximately two days on April 8 and 9 and included moving very heavy items such as solid oak furniture and a big screen TV.

7. Claimant experienced no back pain immediately prior to or during most of the day, April 9, 2008. By the end of the day, however, he began to experience stiffness and pain in his back. He did not think the pain was serious and did not immediately report it to his employer. By the next morning, however, his pain was significantly worse and it continued to worsen as the day wore on. Still, claimant was hopeful the pain would resolve and he would not require medical care.

8. On April 10, 2009, claimant told a coworker, Mr. Scheffe, that he hurt his back moving furniture the previous day. Mr. Scheffe observed claimant exhibiting obvious pain behaviors on that date.

9. Over the next several days, claimant continued to experience pain, which worsened in intensity. He continued to perform his regular work duties.

10. Because claimant was not sure if moving employees was an activity sanctioned by his employer, he was concerned that reporting the injury would cause problems for both him and his supervisor. In spite of this, claimant told his supervisor on approximately April 21, 2008, that he had back pain since the April 9 furniture move, although he thought that it might be due to the motor vehicle accident. At the time of this report, claimant's supervisor did not refer claimant to a physician and did not fill out an injury report.

11. Because he continued to worsen, was less able to perform his work duties, and because he was frustrated by his employer's failure to send him for medical care, claimant sought treatment on May 7, 2008, with his family physician, Dr. Sean O'Donnell. Claimant reported a history of prior back pain and the October 2007 motor vehicle accident without any definite injury. Dr. O'Donnell encouraged claimant to contact the auto insurance carrier to see if they would pay for treatment.

12. On May 8, 2008, claimant called the auto insurer and indicated that he had low back pain the "past few months" related to the motor vehicle accident. He requested authorization of treatment, but the adjuster refused to preauthorize any such treatment.

13. Claimant also sought chiropractic treatment with Dr. Knoche on May 8, 2008, providing a history of the October 2007 motor vehicle accident.

14. Dr. O'Donnell prescribed medication and later sent claimant for x-rays and a magnetic resonance image ("MRI"). The x-rays were negative; however, the MRI on May 15, 2008, revealed a L5-S1 disc protrusion with nerve root impingement and an annular tear.

15. Claimant again spoke with his supervisor on May 9, 2008. This time, claimant was provided an incident form to complete and was referred to Dr. Ogrodnick.

16. On May 9, 2008, Dr. Cuccinelli examined claimant, who reported the history of the household moves in April. Claimant did not report any history of the motor vehicle accident. Dr. Cuccinelli diagnosed lumbar strain, prescribed medications, recommended continuing chiropractic care, and provided work restrictions against bending and lifting over 10 pounds.

17. On May 19, 2008, Dr. Ogrodnick treated claimant, who reported the history of the work injury moving the household goods, but no history of the motor vehicle accident. Dr. Ogrodnick diagnosed L5-S disc protrusion. He continued to treat claimant until June 2, 2008, when the parties agreed to Dr. Richman as the authorized treating physician. On May 30, Dr. Ogrodnick noted that claimant refused to provide a release for Dr. O'Donnell's medical records.

18. On May 9, 2008, Mr. Akerlund, claimant's supervisor, authored a written statement which said that claimant said that his back was sore and he did not know what happened, but maybe it was due to moving furniture.

19. On May 9, 2008, claimant completed an Employee's Report of Incident form on which he mistakenly indicated the incident happened in March, but correctly reported that the pain started as a result of moving furniture.

20. On June 16, 2008, Dr. Griffis performed electromyography and nerve conduction studies ("EMG"), which showed left S1 radiculopathy.

21. Claimant continued to work full time until July 2008. On July 1, 2008, Dr. Richman reduced claimant's work hours to 6 per day.

22. On July 7, 2008, claimant began to work only part-time for the employer. As a result, the employer terminated claimant's health insurance benefits effective August 1, 2008.

23. On August 8, 2008, claimant returned to full-time work for the employer. The employer again offered claimant health insurance benefits, which would have cost claimant approximately $90 per month. Claimant declined the health insurance due to

the cost. The employer did not provide health insurance to claimant at any time after August 1, 2008.

24. On October 31, 2008, Dr. Scott performed an independent medical examination ("IME") for respondents. He diagnosed L5-S1 disc protrusion with S1 nerve root impingement. Dr. Scott was unable to say that the injury was work-related because of the history that claimant provided to other providers did not include the work injury.

25. Dr. Scott admitted that acute events commonly cause chronic degenerative changes to become symptomatic and agreed that the work injury probably caused the symptoms, if claimant actually reported the work injury before May 8.

26. Claimant has proven by a preponderance of the evidence that he suffered an accidental injury to his back arising out of and in the course of employment on April 9, 2008. Claimant suffered only occasional preexisting low back pain due to construction work, but did not obtain medical care for any preexisting problem. He did not injure his back in the October 5, 2007, motor vehicle accident. His statement to the auto insurance adjuster was foolhardy, but does not demonstrate that he in fact injured his back in the auto accident. Claimant complained on April 10 to his coemployee, Mr. Scheffe, that he had low back pain. Mr. Scheffe observed claimant's pain behaviors on that date. Claimant told his supervisor on approximately April 21, 2008, that he had back pain since the April 9 furniture move, although he thought that it might be due to the motor vehicle accident. Claimant did not first make a work injury attribution of the pain after the May 8 denial by the auto insurance adjuster. After that denial, claimant pursued the workers' compensation claim. Dr. Scott admitted that acute events commonly cause chronic degenerative changes to become symptomatic. Dr. Scott agreed that the work injury probably caused the symptoms if claimant actually reported the work injury before May 8. The MRI showed a L5-S1 disc protrusion with nerve root impingement. The acute injury probably was caused by the furniture move on April 9, 2008.

27. Effective August 1, 2008, claimant's average weekly wage includes the COBRA amount for health insurance no longer provided by the employer effective August 1, 2008. Claimant was not required to purchase the insurance when it was again offered to him. The wage includes the insurance premium when the employer ceases to provide the benefit to the employee. The record evidence did not include the COBRA amount. Consequently, the final average weekly wage effective August 1, 2008, cannot be determined at this time.

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). In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found, claimant has proven by a preponderance of the evidence that he suffered an accidental injury to his back arising out of and in the course of employment on April 9, 2008.

2. The insurer 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). No specific medical benefits were requested and none are ordered herein.

3. Section 8-42-102, C.R.S. provides various methods of calculating the "average weekly wage." The parties stipulated to the base average weekly wage of $484.75. They disputed whether the COBRA amount for the health insurance benefits should be included in the average weekly wage effective August 1, 2008. "Wages" is defined in section 8-40-201(19)(b), C.R.S., in pertinent part as:

> 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, ... If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage or the cost of the conversion of such health insurance coverage, such advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make such payment.

Industrial Claim Appeals Office v. Ray, 145 P.3d 661 (Colo. 2006) held that the claimant's cost of continuing the employer's group health insurance plan must be included in the average weekly wage and then, at the expiration of the allowed term for continued coverage, the cost of conversion to a similar or lesser plan must be included in the av-

erage weekly wage, even if claimant does not actually purchase replacement health insurance. The reasoning of Ray, supra, applies to the current issue. Claimant is not required to opt in for the health insurance. The COBRA amount is included in the wage unless the employer decides to continue to provide the health insurance to claimant after the injury. The employer here did not decide to continue to provide the benefit to claimant after the injury. The record evidence did not include the COBRA amount. Consequently, the final average weekly wage effective August 1, 2008, cannot be determined at this time.

4. The parties stipulated that claimant would be entitled to intermittent periods of temporary disability benefits, but they did not stipulate or litigate any specific time periods. No specific benefits were requested and none are ordered herein.

ORDER

It is therefore ordered that:

1. The insurer shall pay for all of claimant's reasonably necessary medical treatment by authorized providers for the work injury.

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

DATED: January 14, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-724-921

ISSUES

The following issues were raised for consideration at hearing:

1. Compensability;
2. Medical benefits;
3. Average weekly wage;
4. Temporary disability benefits;
5. Responsibility for termination;
6. Apportionment;
7. Late notice; and
8. Statute of limitation.

FINDINGS OF FACT

Based on the evidence presented at hearing and the parties' post hearing position statements, the following Findings of Fact are entered.

1. The hearing in this matter concerns the consolidated claims in Workers' Compensation Number 4-724-921 for an alleged injury occurring on November 1, 2003 and Workers' Compensation Number 4-724-922 for an alleged injury occurring on April 4, 2007.

2. Claimant is a 51 year old male who was hired by the employer on September 21, 1992 at $6.00 an hour. On April 20, 2001, he was a shift supervisor. He received safety training and understood that the Employer's designation of medical provider was Centura Centers for Occupational Medicine (CCOM). Claimant was also notified multiple times over the course of his employment about how to report work-related incidents. Further, Claimant testified that as a supervisor he was trained how to handle work injuries and on the identity of the designated health care provider.

3. The parties stipulated that on November 1, 2003, Claimant was a Machine Operator III. His rate of pay was $14.92 an hour, plus time and a half for overtime hours worked and quarterly bonus pay. The parties also stipulated that on April 28, 2006, Claimant's rate of pay was $18.88 an hour, in addition to holiday, overtime, paid time off and quarterly bonus pay, which did not increase thereafter.

4. On April 12, 2007, after Claimant expressed frustration with production, he called Judy Holt, the Human Resources Manager, and stated that he would be giving his two weeks notice in order to resign from his position with the Employer. Later that day, Claimant's badge was on Ms. Holt's desk, and Claimant removed his toolbox from the worksite. It appeared to Ms. Holt that Claimant had walk off the job. Claimant then called Ms. Holt and told her that he had not resigned. Claimant told Ms. Holt that he was giving his two weeks notice, and that he would leave immediately if so desired. After debate about Claimant's intentions whether to quit immediately or give two weeks notice, his resignation was accepted and he was escorted out of the building. Claimant stated that he was going to work for his father-in-law at Quentin Huston & Sons. It is concluded that Claimant undertook a volitional act, which caused his separation from employment and wage loss with the Employer.

5. On April 20, 2007, Claimant applied for unemployment benefits. He wrote that he quit by "inadvertently" blurting out that he was quitting. Claimant represented that his resignation was due to working conditions such as pay, hours, duties, and supervision. Claimant did not indicate that any injury prevented him from working.

6. Prior to November 1, 2003, the date of the alleged injury in W.C. no. 4-724-921, Claimant had pre-existing health conditions. As a child, Claimant's was involved in a farm accident when an old-fashioned corn chopper ran over his torso.

7. On May 17, 1996, Claimant had cervical pain and by x-ray was diagnosed with increased cervical lordosis. On June 7, 1999, compression and anterior wedging

deformities involving two contiguous mid-thoracic vertebral bodies, approximately T6 and T7, with compression of the T8 vertebral body and associated cortical end-plate irregularities at those levels were seen on x-ray. Claimant complained of "rib pain." At the time, it was unclear whether Claimant's back problems were the result of juvenile spondylitis, old compression fractures, or a more recent compression injury.

8. In 2001, Claimant continued to have cervical pain. Claimant also has a herniated disc at L3-4 to the left secondary to a 1989 work injury from moving pianos.

9. On October 14, 2002, Claimant's family physician, Michael Nobel, M.D., treated him for worsening anxiety and compulsivity, which started in 1992. On December 22, 2003, Dr. Nobel was still treating Claimant for obsessive-compulsive disorder and anger management issues. Claimant continued to have "rib pain" and his wife could not lie on his side as a result of the pain, because it hurt when touched.

10. On November 1, 2003, Claimant slipped on an icy platform and fell down approximately five steps while working for Employer. This is the work injury assigned Workers' Compensation Number 4-724-921. Claimant reported injuries requiring medical care on November 11, 2003. Claimant sustained bruises, which healed, but as of November 11, 2003 he complained of a sore foot.

11. On November 14, 2003, Claimant went to the authorized treating provider (ATP), CCOM, for left foot complaints. The Insurer paid for the care and treatment for this injury provided by CCOM. On the Patient Health & Injury History form completed by Claimant, he indicated that he had a previous back problem. On that same form, Claimant identified Dr. Nobel as his family doctor.

12. On November 14, 2003, Claimant also completed a Check In Form. On that form, Claimant marked on a body diagram that his left foot ached, was numb, and had a pins and needles sensation. There were no other complaints of pain. His foot complaints were all of the time at a constant pain level of two out of ten.

13. On November 14, 2003, Al Schultz, P.A.-C saw Claimant and reported that Claimant sustained abrasions to the left lower leg and had stiffness in his back and left hip from a fall on November 1, 2003. It was report to Mr. Schultz that the stiffness in the back and left leg resolved a few days later. About two days after the fall, Claimant reported that he began noting pain over the lateral aspect of the left foot. He continued performing his regular work duties. Mr. Schultz also noted that Claimant suffered from depression. After obtaining normal x-rays, Claimant was diagnosed with left leg abrasions and a left foot sprain and he returned to work with no limitations.

14. One month after the slip and fall, Claimant saw Ronald L. Peveto, M.D. at CCOM on December 1, 2003. At that time, Claimant had no new complaints and felt that his injury was resolving as expected. Claimant had little discomfort in his left foot and no discomfort in his left shin. The abrasions healed and Claimant had no complaints of any pain, numbness or tingling in his left lower extremity. Claimant had no

referrals, special tests or x-rays since his prior visit. Dr. Peveto placed Claimant at maximum medical improvement (MMI) with no impairment or permanent work restrictions. Claimant did not treat again with an ATP for this injury. Claimant did not lose more than three days or shifts from work due to this injury during the course of his treatment by CCOM.

15. After Claimant was released from treatment for the November 1, 2003 work injury, he continued to receive medical treatment. On January 22, 2004, outside of workers' compensation, Claimant had x-rays taken of his chest due to pain. The x-rays showed a wedge deformity of the T7 and T6 vertebral bodies consistent with partial compression fractures of indeterminate age. When compared to x-rays taken on June 4, 1999, there was no significant change.

16. Claimant went to Colorado Springs Health Partners on October 11, 2004 for a toe nail problem. On the Podiatric Surgery Patient Information form, Claimant wrote that in 2001 his shoulder required physical therapy. He also circled that he had a history of back pain.

17. On February 1, 2006, Claimant again saw Dr. Nobel for low back pain that he had for three weeks. Dr. Nobel reported that Claimant had a history of a herniated nucleus pulposus in 1990. Six weeks prior to February 1, 2006, Claimant fell on his buttocks and the pain from that fall resolved, but then he had a sharp pain in the back on the right side after trying to get out of his car three weeks later. He reported that sitting, standing, walking and lying down was painful. Claimant also had an abnormal gait with tender paraspinal muscles on both sides and a decreased range of motion laterally and with forward flexion. Claimant was placed on Vicodin and Flexeril.

18. Dr. Nobel continued to treat Claimant for his low back pain, and on March 22, 2006, the doctor wrote that Claimant had "chronic low back pain since a work comp injury in 1989 for which he takes flexeril and Vicodin and OCD and mood swings with anger for which he takes Paxil and Xanax." Claimant's back pain was to the bilateral sacroiliac areas and radiated down the bilateral hips. The pain was worse when lying on one side or the other with intermittent radiation down the left leg. Dr. Nobel referred Claimant to Action Potential for physical therapy to address "chronic lumbosacral and thoracic strain." He also referred Claimant to Dr. Scott Ross, a physiatrist, for evaluation and treatment of pain control. Claimant never attended physical therapy.

19. Dr. Nobel continued to treat Claimant for chest wall pain, which kept Claimant from sleeping at night and did not improved over time. On April 18, 2006, a CT scan was read as normal with no rib fractures or lesions.

20. James R. Spadoni, M.D., a psychiatrist, began treatment of Claimant on May 9, 2006 for a "long history of obsessional and other anxiety symptoms." Dr. Spadoni reported that "this gentleman relates an overall very negative medical history" with gallbladder symptoms being the most significant. On February 16, 2007, Claimant had an employment option to allow him to "get away" from his job at the Employer, and

Claimant was exploring the other employment options while continuing on psychiatric medications.

21. Claimant filed a Workers' Compensation claim for his November 1, 2003 work injury on May 29, 2007. The claim was filed more than three years after the slip and fall incident in November 2003. Since the claim was filed in excess of two years after the date of the incident, the claim is barred by the statute of limitations. Claimant produced no credible or persuasive evidence that his claim falls within the exceptions defined by section 8-43-103(2), C.R.S.

22. With regard to Workers' Compensation Claim number 4-724-922 concerning the alleged work injury of April 4, 2007, Claimant returned to see Dr. Nobel on April 9, 2007 due to a worsening of upper back pain that started three weeks prior after lifting a heavy basket. Dr. Nobel did not mention in his report an April 2007 work injury, although he reiterated that Claimant had a history of moving pianos and a ruptured L3-4 disc without surgery. An x-ray was ordered, which again showed wedge deformities at T7 through T9, which were stable since June 1999, as well as arthritis at C5-6. The doctor noted that there were no bony or soft tissue abnormalities and the disc and joint spaces were well preserved.

23. Claimant visited Dr. Spadoni on April 20, 2007 and related that he "quit his job and feels enormously relieved with this decision." Claimant expected to receive unemployment benefits as a result of his separation from employment. He was sleeping well and happy to be at home with his wife, although his daughter recently committed suicide.

24. On May 17, 2007, Claimant again saw Dr. Spadoni who wrote that although Claimant had planned on terminating his employment, he responded poorly to challenges at work and made comments that were used as resignation before Claimant had intended to resign. Claimant was depressed and self-critical "for his foolish comments," apparently regarding his resignation from employment.

25. Without returning to CCOM, on June 14, 2007, Claimant requested that Dr. Nobel "take care of Workers' Comp issues". On that date, Claimant told Dr. Nobel that he and a coworker had to move a basket of parts that weighed about 150 pounds, and he immediately had pain across both shoulders and the neck, and mid-back and lower back pain that was severe, unrelenting, and prevented him from working. The June 14, 2007 recollection of the alleged work injury differed from what was reported in Dr. Nobel's April 9, 2007 report. On April 9, 2007, it is reported that the injury occurred in early March 2007. Additionally, there was no mention of a recent work injury. On April 9th, Claimant only complained of upper back pain. Almost two months later, however, he was complaining of bilateral shoulder pain, neck, mid-back and low back pain. On June 14, 2007, Claimant did not complain of upper back pain.

26. Dr. Nobel summarized objective testing that Claimant had in the past for back complaints: an MRI in 1990 that showed a L3-4 herniated disc, cervical and tho-

racic spine x-rays done on April 11, 2007 with progression of the cervical spine arthritis since May 1995 and no change in the thoracic spine since June 1999 with stable mid-thoracic compression fractures. Claimant had a CT scan of his chest in December 2006, which showed a calcified left hibar lymph node consistent with an old granulomatous disease. Claimant was treated by rheumatologist Dr. Zyskowski in January 2004 for left chest wall pain, and by pulmonologist, Dr. John Newcomer, but never saw a physiatrist.

27. Upon objective evaluation in June 2007, Dr. Nobel reported that Claimant had diffuse pain in the paracervical area and over the shoulders and trapezius and supraspinatus. He had diffuse pain over the entire thoracic spine and lower lumbar spine. Palpation over the chest wall was painful. Claimant had left L5 sciatica and pain, but good motor control and power in all extremities with normal deep tendon reflexes. Dr. Nobel referred Claimant for a cervical and thoracic MRI, he referred Claimant to a physical medicine and rehabilitation specialist, Kenneth P. Finn, M.D., and to physical therapy, which Claimant refused.

28. Claimant had a MRI of the cervical spine on June 28, 2007, which was normal. The MRI of the thoracic spine showed the pre-existing compression deformities with no disc herniations, bulges, or evidence of neural forminal encroachment. The MRIs were the same as prior studies.

29. On June 19, 2007, Claimant complained of "severe pain from below the neck to the tail bone" and pain in the left rib area. Claimant had full range of motion of the cervical spine and full flexion and extension of the back with no focal motor-sensory deficits. Claimant requested a referral to Dr. Laub for pain management and was sent to physical therapy.

30. Kenneth P. Finn, M.D., treated Claimant on July 16, 2007 based on Dr. Nobel's referral. Dr. Finn wrote to Dr. Nobel, and stated that Claimant said that he injured his back in 2004 when he fell down stairs at work, which was not treated. Then, on April 4, 2007, Claimant helped his boss "move some parts" on a desk, and sustained injury to his neck, mid and lower back. Claimant then quit his job on April 12, 2007. Claimant complained of diffuse pain from his cervical to lumbar spine with the sensation that his neck was on fire, and pain across the shoulders to the right more than left with numbness and tingling involving the medial aspect of both hands and arms on an intermittent basis. Claimant complained of nocturnal paresthesias and thigh and calf pain in the lower extremities, and bladder incontinence and urgency since March or April of 2007.

31. Dr. Finn diagnosed Claimant with "chronic diffuse spinal pain, uncertain etiology." He further opined that Claimant's subjective complaints were out of proportion to objective findings, making a clear objective picture difficult. Dr. Finn recommended physical therapy and an EMG for the bilateral upper extremity numbness. Claimant refused to return to Dr. Finn due to "personal reasons."

32. On July 24, 2007, a bone density scan was done and was normal. Dr. Laub saw Claimant based on Dr. Nobel's referral, on August 1, 2007. Dr. Laub diagnosed Claimant with: 1) thoracalgia, thoracic radiculitis secondary to chronic compression fractures of the thoracic spine, 2) low back pain, lumbar radiculitis secondary to multilevel degenerative disc disease, and 3) history of arthritis, anxiety panic disorder, depression. When summarizing Claimant's medical history, Dr. Laub reported that in April 2007, Claimant had onset of pain at work in the left gluteal area and left low back. Dr. Laub provided Claimant with narcotic pain medication.

33. T. Drake McDonald, M.D., a neurologist, treated Claimant on October 3, 2007, at the referral of Dr. Nobel and Dr. Laub. Dr. McDonald noted that Claimant had pain from his midback to under his shoulder blade and left flank to his chest since 1999. Claimant did not report an injury at that time that precipitated the complaint. He complained of a work injury that occurred on April 4, 2007 at which time "he felt something 'release' in his lower back." This report of the work injury mechanism of injury contradicts the report of injury to Dr. Nobel on April 9, 2007. Claimant continued to report that the pain radiated from his midback to his left flank and left chest, which caused a sharp pain with any movement. Claimant informed Dr. McDonald that he had not been able to work since April 12, 2007.

34. Dr. McDonald also noted the development of new low back pain since April 4, 2004, localized to the lower back and radiating down both legs in a nondescript fashion. Claimant also had pain in the posterior neck across to both shoulders and down the left arm. On physical examination, Dr. McDonald observed mild diffuse pain to palpation of Claimant's entire spine and paraspinal muscles in the cervical, thoracic, and lumbar regions. Dr. McDonald opined that Claimant's mid-back (thoracic) pain had occurred over the previous nine years, and recommended neuropathic pain medication and a nerve block. Claimant reported cervical and lumbar pain, which was of musculoskeletal origin, and Dr. McDonald did not treat it.

35. Dr. Nobel referred Claimant to Steven B. Waskow, M.D. for evaluation of right shoulder pain on May 15, 2008. Dr. Waskow wrote that Claimant had no history of injury, and reported pain for three to four months, since January 2008. An x-ray of Claimant's right shoulder was taken on May 6, 2008, which was normal. Dr. Waskow diagnosed Claimant with adhesive capsulitis of the right shoulder. Claimant rejected treatment with Dr. Waskow because he wanted to pursue treatment through the "V.A."

36. On May 22, 2008, Robert W. Watson, Jr., M.D. conducted an independent medical evaluation (IME) of Claimant at the Respondents' request. Claimant told Dr. Watson that since his November 1, 2003 work injury, the pain never resolved although he continued to do his normal activities without much difficulty. Claimant admitted to constant rib pain since 1998. He also complained of a "frozen shoulder" from laying on his right side because he could not lie on his left side because of left-sided chest pain.

37. Dr. Watson reviewed an August 15, 2007 report prepared by an IME, Dr. Timothy Hall, at Claimant's request. Dr. Hall was of the opinion that the thoracic anterior

chest wall pain was permanently aggravated in 2007, and that the low back, thoracic and chest wall complaints were directly related to the April 2007 work injury. This opinion was rendered by Dr. Hall despite the inconsistency in Dr. Nobel's reports.

38. Dr. Watson emphasized that medical records from December 2003 until 2007 did not report ongoing back pain related to the 2003 slip and fall. Therefore, Dr. Watson opined that any claims for a back injury in 2003 are not warranted and are not supported by the medical records. Dr. Watson's opinion was deemed credible.

39. Regarding the 2007 work injury, Dr. Watson noted that Claimant saw Dr. Nobel on February 1, 2006 for low back pain as a result of a fall. Claimant continued to treat with Dr. Nobel for that pain, and Dr. Watson summarized that treatment and noted that Claimant had full range of motion of the back and cervical spine on April 9, 2007. Dr. Watson wrote, "given this history, it raises real concern about causality as to exactly what happened for the extent of the injury and along with issues regarding symptom magnification." Further, Dr. Watson opined that treatment for Claimant's myofascial pain falls outside of the medical treatment guidelines. Dr. Watson's opinion was deemed credible.

40. Considering the totality of the evidence, including the medical records, credibility determinations made concerning the truth and veracity of Claimant's testimony, and expert opinions, it is found and concluded that Claimant failed to sustain his burden of proof to establish a work injury occurring on April 4, 2007.

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. Claimant failed to sustain his burden of proof to establish that he sustained a compensable injury while in the course and scope of his employment with the Employer. Medical records offered into evidence at hearing did not support Claimant's claim of a work injury. Respondents' expert witness, Dr. Watson, provided the most credible opinion that Claimant did not suffer a work injury in April 2007. Thus, Claimant's claim in W.C. claim no. 4-724-922 is denied and dismissed.

4. Section 8-43-103(2), C.R.S. requires that Claimant must file a claim for compensation within two years after the injury. Nevertheless, the statute of limitations does not commence to run until Claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of his injury. *City of Boulder v. Payne*, 162 Colo. 345 (Colo. 1967).

5. Based on the totality of the evidence, it is found and concluded that Claimant's claim for workers' compensation benefits in W.C. no. 4-724-921 is barred by the statute of limitations. Claimant filed a Workers' Compensation claim for his November 1, 2003 work injury on May 29, 2007. The claim was filed more than three years after the slip and fall incident in November 2003. Since the claim was filed in excess of two years after the date of the incident, the claim is barred by the statute of limitations. Claimant produced no credible or persuasive evidence that his claim falls within the exceptions defined by section 8-43-103(2), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim nos. 4-724-921 and 4-724-922 are denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED: January 14, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-451-234

ISSUES

¬ Did claimant prove by a preponderance of the evidence that his condition from his work-related injury has worsened such that his claim should be reopened?

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge finds as follows:

1. Claimant's date of birth is November 29, 1951; his age is 57 years. Claimant had worked some 18 weeks for employer as a small package delivery driver when he sustained a compensable injury on December 31, 1999. Claimant continued working for employer until March of 2000. Claimant then worked for Sprint Express in April and May of 2000. From June through October of 2000, claimant worked as a rig operator. Claimant has not worked since October of 2000.

2. At the time of his injury on December 31, 1999, claimant was delivering a box containing a computer monitor. Claimant was carrying the box while navigating through 2 consecutive doors. After moving through the first door, claimant braced the box against the frame of the second door, pushed open the door, turned to catch the door, and lost his grip on the box. Claimant felt a sharp pain in his upper back and neck as he maneuvered the box to keep from dropping it.

3. Claimant testified that, since his injury, his symptoms have included severe headaches, nausea, and pain in his neck, upper back, arms, and hands. Claimant described his treatment as consisting of two epidural steroid injections, occipital nerve block injections, traction, physical and massage therapy, ultrasound, acupuncture, relaxation exercises, psychological counseling, and medications. Claimant's treatment also included a neurosurgical evaluation by Larry Tice, M.D.; electrodiagnositc nerve conduction studies by Neal Gilman, M.D.; surgery to release his right carpal tunnel; and medication management by Psychiatrist Gerd C. Leopoldt, M.D. Claimant's personal physician, Louis W. Bair, Jr., D.O., has followed claimant's treatment since January of 2001.

4. Physiatrist Ellen Price, D.O., directed claimant's treatment for years, beginning in April of 2001. Dr. Price diagnosed claimant with a history of cervical spine pain, including degenerative disk disease (DDD) at the C6-7 level of his cervical spine, with radiculopathy; chronic neck and shoulder pain; myofascial pain; on-the-job injury of 12/31/99; and evidence of Major Depression. Dr. Price placed claimant at maximum medical improvement (MMI) as of February 18, 2003, and rated his permanent medical impairment at 27% of the whole person.

5. Respondents requested an independent medical examination (DIME) through the Division of Workers' Compensation. The division appointed Rachel L. Basse, M.D., as the DIME physician. Dr. Basse evaluated claimant on April 22, 2003, when claimant reported the following mechanism of injury:

> [Claimant] had to open two sets of double doors to get in the building. While on the second set he had the computer braced against a wall and opened the door with his right arm, he grabbed the box, attempted to go through the door and **the large box got caught on a door molding** and it jerked his right upper body and back.

(Emphasis added).

6. Claimant reported to Dr. Basse that his symptoms, overall, had not much improved. Claimant primarily complained of discomfort (burning, achy, pins and needles, and a numb sensation) at the base of his neck. Claimant told Dr. Basse that the discomfort spreads to involve the entire posterior and anterior cervical region, the entire posterior and anterior shoulder girdle, and both upper extremities. Claimant reported ongoing migraine headaches. Dr. Basse further recorded:

> [Claimant] describes that all the muscles throughout his neck, chest, and arms are hard as a rock and they never relax, are tight and tender to touch.
>
> On a scale of zero to 100 with zero being no pain and 100 being pain so severe one would end one's life, he describes **his worst discomfort as an 85, least as a 35, and momentary as a 60 plus** which is what he considers his average.

(Emphasis added).

7. Dr. Basse diagnosed long-standing, multi-level cervical spondylosis and DDD with secondary myofascial pain, aggravated by his injury sustained while working for the employer. Dr. Basse explained:

> [Claimant] clearly has **significant multi-level degenerative changes in the cervical spine** affecting the discs, the joints, and the foramen along with central canal stenosis. **These are all long-standing and preexisting his work exposure**, however, certainly **could have been aggravated by the work exposure**. It is not medically probable that he had an aggravation of all levels.

(Emphasis added). Dr. Basse interpreted claimant's symptoms as indicating probable work-related aggravation of the degenerative disease process at the C4-5 level and possible aggravation of the C7-T1 level of claimant's cervical spine. Dr. Basse was unable to determine claimant's cervical range of motion loss because of his pain behavior and self-limiting motion. Dr. Basse determined that claimant reached MMI on September 11, 2002, which was earlier than Dr. Price's MMI date. Dr. Basse rated claimant's permanent medical impairment from the injury at 13% of the whole person, including a 2% value for permanent mental impairment.

8. Claimant applied for a hearing to overcome Dr. Basse's rating and to prove his claim for permanent and total disability (PTD) benefits. The parties appeared for hearing before Administrative Law Judge Edward R. Martinez on January 6, 2004. Judge Martinez entered Specific Findings of Fact, Conclusions of Law and Order on March 2, 2004. Judge Martinez upheld the determination of MMI on February 18, 2003, and ordered insurer to pay claimant permanent partial disability (PPD) benefits based upon Dr. Price's rating of 27% of the whole person. Judge Martinez denied claimant's claim for PTD benefits.

9. On August 17, 2004, insurer filed an Amended Final Admission of Liability (FAL) consistent with Judge Martinez's order. Under the FAL, insurer admitted liability for medical benefits in the amount of $44,397.55, temporary disability benefits in the amount of $64,682.22, and PPD benefits in the amount of $29,224.83, including interest.

10. In support of his claim that his condition has worsened, claimant testified that his headaches, shoulder and neck pain are more severe now than when he was placed at MMI. Claimant stated that knots in his muscles are more prevalent; that activity more easily aggravates his pain; that it is more difficult to relieve his pain; and that he has to change positions and lie down more frequently throughout the day. Claimant described himself as more limited now than at MMI in performing a number of activities of daily living (ADLs), including playing with grandkids, showering, housework, yardwork, and driving. Claimant stated that, since MMI, he has increased his dosage of pain medication, OxyContin, from 20 to 40 mg and is taking Valium again to help with sleep.

11. Claimant's testimony comparing his current ability to perform ADLs to his abilities at the time of MMI is unreliable. At his evaluation on February 18, 2003, claimant described his day to Dr. Price as follows:

> [C]laimant states he gets up about 7:00 a.m., sits for a couple hours, takes his medications and lets them take effect, then he will eat some breakfast. He states he might go out and do some errands, pick up bread or help his daughter with something, then he will go back home. He will try some light housekeeping, load the dishes, for about two hours. He states it usually kills him and he has to lie down. **He states he really doesn't do anything during the day.** The OxyContin helps him to be a little bit functional but he is still complaining of the same complaints, of neck, shoulder, and arm pain.

(Emphasis added). Claimant thus reported at the time of MMI that he was unable to perform most ADLs; that performing minimal ADLs increased his pain and caused him to need to lie down; and that his medication provided no real relief to increase his functioning. In addition, claimant told Dr. Basse that he needed to lie down 4 to 5 times throughout a typical day. Dr. Basse also described claimant as locked in a pain syndrome and seeing himself as disabled.

12. Following his examination on January 24, 2008, Dr. Bair recommended that claimant undergo another magnetic resonance imaging (MRI) scan of his lumbar spine because his complaints were worse and because the physical examination findings were worse. Claimant underwent the MRI on February 7, 2008. Dr. Bair compared the 2008 MRI with one from some 8 years earlier and noted no changes at the C4-5, C5-6, C6-7, and C7-T1 levels of claimant's cervical spine. Dr. Bair found the only change occurred at the C3-4 level. Dr. Bair explained that claimant's DDD in his cervical spine is a condition which typically worsens over time with normal activities of daily living. Dr. Bair did not change claimant's medication prescription as a result of the MRI.

13. Claimant has been diagnosed with Somataform Disorder. Dr. Bair explained this diagnosis means that claimant's perception of his pain or numbness fails to correlate with objective findings. Because of his Somataform Disorder, there is reason to question or suspect the veracity of claimant's report of his symptoms. Dr. Bair stated that he does not question claimant's complaints of pain, even though some of his complaints lack any correlation to objective findings.

14. At respondents' request, J. Tashof Bernton, M.D., performed an independent medical examination of claimant on July 24, 2008. Dr. Bernton reviewed claimant's medical records, reviewed the MRI, and performed a physical examination of claimant. Claimant reported to Dr. Bernton that he was experiencing pain at a level of 70 out of 100, which Dr. Bernton doubted because claimant failed to display any behavior to support that he was in pain. Dr. Bernton doubted the reliability of claimant's report of his symptoms when weighed against physical examination findings; he wrote:

> [Claimant] has subjective increased symptomatology and reports increased disability **without objective evidence on clinical examination** of increased (sic) in disability.

(Emphasis added). Dr. Bernton's opinion concerning the reliability of claimant's report of his symptoms is persuasive and consistent with findings of other examining and treating physicians over the past 9 years claimant has been treating for his work-related injury. Dr. Bernton's opinion is further supported by the fact that claimant's subjective report of his symptoms likely is unreliable because of his Somataform Disorder. The Judge credits Dr. Bernton's medical opinion in finding unreliable claimant's report of worsening symptoms.

15. On August 11, 2008, Radiologist Charles Seibert, M.D., authored a report based on his review of MRI films and claimant's medical records. Dr. Seibert opined that claimant's 2008 imaging exams demonstrate severe chronic degenerative spondylosis, with multi-level involvement from C3-4, through C7-T1, with accompanying foraminal stenosis and canal compromise, superimposed on a congenitally small spinal canal. Dr. Seibert explained that degenerative cervical spondylosis is one of a spectrum of disorders included in cervical degenerative diseases. Degenerative spondylosis changes in the cervical spine are age related and increasingly evident in subjects over 40 years of

age. Responding to Dr. Bair's opinion that the 2008 MRI showed pathology at claimant's C3-C4 level was worse, Dr. Seibert noted:

> [W]orsening or natural progression of abnormalities may be expected over time in subjects with chronic degenerative spondylosis of the cervical spine; the interval between the MRI's was eight years and interval progression can be expected as part of natural progression of the spondylosis disease process associated with daily life activities.

Dr. Seibert's opinion is consistent with Dr. Bair's testimony at hearing, where Dr. Bair opined that claimant's regular activities of daily living would be expected to cause a worsening of the underlying degenerative condition. As Dr. Seibert opined, the observed eight-year interval progression of pathology between MRI studies likely is due to the natural progression of the spondylotic disease process over time, and is not likely related to claimant's work-related injury some 9 years earlier.

16. Dr. Bernton explained what the expected progression of claimant's severe underlying degenerative disease process in his cervical spine portends:

> In this situation, [claimant] has **diffuse osteoarthritis of the cervical spine.** This is a condition in which **deposition of calcium occurs over a long period of time** on spinal ligaments resulting in the potential to narrow the space available for the spinal cord and for the spinal nerve roots, often resulting in symptoms on this basis.
>
> ****
>
> The **osteoarthritic process is known to be a progressive** process that continues over time with continued deposition. Progression is variable in terms of its speed.

(Emphasis added). The Judge credits as persuasive Dr. Bernton's medical opinion that claimant's preexisting, underlying degenerative disease process likely progressed over the past 9 years because of the nature of the disease process.

17. While he agreed that claimant's work-related injury likely aggravated claimant's preexisting and underlying osteoarthritic disease process, Dr. Bernton attributed claimant's current symptomatology to the natural progression of the disease process, and not to any work-related aggravation of the disease that occurred some 9 years ago:

> The record in this case reflects at least one episode of cervical symptomatology **in July 1999 prior to the occupational injury.** The occupational injury was one in which the patient was carrying a computer monitor and bumped into a doorframe.
>
> ****

> While it certainly is reasonable to accept that that episode may have exacerbated underlying and pre-existing degenerative disc disease in the cervical spine (as observed by multiple physicians), **it is not reasonable to make an assessment that worsening of the patient's condition that may occur eight or nine years later is as a result of bumping a computer monitor against a door frame in 1999** (as opposed to the severe underlying degenerative disease, which is known to be present).

(Emphasis added). Dr. Bernton's medical opinion is amply supported by that of Dr. Seibert.

18. Claimant contends that the Judge should not credit Dr. Bernton's opinion here as persuasive because, according to claimant, Dr. Bernton mischaracterized the mechanism of injury. The history of mechanism of injury Dr. Bernton obtained from claimant is substantially similar to that obtained by Dr. Basse some 5 years ago in April of 2003. The Judge is unconvinced that Dr. Bernton misapprehended the severity of the mechanism of injury by characterizing it as bumping the box against the doorframe. Claimant testified that he rested the box against the doorframe but lost his grip while opening the second door, injuring himself when he attempted to restore his grip to keep from dropping the box. The Judge infers from Dr. Bernton's report that he believes claimant's mechanism of injury insufficient to describe a mechanism that likely would cause an injury severe enough to require 9 years of medical treatment.

19. Dr. Bernton attributed claimant's current complaints and symptoms to the natural progression of his underlying osteoarthritis and degenerative disease process:

> In this case, it is not reasonable to conclude that the "type and magnitude" and "temporal relationship" of the occupational injury (bumping a computer monitor into a doorframe) were sufficient to cause worsening of [claimant's] symptomatology at this point in time nine years later. It is clear that the pathophysiology of cervical osteoarthritis (which is a nonwork-related condition that this patient has) is consistent with potential worsening of [claimant's] condition at this point in time.
>
> ****
>
> Additionally, to the extent that [claimant's] condition has declined, this is, in my assessment, clearly related to his underlying multilevel cervical osteoarthritis and degenerative disease (which has been observed by several physicians to be non-work-related) and not to the current occupational injury that occurred on 12/31/1999, when he was walking with a box of computer equipment and bumped it against a doorway.

Dr. Bernton's medical opinion is persuasive.

20. Claimant suffers from an underlying degenerative cervical osteoarthritis condition that is not work-related, but which was aggravated by an admitted work-

related injury some 9 years ago. Claimant has failed to show it more probably true that any change in his condition was caused by the admitted work injury, rather than the natural progression of underlying degenerative condition. The Judge found claimant's subjective report of his symptoms unreliable. To the extent claimant's symptoms may have changed since he reached MMI, the Judge credits the medical opinions of Dr. Seibert and Dr. Bernton in finding it medically probable that any change likely is the result of the natural progression of claimant's underlying degenerative cervical osteoarthritis condition.

CONCLUSIONS OF LAW

Claimant argues he has proven by a preponderance of the evidence that his condition from his work-related injury has worsened such that his claim should be reopened. 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 carries the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201, *supra*; *see Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). 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 findings above as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Section 8-43-303(1), supra, provides that an award may be reopened on the ground of, *inter alia*, change in condition. A change in condition refers either 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 injury. *Chavez v. Industrial Commission*, 714 p.2d 1328 (Colo. App. 1985). Reopening is appropriate where the degree of permanent disability has changed or where additional

medical or temporary disability benefits are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000).

Here, the Judge found claimant failed to show it more probably true that any change in his condition was caused by the admitted work injury, rather than the natural progression of his underlying degenerative condition. Claimant thus failed to prove by a preponderance of the evidence that his condition from his admitted injury has worsened.

As found, claimant suffers from an underlying degenerative osteoarthritic condition in his cervical spine that is not work-related, but which was aggravated by the admitted work-related injury some 9 years ago. Claimant has failed to show it more probably true that any change in his condition was caused by the admitted work injury, rather than the underlying degenerative condition. The Judge found claimant's subjective report of his symptoms unreliable. To the extent claimant's symptoms may have changed since he reached MMI, the Judge credits the medical opinions of Dr. Seibert and Dr. Bernton in finding it medically probable that any change likely is the result of the natural progression of claimant's underlying degenerative cervical osteoarthritis condition.

The Judge concludes claimant's petition to reopen his claim 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 Petition to Reopen is denied and dismissed.

2. Issues not expressly decided herein are reserved to the parties for future determination.

DATED: _January 14, 2009

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-711-098

ISSUES

The issues to be determined by this decision are as follows: (a) permanent partial disability (PPD); conversion of the impairment rating to an upper extremity or a whole person impairment; and (b) Disfigurement.

FINDINGS OF FACT

1. Claimant was injured in an admitted work-related accident on November 9, 2007. Claimant was using a circular saw that kicked back and resulted in injury to the left middle finger FDP and FDS tendons, left small finger FDP tendon, laceration of the left thumb, index finger and palmar region and amputation of the left ring finger at the PIP joint.
2. Claimant's authorized treating physician (ATP) was Dr. Stephen Johnson.
3. Dr. Johnson noted Claimant's main problem is function in the hand – he is not able to get a good grip and has pain across the dorsum of the proximal phalanges with forceful gripping. Lifting a gallon of milk in that hand is very shaky and he has to support it with his right hand. He also gets pain in his hand with cold weather. Dr. Johnson recommended Claimant avoid heavy work or fine motor activity using the left hand or lifting, pushing, or pulling no more than 5 lbs. with his left hand.
4. Claimant next saw Dr. Johnson on March 25, 2008 for a medical impairment rating. Dr. Johnson noted Claimant's hand is not really bothering him, though he continues to have numbness over the tips of the long and fifth fingers. He is bothered somewhat by persistent flexion deformity and inability to fully extend his long and fifth fingers. He also has a ridge where the thumbnail has not come together and it catches on things.
5. Dr. Johnson noted claimant had improved grip strength. Claimant had reduced range of motion and decreased sensation in his left hand. Dr. Johnson opined Claimant had a total hand impairment of 20% which results in 18% of the upper extremity and 11% of the whole person. Dr. Johnson indicated no medical maintenance was required and Claimant was released to return to full duty at that time.
6. Respondent-Insurer filed an amended final admission of liability with the Division of Workers' Compensation (DOWC) on September 29, 2008 admitting to medical payments totaling $39,352.83, temporary total disability (TTD) benefits from January 14, 2007 through August 5, 2007 totaling $20,975.23 and admitting to permanent partial disability (PPD) benefits from March 25, 2008 through August 17, 2008 based on a 20% scheduled impairment of hand at the wrist, totaling $4,931.89.
7. Claimant objected to the amended final admission of liability contesting the issues of TTD, TPD, PPD, disfigurement and penalties.
8. The instant hearing was held on the issues of PPD and disfigurement.
9. Claimant demonstrated that there was no functional limitations regarding his ability to utilize his wrist, elbow and shoulder, and testified that he did the work related injury did not impair his ability to utilize his wrist, elbow and shoulder.
10. The situs of Claimant's functional impairment is limited to his hand, below the wrist, and does not extend to the hand, including the wrist. Claimant testified that he has suffered a decrease in his ability to grip, grasp, and hold objects. However, this limitation does not include the wrist, and only includes Claimant's hand, below the wrist. The action of gripping, grabbing and holding objects does not include actions of the wrist, and these limitations do not support the extension of the situs of Claimant's functional impairment to include the wrist.
11. Claimant also testified that he all of a sudden began experiencing some type of pain extending from the wrist, up the back of Claimant's forearm, and into the upper arm. However, there is no evidence that this "pain" creates a functional impairment to these body parts, and does not support the extension of Claimant's impairment to include these body parts. There is insufficient medical documentation of this pain as it

pertains to the determination of whether or not Claimant's impairment should extend beyond the hand below the wrist.

12. The situs of Claimant's functional impairment is strictly limited to his hand below the wrist, and does not extend beyond this level. As such, Claimant is only entitled the 20% scheduled impairment to Claimant's hand below the wrist, as admitted on Respondents' Final Admission of Liability.

13. Further, based upon the facts of this claim, the ALJ's authority to convert scheduled impairment ratings is strictly limited by C.R.S. §8-42-107(7)(a), such that Claimant is only entitled to the scheduled impairment to Claimant's hand below the wrist.

14. Claimant has significant scarring and disfigurement as a result of his work related injury. His ring finger is amputated at the second/proximal joint. He has a thick layer of skin over the top of the remaining portion of his finger. His middle and fifth finger do not straighten completely. He has excess skin or scarring on the palmar aspect of the middle and fifth fingers along the lower portion of the fingers. He had multiple scars on the middle and fifth finger, along the thumb and along the palm of the hand.

15. As a result of Claimant's disfigurement Respondents shall pay Claimant $2,000.00.

CONCLUSIONS OF LAW

1. Claimant is limited to a scheduled disability award under § 8-42-107(1), C.R.S., if the injury results in permanent medical impairment enumerated on the schedule of disabilities in § 8-42-107(2). *Kolar v. Industrial Claim Appeals Office*, 122 P.3d 1075, 1076 (Colo. App. 2005). Where Claimant suffers functional impairment that is not listed on the schedule, Claimant is entitled to medical impairment benefits for whole person impairment calculated per § 8-42-107(8)(c). Whether Claimant sustained a scheduled injury or a whole person medical impairment, is a question of fact for determination by the ALJ. *Walker v. Jim Fuoco Motor Co*., 942 P.2d 1390 (Colo. App. 1997); Kolar *v. Industrial Claim Appeals Office*, *supra.* In resolving this question, the ALJ must determine the situs of the Claimant's "functional impairment." *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). The site of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp*., 937 P.2d 883 (Colo. App. 1996), *Strauch v. PSL Swedish Healthcare System*; supra. A physician's rating is not dispositive of this question, although it is certainly relevant. *Strauch v. Swedish Healthcare System, supra*.

2. The term "injury," as used in § 8-42-107(1)(a)-(b), refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Warthen v. Industrial Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System, supra*.

3. As found above, Claimant has not established by a preponderance of the evidence that he has sustained a functional impairment beyond the hand to the wrist or beyond.

4. Colorado law provides for Claimant to be paid benefits if he has a scar or other disfigurement due to the industrial injury. Section 8-42-108, C.R.S. (2006). For an injury

that occurred before July 1, 2007, Claimant is entitled to an award for disfigurement of up to $2,000 if he or she has a serious and permanent scar or other disfigurement to the head, face or parts of the body normally exposed to public view.

5. The ALJ concludes that Claimant has sustained a disfiguring injury as found above. The ALJ concludes that Claimant is entitled to $2,000.00 as a result of that disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's request to convert his scheduled 20% impairment rating to an upper extremity or whole person rating is denied and dismissed.
2. Respondents shall pay Claimant $2,000.00 as a result of Claimant's disfigurement.
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: January 15, 2009
/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-623-424

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

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

No further hearings have been held in the above-captioned matter. On November 4, 2008, the Industrial Claim Appeals Office (ICAO) issued an Order of Remand, remanding the decision of William Martinez, Administrative Law Judge (ALJ), dated June 2, 2008, for further proceedings and entry of another order resolving Respondents' Motion to Strike Division Independent Medical Examination (DIME). The ICAO Remand Order specifically remanded for additional findings of fact to determine whether ALJ Martinez's order denying the Motion to Strike DIME was based on Claimant's "substantial compliance" with the DIME procedures. ALJ Martinez retired on October 31, 2008, and the remand was assigned to ALJ Edwin L. Felter, Jr., on December 8, 2008. On the same date, ALJ Felter determined that an additional evidentiary hearing was unnecessary and he established a briefing schedule. The briefs were filed electronically and in a timely manner. Claimant's opening brief was filed on December 15, 2008. Respondents' answer brief was filed on December 22, 2008. Claimant's reply brief was filed on December 29, 2008. The matter was deemed submitted for decision on remand on December 29, 2008.

ISSUE ON REMAND

The issue to be determined by this decision, on remand, concerns whether Claimant substantially complied with the DIME procedures, thus, warranting a denial of Respondents' motion to strike the DIME. A corollary of this issue is whether Claimant intended to, and/or made a colorable good faith effort, to comply with the statutory requirements concerning DIMEs.

FINDINGS OF FACT ON REMAND

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

1. Insofar as not inconsistent with ICAO's Order of Remand, issued November 4, 2008, ALJ Martinez's Findings of Fact, Conclusions of Law and Order, dated June 2, 2008, are hereby adopted and incorporated herein by reference as if fully restated. Claimant suffered an admitted work-related injury on September 17, 2002, while employed as a foreman by the Employer. He was supervising a job in which employees were laying out forms and pouring concrete. The forms were covered in plastic due to icy weather. Claimant tried to step over a form and he fell, landing on a rock on his left shoulder and head. Claimant was knocked out for approximately one minute. As a result of his September 17, 2002, fall, Claimant experienced symptomatology and injuries in the following body parts: cervical spine at C5-6, C6-7; mid back; right and left arm pain; right and left arm numbness, weakness, pain; upper back pain; chronic regional pain syndrome; and ulnar nerve in right hand (*Tr. p. 33, ll. 23-25, p. 34, ll. 1-8 and 23-25, p. 35, ll. 1-4).*

2. Claimant underwent extensive medical treatment regarding the injuries he sustained on September 17, 2002, including three surgical procedures.*(Tr. p. 34, ll. 9-10).* On July 17, 2003, Claimant underwent a diskogram of his cervical spine by Ross E. Dickstein, M.D. Claimant underwent an anterior cervical diskectomy and arthrodesis at C5-6 on August 3, 2004, with Sanjay Jatana, M.D. On December 4, 2006, Giancarlo Barolat, M.D., implanted a cervical and thoracic peripheral nerve stimulator in Claimant's left pectoral region.

3. In her August 8, 2007, medical report, Claimant's authorized treating physician (ATP), Julie Colliton, M.D., states, "He has plateaued in all of his care at this time and is going continue to see me on approximately quarterly basis for medication management." Dr. Colliton assigned Claimant a 20% whole person impairment rating.

4. Respondents filed a Final Admission of Liability on August 20, 2007, admitting for Dr. Colliton's 20% impairment rating and a maximum medical improvement (MMI) date of February 6, 2007.

5. On September 14, 2007, Claimant filed a timely Objection to Final Admission of Liability and an Application for a Division Independent Medical Examination (DIME). The ALJ finds that the Application for a DIME establishes intent on Claimant's part to pursue a DIME. Claimant did not file a "Notice and Proposal to Select DIME."

6. Respondents were given notice that Claimant intended to obtain a DIME on three different occasions. Claimant checked the box on his Objection to Final Admission of Liability, indicating that he intended to obtain a DIME. Claimant filed an Application for a Division Independent Medical Examination (IME) on September 14, 2007, and he filed an Application for Indigent Determination on September 18, 2007. Respondents objected to the Application for Indigent Determination on September 21, 2007. The Application for Indigent Determination was denied on September 27, 2007. This series of events further establishes Claimant's intent to pursue a DIME, and colorable, good faith efforts to comply with the statutory requirements concerning DIMEs.

7. The parties attempted to negotiate the selection of a physician to conduct the DIME via letters dated September 20, 2007, and September 26, 2007. On September 20, 2007, Respondents' attorney sent Claimant's attorney a letter proposing that Louis Winkler, M.D., conduct the DIME. At this time, Respondents made no indication that they intended to argue that any DIME should be stricken on the basis that there was a jurisdictional defect, *i.e.,* Claimant's failure to file a "Notice and Proposal to Select DIME." On September 26, 2007, Claimant's attorney sent Respondents' attorney a letter rejecting the physician proposed by Respondents, and proposing James McLaughlin, M.D., as the DIME physician. This series of events further establishes Claimant's intent, good faith and colorable efforts to comply with the statutory DIME requirements.

8. The Division of Workers' Compensation (DOWC) DIME Unit issued the DIME Physician Panel on September 24, 2007. Claimant received the DIME Physician Panel on September 27, 2007. Claimant made his strike of the DIME Physician Panel in a timely manner on October 3, 2007. Respondents made their strike of the DIME Physician Panel on October 5, 2007. At this time, Respondents had not yet raised the issue that the DIME was jurisdictionally defective because Claimant had failed to file a "Notice and Proposal to Select DIME." A DIME physician was selected. The DIME Unit issued a DIME Physician Confirmation on October 8, 2007. The appointment was confirmed with the DIME Unit and Respondents' counsel via letter dated October 12, 2007. The ALJ infers and finds that the DOWC DIME Unit caused the Claimant to believe that appropriate DIME procedures were being followed, thus, buttressing Claimant's good faith intent to comply with statutory DIME requirements.

9. Respondents filed a Motion to Strike DIME on October 17, 2007. A second confirmation letter of the DIME appointment was sent on October 23, 2007, because the DIME date was rescheduled. Claimant filed his Response to Respondents' Motion to Strike the DIME on October 25, 2007. After the filing of briefs by the parties, ALJ Martinez denied Respondents' Motion to Strike the DIME on October 29, 2007.

10. A DIME occurred with Lynne Fernandez, M.D., on November 16, 2007. Dr. Fernandez was of the opinion that Claimant reached MMI on August 8, 2007, (the same date that the ATP assigned Claimant an impairment rating). Dr. Fernandez rated the Claimant at 26% whole person permanent impairment.

11. Respondents contested Dr. Fernandez's DIME and filed Application for Hearing endorsing the following issues: "Medical Benefits; Permanent Partial Disability benefits; and Other: MMI. Respondents will attempt to overcome Dr. Fernandez's Division IME on the issues of permanent partial disability as well as gain specific clarification of the date of MMI for claimant." A hearing took place in Grand Junction before ALJ Martinez on May 13, 2008.

12. The parties filed position statements in regard to the May 13, 2008, hearing on May 28, 2008. ALJ Martinez issued a decision on June 2, 2008, ruling that Respondents did not overcome the DIME by clear and convincing evidence and that the "Insurer shall pay claimant PPD benefits based on 26% impairment of the whole person."

13. Respondents filed a Petition to Review ALJ Martinez's June 2, 2008, Order on June 11, 2008, in regard to their contention that ALJ Martinez erred in considering evidence and awarding benefits based upon Dr. Fernandez's report because Section 8-42-107.2(2)(B)(II)(b) C.R.S., states that an ATP's findings and determinations become binding, unless a proper notice and proposal for DIME are filed within thirty days of the Final Admission of Liability.

14. Respondents filed their Brief in Support of Petition to Review on July 18, 2008. Claimant filed his Brief in Opposition of Petition to Review on August 18, 2008. ICAO issued its Order of Remand on November 4, 2008.

15. Respondents moved to strike the DIME because the Claimant did not file a specific form, the Notice and Proposal to Select an Independent Medical Examiner, as required by Workers' Compensation Rules of Procedure (WCRP), Rule 11-3(2), 7 CCR 1101-3. The section labeled 'Requirement to Negotiate', states, "Prior to Division (DOWC) intervention, the parties must attempt to negotiate the selection of a physician to conduct the IME." In their appeal, Respondents cite section 8-42-107.2 (2)(B)(II)(b), C.R.S., which states, "unless such notice and proposal are given within thirty days after the date of mailing the Final Admission of Liability…the authorized treating physicians findings and determinations shall be binding…". Claimant filed his Objection to Final Admission of Liability and his Application for a Division Independent Medical Examination (IME) on September 14, 2007, within the thirty days after the date of mailing the Final Admission of Liability. Claimant did not file a "Notice and Proposal to Select DIME."

16. Respondents were not prejudiced by Claimant's failure to file a specific Notice and Proposal to Select a DIME because the parties attempted to negotiate the selection of a physician to conduct the DIME via letters dated September 20, 2007, and September 26, 2007. The ALJ hastens to add that lack of prejudice is irrelevant to a lack of jurisdiction. The fact, that Respondents were not prejudiced, however, sheds light on Claimant's intent to pursue a DIME and the repeated communications thereof to Respondents.

17. On September 20, 2007, Respondents' attorney sent Claimant's attorney a letter proposing Louis Winkler, M.D., to conduct the DIME. On September 26, 2007, Claimant's attorney sent Respondents' attorney a letter rejecting the physician proposed by Respondents, and proposing James McLaughlin, M.D., as the DIME physician.

18. On remand, the ALJ finds that Claimant substantially complied with the statutory requirements in pursuing the DIME in a timely fashion, within the 30-days, intending to meet the jurisdictional requirement of preventing the ATP's opinion from becoming binding. Respondents were given notice that Claimant intended to obtain a DIME on three different occasions. Claimant checked the box on his Objection to Final Admission of Liability indicating that he intended to obtain a DIME. He filed a timely Application for a DIME on September 14, 2007. And, he filed an Application for Indigent Determination on September 18, 2007. Respondents were put on notice that Claimant intended to proceed through the DIME process. The ALJ notes that although Respondents adopted a position that the DIME of Dr. Fernandez should be stricken, they were obliged to comply with each step of the DIME process because any determinations along the way would be interlocutory.

CONCLUSIONS OF LAW ON REMAND

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

a. Respondents moved to strike the DIME because the Claimant did not file a specific form, the Notice and Proposal to Select an Independent Medical Examiner. WCRP, Rule 11-3(2), under the section labeled 'Requirement to Negotiate,' states, "Prior to Division [DOWC] intervention, the parties must attempt to negotiate the selection of a physician to conduct the IME." In their appeal, Respondents cite section 8-42-107.2 (2)(B)(II)(b), C.R.S., which states, "unless such notice and proposal are given within thirty days after the date of mailing the Final Admission of Liability…the authorized treating physicians findings and determinations shall be binding…," As found, Claimant filed his Objection to Final Admission of Liability and his Application for a DIME on September 14, 2007, within the thirty days after the date of mailing the Final Admission of Liability. As further found, this timely filing of the Application for a DIME, along with the Objection to Final Admission, amounted to substantial compliance with the statutory procedures for obtaining a DIME, sufficient to avoid the loss of jurisdiction and consequent finality of the ATP's findings.

b. Section 8-42-107.2(2)(b), C.R.S. (2008), states, "If any party disputes a finding or determination of the authorized treating physician, such party shall request the selection of an IME (DIME). The requesting party shall notify all other parties in writing of the request, on a form prescribed by the division by rule, and shall propose one or more acceptable candidates for the purpose of entering into negotiations for the selection of an IME…."

c. As found, Claimant substantially complied with the notice provision of Section 8-42-107.2(2)(b), C.R.S. (2008). The doctrine of "substantial compliance" can be invoked in connection with the requirement of filing of the Notice and Proposal to Select an Independent Medical Examiner. *See Pinon v. U-Haul*, W.C. No. 4-632-044, 2007 Colo. Wrk. Comp. LEXIS 76 [Industrial Claim Appeals Office (ICAO), April 25, 2007]; *see also Martinez v. Brunitz Dairy*, W.C. No. 4-218-999, 2004 Wrk. Comp. LEXIS 106 (ICAO, April 7, 2004) ["Any written objection which notifies respondents that the claimant does not accept the FAL (Final Admission of Liability) is sufficient to preserve all issues regardless of whether any specific issues are listed in the objection"]; *see also Stefanski v. Indus. Claim Appeals Office*, 128 P.3d 282, 285 (Colo. App. 2005) ["Any pleading that adequately notifies employer that the claimant does not accept the FAL constitutes substantial, if not actual compliance with the statutory obligation to provide a written objection"]. The ALJ notes that an objection to a final admission is a jurisdictional prerequisite to proceeding further. *See also EZ Building Components Manufacturing, UC v. Industrial Claim Appeals Office*, 74 P.3d 516 (Colo. App. 2005) [the concept of substantial compliance was applied to various Notice requirements in workers' compensation proceedings]. As found, Claimant substantially complied with the statutory DIME requirements and he made a colorable, good faith attempt to comply with all of the statutory DIME requirements. In the absence of a clear delegation, jurisdictional re-

quirements **cannot** be created by agency rule. This prerogative is reserved to the General Assembly.

d. Respondents argue that the filing of a precise notice and proposal within a 30-day period is a jurisdictional prerequisite to a DIME, and a DIME is a jurisdictional prerequisite to an ALJ's adjudication of a Claimant's medical impairment. *Stein v, Community Agriculture Alliance,* W.C. No. 4-533-782 (ICAO, Oct. 5, 2004); *Roddam* v *Rocky Mountain Recycling,* W.C. No. 4 367 003 (ICAO, Jan. 24, 2005); *Town of Ignacio v. Indus. Claim App. Office,* 70 P.3d 513, 515 (Colo. App. 2002). The argument that a DIME is a jurisdictional prerequisite to challenging an ATP's findings is well taken. The argument that the failure of a claimant to strictly comply with the precise requirements of Section 8-42-107.2(2)(B)(II)(b) bars a claimant from litigating the findings of the ATP and deprives the ALJ of jurisdiction is not well taken in the face of timely and substantial compliance. In *Roddam v. Rocky Mountain Recycling*, *supra,* Respondents argue that "the filing of a notice and proposal within a 30 day period is a jurisdictional prerequisite to a DIME…." In fact, *Roddam v. Rocky Mountain Recycling, supra,* holds that "A court lacks subject matter jurisdiction when the claim is **not timely filed** (emphasis supplied) pursuant to the deadlines set forth in a nonclaim statute." In the present case, the Claimant **timely filed** his Objection to the Final Admission of Liability and his Application for DIME within the thirty-day time limit allowed by Section 8-42-107.2(2)(a)(I)(A), C.R.S. (2008). Therefore, ALJ Martinez had jurisdiction over the issues brought before him in regard to the DIME and Claimant's permanent partial disability benefits. In *Roddam*, the claimant filed an Objection to Final Admission of Liability **but failed** to file an Application for Hearing or request a DIME within the time provided by Section 8-42-107.2. In the present case, the Claimant filed his Objection to Final Admission of Liability as well as an Application for DIME within the thirty-day timeframe.

e. Respondents cite *Williams v Devereux Cleo Wallace,* W.C. No. 4-620-507 (ICAO, Aug. 10, 2006); and, *Sanchez v. Straight Creek Constructors,* 580 P.2d 827, 829 (Colo. App. 1978), in support of their argument that ALJ Martinez lacked jurisdiction to adjudicate a contest of the ATP's findings. In *Williams*, as in *Roddam*, the claimant filed an Objection to Final Admission of Liability as well as an Application for Hearing, but she did not request a DIME within the 30-day period provided by Section 8-42-107.2, C.R.S. (2008). Once again, *Williams* differs from the present case. In *Williams v. Devereux Cleo Wallace, supra,* the claimant sustained a compensable industrial injury and was placed at MMI on March 24, 2005 by his ATP. Thereafter the respondents filed a final admission of liability (FAL), however, at the time respondents filed the FAL the claimant's attorney was very sick, undergoing treatment for cancer. *Id.* **The claimant's attorney did file a timely objection to the FAL and an application for hearing, however he did not file a notice and proposal for a DIME**. *Id. Williams* is distinguishable from the present case because the claimant made no indication, within the 30-day jurisdictional period that [s] he intended to pursue a DIME, thus, the ALJ appropriately lost jurisdiction. Subsequently, the attorney's illness worsened and he could no longer render effective assistance of counsel. Therefore, he referred the claimant to another attorney who did file a notice and proposal for a DIME. *Id.* Following the new attorney's filing of the notice and proposal, the claimant filed a motion for late submission of notice and

proposal and the Pre-hearing ALJ granted the motion. *Id.* Then, respondents filed a motion to reconsider the order granting the motion for late submission, centered on the issue that a DIME is jurisdictional and cannot be extended. *Id.* The Pre-hearing ALJ, on reconsideration, denied the claimant's motion for a late submission of a notice and proposal and then the claimant filed an application for hearing appealing the order of the Pre-hearing ALJ. *Id.* The ALJ found that the failure to comply with the requirements of section 8-42-107.2(2)(B)(II)(b) bars the right to litigate the findings of the ATP and deprives the ALJ of jurisdiction. *Id.* Accordingly, the ALJ concluded that the claimant's appeal of the Pre-hearing ALJ's order must he denied. *Id.* Finally, on review, ICAO found that the failure to file a notice and proposal for the DIME within the 30-day period of section 8-42-107.2(2)(B)(II)(b) was a jurisdictional prerequisite to a DIME. *Id.* ICAO held that although the circumstances were unfortunate, with the ill attorney, it could not depart from its previous decisions. Therefore it upheld the ALJ's order. *Id.* Neither the ALJ nor ICAO entertained a factual situation where there was substantial compliance by virtue of a timely, although not technically correct, notice to pursue a DIME such as exists in the present case.

f. Jurisdiction cannot be conferred by consent. The flip side of this proposition is that lack of jurisdiction cannot be waived. *See Roseberry v. The Valley Building and Loan Association,* 17 Colo. App. 448, 68 P. 1063 (1902). Therefore, an ALJ has jurisdiction or does not have jurisdiction, period. Lack of jurisdiction can be raised at any time. If there is lack of jurisdiction, anything a tribunal or an ALJ would do concerning the subject matter over which the ALJ lacks jurisdiction would be void *ab initio*.

g. Respondents argue that "strict compliance" by filing the "Notice and Proposal to Select Division Independent Medical Examiner" under *Williams v. Devereux Cleo Wallace*, *supra*, is the only manner to satisfy the jurisdictional prerequisite to request a DIME. This ICAO decision is in clear contradiction to ICAO's indications in *Pinon*, *supra*. In *Pinon*, the ICAO panel wrote "we do not necessarily agree with the ALJ that because the filing of the Notice and Proposal to Select and [sic] Independent Medical Examiner is jurisdictional, the doctrine of substantial compliance may never be invoked in connection with that requirement… The jurisdictional nature of the filing does not, in our view, compel the conclusion that the doctrine of substantial compliance may not be applied. Rather, the relevant question is whether the Division's jurisdiction to conduct the DIME must be invoked through 'strict compliance' with the statute or whether 'substantial compliance' is adequate to vest jurisdiction with the Division [DOWC]. The Colorado Supreme Court has noted that: 'Compliance' involves the act of conforming to formal or official requirements or norms…and without further modification, connotes an element of degree. Compliance, for example, may be absolute or strict, on the one hand, or somewhat less than absolute but nonetheless substantial, on the other. In determining whether a particular statutory requirement has been satisfied, we have imposed a degree of compliance consistent with the objective sought to be achieved by the legislation under consideration." The rationale of *Pinon* supports the proposition that under the proper circumstances, "substantial compliance" is enough to satisfy the jurisdictional prerequisite of requesting a DIME. As found, the Claimant substantially

complied with the statutory DIME requirements in a timely fashion, and to this extent the ICAO decision in *Pinon, supra,* offers the most persuasive guidance.

h. "Substantial compliance" requires that a party at least intend to or actually make a good faith or colorable effort to comply with the statutory requirements. *Pinon, supra*. "Substantial compliance" in this case would require that the requesting party give timely notice to the other party that they intend to apply for a DIME and that they were rejecting the FAL. After this notification of the requesting party's intention to object to the FAL and apply for a DIME, the parties are required to negotiate on the physician to perform the DIME. As found, Claimant provided notice and Claimant and Respondents entered into negotiations for DIME physicians, thus, substantially complying with Section 8-42-107.2(2)(b), C.R.S. (2008). Claimant provided notice that he intended to follow the DIME procedures to challenge his impairment rating by filing his Application for a DIME and his Application for Indigent Determination. All of these documents were filed before the 30-day notice requirement had expired. Respondents objected to the Application for Indigent Determination but did not, at that time, file any objection to the Application for a DIME.

i. Section 8-42-107.2, C.R.S. (2008), requires that the notice of selecting a DIME physician be "on a form prescribed by the division by rule." Claimant submitted his notice of his intention to select a DIME physician by his Application for a Division Independent Medical Examination which is a "form prescribed by the division by rule." If the only form that could provide notice of Claimant's intention to request a DIME was the Notice and Proposal to Select an Independent Medical Examiner form, then the legislature might have capitalized "notice and proposal" in Section 8-42-107.2(2)(b), C.R.S., and put the complete formal title of the document in the statute. Indeed, form cannot be elevated over substance where, as found, Respondents were given clear notice of Claimant's intentions and were not prejudiced by the form used by Claimant to make his intention of seeking a DIME known to Respondents and Respondents were given the same right to negotiate a DIME physician, and in fact did so. If the implied argument of Respondents is that it is jurisdictionally fatal if Claimant did not use the correct form prescribed by the DOWC, the ALJ rejects this argument and notes that the Workers' Compensation Act evidences no intent of the General Assembly to delegate the enactment of additional jurisdictional requirements to the DOWC.

j. In *Pinon v. U-Haul, supra*, the claimant filed a timely Objection to Final Admission of Liability and an Application for Hearing but he did *not* request a DIME. An IME Physician Panel, however, was issued nonetheless and a DIME took place. The *Pinon* respondents filed a Motion to Strike the DIME, which was granted. In *Pinon*, the Court determined that "the claimant's actions did not constitute "substantial compliance" with the filing requirement" because "substantial compliance requires that a party at least intend to or actually make a good faith or colorable effort to comply with the statutory requirements." The *Pinon* Panel stated that "the statutory requirements are clear" as set forth in Section 8-42-107.2, C.R.S. and W.C.R.P. Rule 11-2(A). In the present case, the Claimant substantially complied with Section 8-42-107.2, in that he notified "all other parties in writing" of his intention to pursue a DIME "on a form prescribed by the

division [DOWC] by rule." As found, the Claimant filed a timely Objection to Final Admission of Liability as well as an Application for a DIME (a "form prescribed by the division by rule") "within thirty days after the date of mailing of the final admission of liability." In addition, the Claimant proposed "one or more acceptable candidates for the purpose of entering into negotiations for the selection of an IME" via letter to Respondents' counsel, dated September 26, 2007, which proposed James McLaughlin, M.D., as a physician to conduct the DIME examination. Additionally, the Claimant substantially complied with W.C.R.P. Rule 11-2(A)(2), which requires that the parties must negotiate regarding the selection of an independent medical examiner "prior to Division intervention". As found, the parties attempted to negotiate the selection of a physician to conduct the DIME via letters dated September 20, 2007, and September 26, 2007. On September 20, 2007, Respondents' attorney sent Claimant's attorney a letter proposing Louis Winkler, M.D., as the physician to conduct the DIME. On September 26, 2007, Claimant's attorney sent Respondents' attorney a letter rejecting the physician proposed by Respondents, and proposing Dr. McLaughlin as the DIME physician. Claimant received the IME Physician Panel issued by the DIME Unit on September 27, 2007. As such, the parties negotiated regarding the selection of an independent medical examiner "prior to Division [DOWC] intervention.

k. As found, Claimant substantially complied with the notice requirements of section 8-42-107.2(2)(b), C.R.S. (2008), giving Respondents sufficient and timely notice of Claimant's objection to the FAL and intention to enter the DIME process to challenge the findings of the ATP. As further found, Claimant and Respondents engaged in negotiations in regard to the selection of a DIME physician, indicating that Respondents were aware of Claimant's intention to obtain a DIME, and that the requirements of WCRP Rule 11-3(2) and Section 8-42-107.2 (2)(b), C.R.S., in regard to the negotiation of the selection of a DIME physician were satisfied.

ORDER ON REMAND

IT IS, THEREFORE, ORDERED THAT:

Respondents' Motion to Strike the Division Independent Medical Examination was properly denied because Claimant substantially and timely complied with the statutory requirements for the Division Independent Medical Examination. Such denial is hereby re-affirmed.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-767-879

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease during the course and scope of her employment with Employer.

2. 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 occupational disease.

FINDINGS OF FACT

1. Claimant has worked for Employer since 1999 as a meeting and hospitality assistant. Claimant's duties involve preparing Employer's conference rooms for meetings and events. She is also responsible for monitoring and stocking inventory. Claimant explained that she repetitively lifted coffee pots, ice buckets, pop and water in performing her duties. She estimated that cases of pop and water could weigh up to 40 pounds.

2. On October 30, 2007 Claimant reported to Employer that she was experiencing left shoulder pain. Because Claimant attributed the pain to her job duties, Employer referred her to HealthOne Occupational Medicine (HealthOne) for medical treatment.

3. Claimant visited HealthOne on October 30, 2007 and reported that she had been suffering from left shoulder pain for approximately two weeks. Claimant explained that she awoke one morning in pain and subsequently experienced the gradual onset of stiffness and soreness throughout her elbow. Claimant did not attribute her symptoms to any specific incident at work but stated that she had engaged in repetitive pushing, pulling, reaching and overhead activities for the past nine years. She also recounted that she was treated for similar symptoms in her right shoulder three to five years earlier. The medical provider diagnosed Claimant with a left shoulder strain and questioned whether her symptoms were causally related to a work incident.

4. On November 6, 2007 Claimant again visited HealthOne and received medical treatment from Martin Kavelik, D.O. Claimant reiterated that she awoke one morning with pain in her shoulder and the pain gradually worsened. She also did not recall a specific work incident that caused her pain, but instead commented that she engaged in frequent pushing, pulling and overhead activities as part of her job duties. Dr. Kavelik questioned the cause of Claimant's pain because Claimant did not mention any specific work incident but instead simply "figured it had to do with her job" based on her work activities.

5. On December 20, 2007 Claimant underwent an MRI of her left shoulder. The MRI revealed "prominent degenerative change of the glenohumeral joint with cartilage loss and bony cystic and osteophytic changes."

6. Based on a referral from Dr. Kavelik Claimant visited orthopedic surgeon Rajesh Bazaz, M.D. on December 31, 2007. Dr. Bazaz reviewed Claimant's MRI and confirmed that Claimant suffered from preexisting arthritis in her left shoulder. He was uncertain whether Claimant's symptoms were caused by a "flare-up of preexisting arthritis, new bursal inflammation, or a new onset of AC joint inflammation." Dr. Bazaz did not recommend surgical intervention because Claimant had previously obtained "good relief" with conservative measures.

7. Because Claimant's symptoms did not improve with conservative treatment, she requested a referral to orthopedic surgeon Mark S. Failinger, M.D. On June 23, 2008 Claimant visited Dr. Failinger for an evaluation. He reviewed Claimant's MRI, noted that she suffered from glenohumeral arthritis and administered a cortisone injection into her left shoulder.

8. On August 4, 2008 Claimant returned to Dr. Failinger and sought to pursue surgery. Dr. Failinger commented that he would perform a decompression and evaluate Claimant's rotator cuff to make sure that there were no "high grade or full-thickness tears." He then requested prior authorization to perform a left shoulder arthroscopy. On August 21, 2008 Insurer denied Dr. Failinger's request.

9. On August 20, 2008 Douglas C. Scott, M.D. reviewed Claimant's medical records in order to ascertain whether her left shoulder symptoms were caused by her employment with Employer. He noted that Claimant awoke one morning with left shoulder pain but could not attribute her symptoms to any specific incident, injury or accident while at work. Dr. Scott explained that Claimant's diagnostic testing revealed degenerative joint disease and degenerative arthritis in her left shoulder. He determined that, although Claimant required left shoulder surgery, her condition was not related to her employment. Dr. Scott concluded that Claimant's condition was not caused by her job duties for Employer but instead constituted "preexisting degenerative osteoarthritis of the left shoulder, which is due to her age and her life activities."

10. On October 28, 2008 F. Mark Paz, M.D. performed an independent medical examination of Claimant. Contrary to Claimant's prior reports that she experienced the insidious onset of pain in her left shoulder, Claimant told Dr. Paz that she felt a "pop" in her shoulder while lifting a case of soda for Employer in October 2007. Claimant stated that, after she felt the "pop" in her left shoulder, she experienced discomfort that failed to improve during the ensuing weeks. Dr. Paz noted that Claimant's description of her injury was inconsistent with her account to prior medical providers that she simply awoke one morning with pain. Nevertheless, Dr. Paz determined that "[n]either history is consistent with a mechanism of injury which would cause degenerative joint disease of the shoulder joint, impingement syndrome or anatomical injury to the rotator cuff."

11. Dr. Paz explained that Claimant suffers from preexisting degenerative joint disease of the left shoulder. He noted that Claimant also has advanced degenerative joint disease in both of her knees. Dr. Paz stated that there was no mechanism of injury

in Claimant's prior medical records that was consistent with a "causal mechanism of a rotator cuff injury." He thus concluded that it could not be established that Claimant's "preexisting, advanced degenerative joint disease of the left shoulder was temporarily, or permanently, aggravated by a single work-related exposure."

12. Dr. Paz testified at the hearing in this matter. He reiterated that Claimant's duties for Employer did not cause her left shoulder condition. Dr. Paz explained that Claimant suffers from osteoarthritis or a chronic inflammation of the joints. He commented that osteoarthritis is an erosive condition that typically occurs over a long period of time and affects more than one joint. Dr. Paz explained that Claimant's age, weight and diabetes are commonly correlated with the development of the condition. He determined that Claimant's genetic factors and diabetes were the likely causes of her left shoulder symptoms. He noted that Claimant's statement that her pain began when she awoke one morning is consistent with the insidious onset of osteoarthritis. Dr. Paz stated that any "pop" that Claimant may have experienced while performing her job duties did not constitute an injury but instead signaled that the joint was arthritic.

13. Claimant has failed to establish that it is more probably true than not that she sustained an occupational disease during the course and scope of her employment with Employer. Claimant's left shoulder problem cannot be fairly traced as a proximate cause to her job duties for Employer. More specifically, Claimant's left shoulder condition was not caused, accelerated, intensified or aggravated by her employment with Employer.

14. Claimant's medical records reveal that she awoke one morning with left shoulder pain but could not attribute her symptoms to any specific incident, injury or accident while at work. Subsequent diagnostic testing revealed that Claimant suffered from degenerative joint disease and degenerative arthritis of the left shoulder. Dr. Scott thus persuasively concluded that Claimant's condition was not caused by her job duties but instead constituted preexisting degenerative osteoarthritis. Similarly, Dr. Paz credibly determined that Claimant's left shoulder symptoms were not caused or aggravated by her job duties for Employer. He commented that Claimant's age, weight and diabetes are commonly correlated with the development of osteoarthritis. Dr. Paz noted that Claimant had told previous medical providers that her pain began when she awoke one morning, but told him that she suffered a "pop" while lifting a case of soda for Employer. He explained that Claimant's initial account is consistent with the insidious onset of osteoarthritis and that any "pop" Claimant may have experienced merely signaled that her left shoulder joint was arthritic. Dr. Paz thus credibly opined that neither waking up in pain nor experiencing a traumatic "pop" would have caused Claimant to develop osteoarthritis in her left shoulder.

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).

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 ALJ. *Faulkner, 12 P.3d at 846*.

5. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment

or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

7. As found, Claimant has failed to establish by a preponderance of the evidence that she sustained an occupational disease during the course and scope of her employment with Employer. Claimant's left shoulder problem cannot be fairly traced as a proximate cause to her job duties for Employer. More specifically, Claimant's left shoulder condition was not caused, accelerated, intensified or aggravated by her employment with Employer.

8. As found, Claimant's medical records reveal that she awoke one morning with left shoulder pain but could not attribute her symptoms to any specific incident, injury or accident while at work. Subsequent diagnostic testing revealed that Claimant suffered from degenerative joint disease and degenerative arthritis of the left shoulder. Dr. Scott thus persuasively concluded that Claimant's condition was not caused by her job duties but instead constituted preexisting degenerative osteoarthritis. Similarly, Dr. Paz credibly determined that Claimant's left shoulder symptoms were not caused or aggravated by her job duties for Employer. He commented that Claimant's age, weight and diabetes are commonly correlated with the development of osteoarthritis. Dr. Paz noted that Claimant had told previous medical providers that her pain began when she awoke one morning, but told him that she suffered a "pop" while lifting a case of soda for Employer. He explained that Claimant's initial account is consistent with the insidious onset of osteoarthritis and that any "pop" Claimant may have experienced merely signaled that her left shoulder joint was arthritic. Dr. Paz thus credibly opined that neither waking up in pain nor experiencing a traumatic "pop" would have caused Claimant to develop osteoarthritis in her left shoulder.

ORDER

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

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

DATED: January 15, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-693-581

ISSUES

¬ Did respondents overcome Dr. DiNapoli's permanent medical impairment rating by clear and convincing evidence?

¬ Did claimant prove by a preponderance of the evidence that Dr. Finn's rating more appropriately describes his permanent medical impairment?

FINDINGS OF FACT

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

1. Claimant worked for employer installing insulation. Claimant sustained an admitted injury to his right shoulder on July 11, 2006, while using a staple hammer. Kenneth P. Finn, M.D., has diagnosed claimant's right shoulder condition as Chronic Regional Pain Syndrome (CRPS), an uncommon condition involving a disorder of the nervous system.

2. The Division of Workers' Compensation (DOWC) appointed Jim DiNapoli, M.D., to perform an independent medical examination (DIME). Dr. DiNapoli examined claimant on May 5, 2008, and rated his permanent medical impairment for CRPS based upon range of motion deficits of the right upper extremity. Dr. DiNapoli rated claimant's impairment at 45% of the right upper extremity, which he converted to 27% of the whole person. Dr. DiNapoli's whole person rating is presumed correct unless overcome by clear and convincing evidence. Although respondents applied for hearing to overcome Dr. DiNapoli's rating, claimant stipulated it highly probable Dr. DiNapoli erred in rating claimant's CRPS on the basis of loss of range of motion. Respondents have overcome Dr. DiNapoli's 27% whole person rating by clear and convincing evidence.

3. At respondents' request, John J. Raschbacher, M.D., performed a records review and provided a rating of claimant's impairment on June 13, 2008. Dr. Raschbacher rated claimant's impairment at 10% of the whole person based upon spinal cord impairment, under Table 1, Pg. 109, of the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* (AMA Guides). Dr. Raschbacher testified as an expert in Occupational Medicine and at rating impairment according to methods taught by DOWC in the Level II Accreditation curriculum.

4. On November 19, 2008, Dr. Finn examined claimant and provided an impairment rating of 30% of the whole person. Dr. Finn wrote:

> I did take range of motion measurements of the right shoulder. However, the most appropriate rating for his [CRPS] will fall under the spinal cord injury of the AMA Guides ….

Dr. Finn's above-quoted opinion supports that of Dr. Raschbacher that claimant's impairment should be rated under Table 1, Pg. 109, of the AMA Guides.

5. Dr. Raschbacher persuasively testified to the following: There is no specific method for rating CRPS according to AMA Guides. Nonetheless, DOWC has promulgated *Impairment Rating Tips*, which recommends rating the effects of CRPS as impairment of the whole person under the spinal cord injury table (Table 1, Pg. 109, of the AMA Guides). Table 1 provides ranges of values to assess the effect of loss of use of the upper extremity in attending to one's self-care. According to the *Impairment Rating Tips*, DOWC recommends against rating CRPS based upon range of motion deficits of the upper extremity:

> **Range of motion should not be used**, as this would be accounted for in the neurologic portion of the rating.

(Emphasis added). Dr. DiNapoli thus failed to follow the methodology recommended by DOWC for rating CRPS. Claimant conceded that Dr. DiNapoli followed incorrect methodology in rating claimant's impairment based upon range of motion deficits, instead of spinal cord impairment values. Crediting Dr. Raschbacher's testimony, the Judge finds it highly probable that Dr. DiNapoli incorrectly rated claimant's impairment from his CRPS condition. Respondents thus overcame Dr. DiNapoli's permanent medical impairment rating by clear and convincing evidence.

6. Crediting Dr. Raschbacher's testimony, impairment resulting from the effects of a disorder of the nervous system upon use of the upper extremities is valued under Table 1, Section A, of the AMA Guides, which provides higher values for impairment of the preferred or dominant extremity. Claimant's dominant upper extremity is his right. Table 1 provides the following values for assessing impairment of use of the dominant upper extremity in providing one's self-care:

> [Category 1] Some difficulty with digital dexterity [5-10]
>
> [Category 2] Has no digital dexterity [15-25]
>
> [Category 3] Has difficulty with self care [30-35]
>
> [Category 4] Cannot carry out self care [40-60]

Dr. Raschbacher testified that claimant's medical records document that claimant retains some use of his fingers for digital dexterity. Dr. Raschbacher gave the example that claimant is able to drive by using his right hand to grab the steering wheel of a car.

7. In his November 19th report, Dr. Finn provided the following explanation for his rating:

> Using table 1, page 109 for the use of the upper extremities for his preferred extremity a 30% whole person impairment would be reasonable.

Without explaining the basis for his rating, Dr. Finn apparently rated claimant's loss of use of his right upper extremity to provide self-care under the 3rd category of Table 1, which is based upon "difficulty with self care".

8. Dr. Finn however reported that claimant sustained the following permanent activity restrictions:

> [F]or his dominant upper extremity … he can lift up to 10 pounds on a very occasional basis as well as carry up to 10 pounds.
>
> ****
>
> [H]e is able to reach, handle, finger, feel, push, and pull on an occasional basis with the right hand and frequent basis with the left hand.
>
> ****
>
> He can use public transportation and **can prepare simple meals, feeds himself and is independent for personal hygiene**.

(Emphasis added).

9. Dr. Raschbacher valued claimant's impairment in providing self-care under the 1st or lowest category based upon the effects of some difficulty with digital dexterity. Dr. Raschbacher stated that the above-quoted restrictions by Dr. Finn show that claimant retains some digital dexterity with his right upper extremity. Dr. Raschbacher explained that medical records show claimant has been enrolled in college and has used a computer for on-line classes, which further shows he retains digital dexterity. Claimant's testimony supports Dr. Raschbacher's opinion that claimant retains some digital dexterity in his right hand. Claimant stated that he is capable of working in a sedentary level and can use the computer. This supports Dr. Raschbacher's opinion that claimant's impairment should not be valued according to the 2nd category of 15-20%, which involves impairment to providing self-care based upon the absence of digital dexterity to provide self-care.

10. Dr. Raschbacher persuasively explained that the above-quoted categories under Table 1 are progressive in describing dysfunction in self-care, such that categories with higher values necessarily include dysfunction described in categories with lower values. Dr. Raschbacher stated that the 3rd category of 30-35% for "difficulty with

self-care" logically includes the 2nd category, *i.e.*, difficulty with self-care and of the lack of digital dexterity. Dr. Raschbacher thus testified that Dr. Finn's rating of 30% for difficulty with self-care is incorrect under the AMA Guides, unless claimant also has no digital dexterity.

11. Dr. Raschbacher provided the only expert medical interpretation for assessing claimant's impairment from his CRPS under the AMA Guides. As found, Dr. Finn failed to give any persuasive rationale for rating claimant's dysfunction in providing self-care under the 3rd category of Table 1. By contrast, Dr. Raschbacher persuasively explained that the 3rd category of difficulty with self-care requires no use of the hand to perform such activities of daily living as driving, dressing, and shopping for oneself. In support of Dr. Raschbacher's opinion, the evidence shows it more probably true that claimant retains some digital dexterity for providing self-care. The Judge thus credits the medical opinion of Dr. Raschbacher as more persuasive than Dr. Finn.

12. Respondents showed it more probably true than not that Dr. Raschbacher's 10% whole person rating more accurately assesses claimant's dysfunction in providing self-care under Table 1, Page 109, of the AMA Guides. Dr. Raschbacher persuasively explained how Dr. Finn's rating is incorrect under the AMA Guides.

CONCLUSIONS OF LAW

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

Claimant and respondents alike agree it highly probable that Dr. DiNapoli's rating is incorrect under the AMA Guides. Claimant argues he has proven by a preponderance of the evidence that Dr. Finn's rating more appropriately describes his permanent medical impairment from CRPS. Respondents argue that Dr. Raschbacher's rating more appropriately describes claimant's impairment. The Judge agrees with respondents.

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*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reason-

ableness 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).

Sections 8-42-107(8)(b)(III) and (c), C.R.S. (2008), provide that the finding of a physician selected through the Division of Workers' Compensation to perform an independent medical examination (DIME) shall only be overcome by clear and convincing evidence. 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*. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indust. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

The DIME physician's finding under §8-42-107(8)(c), *supra*, is generally the impairment rating. *DeLeon v. Whole Foods Market, Inc.*, W.C. No. 4-600-477 (ICAO November 16, 2006). Once a party sustains the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *DeLeon v. Whole Foods Market, Inc.*, *supra*. The ALJ is not required to dissect the overall impairment rating into its component parts and determine whether each part has been overcome by clear and convincing evidence. *DeLeon v. Whole Foods Market, Inc.*, *supra*.

Here, respondents applied for hearing to overcome Dr. DiNapoli's rating by clear and convincing evidence. The Judge adopted claimant's stipulation in finding it highly probable Dr. DiNapoli erred in rating claimant's CRPS on the basis of loss of range of motion. Respondents thus overcame Dr. DiNapoli's 27% whole person rating by clear and convincing evidence.

The Judge further found that respondents showed it more probably true than not that Dr. Raschbacher's 10% whole person rating more accurately assesses claimant's dysfunction in providing self-care under Table 1, Page 109, of the AMA Guides. Dr. Raschbacher persuasively explained how Dr. Finn's rating is incorrect under the AMA Guides. The Judge credited the medical opinion of Dr. Raschbacher as more persuasive than Dr. Finn. Respondents thus proved by a preponderance of the evidence that claimant sustained permanent medical impairment of 10% of the whole person.

The Judge concludes insurer should pay claimant permanent partial disability benefits based upon impairment of 10% of the whole person

ORDER

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

1. Insurer shall pay claimant permanent partial disability benefits based upon impairment of 10% of the whole person.

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

3. Issues not expressly decided herein are reserved to the parties for future determination.

DATED: _January 15, 2009__

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant suffer a compensable injury on April 1, 2005;
2. Whether Claimant is an employee of Sanders Construction, Inc. or Sapphire Custom Homes, Inc. on the date of injury;
3. Whether Claimant's claim is barred by the statute of limitations under Section 8-43-103(2), C.R.S. (2007);
4. Whether Respondents are liable for temporary total disability benefits (TTD) for April 15, 2005 and continuing until terminated by force of law;
5. Whether the Sanders Construction, Inc. is liable for penalties for failure to timely file a First Report of Injury and to admit or deny the claim based on Sections 8-43-101 and 8-43-203, C.R.S. (2007);
6. Whether the Insurer for Sanders Construction, Inc., Pinnacol Assurance, is liable for penalties for failure to timely file the required admission or denial of Claimant's claim dated January 28, 2008, based on Sections 8-43-101 and 8-43-203, C.R.S. (2007); and
7. What is Claimant's average weekly wage.

FINDINGS OF FACT

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

1. Claimant suffered a compensable injury in the course and scope of his employment for Sanders Construction, Inc. on April 1, 2005 when he fell from a roof he was working on. Claimant's testimony was credible and consistent with the evidentiary exhibits and the testimony of the witnesses of Sapphire Custom Homes, Inc.

2. Claimant was not an employee of Sapphire Custom Homes, Inc. and, therefore, Sapphire Custom Homes, Inc. and its insurer, Pinnacol Assurance, are not liable for Claimant's April 1, 2005 work injury.

3. Sanders Construction, Inc. is owned by Jesse Sanders. Claimant was an employee of Sanders Construction, Inc. on April 1, 2005. Sanders Construction, Inc. was insured by Pinnacol Assurance at the time of Claimant's April 1, 2005 injury. Sanders Construction, Inc. and Pinnacol Assurance are liable for the Claimant's April 1, 2005 work related injury.

4. Sanders Construction, Inc. and Pinnacol Assurance contend that Claimant's claim is barred by the statute of limitation under Section 8-43-103(2), C.R.S. (2007). Sanders Construction, Inc. and Pinnacol Assurance contend that Claimant's injury occurred on April 1, 2005 and, under Section 8-43-103(2), Claimant was required to file a claim within two years of the date of injury, or within three years of the date of injury, if good cause is shown.

5. Claimant credibly testified at hearing that a Worker's Claim for Compensation was first filed by Claimant for the April 1, 2005 injury on June 29, 2005 after Claimant and his attorney were incorrectly advised by the Division that Sanders Construction, Inc. was non-insured. On June 29, 2005, Claimant filed the Workers' Claim for Compensation naming Sapphire Custom Homes, Inc. as the employer at the time of the injury. On this same form, Claimant also identified "Jesse Sanders Construction Company" as the "Employer's Other Company Name." Through the date of hearing, the records of the Division continue to reflect that Sanders Construction, Inc. is non-insured.

6. Subsequently, Claimant was informed that Sanders Construction, Inc. was insured by Pinnacol Assurance on the date of Claimant's work injury, and on January 28, 2008, Claimant filed a Worker's Claim for Compensation properly naming Sanders Construction, Inc. as Claimant's employer at the time of injury. Claimant timely filed the Worker's Claim for Compensation on January 28, 2008 and therefore the claim is not barred by the statute of limitation contained in Section 8-43-103(2). Claimant established good cause for his failure to file the claim within two years of the date of injury and filed the claim on January 28, 2008, which was within three years of the date of the April 1, 2005 injury. Claimant reasonably relied on the records of the Division, which incorrectly reflected that Sanders Construction, Inc. was non-insured.

7. Accordingly, it is concluded that Sanders Construction, Inc. and Pinnacol Assurance's contention that the statute of limitation should apply to bar Claimant's claim is not sustainable. In addition, the statutory requirements of Section 8-43-103(2), C.R.S., are tolled by the Claimant's oral reporting of his injury to the Jesse Sanders, the owner of Sanders Construction, Inc., on April 1, 2005.

8. Claimant began working for Jesse Sanders on March 1, 2005, thirty days before the work injury of April 1, 2005. On March 1, 2005, Claimant went to a job site where Jesse Sanders was working and request that Mr. Sanders employ him. Mr. Sanders advised Claimant to return to a job site in Greeley called "West Point" in a couple of days and that Claimant could work for Mr. Sanders at this location. Then, on March 1st or 2nd, Claimant met a person named Nate who was also employed by Mr. Sanders and who was assigned as Claimant's supervisor or lead worker. On March 1st or 2nd Claimant was instructed by Nate to travel to Windsor with a worker named Joe and there Claimant worked on a house building walls for the house with Nate.

9. From March 1 or 2, 2005 forward to the date of Claimant's work injury, Claimant worked with Nate as the lead worker/supervisor for the Employer. Claimant observed that Mr. Sanders came to the work site where Claimant and Nate worked on a daily basis. Claimant was observed by Mr. Sanders working daily at the job site. Mr. Sanders gave Claimant instructions each day about his work. Mr. Sanders hauled a utility trailer behind the vehicle he operated each day to the work site where Claimant was working. Mr. Sanders had tools in the trailer that he hauled to Claimant's work site and Claimant utilized these tools in his work. Mr. Sanders communicated with lead worker Nate and Claimant each day about the work they performed.

10. On April 1, 2005, Claimant and Nate were working on decking a roof at a resident on Kitty Hawk Lane in Windsor, CO for the Employer. Mr. Sanders came to the work location and dropped off equipment for Claimant and Nate to use. About 11:30 a.m., while Nate and Claimant were working on the roof decking the roof gave way and Claimant fell 18 to 20 feet to the ground. Nate observed the fall. Nate hung on to the roof in order not to fall when the roof decking collapsed.

11. Following the fall, Claimant was in shock. When Claimant opened his eyes following the fall, he saw nothing but blackness. He could not breathe initially. He felt severe pain in his chest. Claimant had scrapes all over his face and he had bitten his tongue. Both Claimant's arms were fractured. Nate inquired if Claimant was ok. Claimant replied that he was not ok and that he needed to go home. Claimant drove himself from Windsor to his home in Greeley. At his home, Claimant's wife called Mr. Sanders to report that Claimant was injured in a fall at work. Mr. Sanders instructed Claimant to return to the job site at 4:30 p.m. on April 1, 2005 and meet him there.

12. Claimant reported to the job site on Friday, April 1, 2005, as instructed, and he met Mr. Sanders there. Claimant reported to Mr. Sanders that he was in extreme pain and that he required medical treatment. Mr. Sanders informed Claimant that he would take him to the doctor the following Monday, April 4, 2005.

13. During the 30-day period that Claimant worked for the Employer, payment for his services was sporadic. As of April 4, 2005, Claimant was owed money from the Employer for his services.

14. Claimant appeared at the work site on Monday, April 4, 2005 at 7:00 a.m. Claimant was seeking medical care and he wanted to be paid for his services. Claimant reported to Mr. Sanders that he was in extreme pain and again requested to receive medical care. Mr. Sanders advised Claimant that he would take Claimant for medical care later in the day on April 4th. Claimant resumed work with Nate on April 4 and remained at work until Mr. Sanders returned. Sanders did not provide Claimant with medical care on April 4th.

15. On April 5, 2005, Claimant appeared for work at 7:00 a.m. and requested medical care from Mr. Sanders. Mr. Sanders promised that his wife would take Claimant for medical care later on April 5th. Mr. Sanders' wife never appeared at the work site to take Claimant for medical care.

16. On April 6, 2005, Claimant returned to work at the work site for the Employer. Claimant was told by Nate that Mr. Sanders would arrive at the work site a noon. Mr. Sanders never arrived at the work site on April 6th. Nate gave Claimant $100.00 on April 6th and advised him that Mr. Sanders would be gone for a couple of days.

17. It is inferred from Mr. Sanders' actions and conduct, and from Claimant's repeated communication to Mr. Sanders from April 1, 2005 to April 6, 2005, that, by April 6, 2005, Mr. Sanders was aware of the seriousness of Claimant's condition and was aware that the condition would cause Claimant permanent impairment and lost time from work equaling three work shifts.

18. During the week of April 11, 2005, Claimant saw Mr. Sanders who gave Claimant a couple hundred dollars, but still did not provide Claimant with medical care. On April 15, 2005, Claimant sought medical care of his own accord at Greeley Quick Care where he learned that he fracture his distal right radius. Claimant was referred to seek medical treatment at the emergency room at the Northern Colorado Medical Center. Claimant was treated at the emergency room for a right wrist fracture and he was restricted from work on April 15, 2005.

19. As a result of the April 1, 2005 work injury, Claimant suffered injury to his bilateral arms, wrists, knees, and ankles. Claimant also suffered injury to the upper back, left side of his neck, and his bilateral shoulders.

20. The credible and persuasive evidence at hearing establishes that starting on the date of the Claimant's injury, April 1, 2005, the Claimant repeatedly requested a referral for medical care from Jesse Sanders, and he was not referred for the care despite fractures in the Claimant's upper extremities. Therefore, Claimant had the right to

select his own physician and all medical care received from Champs, Dr. Bussey and any referrals stemming from their offices are within the chain of referral and shall be covered by the Respondents, Sanders Construction, Inc. and Pinnacol Assurance.

21. Respondents, Sanders Construction, Inc. and Pinnacol Assurance, shall be liable for all reasonable, necessary, and related medical benefits to cure and relieve Claimant of the effects of the April 1, 2005 injury.

22. On April 15, 2005, Claimant was restricted from the use of his right arm. Claimant's usual employment is as a roofer. This employment requires use of the Claimant's bilateral arms. Therefore, it is concluded that Claimant was disabled from his usual employment commencing April 15, 2005. Claimant's disability continues through the date of hearing. It is found and concluded that Respondents, Sanders Construction, Inc. and Pinnacol Assurance, shall be liable for TTD from April 15, 2005 and continuing until terminated by force of law.

23. Claimant's average weekly wage while employed by Sanders Construction, Inc. is $600.00 per week based on the parties' stipulation of July 15, 2008, which is contained in Respondents' Motion for Clarification with Stipulation.

24. The evidence at hearing established that Jesse Sanders was advised on April 1, 2005 that Claimant was injured in the course and scope of his employment when he fell off the roof on that date. The evidence further established that Claimant filed a Worker's Claim for Compensation on June 29, 2005 in which Claimant named the wrong employer as the responsible party. On January 28, 2008, Claimant timely filed a Workers' Claim for Compensation identifying Sanders Construction, Inc. and Pinnacol Assurance, as the employer and insurer. The evidence further established that Respondents, Sanders Construction, Inc. and Pinnacol Assurance, filed a Notice of Contest on February 21, 2008.

25. Under Section 8-43-101, the employer was obligated to file a first report of injury with the Division within 10 days after the employer had knowledge of Claimant's work injury and failure to file that report shall result in imposition of a penalty amounting to a fine not to exceed $500.00 per day for each such offense under Section 8-43-304.

26. Sanders Construction, Inc. is found to have had actual notice of the Claimant's April 1, 2005 injury on April 1, 2005. Sanders Construction, Inc. was made aware that Claimant's injuries would cause lost time from work and permanent impairment by April 6, 2005. Sanders Construction, Inc. has, independently, failed to file a first report of injury as required by Section 8-43-101, through the date of hearing.

27. Accordingly, it is found that imposition of a penalty against the Employer, Sanders Construction, Inc., is appropriate based on the provisions of sections 8-43-101 and 8-43-304. A penalty pursuant to the provisions of Section 8-43-304 is imposed on Sander Construction, Inc. in the amount of $2.00 per day commencing April 16, 2005 and continuing through the date of the hearing.

28. Furthermore, it is found that Pinnacol Assurance, the insurer for Sanders Construction, Inc., did not timely file the Notice of Contest on February 21, 2008. Under Section 8-43-203, Pinnacol Assurance was required to admit or deny the claim within 20 days of notice of the Workers' Claim for Compensation. Failure to timely file the Notice of Contest results in a penalty of one days' compensation for each days' failure to admit or deny the claim. Since Claimant filed a Workers' Claim for Compensation on January 28, 2008, a timely filed Notice of Contest should have been filed by Pinnacol Assurance on or before February 18, 2008. Pinnacol Assurance filed the Notice of Contest on February 21, 2008, or three days late. Therefore, Respondents, Pinnacol Assurance and Sanders Construction, Inc., shall be liable for a penalty amounting to three days compensation under Section 8-43-203. The penalty shall be paid consistent with the provisions of section 8-43-203(2)(a).

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following 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. Section 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. Section 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. Clar,,* 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. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The 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. 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. The record in this case establishes that Claimant suffered a work related injury on April 1, 2005 while in the course and scope of his employment with the em-

ployer, Sanders Construction, Inc. As a result of the April 1, 2005 injury, Claimant suffered injury to his bilateral arms, wrists, knees, and ankles. Claimant also suffered injury to the upper back, left side of his neck, and his bilateral shoulders these injuries are compensable as well as the Claimant's subsequent need for surgery and related medical care.

5. Respondents, Sanders Construction, Inc. and Pinnacol Assurance, are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio,* 866 P.2d 714, 716 (Colo. 1994).

6. Section 8-43-404(5)(a), C.R.S. grants employers the initial authority to select the authorized treating physician (ATP). However, if an employer is notified of an industrial injury and fails to designate an ATP the right of selection passes to the employee. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565, 567 (Colo. App. 1987). An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381, 383 (Colo. App. 2006).

7. The credible and persuasive evidence at hearing establishes that the Claimant repeatedly requested a referral for medical care commencing on the date of Claimant's injury from Respondent, Sanders Construction, Inc., and Claimant was not referred for care despite fractures in the Claimant's upper extremities. Therefore, the Claimant had the right to select his own physician and all medical care received from Champs, Dr. Bussey and any referrals stemming from their offices are within the chain of referral and shall be covered by the Respondents, Sanders Construction, Inc. and Pinnacol Assurance.

8. 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. Section 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).

9. On April 15, 2005, Claimant was restricted from the use of his right arm. Therefore, it is concluded that Claimant was disabled from his usual employment commencing April 15, 2005. Claimant's disability continues through the date of hearing. It

is found and concluded that Respondents, Sanders construction and Pinnacol Assurance, shall be liable for temporary total disability benefits (TTD) from April 15, 2005 and continuing until terminated by force of law.

10. Section 8-43-101 provides that the employer shall file a first report of injury with the Division within 10 days of the date the employer receives notice or has knowledge that an employee has suffered a permanently physically impairing injury or lost-time injury. Sanders Construction, Inc, the Employer, learned of Claimant's injury on April 1, 2005. Jesse Sanders was aware that the injury would result in lost time from work amounting to three shifts and permanent impairment on April 6, 2005. Accordingly it is concluded that Sanders Construction, Inc. had a duty to file a first report of injury on or before April 16, 2005. Sanders Construction, Inc. did not file a report of the injury through the date of hearing and is therefore liable for a penalty.

11. Section 8-43-304, C.R.S. allows for penalties when an employer or insurer violates the provisions of articles 40 to 47 of the title. A penalty of up to $500.00 per day may be imposed. Under Sections 8-43-101, the employer was obligated to file a first report of injury with the Division within 10 days after the employer had knowledge of Claimant's work injury and failure to file that report shall result in imposition of a penalty.

12. Since the employer, Sanders Construction, Inc. failed to report Claimant's April 1, 2005 lost time injury to the Division as required under statute, Sanders, Construction, Inc. is subject to a penalty under Section 8-43-304 at the rate of $2.00 per day commencing April 16, 2005 and continuing through the date of hearing.

13. Respondent, Sanders Construction, Inc., shall be subject to payment of the penalty consistent with Section 8-43-304, 75% payable to Claimant and 25% payable to the subsequent injury fund.

14. Based on Section 8-43-203, Respondent, Pinnacol Assurance, is subject to a penalty amounting to one day's compensation for each day's failure to file its Notice of Contest. Section 8-43-203 provides that the insurer is required to file a notice of contest within 20 days after a report of the injury is filed with the Division. In this case, the evidence established that the employer never filed a report of the injury with the Division. Claimant filed a Workers' Claim for Compensation on January 28, 2008, naming the proper employer and insurer. The evidence further established that Pinnacol Assurance filed a Notice of Contest on February 21, 2008, more than 20 days from the date of the filing of the Workers' Claim for Compensation. Respondents, Pinnacol Assurance and Sanders Construction, Inc., were three days late in filing the Notice of Contest. Therefore, Respondents, Pinnacol Assurance and Sanders Construction, Inc., shall be liable for a penalty amounting to three days compensation under Section 8-43-203. The penalty shall be paid consistent with the provisions of section 8-43-203(2)(a).

15. Pursuant to 8-43-103 (2), "the right to compensation and benefits provided by said articles shall be barred unless, within two years after the injury or after death re-

sulting there from, a notice claiming compensation is filed with the division. This limitation shall not apply to any claimant to whom compensation has been paid or if it is established to the satisfaction of the director within three years after the injury or death that a reasonable excuse exists for the failure to file such notice claiming compensation and if the employer's rights have not been prejudiced thereby…"

16. As found, Claimant timely filed the Worker's Claim for Compensation on January 28, 2008 and therefore the claim is not barred by the statute of limitation contained in Section 8-43-103(2). Claimant established good cause for his failure to file the claim within two years of the date of injury and filed the claim on January 28, 2008, which was within three years of the date of the April 1, 2005 injury. Accordingly, it is concluded that Respondents' contention that the statute of limitation should apply to bar Claimant's claim is not sustainable.

ORDER

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

1. Claimant was not an employee of Respondents, Sapphire Custom Homes, Inc. and its insurance carrier, Pinnacol Assurance, on the date of injury. Sapphire Custom Homes, Inc. and its insurance carrier, Pinnacol Assurance, are hereby dismissed as parties to these claims.

2. Respondents, Sanders Construction Company and Pinnacol Assurance, shall be liable for all reasonable, necessary, and related medical benefits to cure and relieve Claimant of the effects of the April 1, 2005 injury.

3. Based on the stipulation of the parties, Claimant and Respondents, Sanders Construction, Inc. and Pinnacol Assurance, Claimant's average weekly wage is $600.00 per week.

4. Respondent, Pinnacol Assurance, shall be liable for a penalty for three (3) days' compensation to Claimant under Section 8-43-203 for failure to timely admit or deny the claim.

5. Respondent, Sanders Construction, Inc., shall be liable for a penalty pursuant to Section 8-43-304 for failure to comply with Section 8-43-101 by failing to file a first report of injury commencing April 16, 2005 and continuing through the date of the hearing in the amount of $2.00 per day.

6. Respondents, Sanders Construction, Inc. and Pinnacol Assurance, shall be liable for TTD for April 15, 2005 and continuing until terminated by force of law.

7. Respondents, Sanders Construction, Inc. and Pinnacol Assurance, shall pay statutory interest at the rate of eight (8%) per annum on all amounts due and not paid when due.

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

DATED: January 15, 2009

Margot W. Jones,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-755-737

ISSUES

- Whether Claimant suffered a work-related injury to his neck (withdrawal of the general admission of liability filed by Respondents);
- Whether Claimant is responsible for his termination from work; and
- Whether Claimant is entitled to temporary total disability (TTD) benefits.

FINDINGS OF FACT

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

1. Claimant worked as an auto technician for Employer beginning on August 13, 2007.
2. On March 24, 2008, Claimant was lifting up on a vehicle's fender to allow another employee to pull a jack out from under the vehicle. Claimant felt immediate pain in his neck which he reported was much worse than anything he had felt in the past. Claimant reported the injury to his supervisor, Matt Wheeler, and was referred to Concentra for treatment.
3. Claimant had neck and upper back symptoms prior to March 24, 2008. On March 13, 2008, Claimant sought treatment with a chiropractor, Barry Hand, D.C., for pain in the left shoulder, left upper back and neck. Claimant reported insidious onset of pain in the area beginning two weeks earlier. Mr. Hand noted decreased range of motion in Claimant's neck. Mr. Hand performed a chiropractic adjustment to treat Claimant's symptoms and suggested that Claimant return the following week.
4. On March 19, 2008, Claimant returned to Mr. Hand with continued complaints of upper back and neck pain. Claimant reported temporary improvement following the treatment he received on March 13, 2008.
5. On March 21, 2008, Claimant reported to Mr. Hand that his pain frequency had decreased. According to the medical records and the testimony of Mr. Hand, Claimant had also reported a decrease in the sharpness of his arm pain. Claimant, however, complained of numbness in the first two digits of his left hand.
6. Mr. Hand felt that Claimant's neck, upper back and arm symptoms probably arose from the cervical spine at the C5-C6 level.
7. On March 24, 2008, Claimant saw Mr. Hand and reported that his symptoms were slowly improving, although he still had upper back and neck pain with numbness in

his left arm. According to the medical records and the testimony of Mr. Hand, Claimant's symptoms were improving over the course of the chiropractic treatment. Mr. Hand testified that as of March 24, 2008, Claimant would have needed a few more treatments to resolve his symptoms.

8. Mr. Hand knew that Claimant worked as an auto technician but did not impose work restrictions.

9. Claimant had discussions with Mr. Wheeler about seeing Mr. Hand. Specifically, Claimant told Mr. Wheeler that he had experienced some pain and stiffness in his neck after repairing a steering assembly on a vehicle. Mr. Wheeler asked Claimant to take care of it on his own so that Mr. Wheeler would not have to complete paperwork. Contrary to Mr. Wheeler's testimony, Claimant never told Mr. Wheeler that he injured himself helping someone move.

10. On March 26, 2008, Claimant saw Keith Meier, CSNP, at Concentra. Mr. Meier restricted Claimant from using his left arm, prescribed pain and anti-inflammatory medications and referred Claimant to physical therapy. Mr. Meier noted that Claimant had full neck range of motion and numbness in the index, middle and ring fingers.

11. Claimant eventually was referred for an EMG. On April 9, 2008, Dr. Jeffery Wunder examined Claimant and performed an EMG which revealed radiculopathy at the C7 nerve root. Dr. Wunder referred Claimant for an MRI to rule out C6-7 disk herniation versus foraminal stenosis.

12. On April 25, 2008, Claimant underwent the MRI. The MRI reflected a diffuse disk osteophyte complex, worse to the right at the C5-6 interspace. At the C6-7 level, the MRI showed a diffuse disc bulge, neural formanal narrowing and left-sided vertebral osteophyte. According to the report of Dr. Stephen Davis, the findings at the C6-7 level correlate better to Claimant's clinical symptoms.

13. On May 5, 2008, Claimant underwent epidural steroid injections at the C6-7 level on the left side. Claimant reported complete relief from the injection. Once the pain returned, Claimant underwent another injection on June 19, 2008, which Claimant reported provided some relief.

14. In June 2008, Claimant saw Dr. Rosalinda Pineiro at Concentra. She prescribed Percocet to Claimant and advised him not to drive. On June 11, 2008, Dr. Pineiro wrote a note stating that Claimant cannot drive while taking narcotics.

15. Throughout the time Claimant treated with Concentra medical professionals through the date of the hearing, he had physical restrictions of no overhead work and no lifting more than 30 pounds with his left arm.

16. Claimant began modified duty with Employer following the visit with Mr. Meier on March 26, 2008, when Mr. Meier had restricted Claimant to no use of his left arm. While on light duty, Claimant diagnosed vehicles and did paperwork. He was unable to perform much repair work. Claimant continued on modified duty until he was terminated on April 23, 2008.

17. Claimant's co-workers testified that Claimant was able to physically perform all of his job duties prior to March 24, 2008.

18. Following the incident on March 24, 2008, Claimant's neck, upper back and arm symptoms worsened. He additional pain and more numbness in his fingers and hand. Before March 24, 2008, Claimant was able to perform his work duties and was seeking only chiropractic treatment for his symptoms, which were slowly improving. Claimant

also was not taking prescription pain medications for his symptoms prior to the work incident. Based on the foregoing, Claimant has established that he sustained a work-related injury to his neck.

19. As of the date of the hearing, Claimant still had restrictions in place of no overhead work with his left arm and no lifting over 30 pounds with this left arm.

20. Employer terminated Claimant's employment on April 23, 2008. Employer cites four incidents that are described below.

21. According to an Employee Corrective Action Report completed on October 10, 2007, Claimant took a customer's vehicle to a fast food restaurant for a test drive on October 7, 2007, which was a Sunday. The report stated that while Claimant was driving with one hand and holding a sandwich with the other hand, he hit a lift and popped a tire. Claimant agreed that this incident happened but disagreed that he was holding a sandwich while driving. Claimant and David Wolford testified that it was not uncommon for employees to pick up food while test-driving a vehicle. Mr. Wheeler testified that the shop paid for the tire whereas Claimant testified that he worked extra hours without pay to cover the cost of the tire. Claimant's signature does not appear on this report.

22. On March 22, 2008, a customer requested repairs on a 1985 Pontiac Fiero with 195,690 miles. Claimant diagnosed the problem and suggested certain repairs that cost $748.60, which the customer allowed the shop to perform. The customer was dissatisfied with the results and complained through a customer service survey. The complaint stated that not all of the work was performed, that the labor charges were too expensive and that the vehicle was not repaired. Wheeler, completed an "Employee Corrective Action Report" that stated Claimant misdiagnosed the vehicle and that Claimant was counseled verbally. Claimant's signature does not appear on this form.

23. On April 10, 2008, a customer requested repairs on a 2003 Chevy Malibu. Claimant diagnosed the vehicle's problems and made repair recommendations. According to Mr. Wheeler, Claimant's diagnosis was incorrect and the customer was dissatisfied. Mr. Wheeler completed an Employee Corrective Action Report regarding this issue. Claimant's signature does not appear on this form.

24. On April 19, 2008, a customer drove his vehicle to the shop and reported that it had no brake pedal or a soft brake pedal. Mr. Wolford conveyed this information to Claimant. Claimant drove the vehicle around the parking lot to test the braking ability. It stopped sufficiently in the parking lot so Claimant decided to drive the vehicle onto the lift. While Claimant was driving the vehicle onto the lift, the brakes failed and the vehicle went forward off the front of the lift causing damage to other machinery. Afterward, Mr. Wheeler asked Claimant if he was okay and then asked him to run an errand with the company vehicle.

25. The shop owner, Nick Dodgson, testified that he came by the shop at a few days per week to pick up paperwork. Three other witnesses contradicted that testimony saying that Mr. Dodgson was at the shop a couple of times per month. Mr. Dodgson also testified that he personally counseled Claimant about the hamburger incident and the Fiero incident. Claimant denied that any such discussions occurred. Mr. Dodgson also testified that Mr. Wheeler sent him the corrective action reports when they were allegedly completed. The fax stamp on the reports indicates that they were sent to Mr. Dodgson on the same date. Page two of the April 10, 2008, report reflects a different fax stamp date. Mr. Dodgson testified that the shop's fax machine had problems with

the dates and that the date was always incorrect. Mr. Dodgson's testimony did not explain why it appears that all of the corrective action reports were sent to him on the same date.

26. Following the April 19, 2008, incident, Employer terminated Claimant's employment on April 23, 2008. Mr. Wheeler cited the April 19 incident as the sole reason for termination when the actual firing occurred. Claimant first learned of the other three Employee Corrective Action Reports during the discovery phase in preparation for this hearing. Contrary to their testimony, neither Mr. Wheeler nor Nick Dodgson discussed the other three incidents with Claimant.

27. David Wolford, an assistant manager, witnessed Mr. Wheeler complete all of the Employee Corrective Action Reports at the same time right before Claimant was terminated. Mr. Wolford testified that employees were not terminated for incidents like the one that occurred on April 19.

28. Based on the foregoing, Claimant has established that he is entitled to TTD. Claimant has sought employment elsewhere but has been unsuccessful. He still has physical restrictions that prevent him from performing all of the duties required of an auto mechanic. He cannot work overhead and he cannot lift more than 30 pounds with his left arm. Respondents have not established that Claimant was responsible for termination of his employment.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the ALJ enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, 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). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and ac-

tions; 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).

Compensability/Withdrawing the Final Admission of Liability

4. When an insurer seeks to withdraw an admission of liability, it does not have the burden of demonstrating that the admission was improvident and the burden remains on the claimant to demonstrate a compensable injury. *Pacesetter Corp. v. Collett,* 33 P.3d 1230, 1232 (Colo. App. 2001); *In re Fuller,* W.C. No. 4-588-675 (ICAP, Sept. 1, 2006).

5. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). Resolution of that issue is one of fact for the ALJ. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985).

6. As found, Claimant has established by a preponderance of the evidence that on March 24, 2008, he sustained an injury to his neck within the scope and course of his employment. While it is true that Claimant had sought treatment with Mr. Hand for similar symptoms, Mr. Hand and Claimant felt that Claimant's symptoms were improving over the course of the chiropractic treatment. Claimant was also working without restrictions before March 24, 2008. Following the incident on the March 24, 2008, Claimant's symptoms worsened resulting in the need for more aggressive treatment, including prescription pain medications and work restrictions. The incident on March 24 aggravated, accelerated and combined with the preexisting symptoms and accelerated the need for more aggressive treatment.

Termination from Employment

7. Sections 8-42-103(1)(g) and 8-42-105(4), *supra*, (termination statutes) provide that, where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury. Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for her termination. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 20 P.3d 1209 (Colo. App. 2000).

8. By enacting the termination statutes, the General Assembly sought to preclude an injured worker from recovering temporary disability benefits where the worker is at fault for the loss of regular or modified employment, irrespective whether the industrial injury remains the proximate cause of the subsequent wage loss. *Colorado Springs Disposal v. Martinez*, 58 P.3d 1061 (Colo. App. 2002) (court held termination statutes inapplicable where employer terminates an employee because of employee's injury or injury-producing conduct). An employee is "responsible" if the employee precipitated the employment termination by a volitional act which an employee would reasonably expect

to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). Thus, the fault determination depends upon whether claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). That determination must be based upon an examination of the totality of the circumstances. *Id.*

9. As found, Respondents have not established that Claimant was responsible for his termination from employment. The testimony of Matt Wheeler and Nick Dodgson lacked credibility. Mr. Wheeler contends that for each incident, he verbally warned Claimant, and contemporaneously issued corrective action reports. David Wolford credibly testified that he witnessed Mr. Wheeler completing all four corrective actions reports at the same time on the date of Claimant's termination. Three witnesses refuted Mr. Dodgson's testimony that he was in the shop at least once per week. Furthermore, contrary to the testimony of Mr. Dodgson and Mr. Wheeler, both Claimant and Mr. Wolford testified that Claimant had never been verbally warned regarding his performance until the lift incident on April 19, 2008. Finally, Mr. Wolford credibly testified that the incident of driving off of the lift was not one that would result in immediate termination. Claimant was unaware that any disciplinary problems existed until he was terminated. Based upon the totality of the circumstances, Claimant did not commit a volitional act that led to the termination and did not exercise a sufficient degree of control over the circumstances of his termination. It is found and concluded that Claimant is not responsible for the termination of his employment. Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S., do not bar Claimant from receiving temporary disability benefits.

Temporary Total Disability

10. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury or disease caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her 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 her regular employment. *Ortiz, supra.*

11. As found, Claimant was unable to perform his normal job duties as an auto technician as of the date Mr. Meier instructed Claimant to abstain from using his left arm. Although his restrictions have changed to allow some use of the left hand, he still cannot work overhead. Because Claimant's profession as a mechanic generally requires him

to work on vehicles overhead, he cannot effectively and properly perform such job duties without the ability to work overhead. As such, Claimant is entitled to TTD commencing on April 24, 2008 until terminated by statute or order.

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim is compensable.
2. Claimant was not responsible for his termination from employment. Thus Claimant's Respondent's Petition to Modify, Terminate or Suspend temporary disability benefits is DENIED.
3. Claimant is entitled to TTD benefits at the average weekly wage contained in the General Admission of Liability until terminated pursuant to law or order.
4. Insurer shall pay Claimant TTD benefits at the AWW rate of $830.53 commencing April 24, 2008 and continuing until terminated pursuant to statute or order
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.

DATED: _____

Laura A. Broniak
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-733-570

ISSUES

The issues determined herein are temporary total disability ("TTD") and temporary partial disability ("TPD") benefits and continuing medical benefits after maximum medical improvement ("MMI"). The parties stipulated that claimant was entitled to $305.78 per week for all admitted periods of TTD benefits based upon the admitted average weekly wage of $458.68.

FINDINGS OF FACT

1. In May 2007, claimant began work for the employer as a dishwasher and busboy.
2. On July 11, 2007, claimant suffered an admitted industrial injury to his low back. He suffered severe low back pain and left leg pain.
3. On July 12, 2007, Nurse Practitioner Barnes diagnosed lumbar strain. She imposed restrictions.

4. Dr. Olson continued to provide follow up care, and referred claimant for physical therapy.
5. On August 28, 2007, Physician's Assistant Schultz imposed restrictions against lifting over 20 pounds, pushing or pulling over 30 pounds, or doing any bending or twisting.
6. Claimant continued working full-time for the employer until August 29, 2007.
7. From August 29 to September 7, 2007, claimant worked only 16 hours for the employer, earning $137.60 gross wages.
8. On September 24, 2007, Dr. Olson reexamined claimant, who reported only morning stiffness and some achiness in his low back. Dr. Olson determined that claimant was at MMI with no permanent impairment. He released claimant to return to regular work.
9. Claimant admitted that he still had low back pain at MMI.
10. On October 29, 2007, the insurer filed a final admission of liability ("FAL") for an average weekly wage of $344. The FAL admitted liability for TPD benefits in the total of $366.95 for the period August 25 to September 7, 2007 and for TTD benefits at the rate of $229.34 per week for the period September 8 through 21, 2007. The FAL admitted TPD benefits in the total of $91.73 for September 22 and 23, 2007. The FAL denied permanent disability benefits, but admitted for any reasonably necessary medical treatments after MMI.
11. On June 9, 2008, Dr. Sandell performed a Division Independent Medical Examination ("DIME"). Claimant reported low back pain varying day to day as well as intermittent left leg pain. He had full lumbar range of motion. Dr. Sandell agreed that claimant was at MMI on September 24, 2007. He recommended only home exercises, but no additional medical treatment. He recommended x-rays and a magnetic resonance image ("MRI") only if the consistency of claimant's radicular symptoms increased or if he had changes on neurological examination. He recommended permanent restrictions against heavy lifting or any repetitive bending or squatting.
12. On August 12, 2008, the insurer filed an amended FAL denying post-MMI medical benefits. The FAL admitted for an average weekly wage of $458.68, but did not make any changes in the weekly amount of TTD or the total amounts of TPD benefits.
13. On September 24, 2008, claimant reinjured his low back in a motor vehicle accident. He obtained additional chiropractic treatment after the accident.
14. At hearing, respondents stipulated that they failed to recalculate the amount of TTD and TPD benefits in the amended FAL for the higher average weekly wage.
15. For the two weeks of August 25 through September 7, 2007, claimant suffered a wage loss of $779.76. His correct TPD benefit amount for that period is $519.84 rather than the admitted $366.95.
16. Claimant has failed to prove by substantial evidence that he needs any post-MMI medical treatment. He still had low back pain at MMI. Dr. Olson prescribed no additional treatment. Dr. Sandell performed the DIME in June 2008 and still found no need for additional treatment. Dr. Sandell recommended additional diagnostic testing only if claimant's radicular symptoms increased or if he had changes on neurological examination. The record evidence does not demonstrate that claimant has had such increases in radicular symptoms. He has had no repeat neurological testing. His increased symptoms after September 24, 2008, are due to the motor vehicle accident. Despite the ad-

mission for post-MMI medical benefits on October 29, 2007, claimant sought no medical treatment prior to the September 24, 2008, motor vehicle accident. The trier-of-fact infers that claimant needed no additional treatment during that period.

CONCLUSIONS OF LAW

1. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury, including treatment from authorized providers after MMI. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two step procedure for awarding ongoing medical benefits under *Grover, supra.* The court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment. If the claimant reaches this threshold, the court stated that the ALJ should enter "a general order, similar to that described in *Grover*." While claimant does not have to prove the need for a specific medical benefit at this time, and respondents remain free to contest the reasonable necessity of any future treatment, claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction, supra.* As found, claimant has failed to make such a showing in this case.

2. Claimant seeks additional TTD and TPD benefits based upon the higher average weekly wage in the amended FAL. At hearing, respondents agreed that they were bound by the higher average weekly wage, which they alleged was mistaken. Consequently, claimant is entitled to TTD benefits at the rate of $305.78 per week for the period September 8 through 21, 2007.

3. Claimant sought TTD benefits rather than TPD benefits for the admitted period August 25 through September 7, 2007. At hearing, claimant agreed that he earned wages during that period. As found, claimant earned $137.60 gross wages for that period. Pursuant to section 8-42-106, C.R.S., claimant is entitled to 2/3 of the difference between his admitted average weekly wage and his earnings during the period of TPD. As found, claimant suffered a wage loss of $779.76 for the two week period in question. His correct TPD benefit amount for that period is $519.84 rather than the admitted $366.95.

ORDER

It is therefore ordered that:

1. Claimant's request for medical benefits after MMI is denied and dismissed.
2. The insurer shall pay to claimant TPD benefits in the total amount of $519.84 for the period August 25 through September 7, 2007.
3. The insurer shall pay to claimant TTD benefits at the rate of $305.78 per week for the period September 8 through 21, 2007.
4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

DATED: January 20, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-122-830

ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Dependent-Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 13, 2008 and January 5, 2009, in Denver, Colorado. Both sessions of the hearing were digitally recorded (reference: 11/13/08, Courtroom 3, beginning at 8:37 AM, and ending at 9:28 AM; and, 1/5/09, Courtroom 3, beginning at 8:30 AM, and ending at 9:30 AM). No testimonial evidence was taken at either session. The November 13 session consisted of an advisement. The January 5 session consisted of the receipt of stipulations upon which and order could be entered.

Claimant was present in person and represented herself

At the conclusion of the non-evidentiary hearing, the ALJ referred preparation of a proposed decision to Respondent's counsel, giving Dependent-Claimant 3 working days within which to fax any objections thereto to the ALJ and Respondents. Respondents filed a proposed decision, electronically, on January 9, 2009, indicating that a copy thereof had been mailed to the Dependent-Claimant. Allowing 3 days for the re-

ceipt of mail and 3 working days to file objections, Claimant's objections were due on January 20, 2009. None having been timely filed, the ALJ hereby issues the following Order.

ISSUES

The issues to be determined by this decision concern: (1) whether the September 7, 2007 Settlement in this case Agreement can be reopened based upon fraud and misrepresentation pursuant to Section 8-43-303, C.R.S. (2008)? (2) Whether Dependent-Claimant's periodic death benefits terminated on May 9, 1994, based upon her remarriage pursuant to Section 8-42-120, C.R.S? (3) Whether Respondents are entitled to recoup an overpayment and/or repayment of periodic death benefits pursuant to Section 8-43-303? Additional issues include whether Respondents are entitled to a penalty in an amount of up to $500 per day pursuant to Section 8-43-304, C.R.S. and should the claim be reopened and the September 7, 2007 Settlement be set aside based upon fraud?

STIPULATIONS OF FACT

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

1. This claim arises out of admitted fatal injuries that the Deceased sustained on January 29, 1992, resulting in his demise.

2. Dependent-Claimant, as the widow-spouse of the Deceased, filed a claim for workers' compensation death benefits.

3. Pinnacol accepted Dependent-Claimant's claim.

4. Dependent-Claimant married Serif Amirak on May 9, 1994.

5. Dependent-Claimant knowingly received periodic workers' compensation death benefits after her marriage to Serif Amirak.

6. Dependent-Claimant knowingly failed to advise Pinnacol of her marriage to Serif Amirak on May 9, 1994.

7. Pinnacol sent multiple Affidavits of Continued Widowhood (March 11, 1993, April 3, 1997, April 21, 1999 and February 20, 2006) to Dependent-Claimant asking her whether she had remarried. Dependent-Claimant, on said Affidavits of Continued Widowhood, indicated/represented she had not remarried.

8. Additionally, language on the back of each workers' compensation benefits check Pinnacol sent to Dependent-Claimant, indicates "if you are a widow …receiving

benefits for the death of your spouse, when you endorse this warrant you are stating that you have not remarried since the death of your spouse." Dependent-Claimant executed her name under said statement on each benefit check.

9. On September 7, 2007, Dependent-Claimant and Pinnacol entered into a Settlement Agreement to resolve Dependent-Claimant's workers' compensation claim. The Settlement Agreement provided that "Pinnacol shall pay Dependent-Claimant a $25,000 lump sum, in addition to periodic payments in an annuity totaling $85,000 for a total settlement of $110,000." At the time of the settlement, Pinnacol was not aware of Dependent-Claimant's marriage to Serif Amirak.

10. On September 7, 2007 Dependent-Claimant knowingly did not advise Pinnacol of her marriage to Serif Amirak. As a result of Dependent-Claimant's knowingly failing to inform Pinnacol of her remarriage and/or her continued receipt of benefits after her re-marriage, Pinnacol overpaid Dependent-Claimant $169,255.98 in addition to $85,000 placed in annuity as a result of the September 7, 2007 settlement.

11. Pinnacol agrees to discount said overpayment as follows: $169,255.98 minus two year lump sum in the amount of $11,710.56 for a total agreed overpayment of $157,545.42.

12. Dependent-Claimant agrees to pay the $157,545.42 back to Pinnacol in the amount of $200.00 per month with payments to begin on the fifteenth day of February 2009, and thereafter due and payable to Pinnacol on or before the fifteenth day of each month until the $157,545.42 is paid in full. Pinnacol agreed to waive any claims for interest.

13. Dependent-Claimant agrees to repay the $200.00 per month directly to Pinnacol Assurance.

14. Further, Pinnacol agrees not seek repayment of the $85,000 placed in annuity for the Dependent-Claimant.

15. Pinnacol agrees to forgo penalties against Judy Harris.

16. In the event, however, that Dependent-Claimant ceases to pay the $200.00 per month to Pinnacol, Dependent-Claimant agrees that Pinnacol shall be entitled to seek repayment of said overpayment in law or equity, as well as seek interest, penalties and/or any other relief.

17. Dependent-Claimant's ability to repay is taken into account for the $200.00 per month repayment.

CONCLUSIONS OF LAW

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

September 7, 2007 Settlement is reopened based upon Fraud

a. Section 8-43-303, C.R.S. (2008), provides, in pertinent part, that a settlement may be reopened at any time on the grounds of fraud. As stipulated, Pinnacol sent multiple Affidavits of Continued Widowhood (March 11, 1993, April 3, 1997, April 21, 1999 and February 20, 2006) to Dependent-Claimant asking whether she had remarried. As stipulated on said Affidavits of Continued Widowhood, she indicated/ represented that she had not remarried. Additionally, Dependent-Claimant represented by signing her name on the back of each benefit check(s) that she had not remarried when in fact she had married Serif Amirak on May 9, 1994.

b. Pinnacol paid Dependent-Claimant benefits based upon her misrepresentation. Dependent-Claimant knowingly concealed her remarriage and continued to receive workers' compensation benefits. As a result, she was overpaid $169,255.98 plus the $85,000 placed in annuity. As such, the parties' September 7, 2007 Settlement Agreement is reopened *ab initio* based upon said Fraud. *See Vargo v. Colorado Industrial Comm.,* 626 P.2d 1164 (Colo. App. 1981).

September 7, 2007 Settlement is *void ab initio* and is set aside.

c. The September 7, 2007 Settlement is premised upon a material misrepresentation and, therefore, there was no "meeting of the minds." Dependent-Claimant concealed the fact of her remarriage, which constitutes a material misrepresentation. *See Morrison v. Goodspeed,* 100 Colo. 470, 68 P.2d 458 (1937). Also, Respondents relied to their detriment on the concealed information to settle the claim.

d. The September 7, 2007 Settlement is *void ab initio* and should be set aside. *See Vargo v. Colorado Industrial Comm., supra*; *Michael Quinton v. LT&L Logging, Inc.,* W.C. No. 4-227-138 [Industrial Claim Appeals Office (ICAO), 2000, where ICAO affirmed the ALJ's order setting aside a stipulation, which was based upon claimant's fraudulent misrepresentation]. In *Quinton, supra*, the ALJ reopened the claim, and set aside as *void ab initio,* an October 3, 1995 award of workers' compensation benefits.

Dependent-Claimant should repay $157,545.42 to Pinnacol

e. Section 8-43-303, C.R.S., provides that if "…claimant received overpayments, the award shall be reopened solely as to overpayments and repayment shall be ordered." Further, the statute (Section 8-43-303) also provides that no such reopening shall affect the earlier award as to monies already paid except in cases of fraud or overpayment. The statute contemplates that in the case of overpayment the ALJ has authority to remedy the situation. *Stroman v. Southway Services, Inc.,* W. C. No. 4-366-

989 (ICAO, August 31, 1999). As stipulated, Pinnacol overpaid Dependent-Claimant $169,255.98 plus the $85,000 placed in annuity in periodic death benefits. Dependent-Claimant misrepresented her marital status by knowingly concealing her remarriage, whereby she continued to receive workers' compensation death benefits.

g. Pursuant to its agreement, Pinnacol may discount the amount the overpayment as follows: $169,255.98 minus two year lump sum in the amount of $11,710.56 for a total overpayment of $157,545.42. Dependent-Claimant should pay the $157,545.42 back to Pinnacol in the amount of $200.00 per month with payments to begin on the fifteenth day of February, 2009 and due and payable to Pinnacol on or before the fifteenth day of each month until the $157,545.42 is paid in full to Pinnacol.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Dependent-Claimant received workers' compensation death benefits by knowingly representing she had not remarried. She endorsed the back of benefit checks, as well as acknowledged on Affidavits of Continued Widowhoods she had not remarried when in fact she had married Serif Amirak on May 9, 1994. Such representations constitute fraud pursuant to Section 8-43-303, C.R.S. (2008). *Morrison v. Goodspeed, supra.*

B. The September 7, 2007 Settlement Agreement is reopened based upon fraud.

C. The September 7, 2007 Settlement is *void ab initio* and is set aside.

D. As a result of Dependent-Claimant's continued receipt of benefits after her remarriage of May 9, 1994, Pinnacol Assurance overpaid Dependent-Claimant $169,255.98 in additional to the $85,000 which was placed in an annuity.

E. Pinnacol Assurance shall not seek repayment of the $85,000 placed in annuity directly for Dependent-Claimant.

F. Pinnacol Assurance shall forgo any interest against Dependent-Claimant on said overpayment.

G. Pinnacol Assurance shall discount said overpayment as follows: $169,255.98 minus two year lump sum in the amount of $11,710.56 for a total overpayment of $157,545.42.

H. Dependent-Claimant shall repay Pinnacol Assurance the overpayment of $157,545.42 pursuant to Section 8-43-303, C.R.S. (2008).

I. Dependent-Claimant agrees to pay the overpayment of $157,545.42 to Pinnacol Assurance in the amount of $200.00 per month with payments to begin on the fifteenth day of February, 2009, payment thereafter due and payable to Pinnacol Assurance on or before the fifteenth day of each and every month until the $157,545.42 has been paid in full to Pinnacol Assurance.

J. In the event Dependent-Claimant ceases to pay the $200.00 per month to Pinnacol Assurance, Pinnacol Assurance shall be entitled to seek repayment of said overpayment in law or equity, as well as seek interest, penalties and/or any other relief.

DATED this_____day of January 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-751-056

ISSUES

The issues determined herein are respondents' petition to suspend temporary partial disability ("TPD") benefits and claimant's right to audio record an independent medical examination ("IME").

FINDINGS OF FACT

1. On January 2, 2007, claimant suffered an admitted industrial injury.
2. On March 13, 2008, the insurer filed a general admission of liability for ongoing TPD benefits commencing February 23, 2008.
3. The insurer notified claimant that he was required to undergo an IME by Dr. Arnold on September 16, 2008 at 11:30 a.m.
4. By letter dated August 28, 2008, claimant's attorney notified the insurer that claimant was requesting to audio record or video record the IME.
5. On September 8, 2008, the insurer sent an e-mail to claimant's attorney to indicate that Dr. Arnold does not allow audio or video recording of an IME. The e-mail noted that the statute does not provide for audio recording of the IME and indicated that the insurer could petition to suspend claimant's compensation if he failed to appear for the IME.
6. On September 16, 2008, claimant arrived at Dr. Arnold's office at approximately 10:50 a.m. Dr. Arnold's office staff informed claimant that claimant would not be allowed to audio record the IME. Claimant called his attorney and then left the IME.
7. On November 5, 2008, the insurer filed a petition to suspend claimant's TPD benefits until he attended the IME by Dr. Arnold.

8. On balance, the record evidence does not demonstrate that claimant should not be allowed to make an audio recording of the IME. Claimant's use of an audio recording device is a minor intrusion into a physical medicine examination and does not raise concerns with a physician/examinee relationship.

9. By insisting on making an audio record of the IME, claimant has not "obstructed" the IME.

CONCLUSIONS OF LAW

1. The central issue is whether claimant may audio record the IME. Section 8-43-404(1), C.R.S., provides:

> If in case of injury the right to compensation under articles 40 to 47 of this title exists in favor of an employee, upon the written request of the employee's employer or the insurer carrying such risk, the employee shall from time to time submit to examination by a physician or surgeon or to a vocational evaluation, which shall be provided and paid for by the employer or insurer, and the employee shall likewise submit to examination from time to time by any regular physician selected and paid for by the division.

Section 8-43-404(2), C.R.S., provides in pertinent part, "The employee shall be entitled to have a physician, provided and paid for by the employee, present at any such examination." The statute neither expressly authorizes nor expressly prohibits claimant from audio recording the IME. Rather, in workers' compensation cases in Colorado, the ALJ has discretion to impose the conditions under which the IME may occur. *Brownson-Rausin v. Valley View Hospital*, W.C. No. 3-101-431 (Industrial Claim Appeals Office, October 3, 2006). Contrary to respondents' argument, *Brownson-Rausin* even mentioned the alternative for claimant to video record an IME. Most reported cases deal with the conditions of discretionary IMEs in non-workers' compensation matters. The workers' compensation act clearly authorizes respondents to obtain IMEs, but it also clearly contemplates some protection for the claimant as to the events that transpire during the IME. Claimant is expressly permitted to retain another physician to attend the IME with the claimant. Consequently, unlike the personal injury case, respondents are not entitled to an IME unfettered by any external intrusion. *Cf. Hayes v. District Court*, 854 P.2d 1240 (Colo. 1993). Although the express authorization in the workers' compensation act for an attending physician might mean that the general assembly intended not to allow audio recordings, that is not the better interpretation of the statutory language. Technology has developed and permits a far better mode of protection for claimant as to the events that transpire in the IME. Claimant need not go to the expense of hiring a physician when he can obtain an inexpensive portable audio recording device to make a record of what was said in the IME. On balance, the record evidence does not demonstrate that claimant should not be allowed to make an audio recording of the IME. If Dr. Arnold will not perform an IME under those circumstances, respon-

dents will need to select another IME physician. They would face that same result, as mandated by statute, if Dr. Arnold refused to perform the IME in the presence of claimant's own attending physician. If claimant makes an audio recording of the IME, that IME physician is also permitted to make an audio or video recording of the IME.

2. Respondents have failed to prove by a preponderance of the evidence, pursuant to section 8-43-404(3), C.R.S., that claimant's right to collect compensation benefits should be suspended due to "obstruction" of the IME. As found, claimant did not obstruct the IME simply by insisting on the right to audio record the IME.

ORDER

It is therefore ordered that:

1. Respondents' petition to suspend TPD benefits is denied and dismissed.
2. Claimant is permitted to audio record the IME by Dr. Arnold or other physician selected by respondents.
3. All matters not determined herein are reserved for future determination.

DATED: January 20, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
W.C. No. 4-739-094

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 January 7, 2008, in Denver, Colorado. The hearing was digitally recorded (reference: 1/7/09, Courtroom 3, beginning at 1:40 PM, and ending at 3:55 PM). Karla Loaiza served as the official Spanish/English interpreter.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Respondents' counsel, to be submitted electronically, giving Claimant's counsel 3 days after receipt thereof within which to file objections, electronically. The proposed decision was filed on January 14, 2009. Claimant filed objections thereto on January 20, 2009. Respondents replied to Claimant's objections on January 20, 2009. After a consideration of the proposal and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern; (1) whether the Claimant overcame the Division Independent Medical Examination (DIME) of James Lindberg, M.D., by clear and convincing evidence; (2) Whether Claimant proved, by a preponderance of the evidence, that his scheduled permanent disability rating should be converted to a whole person impairment rating (Claimant endorsed the issue of "permanent partial disability" (PPD) in his Application for Hearing, Respondents never agreed to a withdrawal of this issue at hearing, and Respondents argued this issue at hearing without objection by Claimant) ; (3) Whether Claimant proved entitlement to reasonably necessary post-maximum medical improvement (MMI) maintenance medical benefits; and, (4) Whether Claimant is entitled to additional bodily disfigurement benefits.

FINDINGS OF FACT

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

1. On September 18, 2007, the Claimant sustained a work-related right knee injury while working for the Employer. His right knee is the only body part that was injured as a result of that accident.

2. On February 1, 2008, David Orgel, M.D., the authorized treating physician (ATP) placed claimant at MMI, and assigned a 16% right lower extremity

(RLE) rating for Claimant's right knee injury (7% for loss of range of motion, 10% for meniscal repair surgery performed on November 1, 2007). On February 4, 2008, Dr. Orgel was of the opinion that Claimant's "residual symptoms are pre-existing and degenerative…."

3. On June 23, 2008, the Claimant underwent a DIME performed by Dr. Lindberg. Dr. Lindberg was of the opinion that Claimant reached MMI on February 1, 2008, and he assigned Claimant a 17% RLE rating for his right knee injury (7% for loss of range of motion, 10% for meniscal repair surgery performed on November 1, 2007). Dr. Lindberg did **not** indicate that anything other than his scheduled rating was appropriate for the Claimant.

4. On August 1, 2008, Pinnacol filed a Final Admission of Liability (FAL), admitting for a 17% scheduled RLE rating, disfigurement benefits in the amount of $200.00, and specified post-MMI medical benefits.

5. Claimant received no right knee treatment from February 4, 2008 through September 30, 2008. The only physician Claimant saw during that time period was Dr. Lindberg.

6. On October 1, 2008, Claimant saw Curtis Leonard, M.D., and reported that his knee pain had "been without change." Dr. Leonard was of the opinion that Claimant's work-related injury (*i.e*. "meniscus tear and temporary DJD aggravation") had been adequately treated, and that Claimant's ongoing symptoms were being caused by the progression of his pre-existing degenerative joint disease, and the ALJ so finds.

7. On November 4, 2008, Dr. Leonard recommended a cortisone injection, but clarified that Claimant had already "reached the point of maximum medical improvement" for his work-related injury.

8. In his Application for Hearing, dated August 29, 2008, Claimant designated the issue of PPD. Again, in his Case Information Sheet, dated December 31, 2008, Claimant designated the issue of PPD. Respondents argued the issue of conversion at hearing without objection by Claimant. Respondents never agreed to a withdrawal of the PPD issue nor did Claimant move to withdraw it as an issue. Claimant now objects to an order resolving the issue of conversion. Under the circumstances, this objection is wholly without merit.

9. On January 7, 2009, the parties attended a hearing before ALJ Felter. Claimant testified that the pain relief provided by the injection administered by Dr. Leonard was only temporary. At the conclusion of the hearing, Claimant demonstrated his antalgic gait to the ALJ. Claimant then left the hearing room to remove his knee brace in privacy. When Claimant returned to the hearing room, the ALJ observed that

Claimant's antalgic gait was less than before the disfigurement evaluation, and that Claimant had suffered post-surgical scars on his right knee.

10. Dr. Orgel testified (via telephone) that he still believes Claimant reached MMI for his work-related injury in February 2008. Dr. Orgel explained that Claimant's work-related injury has remained stable since he reached MMI, that Claimant's need for ongoing treatment is being caused by the progression of his non-occupational degenerative joint disease, and that the injection administered by Dr. Leonard was designed to reduce Claimant's knee pain rather than repair any structural problem. Dr. Orgel as Claimant's ATP, has the most familiarity with Claimant's case.

11. Claimant reached MMI for his work-related injury on February 1, 2008. There are no additional medical treatments that are reasonably likely to permanently improve the function of Claimant's body from his work-related injury.

12. The degree of Claimant's permanent disability is 17% RLE. The permanent impairment rating assigned by Dr. Lindberg accurately represents Claimant's work-related permanent disability and complies with the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 3rd. Ed., Rev.

13. Claimant's work-related permanent impairment does not affect the whole person. The site of his work-related permanent functional impairment is limited to his right knee.

14. Claimant has suffered disfigurement in the form of post-surgical scars and antalgic gait as a result of his work-related injury, which disfigurement is plainly visible to public view.

15. Claimant has failed to establish that it highly probable and free from serious and substantial doubt that Dr. Lindberg's DIME opinions concerning MMI and degree of permanent impairment are erroneous. Therefore, the Claimant has failed to overcome the DIME by clear and convincing evidence.

16. Claimant has failed to establish that it is more reasonably probable than not that the site of his functional impairment is beyond the RLE. Therefore, Claimant has failed to prove, by a preponderance of the evidence, that a whole person permanent medical impairment is warranted.

17. Respondents admitted for post-MMI medical maintenance benefits and attempted to limit these to what the ATP specifically indicated was needed. In his November 20, 2008, chart note, Dr. Orgel does **not** indicate whether the need for post-MMI medical care is attributable to Claimant's degenerative joint disease or the admitted injury, despite Claimant's objection to the contrary. In his testimony at the hearing, Dr. Orgel testified that Claimant's need for post-MMI medical treatment was caused by the natural progression of the degenerative joint disease. The ALJ finds that Dr. Orgel's later hearing testimony overrides and controls any previous expression to the contrary.

Consequently, post-MMI medical treatment after February 4, 2008, and before October 11, 2008, was causally related to the admitted, work-related temporary aggravation of Claimant's degenerative joint disease of the RLE.

18. Claimant suffered non-severe post-surgical scars and an antalgic gait, plainly visible to public view, as a result of his work-related injury,

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 ,as Claimant's ATP, has the most familiarity with Claimant's case. Also, Dr. Orgel's assessment of Claimant was consistent throughout and more thorough than the assessments of other physicians. Therefore, Dr. Orgel's opinions outweigh other medical opinions and are credible.

Overcoming the DIME and Maximum Medical improvement

b. An injured worker has reached MMI when his impairment is stable and no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. (2008). Claimant had the burden of overcoming the DIME physician's opinions by clear and convincing evidence. Section 8-42-107(2) (b) (III), C.R.S. (2008). A DIME physician's opinions have been overcome by clear and convincing evidence if it has been shown that it is highly probable those opinions are incorrect. *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411, 414 (Colo. App. 1995). Whether a DIME physician's opinion has been overcome is a question of fact for the ALJ. *Mag-*

netic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385, 387 (Colo. App. 2000). Here, Claimant failed to carry his burden, by clear and convincing evidence, of overcoming Dr. Lindberg's opinions regarding MMI and permanent impairment by clear and convincing evidence. The ALJ, therefore, concludes that the DIME physician's opinions regarding MMI and permanent impairment should stand.

Conversion

c.An injured worker is only entitled to a whole person permanent impairment rating if his injury is not enumerated on the schedule of disabilities codified in Section 842107(2), C.R.S. (2008). *See* Section 842107. The question of whether an injured worker's injury results in a scheduled impairment rating, or a whole person rating, depends on the site of his functional impairment. *See, e.g. Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996); *Walker v. Jim Fuoco Motor Co.,* 942 P.2d 1390 (Colo. App. 1997). Claimant had the burden to prove that his scheduled impairment rating should be converted into a whole person rating. *Vega v. Startek USA, Inc.,* W. C. No. 4-437-951 [Industrial Claim Appeals Office (ICAO)), Oct. 29, 2003]. Here, the Claimant failed to carry his burden that the site of his work-related functional impairment affects his whole person. If the Claimant's argument that conversion was not on the table at hearing is meritorious, then, as found, since PPD was on the table, Claimant would have waived any "conversion" issue. The ALJ, therefore, concludes that Claimant is not entitled to a whole person permanent impairment rating.

Post-MMI Medical Benefits

d. An injured worker is only entitled to post-MMI medical benefits if such treatment is reasonably necessary to relieve his work-related injury. *Grover v. Industrial Commission,* 759 P. 2d 705 (Colo. 1988). Even if an injured worker is awarded post-MMI medical benefits, however, employers are only liable for the medical treatment that is reasonably necessary to cure or relieve the effects of the work-related injury. *Id., see also* Section 8-42-101, C.R.S. (2008). As found, the Claimant established that his work-related injury may require post-MMI medical treatment. The ALJ, therefore, concludes that Claimant should receive reasonably necessary post-MMI medical maintenance benefits.

Disfigurement

e. Pursuant to Section 8-42-108(1), C.R.S. (2008), an ALJ may award an injured worker up to $4,000 in disfigurement benefits for injuries occurring after July 1, 2007. In cases of severe disfigurement, Section 8-42-108(2), permits an ALJ to award an injured worker up to $8,000 in disfigurement benefits. As found, Claimant suffered non-severe post-surgical scars and an antalgic gait, plainly visible to public view, as a result of his work-related injury, which entitles him to disfigurement benefits under Section 8-42-108(1). As further found, he did not establish that he suffered any severe disfigurement that would entitle him to benefits under Section 8-42-108(2). The ALJ concludes that Claimant should be entitled to $1,000.00 in bodily disfigurement benefits as

a result of his work-related injury. As found, Respondents have already admitted and paid $200.00 in bodily disfigurement benefits. Therefore, Claimant is only entitled to $800.00 in additional disfigurement benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant's claim for additional permanent partial disability benefits based on a whole person is hereby denied and dismissed. The Final Admission of Liability, dated August 1, 2008, is hereby approved, affirmed and adopted as a part of this decision with the exception of the provision therein limiting post-maximum medical improvement medical maintenance benefits.

B. Respondents shall pay the costs of post-maximum medical improvement medical maintenance benefits to the extent they are causally-related to the work injury herein and reasonably necessary to cure and relieve the effects thereof, in the judgment of the authorized treating physician, from February 4, 2008, the date of maximum medical improvement, through October 11, 2008, the date that post-maximum medical improvement medical care was **no longer** attributable to the admitted injury.

C. Respondents shall pay the Claimant $1,000 in bodily disfigurement benefits, with a credit of $200 to Respondents for disfigurement benefits previously paid. Net additional disfigurement benefits due and payable are $800.00

D. Respondents shall pay the Claimant statutory interest at the rate of eight percent per annum on additional disfigurement benefits due and not paid when due.

DATED this _____ day of January 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-691-499

ISSUES

The issues determined herein are average weekly wage and medical benefits after maximum medical improvement ("MMI").

FINDINGS OF FACT

1. In 2003, claimant began work as store manager for the employer. She was paid $577 per week. She also could earn quarterly bonuses if the store met all applicable criteria.

2. On July 12, 2004, claimant received a raise to $597 per week. On April 29, 2005, claimant received a raise to $615 per week.

3. On February 17, 2006, claimant received an additional $240 in pay. Although the wage records do not clearly identify this as a bonus, the trier-of-fact finds that the $240 is likely a quarterly bonus. The same pay record shows that claimant had earned $5,775 over the 9 weeks year-to-date. As of March 5, 2006, claimant was earning $641.67 per week. Claimant also continued to receive medical, dental, and vision insurance from the employer's group health insurance provider.

4. On March 5, 2006, claimant suffered an admitted industrial injury to her left shoulder.

5. On May 12, 2006, claimant received a raise to $635 per week, in addition to any bonuses.

6. Claimant underwent surgery on her left shoulder. She was off work from June 29 through September 17, 2006. The insurer paid claimant temporary total disability ("TTD") benefits at the rate of $427.78 per week based upon an admitted average weekly wage of $641.67. Claimant then returned to work with some temporary wage loss from September 18 through October 26, 2006.

7. On May 4, 2007, claimant received a raise to $655 per week, in addition to any bonuses.

8. Claimant worked for the employer through May 8, 2007. On May 9, 2007, she underwent a second surgery on her left shoulder. She never again returned to work for the employer.

9. On June 16, 2007, claimant received a bonus of $320. As of that date, she had earned $13,020 for the year-to-date. Claimant earned all of the money for her work January 1 through May 8, 2007.

10. As a result of the second surgery, claimant was off work from May 9, 2007 through January 8, 2008. The insurer again paid claimant TTD benefits at the rate of $427.78 per week based upon the admitted average weekly wage of $641.67.

11. On June 28, 2007, Dr. Caughfield, the primary authorized treating physician, recommended a trial of acupuncture to treat claimant's chronic pain condition.

12. On July 17, 2007, Nurse Wadsworth prepared notes indicating that acupuncture was not reasonably necessary because claimant needed to continue with her active exercises.

13. On July 19, 2007, Dr. Caughfield reexamined claimant and informed her that the acupuncture had been denied. Dr. Caughfield recommended continuing the exercises prescribed by Dr. Noonan as well as the prescription medications.

14. On August 20, 2007, Dr. Caughfield reexamined claimant and prescribed soft tissue release, trial of acupuncture, and anti-inflammatory medications.

15. The employer continued to provide health insurance to claimant through November 30, 2007. The employer then provided notice to claimant that she could elect COBRA coverage. Claimant's cost for the medical, dental, and vision insurance was $54.19 per week.

16. On December 5, 2007, Dr. Caughfield referred claimant for a functional capacity evaluation. On January 8, 2008, Dr. Caughfield determined that claimant was at MMI.

17. On February 5, 2008, Dr. Caughfield determined physical impairment for claimant and recommended post-MMI medical treatment with her prescription medications.

18. On April 15, 2008, Dr. Caughfield responded to inquiry from the adjuster and converted his rating to 18% of the upper extremity.

19. On April 23, 2008, the insurer filed a final admission of liability for scheduled permanent disability benefits of 18% of the arm. The FAL stated that MMI was on January 9, 2008. The FAL admitted liability for the TTD benefits for the previous two separate periods of time at the rate of $427.78 per week based upon an admitted average weekly wage of $641.67.

20. On August 27, 2008, Dr. Caughfield reexamined claimant and prescribed Nexium due to gastrointestinal upset from the amitriptyline. On September 30, 2008, Dr. Caughfield noted that the amitriptyline was returning claimant to her baseline condition. On October 28, 2008, Dr. Caughfield recommended that claimant continue her current medications.

21. In his November 11, 2008, deposition, Dr. Caughfield testified that he prescribed the acupuncture trial because it was within the medical treatment guidelines for myofascial pain. He thought it had a reasonable likelihood of benefiting claimant and improving her function. Dr. Caughfield acknowledged that acupuncture required preauthorization and he submitted the request. He understood that the insurer denied the acupuncture request, although the insurer never gave a reason for the denial. He dropped the acupuncture request and moved on to other treatments.

22. At the time of her temporary disability from June 29 through September 17, 2006, claimant's average weekly wage was correctly admitted as $641.67. Claimant's method of compensation included bonuses. Consequently, the average weekly wage is best calculated other than through the methods set forth in Section 8-42-102(2), C.R.S.

23. As of May 9, 2007, when claimant was again temporarily disabled, her average weekly wage was $679.62, based upon $655 per week in base salary and a bonus of $320 per 13-week quarter. The record evidence does not establish the exact period of time for which the bonus was paid; however, the bonus was paid for a 13-week quarter. The weekly equivalent of the bonus was $24.62.

24. Effective December 1, 2007, claimant's average weekly wage also included $54.19 for health insurance benefits no longer provided by the employer. Effective that date, claimant's average weekly wage was $733.81.

25. The insurer failed to make a timely written denial with an explanation of the medical reason for denying the request for prior authorization of the acupuncture trial.

26. The preponderance of the evidence demonstrates that the recommended trial of acupuncture is reasonably necessary to cure or relieve the effects of claimant's admitted work injury. The testimony of Dr. Caughfield is credible and persuasive.

CONCLUSIONS OF LAW

1. Section 8-42-102(2), C.R.S., sets forth certain methods of calculating the average weekly wage. Section 8-42-102(3), C.R.S., permits the ALJ discretion in the method of calculating the average weekly wage if the nature of the employment or the fact that the injured employee has not worked a sufficient length of time, has been ill or self-employed, or for any other reason, the specific methods do not fairly compute the average weekly wage. As found, claimant's average weekly wage is best calculated other than through the methods set forth in Section 8-42-102(2), C.R.S. At the time of her temporary disability from June 29 through September 17, 2006, claimant's average weekly wage was correctly admitted as $641.67. As of May 9, 2007, when claimant was again temporarily disabled, her average weekly wage was $679.62, based upon $655 per week in base salary and a bonus of $320 per 13-week quarter. The discretionary calculation of the average weekly wage may include increases in the wages after the admitted injury and before the subsequent onset of a period of disability. *Avalanche Industries, Inc. v. Clark,* No. 07SC255 (Colo. Sup. Ct., January 20, 2009); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993); *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo.App. 2001).

2. Effective December 1, 2007, claimant's average weekly wage also included $54.19 for health insurance benefits no longer provided by the employer. Effective that date, claimant's average weekly wage was $733.81. *Industrial Claim Appeals Office v. Ray*, 145 P.3d 661 (Colo. 2006).

3. Claimant seeks authorization of the acupuncture trial. Respondents argue that the treatment is subject to the requirement for prior authorization. As found, Dr. Caughfield agreed that the treatment required prior authorization. Respondents argue that the application for hearing on the medical benefit is premature because neither Dr. Caughfield nor claimant complied with WCRP 16-10(C)(3). WCRP 16-10(C) provides:

> (1) The requesting party or provider shall have seven (7) business days from the date of the certificate of mailing on the written contest to provide a written response to the payer, including a certificate of mailing. The response is not considered a "special report" when prepared by the provider of the requested service.
> (2) The payer shall have seven (7) business days from the date of the certificate of mailing of the response to issue a final decision, including a certificate of mailing to the provider and parties.
> (3) In the event of continued disagreement, the parties should follow dispute resolution and adjudication procedures available through the Division or Office of Administrative Courts.

The record evidence, however, fails to show that the insurer provided a written denial to the provider within 7 business days as required by WCRP 16-10(B), which provides:

> If the payer is contesting a request for prior authorization for medical reasons, the payer shall, within seven (7) business days of the completed request:
>
> > (1) Have all the submitted documentation under Rule 16-9(E) reviewed by a physician or other health care professional, as defined in Rule 16-5(A)(1)(a), who holds a license and is in the same or similar specialty as would typically manage the medical condition, procedures, or treatment under review; and
> > (2) After reviewing all the submitted documentation, the reviewing provider may call the requesting provider to expedite communication and processing of prior authorization requests. However, the written contest or approval still needs to be completed within the specified seven (7) days under Rule 16-10(B).
> > (3) Furnish the provider and the parties with either a verbal or written approval, or a written contest that sets forth the following information:
> >
> > > (a) An explanation of the specific medical reasons for the contest, including the name and professional credentials of the person performing the medical review and a copy of the medical reviewer's opinion;
> > > (b) The specific cite from the Division's Medical Treatment Guidelines exhibits to Rule 17, when applicable;

(c) Identification of the information deemed most likely to influence the reconsideration of the contest when applicable; and
(d) A certificate of mailing to the provider and parties.

WCRP 16-10(E) deems the acupuncture treatment authorized because of the insurer's failure to comply fully with the requirements for handling the request for preauthorization:

> Failure of the payer to timely comply in full with the requirements of Rule 16-10(A) or (B), shall be deemed authorization for payment of the requested treatment unless:
> (1) a hearing is requested within the time prescribed for responding as set forth in Rule 16-10(A) or (B), and
> (2) the requesting provider is notified that the request is being contested and the matter is going to hearing.

4. Alternatively, even if the acupuncture is not deemed authorized by WCRP 16-10(E), claimant is not barred from applying for hearing on the requested medical benefit. Nothing in WCRP 16-10(C) prohibits the application for hearing. Indeed, WCRP 16-10(E) contemplates an application for hearing in lieu of the responding actions required by WCRP 16-10(A) or (B). Neither party is required to exhaust all of the communications provided by the rule if that party applies for hearing. Claimant's application for hearing on the medical benefit issue placed the insurer on inquiry notice that the acupuncture was being considered at the hearing. The preponderance of the record evidence demonstrates that the treatment is reasonably necessary to cure or relieve the effects of claimant's admitted work injury. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury, including treatment by authorized providers after MMI. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

ORDER

It is therefore ordered that:

1. The insurer shall pay TTD benefits to claimant at the rate of $453.08 per week for the period May 9 through November 30, 2007. The insurer is entitled to credit for all previous payments of benefits to claimant for this period.

2. The insurer shall pay TTD benefits to claimant at the rate of $489.21 per week for the period December 1, 2007, through January 8, 2008. The insurer is entitled to credit for all previous payments of benefits to claimant for this period.

3. The insurer shall pay for the acupuncture trial prescribed by Dr. Caughfield, according to the Colorado fee schedule.

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

DATED: January 21, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-734-859

ISSUES

The issues for determination are compensability, medical benefits, temporary disability benefits, penalty for Claimant's late reporting, and offsets.

FINDINGS OF FACT

1. Claimant served in the United States Army for over twenty-five years, retiring as a Master Sergeant. He initially served as a medic. He spent the last ten years in service as an operations medical liaison, a sedentary job that did not require overhead activities or exertion with his upper extremities. During his service in the military Claimant had six back surgeries, two left shoulder surgeries, and a right carpal tunnel release. He continues to experience chronic back pain. Claimant also suffers from post-traumatic stress disorder resulting from his service in the United States Army, as well as migraine headaches. He has previously experienced cramping and spasm in his left hand.

2. Claimant was assigned by the Veterans Administration an 80 percent permanent disability rating, of which 20 percent was assigned to the left shoulder. He had physical limitations of lifting or carrying no greater than twenty pounds prior to commencing his employment with Employer.

3. Claimant commenced working for Employer on June 19, 2007, as a stocker. Employer was aware of Claimant's lifting and carrying restriction and his job as a stocker was within these limitations. He worked from 11:00 p.m. to 7:00 a.m., five days a week, as a night stocker. This job involved a number of activities, including unloading trucks, stocking product, distributing product into zones, and maneuvering product so that it would face customers. Claimant's employment with Employer as a night stocker involved reaching overhead approximately ten percent of the time.

4. At the time Claimant worked at Employer, he was also employed part-time as a Marshall at a golf course. Claimant played golf several times a week.

5. The parties have stipulated to an average weekly wage, from the combined employment, in the amount of $565.00.

6. On July 28, 2007, Claimant had worked less than fourteen days as a night stocker for Employer. He had not engaged in the type of repetitive work required of this

job prior to commencing his employment with Employer. Claimant does not have a history of any similar symptoms to those he developed while working for Employer.

7. On July 28, 2007, Claimant developed loss of feeling and tingling in his left arm. He shook the arm to regain feeling and kept on working. Claimant did not report a work injury. Claimant could still do the work and did not know the problems were related to his job duties. Claimant continued working at Employer performing the job of a stocker. When he developed the loss of feeling and tingling in the left arm, he would shake it and continue with his job. He continued to feel that the problems would resolve and were not related to his employment. He did not file a report of injury.

8. On August 21, 2007, after having been off work for two days, Claimant woke up with a throbbing pain and loss of feeling in his left arm. Claimant sought medical treatment at the emergency room of the Air Force Academy Hospital. Claimant received medical treatment at the Air Force Academy prior to his employment with Employer. His primary treating physician was Dr. Whitmarsh. He was also treated by Dr. O'Brien for chronic back pain.

9. Claimant was examined on August 22, 2007, by Dr. O'Brien and Dr. Whitmarsh. The initial diagnosis was cervical radiculopathy. Dr. Whitmarsh prepared an off-work slip effective August 21, 2007, that Claimant presented to Employer. He did not report a work injury as he felt his problems were not related to his job.

10. On September 5, 2007, an arterial study of the upper extremities was performed at the Air Force Academy Hospital. Upon reviewing the test results, Dr. O'Brien diagnosed thoracic outlet syndrome. Dr. O'Brien's notes reflect that Claimant's employment at Employer could have been a significant factor in the onset of the left arm pain. He prepared an off-work slip dated September 6, 2007, providing a diagnosis of thoracic outlet syndrome.

11. Claimant filed an injury report with Employer on September 6, 2007. He was referred by Employer to Concentra for medical treatment. Claimant was examined by Dr. Malis on September 6, 2007. Dr. Malis noted an injury date of July 28, 2007, while Claimant was lifting cases of food for Employer. After performing a physical examination, Dr. Malis detected a positive thoracic outlet maneuver on the left side and suspected thoracic outlet syndrome. It is the opinion of Dr. Malis that the objective findings are consistent with a work injury. Dr. Malis imposed limitations, effective September 6, 2007, restricting Claimant to five pounds repetitive lifting, ten pounds pushing and pulling, and no reaching above shoulder level.

12. Claimant was off work from September 6 through September 9, 2007. On September 10, 2007, he resumed his employment as a Greeter. This position was within the limitations imposed by Dr. Malis.

13. Claimant was referred to Dr. Baer by Dr. Malis. In his report dated September 20, 2007, Dr. Baer stated that Claimant's symptoms are not related to his employment for Employer. Dr. Baer had an incorrect history, not consistent with the evidence and medical record in this claim. Dr. Baer based his opinion on the belief that Claimant did not experience the symptoms in his left arm while at work. Rather, on July 28, 2007, after Claimant had not worked for two days, he woke up with a burning sensation in his left arm. Based on the report of Dr. Baer, Dr. Malis changed her opinion concerning causation, indicating that Claimant's injury was not work-related.

14. Claimant was referred to Dr. Quick. In his report dated October 19, 2007, Dr. Quick diagnosed a moderate to severe thoracic outlet syndrome that was probably a pre-existing disorder. These symptoms became mildly manifested during Claimant's employment with Employer, resolved and then became spontaneously worse. Dr. Quick did not feel Claimant's injury was work-related. He referred Claimant on October 19, 2007, to his primary care physician for further treatment.

15. Claimant's primary care physicians for the thoracic outlet syndrome at the Air Force Academy, pursuant to referral by Dr. Quick, are Dr. Whitmarsh and Dr. O'Brien. Claimant continued treatment with these physicians.

16. Claimant was subsequently diagnosed with left carpal tunnel and left cubital tunnel syndrome. Dr. Hart performed a left carpal tunnel and left cubital tunnel release on December 4, 2007. Claimant was off work from December 5, 2007, through February 4, 2008. The left carpal tunnel and left cubital tunnel are not related to his employment and are not a compensable injury.

17. After being released by Dr. Hart, Claimant returned to Employer and was placed in the hardware and automotive department. This work required overhead activities with the upper extremities. Claimant again experienced pain and loss of feeling.

18. Claimant was examined by Dr. Higginbotham on March 14, 2008. Dr. Higginbotham provided a diagnosis of thoracic outlet syndrome, noting that Claimant had no pre-existing problems with numbness or tingling prior to commencing his work for Employer. Dr. Higginbotham provided an opinion that the thoracic outlet syndrome is related to Claimant's employment with Employer as a stocker. He recommended physical restrictions of no repetitive upper extremity activity, no more than a twenty pound bilateral lift and carry, and no lifting greater than ten pounds with the left arm.

19. Claimant presented the restrictions from Dr. Higginbotham to his supervisor and requested a return to work as a Greeter. Employer could not accommodate his physical restrictions. Claimant took a leave of absence from Employer on April 1, 2008.

20. Dr. Whitmarsh referred the Claimant to Dr. Misare, a vascular surgeon. A peripheral arterial study was performed on April 17, 2008. In a report dated April 29, 2008, Dr. Misare stated that the peripheral artery study revealed a significant decrease in blood flow to the fingers in both arms when elevated. He provided a diagnosis of bilateral vasculargenic thoracic outlet syndrome with a possible component of neurogenic thoracic outlet syndrome. He referred Claimant to Dr. Brantigan for possible surgical intervention. Dr. Brantigan initially examined the Claimant on June 16, 2008, and noted a drop in blood pressure with the arm elevated. He continued examining Claimant on a regular basis. In his medical note dated August 25, 2008, Dr. Brantigan stated that Claimant's physical findings and the thoracic outlet syndromes, from a temporal standpoint, are related to his employment at Employer.

21. Claimant was examined by Dr. Pitzer who prepared a report dated October 13, 2008. Dr. Pitzer provided a diagnosis of vascular thoracic outlet syndrome. Claimant had a predisposition to thoracic outlet syndrome, but his employment at Employer did not cause this to be symptomatic. Dr. Pitzer testified at hearing that thoracic outlet syndrome was a controversial diagnosis and there is a higher incident of surgical intervention to resolve these symptoms in Denver than other medical communities. Dr. Pitzer did not feel Claimant's history of golf playing was a significant factor in the causation of Claimant's symptoms.

22. In a report dated October 28, 2008, Dr. Brantigan reviewed the report of Dr. Pitzer. He reiterated his opinion that the onset of thoracic outlet syndrome was due to Claimant's employment for Employer. There was sufficient time during this employment, given the anatomic predisposition, to develop the thoracic outlet syndrome symptoms.
23. The medical opinions of Dr. Brantigan and Dr. Higginbotham are credible and more persuasive than the opinions of Dr. Pitzer, Dr. Baer and Dr. Quick.
24. Claimant's employment with Employer aggravated a predisposition to thoracic outlet syndrome and resulted in the symptoms and pain detailed by Claimant and supported by the medical record. Claimant required medical treatment for the thoracic outlet syndrome that resulted from his employment at Employer.
25. Claimant's golfing did not contribute to his injury.

CONCLUSIONS OF LAW

1. Claimant's thoracic outlet syndrome is directly related to Claimant's employment with Employer. The testimony of Claimant is credible. The medical opinions of Dr. Brantigan and Dr. Higginbotham are credible and persuasive. The left carpal tunnel and left cubital tunnel are not compensable.

2. Claimant became aware that the thoracic outlet syndrome was related to his employment on September 5, 2007, after an arterial study of the upper extremities was performed and after consultation with Dr. O'Brien. The injury was reported by Claimant to Employer on September 6, 2007. The injury was timely reported pursuant to Section 8-43-102(1)(a). C.R.S

3. Claimant is entitled to temporary disability benefits resulting from his work injury. Pursuant to restrictions imposed by Dr. Malis, Claimant was off work from September 6 through September 9, 2007. Respondents are responsible for temporary total disability benefits for one day, September 9, 2007, based on an average weekly wage of $565.00. Additional periods of temporary disability benefits not determined by this Order are reserved for future consideration.

4. On October 19, 2007, Dr. Quick referred Claimant to his primary care physician. This referral was made in the course of medical treatment at Concentra and is therefore authorized. *Cabello v. ICAO, 2008-CO-1114.0607 C.A. 2528 (Colo.App. November 13, 2008)*. Claimant's primary care treating physicians at the Air Force Academy are Dr. Whitmarsh and Dr. O'Brien. These primary care physicians are therefore authorized for continued treatment of Claimant's thoracic outlet syndrome. Dr. Whitmarsh subsequently referred Claimant to Dr. Misare who diagnosed thoracic outlet syndrome and recommended surgery. Dr. Misare referred Claimant to Dr. Brantigan. Dr. Misare and Dr. Brantigan are authorized treating physicians.

5. Respondents are liable for the cost of the medical care Claimant received from his authorized treating physicians reasonably needed to cure and relieve the effects of the thoracic outlet syndrome, Section 8-42-101(1). C.R.S. Medical liability is lim-

ited to the amounts established by the Division of Workers' Compensation Fee Schedule. Section 8-42-101(3), C.R.S.

6. Respondents are liable for interest at the rate of eight percent per annum on all amounts due and not paid when due. Section 8-43-410, C.R.S.
7. Claimant timely reported his injury to his Employer. Insurer is not entitled to a penalty for late reporting.
8. Respondents have not shown that any offsets apply. Respondents' request for an offset is denied.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant temporary total disability benefits for September 9, 2007, based on an average weekly wage of $565.00. The insurer shall pay interest to Claimant at the rate of eight percent per annum on all amounts of compensation not paid when due.
2. Insurer is liable for the cost of the medical care Claimant received from his authorized treating physicians reasonably needed to cure and relieve Claimant from the effects of the thoracic outlet syndrome. Medical liability is limited to the amounts established by the Division of Workers' Compensation Fee Schedule. Dr. Quick is an authorized treating physician. After October 19, 2007, Dr. Whitmarsh, Dr. O'Brien, Dr. Misare and Dr. Brantigan are authorized treating physicians.
3. Insurer's request for a penalty against Claimant for late reporting is denied.
4. Respondents' request for an offset is denied.
5. All matters not determined herein are reserved for future determination.

DATED: *January 20, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-758-486

ISSUES

The issues endorsed on the Application for Hearing were medical benefits, maximum medical improvement, permanent partial disability benefits, and disfigurement. No Division independent medical examination was held. Therefore, the issues of maximum medical improvement and permanent partial disability benefits were stricken. Section 8-42-107(8), C.R.S. The matter proceeded to hearing on the issues of medical benefits and disfigurement.

FINDINGS OF FACT

1. Claimant injured her right great toe in a compensable accident on April 23, 2008. Claimant was initially treated at Littleton Hospital. Claimant has received treatment from Dr. Gerber and Dr. Scott.
2. Dr. Gerber, an authorized treating physician, placed Claimant at maximum medical improvement on July 25, 2008. Insurer filed a Final Admission of Liability on July 31, 2008. Claimant objected to the Final Admission, but did not request a Division independent medical examination.
3. Claimant continued to experience pain in her foot after she was placed at maximum medical improvement. Claimant sought care from James Pettet, D.P.M. Claimant was not referred to Dr. Pettet by an authorized physician or by Respondents.
4. Dr. Pettet examined Claimant on November 13, 2008. Dr. Pettet taped Claimant's foot for three or four days. Claimant's condition improved. On November 20, 2008, Dr. Pettet scanned Claimant's foot for orthotics. Claimant used the orthotics. She noted a further improvement in her condition.
5. The treatment Claimant received from Dr. Pettet was reasonably needed to relieve Claimant from the effects of the compensable injury.
6. The nail on Claimant's right great toe is irregular across the end and is rough. Claimant has sustained a serious permanent disfigurement to an area of her body normally exposed to public view.

CONCLUSIONS OF LAW

1. An ALJ may order payment of medical expenses reasonably necessary to relieve the claimant from the effects of the industrial injury even though the treatment is rendered subsequent to maximum medical improvement. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). In order to support an award of medical benefits following maximum medical improvement, there must be substantial evidence that the medical treatment is reasonably necessary to relieve the effects of the industrial injury or prevent future deterioration of the claimant's work-related condition. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo.App. 1995).
2. Claimant has established by a preponderance of the evidence that medical treatment after maximum medical improvement is reasonably necessary to relieve her from the effects of her compensable jury. Insurer remains liable after maximum medical improvement for medical treatment from authorized providers. Section 8-42-101(1), C.R.S.
3. Insurer is liable for all authorized and emergency treatment reasonably necessary to cure or relieve the effects of the industrial injury. *Sims v. Industrial Claim,* 797 P.2d 777 (Colo.App. 1990). "Authorization" refers to the physician's legal status to treat the injury at the insurer's expense. *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo.App. 1997). Under Section 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, a claimant may not change physicians without permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office,* 931 P.2d 570 (Colo.App. 1996); *Sims v. Industrial Claim Appeals Office, supra.* However, treatment that is rendered as a result of a referral in the "normal progression of authorized treatment" is compensable. *Greager v. Industrial Commission,* 701 P.2d 168 (Colo.App.1985).

4. Claimant has failed to establish that Dr. Pettet was the original authorized physician, or that an authorized physician referred Claimant to Dr. Pettet for treatment. Insurer is not liable for the costs of the care Claimant received from Dr. Pettet.
5. Claimant has sustained a serious permanent disfigurement to an area of her body normally exposed to public view. Insurer is liable for additional compensation for that disfigurement. Section 8-42-108, C.R.S. Based on a look of her great toe, it is determined that the additional compensation should be in the amount of $500.00.

ORDER

It is therefore ordered that:

1. Insurer is liable for medical treatment after maximum medical improvement from authorized providers that is reasonably necessary to cure or relieve Claimant from the effects of the compensable injury.
2. Insurer is not liable for the costs of the treatment Claimant has received from Dr. Pettet.
3. Insurer shall pay Claimant additional compensation for disfigurement in the amount of $500.00.

All matters not determined herein are reserved for future determination.

This decision of the ALJ is final, unless a Petition to Review this decision is filed within

DATED: *January 20, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-740-802

ISSUES

- Temporary total disability (TTD);
- Average weekly wage (AWW); and
- Whether Claimant was responsible for termination of his employment.

STIPULATIONS

The parties stipulated to the following:

- Claimant's average weekly wage is $1,236.40 thereby entitling him to the maximum TTD rate of $753.41.
- Claimant's last day of employment was February 13, 2008, he had work restrictions as of that date and was working in a modified duty position.

- As of October 27, 2008, Claimant had not reached maximum medical improvement.

FINDINGS OF FACT

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

1. Claimant was employed by Employer from May 10, 2004 to February 13, 2008 as a biomedical technician. Claimant's primary job functions consisted of maintaining and repairing laboratory equipment throughout Employer's 25 laboratories and to ensure that the equipment was properly certified. Claimant's work hours were from 9:00 a.m. to 5:45 p.m.

2. On October 11, 2007, Claimant sustained an admitted work related injury to his left bicep tendon while moving laboratory equipment. As a result of this injury, Claimant had surgery on November 2, 2007, and was off work completely until the beginning of December 2007 when he returned with restrictions of lifting of no more than 2 pounds and limited use of his left arm. Claimant's restrictions changed and as of January 29, 2008, his lifting limit was increased to five pounds.

3. Upon returning to work in December 2007, Claimant was placed in a modified duty position. Rather than performing his usual duties as a biomedical technician, Claimant was required to oversee the outsourcing of equipment maintenance and certification through third party vendors. In addition, Claimant would still deliver parts and meet with individuals in labs to trouble shoot and coordinate maintenance on occasion. The primary third-party vendor was located in Fort Collins, Colorado.

4. Prior to being injured, Claimant was subjected to corrective action. On February 13, 2006, Claimant's supervisor, Brian Moore placed Claimant on an Action Plan. The Action Plan generally dealt with Claimant not completing tasks in a timely manner.

5. On June 12, 2007, Mr. Moore again placed Claimant on an Action Plan due to Claimant's work performance.

6. The corrective action associated with Claimant's past job performance dealt with the following issues:

a. The need to send Customer Service Reports to the manager in a timely fashion;
b. P-Card statements needed to be completed in a timely manner;
c. Expense reports needed to be complete within 2 months;
d. Numerous requests need to be completed within an acceptable time frame.

7. Mr. Moore placed Claimant on decision-making leave on August 16, 2007. Claimant was to decide whether he wanted to continue employment with Employer and adhere to the Action Plan dated June 12, 2007. Claimant returned to work on August

17, 2007, and agreed to continue working for Employer. As such, the June 12, 2007, Action Plan was converted into a "Performance Agreement" wherein Claimant and Mr. Moore agreed to certain corrective action to deal with Claimant's job performance as a biomedical technician.

8. The Performance Agreement dated August 17, 2007, required the following:

Actions to Correct	Date of Completion
Submission of Service Report	Within 1 week of service
Submission of P-card Statement	By 24th of each month
Submission of Expense Reports	Within 2 months of expense
Non-critical service request initial service/ maintenance performed.	Within 2 weeks of request
Critical Service requests initial service/ Maintenance performed.	Within 4 hours of request
All other requests	Within 2 weeks of request or as specified by requestor
Respond to Requestors in writing, giving Date and approximate time when service/ maintenance will occur (must copy his manager)	Within 24 hours of request
If [Claimant] cannot meet requestor's timeline Or standard timeline he will contact his Manager to request extension	Within 24 hours of request
2007 CAP Safety Inspection & Paperwork (written status reports at bimonthly meetings)	12/31/07
Attend one on one meeting with manager	2 times per month

All of the above actions to correct are an ongoing expectation.

9. At all times prior to February 1, 2008, Mr. Moore supervised Claimant. Effective February 1, 2008, Lynette Hampton became Claimant's direct supervisor. Ms. Hampton began transitioning into the supervisor for the Biomed Department in mid-January 2008.

10. Between August 17, 2007, and January 18, 2008, there are no documented performance problems and no performance issues were brought to Claimant's attention.

11. On January 18, 2008, Claimant, Mr. Moore, and Ms. Hampton met to discuss the management transition process. At this meeting, Ms. Hampton set forth her expectations of Claimant as his new manager. According to her memorandum to Kent Enwright, she discussed Claimant's work hours and coming back to work after appointments. She discussed professionalism and provided examples of recent work she felt was unacceptable. The specific examples were not developed by the record.

12. Also on January 18, 2008, Ms. Hampton asked Claimant to send her a list of his scheduled medical appointments. Claimant responded by e-mail on January 21, 2008, at 2:00 p.m., stating that he had an appointment that day at 2:30 p.m., January 25 at 2:30, January 28 at 3:00, January 29 all day, and January 30 at 3:00. Ms. Hampton responded to Claimant by e-mail and stated that she expected Claimant to return to work after his appointments with the exception of January 29 because he was undergoing surgery on that day. Claimant responded that he would return to work if "time or pain permits" and that he did not expect that he would be out more than a day or two for the surgery on January 29.

13. On January 21, 2008, a Microbiology Manager sent an e-mail message to Claimant asking him to dispose of a water bath. Claimant responded on January 25, 2008. According to Ms. Hampton, this response was late and in violation of the Performance Agreement.

14. On January 28, 2008, Claimant, Mr. Moore and Ms. Hampton met for the final time before the official management transition. According to Ms. Hampton's handwritten notes, she advised Claimant that the Performance Agreement was still in place. Claimant did not recall the content of this meeting. Mr. Moore had previously told Claimant that the Performance Agreement would not apply while Claimant was injured and working in a modified duty job.

15. On January 29, 2008, Claimant underwent another injury-related surgery. He had previously advised Ms. Hampton that he did not expect to be out for more than a day or two. On January 30, 2008, Ms. Hampton sent an e-mail message to Claimant at 9:43 a.m. asking where he was and directing him to account for his whereabouts. She further directed him to send her a daily e-mail about trips to other laboratories and the purpose for the trip.

16. On January 30, 2008, Ms. Hampton sent another email to Claimant that imposed a deadline of February 1 for completion of the hood certification paperwork. Claimant responded the next day. The evidence did not specifically reveal whether Claimant worked on January 30 or whether he had missed work due to the surgery the previous day. Based on the e-mail exchanges, the ALJ infers that Claimant did not work on January 30.

17. On February 1, 2008, Ms. Hampton sent an e-mail to all of the lab managers advising them that Claimant's deadline to complete the hood certifications was 5 p.m. on

that day and that the managers should let her know if they do not receive the paperwork or if it is insufficient.

18. After e-mail exchanges with some of the managers regarding discrepancies in the paperwork, the hood certifications were timely completed. During the hearing, Ms. Hampton agreed that Claimant completed the hood certifications.

19. On February 4, 2008, Claimant sent another e-mail message to Ms. Hampton updating his medical appointment schedule. Claimant noted that he had appointments on February 6, 2008, at 3:30, on February 7, 2008, at 11:00, on February 8, 2008, at 4:00, on February 12, 2008, at 4:00, and on February 15, 2008, at 3:00.

20. On February 5, 2008, Ms. Hampton sent an e-mail message to Kent Enwright stating that she had created a timeline of the issues with Claimant. She further stated that she was continuing to gather more data that shows extremely poor quality in his management of the third party vendor. Ms. Hampton stated that she and Mr. Moore would like to start the termination process.

21. On February 7, 2008, Claimant did not come to work before his 11:00 a.m. medical appointment. According to Ms. Hampton's notes, Claimant did not arrive at work until 3:20 p.m. on February 6, 2008, following the 11 a.m. appointment. Based on Claimant's testimony and his February 4, 2008, e-mail message, it was February 7, 2008, when Claimant arrived at 3:20 p.m. Claimant explained that he and his daughter had dentist appointments on February 7, 2008, so he had to drop his daughter back at home following the appointment before he arrived at work. Claimant took paid time off for this appointment.

22. On February 8, 2008, Ms. Hampton prepared an updated memorandum containing examples of Claimant's failure to comply with the Performance Contract. The memorandum states that Claimant did not respond to non-critical service requests timely, did not return from medical appointments as required, did not provide access to his calendar as requested, failed to meet other deadlines, and overall poor work quality. Ms. Hampton felt that the examples she cited violated the Performance Agreement. The evidence, however, is less than persuasive that the examples constituted a violation of the Performance Agreement.

23. Ms. Hampton had sent an e-mail message to Vicky Pryor on February 11, 2008, stating that it was not clear to her that Claimant's accommodations included working part time and that she felt Claimant's time away from work was excessive. Ms. Hampton stated that Claimant routinely leaves for 2:00 p.m. appointments and never returns. Claimant's e-mails to Ms. Hampton do not reflect that Claimant had any appointments at 2:00 p.m.

24. In Ms. Pryor's response to Ms. Hampton, she offered to place Claimant in an Integrated Disability Management program or find Claimant work in another department.

Ms. Pryor further advised Ms. Hampton that Claimant's pay would still come from Ms. Hampton's department. Ms. Hampton declined the offer.

25. According to Ms. Hampton and Mr. Moore, Claimant was terminated for poor work performance, which included the amount of time he spent at his workers' compensation medical appointments. Ms. Hampton felt that Claimant's medical appointments should not have been a problem had he made up the missed time by either coming to work early or staying late. On the days Claimant had medical appointments, he did not take lunch or breaks. Ms. Hampton testified that Claimant was not required to make up time lost due to attendance at injury-related medical appointments. As Claimant's supervisor, Mr. Moore had never taken issue with Claimant's time away from work for injury-related medical appointments. Claimant was not accustomed to the new and more strict reporting requirements imposed by Ms. Hampton.

26. At the time Claimant was terminated, he was not performing his normal job duties as a biomedical technician. Rather, he was outsourcing the work to third-party vendors. The main vendor is located in Fort Collins, Colorado. Claimant experienced difficulties using the vendor. Because the vendor charged Employer for travel and time, it was not cost effective to request the vendor to travel to the Denver area to perform minor maintenance. Claimant would wait to contact the vendor until he received many requests for minor maintenance or a request for critical maintenance. Claimant also testified that the vendor did not always promptly respond to repair requests and that he experienced delays in getting equipment to the vendor.

27. On June 11, 2008, Claimant underwent an evaluation for work hardening/work conditioning with Vickie Mallon, CTR. According to Ms. Mallon's report, Claimant's abilities did not meet his job requirements.

28. Based on the foregoing, Respondents have not established by a preponderance of the evidence that Claimant was responsible for his termination from employment within the meaning of the termination statutes in the Workers' Compensation Act. While it is true that Claimant had some work performance issues largely dealing with timeliness, it was due, in part, to his work-related injury. Claimant had multiple medical appointments each week resulting in frequent absences from work. In addition, he was required to manage work performed by a third-party, over which he exercised no control. Finally, Ms. Hampton admitted that the length of Claimant's appointments and his time away from work spent at medical appointments factored in her decision to terminate Claimant's employment. It is apparent from the evidence and Ms. Hampton admitted that she was "gathering more data" to support a termination. Ms. Hampton began the termination process within five days of becoming Claimant's supervisor. Based upon the totality of the circumstances, Claimant did not commit a volitional act that led to the termination and did not exercise a sufficient degree of control over the circumstances of his termination. Claimant is not barred from receiving TTD.

29. Claimant was terminated from his employment due, in part, to his work-related injury. In addition, Claimant's work-related injury to his biceps tendon has prevented

Claimant from physically performing the normal duties of a biomedical technician. Accordingly, Claimant's wage loss is a result of his work-related injury thereby entitling Claimant to TTD benefits.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, 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). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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).

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).

Responsibility For Termination/ Entitlement to TTD

Sections 8-42-103(1)(g) and 8-42-105(4), *supra*, (termination statutes) provide that, where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury. Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for her termination. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 20 P.3d 1209 (Colo. App. 2000). Once termination for fault is established, the Claimant bears the burden of proving, by a preponderance of the evidence, that the work-related injury contributed in some way to the termination in order to remain eligible for temporary total disability benefits. *Black Roofing, Inc., v. West,* 967 P.2d 195 (Colo. App. 1998).

By enacting the termination statutes, the General Assembly sought to preclude an injured worker from recovering temporary disability benefits where the worker is at

fault for the loss of regular or modified employment, irrespective whether the industrial injury remains the proximate cause of the subsequent wage loss. *Colorado Springs Disposal v. Martinez*, 58 P.3d 1061 (Colo. App. 2002) (court held termination statutes inapplicable where employer terminates an employee because of employee's injury or injury-producing conduct). An employee is "responsible" if the employee precipitated the employment termination by a volitional act which an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). Thus, the fault determination depends upon whether claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). That determination must be based upon an examination of the totality of the circumstances. *Id.*

However, if a claimant is terminated for fault, and a work related injury contributes in some degree to the subsequent wage loss, the claimant remains eligible for TTD benefits. *Bestway Concrete v. Industrial Claim Appeals Office,* 984 P.2d 680 (Colo. App. 1999). However, a claimant does not act "volitionally," or exercise control over the circumstances leading to the termination if the effects of the injury preclude performance of her assigned duties and cause or contribute to the termination. *Eskridge v. Alterra Clarebridge Cottage, W.C. No. 4-651-260 (April 21, 2006).* The question as to whether a claimant acted volitionally is one of fact and is upheld if supported by substantial evidence. *Id.*

Based on the foregoing, Respondents have not established by a preponderance of the evidence that Claimant was responsible for his termination from employment within the meaning of the termination statutes in the Workers' Compensation Act. While it is true that Claimant had some work performance issues largely dealing with timeliness, it was due, in part, to his work-related injury. Claimant had multiple medical appointments each week resulting in frequent absences from work. In addition, he was required to manage work performed by a third-party, over which he exercised no control. Finally, Ms. Hampton admitted that the length of Claimant's appointments and his time away from work spent at medical appointments factored in her decision to terminate Claimant's employment. It is apparent from the evidence and Ms. Hampton admitted that she was "gathering more data" to support a termination. Ms. Hampton began the termination process within five days of becoming Claimant's supervisor. Based upon the totality of the circumstances, Claimant did not commit a volitional act that led to his termination and did not exercise a sufficient degree of control over the circumstances of his termination. Claimant is not responsible for the termination of his employment. Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S., do not bar Claimant from receiving temporary disability benefits.

Temporary Total Disability

Section 8-42-103(1)(a), C.R.S., requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD

benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her 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 her regular employment. *Ortiz, supra.*

While a workers' compensation claimant must establish a causal connection between the work-related injury and subsequent wage loss in order to obtain temporary total disability benefits, claimant need not prove that the work related injury was the "sole" cause of his wage loss to establish eligibility for those benefits. *Lindner Chevrolet v. Industrial Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995).

As found, Claimant was terminated from his employment due, in part, to his work-related injury. In addition, Claimant's work-related injury to his biceps tendon has prevented Claimant from physically performing the normal duties of a biomedical technician. Accordingly, Claimant's wage loss is a result of his work-related injury thereby entitling Claimant to TTD benefits.

ORDER

It is therefore ordered that:

1. Claimant was not responsible for his termination.
2. Claimant is entitled to TTD benefits. Insurer shall pay Claimant TTD benefits at the TTD rate of $753.41 commencing February 14, 2008, and continuing until terminated pursuant to statute or order.
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: January 20, 2009

Laura A. Broniak
Administrative Law Judge

STATE OF COLORADO

OFFICE OF ADMINISTRATIVE COURTS
W.C. No. 4-744-410

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

vs.

Employer,

and

Insurer / Respondents.

Hearing in the above captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 8, 2009 in Denver, Colorado. The hearing was digitally recorded (reference: 1/08/09, Courtroom 3, beginning 3:15 PM and ending at 5:03 PM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for Respondents, to be submitted electronically, giving Claimant 3 business days within which to file objections, electronically. The proposed decision was submitted on January 15, 2009. No timely objections having been filed, the ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether a prescription written by Kelly Sanderford, M.D., for attendant care is reasonably necessary to cure and relieve the effects of the industrial injury and whether Claimant's back is a causally-related component of his admitted November 15, 2007 industrial injury.

FINDINGS OF FACT

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

1. This is an admitted claim based upon an injury Claimant suffered while working as an assistant manager for the Employer on November 15, 2007. Claimant injured his left knee and left hand when he became trapped between a cow and a gate.

2. Respondents filed a General Admission of Liability (GAL), dated January 9, 2008, admitting for medical benefits, an average weekly wage (AWW) of $390, and temporary total disability (TTD) benefits of $260 per week from November 16, 2007 and "ongoing."

3. Claimant was first seen for his injury at Greeley Medical Clinic on November 15, 2007. He complained of pain in his left knee and left hand. He did not complain of any pain in his back. Examination of the left hand showed some swelling with no deformity. A Dr. Harms first assessed the Claimant with major ligamentous sprain of the left knee and contusion of the left leg, thigh, and hand. Claimant was released to full duty with restriction of using crutches and no weight bearing on the left leg.

4. On November 18, 2007, Claimant was seen for his injury at North Colorado Medical Center Emergency Room for complaints of pain and swelling in his left leg. Claimant did not complain of back pain.

5. On November 20, 2007, Thomas Lynch, M.D., saw Claimant again at Greeley Medical Clinic. Dr. Lynch noted that Claimant's left hand had completely resolved. Claimant, however, continued to experience significant pain in his left knee. Dr. Lynch placed Claimant on no work status and recommended he continue to use crutches and be non-weight bearing. Claimant did not complain about any back symptoms at the time.

6. The following day, November 21, 2007, Claimant went to North Colorado Medical Center Emergency Room due to pain. The emergency room performed an MRI ((magnetic resonance imaging) and the MRI showed "probable complete disarticulation of his knee with ACL tear, partial PCL tear, LCL tear, lateral patellofemoral ligament tear, bone contusion of his medial femoral condyle, capsular disruption as well as meniscus bruising." Claimant did not complain of any back pain or back symptoms at the time.

7. `Claimant complained to Dr. Lynch on November 26, 2007 that he continued to have significant pain in his left knee despite being off work. Based on the MRI report, Dr. Lynch referred Claimant to Dr. Sanderford for surgical evaluation.

8. On November 30, 2007, Dr. Sanderford first saw the Claimant. Dr. Sanderford diagnosed left knee trauma, probable complete disarticulation of his knee with ACL tear, partial PCL tear, LCL tear, lateral patellofemoral ligament tear, bone contusion of his medial femoral condyle, capsular disruption as well as meniscus bruising. Dr. Sanderford recommended surgery. Claimant did not complain to Dr. Sanderford of any back pain at the time.

9. On December 4, 2007, Dr. Lynch saw the Claimant again. Dr. Lynch released Claimant to return to work on December 5, 2007 with restrictions of no lifting, carrying, or pulling over 10 pounds, sitting 8 to 10 hours, no crawling, kneeling, squatting, or climbing. Dr. Lynch also stated Claimant must use his crutches and could only

walk or stand for an hour each. Claimant did not complain to Dr. Lynch of any back pain or any back symptoms at the time.

10. On December 27, 2007, Dr. Sanderford examined Claimant prior to his knee surgery. Dr. Sanderford did not note any complaints of back pain or back symptoms. Dr. Sanderford released Claimant to sedentary work. Claimant was not restricted from operating heavy machinery or driving a vehicle.

11. Dr. Sanderford performed a left knee diagnostic arthroscopy, open STG/ ACL reconstruction, and LCL reconstruction on January 14, 2008.

12. On January 21, 2008, Dr. Lynch noted some tightness and tenderness of the lower SI joints. This was the first time Claimant's back was mentioned in any medical records.

13. Claimant was seen for physical therapy (PT) sessions 17 times between November 22, 2007 and February 5, 2008. On February 5, 2008, Claimant complained of back pain for the first time. Prior to this, PT records do not note any pain complaints other than left lower extremity.

14. Claimant also did not complain of any back pain during 28 sessions of PT between February 12, 2008 and May 8, 2008.

15. On May 2, 2008, Dr. Lynch evaluated the Claimant again. Dr. Lynch reviewed Claimant's medical records and noted that he could find no specific mention of Claimant's back as part of this injury and stated the opinion that the back was not part of the industrial injury.

16. Claimant continued to complain of pain in his left knee. Specifically, Claimant complained of pain in the posterior section of his knee. Claimant underwent an MRI of the posterior section of his knee. The MRI revealed a torn medial meniscus. Claimant underwent a left knee arthroscopy with medial meniscal debridement and repair on July 22, 2008.

17. On July 31, 2008, at Claimant's request, Dr. Sanderford wrote a retroactive prescription for attendant care. The prescription noted Claimant had to have his wife provide attendant care for 8 to 10 hours a day from November 15, 2007 to March 28, 2008 and again from July 22, 2008 ongoing.

18. Claimant underwent a third knee surgery on August 21, 2008.

19. Respondents held a *Samms* conference with Dr. Lynch on October 14, 2008. Dr. Lynch stated that Claimant had asked him to write a similar prescription for attendant care but that he had refused to do so. When asked why he would not write the prescription, Dr. Lynch stated the opinion that Claimant did not need attendant care because he could ambulate nearly as well as a normal person. Subsequently, Dr. Lynch

signed a synopsis of his statements and underlined the statement that "Claimant was able to ambulate nearly as well as a normal person." The ALJ finds the opinion of Dr. Lynch regarding whether attendant care was reasonably necessary highly persuasive.

20. After reviewing the medical records, Dr. Lynch also stated the opinion that to a reasonable degree of medical probability, Claimant's back symptoms are not related to the November 15, 2007 industrial injury. The ALJ finds the records and opinion of Dr. Lynch regarding Claimant's back symptoms persuasive.

21. Dr. Watson examined the Claimant for an Independent Medical Examination (IME) on October 30, 2008. Claimant told Dr. Watson that he injured his back during the industrial injury. Specifically, Claimant said that the cow knocked him down and trampled him and injured his upper and lower extremity. Claimant also stated that he told the emergency room doctors that his back hurt. Dr. Watson noted that the medical records did not support Claimant's alleged mechanism of injury to his back or his reporting back pain to the emergency room.

22. Claimant later told Dr. Watson that he did not notice the back pain until 15 to 20 days after the industrial injury. Claimant stated that he complained of back pain throughout his treatment. Dr. Watson, however, again noted that the medical records did not support Claimant's assertions. Specifically, medical records do not note any back pain or back symptoms until approximately two months after November 15, 2007.

23. After reviewing the medical records and examining Claimant, Dr. Watson was of the opinion that Claimant "did not appear to have any functional limitations because of his knee brace or his knee surgery that would require in home assistance." Dr. Watson also noted that the medical records showed that Claimant was able to walk post-surgery with only minimal antalgic gait and that he agreed with Dr. Lynch that Claimant had been able to ambulate nearly as well as someone without an injury. The ALJ finds the opinion of Dr. Watson regarding whether attendant care was reasonably necessary highly persuasive.

24. Dr. Watson also agreed with Dr. Lynch that Claimant did not sustain an injury to his back as a result of the November 15, 2007 injury. Specifically, Dr. Watson noted that the medical records did not show a history of an injury to Claimant's back and that the onset of the back pain is not temporal in time to the accident since it developed almost 12 weeks after the industrial injury. The ALJ finds the opinion of Dr. Watson persuasive.

25. Claimant testified that his wife had to prepare his meals, help him bathe, clean the house, wash his clothes, bring him ice for his knee, pick up his prescriptions, and drive him to medical appointments. Claimant testified that his wife cared for him in this capacity from the date of injury until April 2008. Claimant further testified that his wife had to return to Mexico so his mother took over these duties from July 22, 2008 until October 2008- 2 months after August 21, 2008 surgery. Claimant also made a claim

for mileage to medical appointment but offered no details concerning the number of miles to and from medical appointments nor the number of medical appointments for which mileage was claimed. Balanced against the aggregate medical opinions of Dr. Lynch and Dr. Watson, the ALJ does not find Claimant's testimony persuasive.

26. Medical records reflect that Claimant had only minimal antalatic gait following his operations. Furthermore, medical records show that Claimant was able to performed modified duty during portions of this time despite his allegations that he needed attendant care to eat, bathe, and drive. Specifically, Dr. Sanderford's records show that Claimant was released to do sedentary work, including driving, as of December 27, 2007. There was insufficient persuasive evidence presented that Claimant ever requested that Respondents provide transportation for his medical appointments. The evidence also reflects that Claimant never requested attendant care services or expressed a need for attendant care services prior to July 2008.

27. Claimant presented no persuasive evidence, either written or through testimony, of the amount which either his wife or mother should be paid for the alleged attendant care. The ALJ finds that Claimant failed to meet his burden of proof in this regard.

28. Regarding his alleged back injury, Claimant stated that he did not have any back pain or report any back pain until 2 months post-injury. This is inconsistent with what he told Dr. Watson. Claimant alleged that the injury was a result of his initial injury and did not claim it developed due to using crutches or altered gait.

29. At the conclusion of Claimant's case, the ALJ found upon motion by Respondents, that Claimant had failed to meet his burden of proof because he failed to offer any evidence which the ALJ could credit to establish the amount of remuneration payable to either his wife of mother for the services for which claimant was requesting. As such, the ALJ dismissed Claimant's claim for attendant care prior to the date of the hearing. However, the ALJ reserves decision regarding attendant care from January 8, 2009 ongoing until the end of the proceedings.

30. Dr. Watson was of the opinion that when he examined Claimant on October 30, 2008, attendant care was not reasonable or necessary. Dr. Watson also was of the opinion that based on Claimant's ambulation in court and his testimony, attendant care was not reasonably necessary from January 8, 2009 ongoing.

31. Claimant has failed to prove, by a preponderance of the evidence, that any back condition is causally related to the admitted injury of November 15, 2007; and, that he is entitled to attendant care.

CONCLUSIONS OF LAW

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

a. Colo. Rules of Civil Procedure, Rule 41(b)(1), provides that, after a plaintiff in a civil action *tried without a jury* has completed the presentation of his evidence, the defendant may move for a dismissal on the grounds that the plaintiff has failed to present a prima facie case for relief. In determining whether to grant a motion to dismiss or for directed verdict, the court is not required to view the evidence in the light most favorable to the plaintiff, as argued by a claimant. *Rowe v. Bowers*, 160 Colo. 379, 417 P.2d 503 (Colo. 1966)*; Blea v. Deluxe/Current, Inc.*, W.C. No. 3-940-062 [Industrial Claim Appeals Office (ICAO), June 18, 1997] (applying these principles to workers' compensation proceedings). Neither is the court required to "indulge in every reasonable inference that can be legitimately drawn from the evidence" in favor of the Claimant. Rather, the test is whether judgment for the respondents is justified on the claimant's evidence. *Amer. National Bank v. First National Bank*, 28 Colo. App. 486, 476 P.2d 304 (Colo. App. 1970); *Bruce v. Moffat County Youth Care Center*, W. C. No. 4-311-203 (ICAO, March 23, 1998). The question of whether the Claimant carried this burden was one of fact for resolution by the ALJ. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the causal relatedness of another condition to the compensable injury and the entitlement to medical and ancillary 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, the Claimant has failed to sustain his burden of proof with respect to the causal relatedness of his back condition and the need for attendant care.

Credibility

c. 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 persuasiveness and credibility of Dr. Lynch and Dr. Watson outweighs the credibility of Dr. Sanderford on the issue of attendant care. The fact that Dr. Sanderford released the Claimant to sedentary work on December 27, 2007, and this release was not subsequently modified or retracted is inconsistent with Dr. Sanderford's retroactive prescription for attendant care. Additionally, the opinions of Dr. Lynch and Dr. Watson are more objective and persuasive than Dr. Sanderford's retroactive prescription for attendant care, given at Claimant's insistent requests. The absence of back complaints throughout Claimant's medical history until recently, plus the opinions of Dr. Lynch and Dr. Hill that any back problems are not causally related to the admitted injury outweigh the credibility and persuasiveness of Dr. Sanderford's, and the Claimant's, implications that the back is causally related.

<u>Attendant care prescription</u>

d. To be a compensable medical benefit, the service requested 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). Services that are "medical in nature" include home health services in the nature of "attendant care" if reasonably needed to cure or relieve the effects of the industrial injury. *Atencio v. Quality Care, Inc.*, 791 P.2d 7 (Colo. Ct. App. 1990). As found, Claimant failed to establish the need for medical attendant care.

e. The prescribed services must directly treat the claimant's physical condition and injury. *See Jacobs v. Ed Bozarth Chevrolet Company*, W.C. No. 4-222-373 (ICAO, June 26, 1997) [holding that housekeeping and lawn care were not necessary to treat or cure and relieve the claimant's symptoms and therefore, not reasonable or necessary]. If the attendant care is simply for household chores, it is not medically necessary. *See Edward Kraemer & Sons, Inc. v. Downey*, 852 P.2d 1286 (Colo. Ct. App. 1992) [holding that "compensation is not awarded to a spouse if the only services being rendered to the claimant are ordinary household services"]. Furthermore, the mere fact that a treating physician has prescribed the attendant care does not make the care medically necessary. *Country Squire Kennels v. Tarshis*, *supra*. As found, Dr. Sanderford's retroactive prescription for attendant care is not credible and, therefore, does not support Claimant's claim for attendant care.

f. A claimant is entitled to mileage reimbursement for travel to and from medical appointments. *See Sigman Meat Co. v. Indus. Claim Appeals Office*, 761 P.2d 265 (Colo. Ct. App. 1988). An employer may also be required to provide transportation to and from medical appointments if the claimant is unable to drive. *Id*. However, it is not necessary that an employer provide the specific transportation means requested by a claimant to reach an appointment as long as adequate means are provided. *See Bogue v. SDI Corp.*, 931 P.2d 477 (Colo. Ct. App. 1996) [holding that the respondents did not have to provide a wheelchair-accessible van for the claimant to drive himself to appointments when the respondents were already providing other transportation]; *Robert-*

son v. Vincam Staff Administrators, W.C. No. 4-389-907 (ICAO, Aug. 21, 2007) [holding that the respondents did not have to provide taxi vouchers when the claimant could drive himself to appointments and was being reimbursed for mileage]. As found, Claimant failed to prove any costs of attendant care. Therefore, as found, the claim for attendant care and mileage to and from medical appointments fails. Medical records, however, reflect that Claimant had only minimal antalatic gait following his operations. Furthermore, medical records show that Claimant was able to performed modified duty during portions of this time despite his allegations that he needed attendant care to eat, bathe, and drive. Specifically, Dr. Sanderford's records show that Claimant was released to do sedentary work, including driving, as of December 27, 2007. There was insufficient persuasive evidence presented that Claimant ever requested that Respondents provide transportation for his medical appointments. The evidence also reflects that Claimant never requested attendant care services or expressed a need for attendant care services prior to July 2008.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Because Claimant's alleged back condition is not causally related to the admitted, compensable injury, any and all claims for treatment thereof or benefits in connection therewith are hereby denied and dismissed.

B. Any and all claims for attendant care are hereby denied and dismissed.

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

DATED this_____day of January 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-746-716

ISSUES

¬ Were the claimant's temporary total disability benefits properly terminated on August 13, 2008, under § 8-42-105(3)(c), C.R.S., because the authorized treating physician released her to regular employment?

¬ Are the respondents subject to penalties under § 8-43-304, C.R.S., because they terminated the claimant's temporary total disability benefits without legal justification?

FINDINGS OF FACT

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

1. On December 6, 2007, the claimant was employed by the employer as a Director of Investor Relations and Communications (Director). The employer operates an Internet site for persons with disabilities.

2. The claimant testified that her job as Director required her to be in the office 8 to 10 hours per day, five or six days per week. However, the claimant also testified that she was sometimes required to travel to remote locations to promote the employer's website. The claimant stated that when she traveled to such events she was required to lift boxes of shirts and banners that weighed in excess of 20 pounds. The claimant recalled that she attended one promotional event in New York during the month of November 2007.

3. On December 6, 2007, the claimant was in Breckenridge, Colorado. In her capacity as Director, the claimant was hosting an event for some of the employer's investors. A skier ran into the claimant causing injury to her left knee.

4. On December 6, 2007, the claimant received treatment at the Breckenridge Medical Clinic. The claimant underwent x-rays and was assessed with a "third-degree ACL and second-degree MCL of the left knee."

5. On December 10, 2007, Dr. Charles Gottlob, M.D., of Panorama Orthopedics & Spine Center, examined the claimant. Dr. Gottlob noted the claimant had been using a knee brace and crutches since she was evaluated in Breckenridge. Dr. Gottlob recommended the claimant undergo a "left knee diagnostic arthroscopy and ACL reconstruction, with hamstrings tendon autograft." Dr. Gottlob became the claimant's primary authorized treating physician for the December 6, 2007, injury.

6. On January 4, 2008, the employer terminated the claimant's employment.

7. On January 9, 2008, the claimant underwent surgery as recommended by Dr. Gottlob.

8. On January 14, 2008, the employer's human resource director, Ms. Karen Semryck, completed a written form entitled "Physical Demands Analysis." Ms. Semryck testified that this form accurately described the physical requirements of the claimant's job with the employer. The form states the claimant was never required to lift more than 11 pounds, and lifted 1 to 10 pounds occasionally. The form further states the claimant was never required to climb, bend, stoop, kneel, or work on ladders. The form further states the claimant sat for 90 percent of the day, stood for 5 percent of the day, and walked 5 percent of the day.

9. Ms. Semryck credibly testified that the employer did not hire her until January 14, 2008, after the claimant was terminated on January 4, 2008. The ALJ in-

fers from this testimony that Ms. Semryck never observed the claimant perform the job of Director, and filled out the Physical Demands Analysis based on information gathered from second-hand sources. Ms. Semryck admitted that she did not know if the claimant traveled and made presentations as part of her job as Director, although she knew the claimant was injured while working in Breckenridge.

10. The respondents admitted liability for temporary total disability (TTD) benefits commencing January 5, 2008.

11. On January 17, 2008, Dr. Gottlob noted the claimant should continue with ice, physical therapy and anti-inflammatory drugs. Dr. Gottlob stated that the claimant's restrictions included a sedentary desk job only, no stairs or ladders, no crawling and no kneeling.

12. On February 26, 2008, Dr. Gottlob continued to recommend physical therapy, medications and "activity modification." Dr. Gottlob imposed restrictions of no cutting, planting and pivoting," and stated the claimant was "able to do sedentary sitting/ desk work only."

13. On April 8, 2008, Dr. Gottlob recommended that the claimant continue physical therapy, medications, and "activity modification." Dr. Gottlob again stated the claimant should not engage in "cutting, planting and pivoting sports/activities until 6 months" after surgery.

14. On June 9, 2008, Dr. Gottlob recommended that the claimant continue with physical therapy ice, medication and " activity modification." He stated the claimant could hit a tennis ball against a wall but should not play tennis.

15. On August 4, 2008, Dr. Gottlob noted the claimant was "functionally significantly behind schedule due to fairly profound persistent quadriceps deconditioning," and that she needed more physical therapy. Dr. Gottlob noted, "Tenderness is present in the knee tendon," and he recommended physical therapy and imposed restrictions of no lifting more than 20 pounds and no crawling or kneeling.

16. On August 6, 2008, Dr. Gottlob completed a form M164 Physician's Report of Workers' Compensation Injury. On this form Dr. Gottlob stated that claimant had been able to perform modified duty since February 26, 2008, and that her restrictions were no lifting greater than 20 pounds and no crawling and kneeling. Dr. Gottlob further wrote that that the claimant's "other" restrictions were, "Sedentary sitting desk work only. Able to do her normal job as per Physical Demand Analysis provided by the" insurer.

17. The ALJ infers that Dr. Gottlob's August 6, 2008, note refers to the Physical Demands Analysis completed by Ms. Semryck on January 14, 2008. The ALJ further infers that the insurer provided the Physical Demands Analysis to Dr. Gottlob at some point in time after January 14, 2008.

18. On August 11, 2008, Ms. Sharon N. Taylor, the adjuster assigned to the case by the insurer, wrote a letter to Dr. Gottlob. The letter states the insurer recently received "the attached Physician's Report of Workers' Compensation Injury" and that the insurer was requesting "clarification." The letter further notes that "per the Physical Demands Analysis" supplied by the employer, the claimant "is required to sit 90% of the day, stand 5%, walk 5% and she is not required to lift over 10lbs." The letter notes that none of the restrictions imposed by Dr. Gottlob on August 6, 2008, were "required by the patient's job." The letter requests Dr. Gottlob to answer the question: "Is the Injured worker able to work full duty per the requirements of her actual job?"

19. On August 12, 2008, Dr. Gottlob circled the word "yes" next to the question posed Ms. Taylor concerning the claimant's ability to perform "full duty," and returned the letter to the adjuster.

20. On August 13, 2008, Ms. Taylor filed a General Admission of Liability (GAL) terminating the claimant's TTD benefits effective August 13, 2008. Attached to the GAL was a copy of Ms. Taylor's August 11, 2008, letter to Dr. Gottlob, and Dr. Gottlob's August 12, 2008, written response as described in Finding of Fact 19.

21. Ms. Taylor testified that she relied on Dr. Gottlob's August 12, 2008, response to her letter when filing the GAL to terminate the claimant's TTD benefits. She stated that she understood Dr. Gottlob's response to the letter as releasing the claimant to work full duty at her regular employment.

22. On September 4, 2008 Dr. Gottlob authored a To Whom It May Concern letter. Dr. Gottlob wrote: "There is some confusion about [the claimant's] work status. I have not, at anytime released [the claimant] to full duty work." Dr. Gottlob further stated that the claimant's restrictions since March 5, 2008, had been "primarily sedentary work with limited standing and walking and no kneeling, crawling or squatting and there has been no update to that light duty notice since that time."

23. The claimant testified that, considering the restrictions imposed by Dr. Gottlob, including the restrictions on lifting, standing and walking, she could not have performed all of the duties of her employment as a Director. Specifically, the claimant testified that she could not travel and carry luggage, she could not move materials and lift boxes weighing in excess of 20 pounds, and could not kneel to pick up materials.

24. The claimant admitted that between January 30, 2008, and April 15, 2008, she had applied for and received unemployment compensation benefits from the State of New York.

25. The claimant testified that on September 8, 2008, she obtained employment with Concierge Resource. The claimant testified that she earns $1,753. 00 every two weeks, or $876.50 per week. This job involves business promotion, and is in many ways similar to the work that she performed for the employer. The claimant testified that

she is not fully able to perform all of the duties of her new employment. Specifically, she has difficulty traveling, lifting boxes and standing.

26. Dr. Gottlob placed the claimant at maximum medical improvement (MMI) on December 9, 2008.

27. The ALJ credits the claimant's testimony that her work as a Director sometimes required her to travel to remote sites to perform presentations, to lift boxes of shirts and banners weighing in excess of 20 pounds, and to arrange displays as part of her promotional activities on behalf of the employer. The claimant's testimony is generally corroborated by the fact that she was injured while performing her duties in Breckenridge, a site remote from the employer's offices. The claimant's testimony concerning her duties is further corroborated by the fact that the employer terminated her soon after her injury. The ALJ is not persuaded that the Physical Demands Analysis prepared by Ms. Semryck accurately portrayed all of the requirements of the claimant's job as Director. As found. Ms. Semryck began work after the claimant had been discharged, and had no first hand knowledge of the claimant's duties as Director. Ms. Semryck did not see the claimant perform the job, and did not know about the claimant's activities when she was traveling.

28. Dr. Gottlob issued contradictory reports concerning whether or not the claimant was released to return to her regular employment as a Director on August 13, 2008. The ALJ resolves the conflicts between Dr. Gottlob's reports of August 12, 2008, and September 4, 2008, and finds that Dr. Gottlob did not release the claimant to return to her regular employment on August 13, 2008. On August 12, 2008, when Dr. Gottlob replied, "yes" to the question of whether the claimant was able to return "to work full duty per the requirements of her actual job," he was relying on the job description contained in the Physical Demands Analysis prepared by Ms. Semryck. However, as found, this description does not accurately reflect all of the claimant's duties as a Director. Moreover, on September 4, 2008, Dr. Gottlob emphasized that in his opinion the claimant remained restricted to "sedentary work" with limited standing and walking, and that he had not released her to full duty work. Significantly, on August 6, 2008, a mere six days before the August 12 report, Dr. Gottlob limited the claimant to lifting no more than 20 pounds, in addition to the other restrictions.

30. The ALJ finds the respondents, and in particular the insurer, had a rational argument based in law and fact to terminate the claimant's TTD benefits without first obtaining a hearing. The ALJ further finds the insurer acted reasonably under WCRP 6-1(A)(2). Specifically, Dr. Gottlob's report of August 12, 2008, may reasonably be construed as report of the authorized treating physician providing primary care that released the claimant to return to her regular employment. Dr. Gottlob's August 12 report was filed as part of the August 13, 2008, GAL, terminating the claimant's TTD benefits. Ms. Taylor credibly testified that she relied on Dr. Gottlob's report when filing the GAL. Nothing in the rule requires the respondents to again admit for TTD benefits where, as here, the authorized treating physician releases the claimant to regular employment, then subsequently issues opinions that conflict with the original release. The insurer

reasonably believed it was acting in accordance with the applicable statutes and rules of procedure when terminating the claimant's TTD benefits on August 13, 2008.

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).

ENTITLEMENT TO TEMPORARY TOTAL DISABILITY BENEFITS COMMENCING AUGUST 13, 2008

The claimant contends that she is entitled to an award of TTD benefits commencing August 13, 2008, and continuing until September 8, 2008, when she claims entitlement to temporary partial disability (TPD) benefits. The respondents argue that the claimant "failed to sustain her burden of proof that she is entitled to temporary total disability or temporary partial disability benefits beginning August 13, 2008, because Dr. Gottlob gave her a written release to return to regular employment on August 12, 2008. The ALJ agrees with the claimant.

Once respondents admit liability for TTD benefits, they must continue paying in accordance with the admission until such payments are legally terminated. Section 8-43-203(2)(d), C.R.S.; *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P.3d 790 (Colo. App. 2000). Section 8-42-105(3)(c), C.R.S., authorizes the termination of TTD benefits when "the attending physician" gives the claimant a

"written release to return to regular employment." Because the respondents seek to terminate benefits under this section, they have the burden of proof to establish the factual predicates for application of the statute. *See Witherspoon v. Metropolitan Club of Denver*, W.C. No. 4-509-612 (ICAO December 16, 2004), citing *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office, supra*.

Ordinarily, the ALJ is bound by the authorized treating physician's release to regular employment. *Burns v. Robinson Dairy, Inc.,* 911 P.2d 661 (Colo. App. 1995). However, if the authorized treating physician issues ambiguous or conflicting reports concerning whether or not the claimant has been released to return to regular employment, the ALJ may resolve the conflict as a matter of fact. *Imperial Headware, Inc. v. Industrial Claim Appeals Office,* 15 P.3d 295 (Colo. App. 2000); *Purser v. Rent A Center,* W.C. No. 4-643-942 (ICAO April 4, 2007).

Here, the respondents admitted the claimant became temporarily totally disabled commencing January 5, 2008. Consequently, the respondents had the burden of proof to establish grounds to terminate the admitted TTD benefits in accordance with the Act. The respondents argue that the benefits were properly terminated under § 8-42-105(3)(c), based on Dr. Gottlob's alleged release to regular employment on August 12, 2008. However, as determined in Finding of Fact 28, Dr. Gottlob issued conflicting reports concerning whether or not the claimant was released to regular employment, and the ALJ has resolved the conflict against the respondents and found that Dr. Gottlob did not release the claimant to perform all of the duties of her regular employment as a Director. Specifically, the claimant was under lifting restrictions that prohibited her from lifting boxes in excess of 20 pounds, and from carrying luggage when traveling to remote sites. The claimant was limited to sedentary work that inhibited or prohibited travel and the performance of her promotional duties as a Director.

It follows that the claimant remained entitled to TTD benefits until September 8, 2007, when she was hired at Concierge Resource. As of September 8, 2008, the claimant's wage loss was less than total and she became entitled to TPD benefits measured as "sixty-six and two-thirds percent of the difference between said employee's average weekly wage during the continuance of the temporary partial disability, not to exceed a maximum of ninety-one percent of the state average weekly wage per week." Section 8-42-106(1), C.R.S.

The respondents assert the claimant's "position that she was disabled, notwithstanding Dr. Gottlob's August 12, 2008 release, is further controverted by her application for and receipt of unemployment benefits from the State of New York, the eligibility for which requires a person to be able and available for work." First, this argument is not persuasive because the ALJ has determined as a matter of fact that Dr. Gottlob did not release the claimant to return to her regular pre-injury employment on August 12. Moreover, the claimant's hypothetical ability to perform some work within her temporary medical restrictions does not sever the causal relationship between the injury and the temporary wage loss. *Schlage Lock v. Lahr,* 870 P.2d 615 (Colo. App. 1993). There-

fore, the mere fact the claimant may have certified she could perform some work in order to obtain unemployment benefits does not disqualify her from receiving TTD.

PENALTIES FOR ALLEGED IMPROPER TERMINATION OF TTD BENEIFTS

The claimant seeks the imposition of penalties against the respondents for "termination of temporary disability benefits when an occurrence pursuant to C.R.S. 8-42-105(3) did not occur." In her position statement the claimant argues that an "employer needs to continue payment pursuant to an admission of liability until a hearting is held to determine whether there was sufficient evidence to permit withdrawal of the admission." The claimant's application for hearing states that the respondents' actions violated § 8-42-108(3), C.R.S., although her position statement cites *Kraus v. Artcraft Sign Co.,* 710 P.2d 480 (Colo. 1985), and *Vargo v. Industrial Commission,* 626 P.2d 1164 (Colo. App. 1981). The ALJ concludes that the imposition of penalties is not appropriate under the facts of this case.

Whether statutory penalties may be imposed under § 8-43-304(1), C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $500 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…" Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (ICAO August 2, 2006), *but see, Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of "unreasonableness"). However, there is no requirement that the insurer knew that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office, supra*. A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. If the claimant makes such a prima facie showing the burden of persuasion shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra, Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999).

Insofar as the claimant is asserting that there was a violation of § 8-42-108(3) the ALJ agrees with the respondents that the claimant failed to prove there was any violation of that statute. Section 8-42-108 concerns compensation for disfigurement, and subsection (3) pertains to adjustments in compensation for disfigurement. None of the evidence presented by the claimant relates to this statute, or a potential violation of it.

However, based on the claimant's reliance on the *Kraus* and *Vargo* decisions, the ALJ infers that the claimant is actually alleging that the respondents violated § 8-43-203(2)(d), C.R.S. That statue provides that: "Hearings may be set to determine any matter, but if any liability is admitted, payments shall continue according to admitted liability."

Our courts have held that once an insurer admits liability for TTD benefits, it is bound by the admission and must pay accordingly. Further, if the respondents file an admission of liability for TTD benefits, they may not terminate benefits unilaterally unless the date listed for the termination of benefits conforms to one of the statutory grounds listed in § 8-42-105(3) and is documented in accordance with the rules of procedure governing unilateral termination of benefits. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office, supra*; *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

As noted above, § 8-42-105(3)(c) authorizes the termination of TTD benefits when "the attending physician" gives the claimant a "written release to return to regular employment." Reflective of this statute, WCRP 6-1(A)(2) provides that in cases of injury occurring on or after July 1, 1991, an insurer may terminate temporary disability benefits "*without a hearing* by filing an admission of liability form with: a medical report from the authorized treating physician who has provided the primary care, stating the claimant is able to return to regular employment." (Emphasis added).

As determined in Finding of Fact 29, the ALJ concludes that the respondents had a rational basis in law and fact to terminate the claimant's TTD benefits without first obtaining a hearing. The ALJ further concludes the respondents acted reasonably in terminating the benefits. Specifically, Dr. Gottlob's report of August 12, 2008, may reasonably be construed as report of the authorized treating physician providing primary care that released the claimant to return to her regular employment. The ALJ concludes that the adjuster's action in filing the report in connection with the August 13, 2008, GAL terminating the TTD benefits was reasonable. Further, there is nothing in the rule that required the respondents to again admit for TTD benefits after Dr. Gottlob issued his conflicting opinion on September 4, 2008. Rather, determination of Dr. Gottlob's true opinion concerning the claimant's ability to perform regular employment became a question of fact for resolution by the ALJ.

In these circumstances the ALJ concludes that the request for the imposition of penalties against the respondents for an alleged improper termination of TTD benefits must be denied.

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

3. The insurer shall pay the claimant temporary total disability benefits at the statutory rate commencing August 13, 2008, and continuing through September 7, 2008. Commencing September 8, 2008, the respondents shall pay the claimant temporary partial disability benefits at the statutory rate. Temporary partial disability benefits shall continue until December 9, 2008.

4. The claimant's request for the imposition of penalties against the respondents is denied and dismissed.

DATED: January 21, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-763-714

ISSUES

The issues for determination are dependency and reductions for safety rule violation or intoxication.

FINDINGS OF FACT

1. Deceased died on July 1, 2008, as a result of a fall at a construction site on June 30, 2008. Respondents have admitted liability.
2. Deceased was the father of BD. Deceased was not under an order to pay child support, and provided no support to BD.
3. VG was not married to Deceased, either by ceremonial marriage or common law marriage. VG has not shown that she was wholly or partially dependent on Deceased at the time of his death.
4. Deceased died without dependents.

CONCLUSIONS OF LAW

1. BD is a child of Deceased, was a minor at the time of death, and as such is presumed to be dependent. Section 8-41-501(1)(b), C.R.S. Respondents overcame that presumption by evidence showing that BD had received no support from Deceased, and there was no order requiring Deceased to pay support. No benefits are due to BD.
2. VG was not married to Deceased, either by ceremonial marriage or common law marriage. VG is not Deceased's widow. Section 8-41-501(1)(b), C.R.S. VG has not

shown that she was wholly or partially dependent on Deceased at the time of his death. Sections 8-41-114 and 8-41-115, C.R.S. No benefits are due to VG.

3. Deceased died without dependents. Compensation is limited to the expenses for medical, hospital, and funeral expenses of Deceased. Section 8-42-115(a), C.R.S. Insurer is liable for a payment to the Subsequent Injury Fund in the amount of $15,000.00.

4. Respondents allege that the injuries of Deceased were the result of Deceased's willful failure to obey a reasonable rule adopted by Employer for the safety of the employee. Section 8-42-112, C.R.S. However, that section reduces "compensation" by fifty percent. The payment to the Subsequent Injury Fund is not "compensation". Insurer may not reduce the amount payable to the Subsequent Injury Fund pursuant to Section 8-42-112, C.R.S.

5. Respondents also allege that Deceased's injuries resulted from the intoxication of Deceased, and that Deceased's blood alcohol level exceeded 0.10 percent. Section 8-42-112.5, C.R.S. However, that section reduces "nonmedical benefits otherwise payable to an injured worker." The Subsequent Injury Fund is not an "injured worker". Respondents may not reduce the amount payable to the Subsequent Fund under Section 8-42-112.5, C.R.S.

ORDER

It is therefore ordered that:

1. Insurer is not liable for benefits to BD;
2. Insurer is not liable for benefits to VG;
3. Insurer shall pay $15,000.00 to the Subsequent Injury Fund; and
4. Insurer may not reduce the amount payable to the Subsequent Injury Fund pursuant to Section 8-42-112, C.R.S., or Section 8-42-112.5, C.R.S.
5. All matters not determined herein are reserved for future determination.

DATED: *January 21, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-767-425

ISSUE

The issue raised for consideration at hearing concerned the distribution of workers' compensation death benefits to Claimant's spouse and dependent children.

FINDINGS OF FACT

1. On August 4, 2008, Claimant suffered severe burns when a high-pressure clean-in-place hose blew off it's fitting and sprayed him with scalding water. As a result

of his injuries, Claimant died on August 12, 2008. The Employer does not contest that Claimant's injuries were sustained while he was acting within the course and scope of his employment.

2. At the time of his death, Claimant was married to Lita Encina. It was established that Claimant and his spouse were married in Pueblo, Colorado on March 8, 2003. Claimant and his spouse resided together in the family home at 921 Amarillo Avenue, in Pueblo Colorado.

3. Claimant and his spouse had no children of their marriage, and Claimant has no children of his own. However, his spouse has four children. The Court heard testimony that the four children were fathered by Oscar Perez-Gonzalez and that Mr. Perez-Gonzalez died in 1991. Claimant's spouse testified that her oldest child is Nidia Lizbeth Perez Reyes whose date of birth is May 28, 1985. Nidia was 24 years old at the time of Claimant's death. Though Nidia does live at the family home now, she did not at the time of Claimant's death and is not enrolled in any educational program. The other three children were present at the hearing and offered testimony.

4. First, Oscar Ivan Perez Reyes whose date of birth is November 6, 1989 testified that he was a dependent resident of the family home on the date of Claimant's death. He is 19 years old now and attends school at the Pueblo Community College. Mr. Perez-Reyes testified that he considered Claimant to be his father, and that Claimant provided love and support to him and his family. He testified that he planned to complete his Associate's degree at Pueblo Community College and then pursue further college at the University of Colorado.

5. Next, Cynthia Jevita Perez Reyes whose date of birth is July 28, 1991 testified at the hearing. At the time of Claimant's death, Cynthia was 17 years old. She testified that she resides at the family home and received support from her mother and Claimant. She attends Pueblo East High School where she is a senior. She is scheduled to graduate in May of 2009 and plans to attend college. She testified that she considered Claimant to be her father as her biological father passed away before her birth. She also testified that she completely understood the proceedings that were being discussed and felt that her mother should receive the bulk of the benefits because her mother is providing 100% of the support to the household right now. When asked whether she felt she needed an independent guardian to help protect her interests, she credibly testified that she did not.

6. Finally, the Court heard the testimony of Ana Alejandra Perez Reyes whose date of birth is November 6, 1989. Ms. Perez Reyes is the 19-year-old twin of Oscar Perez Reyes. At all relevant times, Ms. Perez Reyes lived at the family home. She also attends Pueblo East High School, where she is a senior. She plans to graduate in May of 2009 and enroll in cosmetology school thereafter. She testified that she considered Claimant to be her father and that he provided love and support to the family.

7. The above-described individuals are deemed to be Claimant's lawful dependents.

8. The death benefits payable to Claimant's dependents should be apportioned 50% to the surviving widow Lita Encina. The remaining balance should be divided equally among the three qualifying dependent children, described above. As each child reaches the age of majority or ceases to qualify as a dependent child by remaining in a qualifying educational program, that portion of the benefits shall shift to Claimant's widow. No amounts accrued between the date of Claimant's death and the date of this order shall be payable to the minor children as 100% of those proceeds have already been spent in the support of the children and the household.

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. Section 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. Section 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. Clar,,* 197 Colo. 306, 592 P.2d 792 (1979. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 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. If there are wholly dependent persons at the time of an injured worker's death, workers' compensation death benefits payment shall be made in accordance with the provisions of Section 8-42-114, C.R.S. Under Section 8-42-114, the dependents of a deceased Claimant are entitled to receive 66 2/3% of the deceased Claimant's average weekly wages. Said benefits shall be paid to the dependent widow for life or until remarriage. Section 8-42-120, C.R.S. Benefits shall be paid to such one or more of the dependents of the deceased Claimant, for the benefit of all the dependents entitled to such compensation, as may be determined by the director. The director may apportion benefits among the dependents in such a manner as the director may deem just and equitable. Section 8-42-121, C.R.S.

4. It is found and concluded that credible and persuasive testimony established that Lita Encina is a qualifying dependent widow of Claimant under Section 8-42-

120, C.R.S. Further, Oscar Perez Reyes, Ana Alejandra Perez Reyes and Cynthia Jevita Perez Reyes have established through credible and persuasive testimony that they were wholly dependent at the time of Claimant's death as per Section 8-41-501(1)(c)(I) and (II), C.R.S.

5. As to the minor child, Cynthia Jevita Perez Reyes, it is found that under Section 8-42-122, C.R.S., Claimant's surviving spouse, Lita Encina, is qualified to make application for benefits without the necessity for a separately appointed Guardian Ad Litem or independent counsel for the minor child.

ORDER

It is therefore ordered that:

1. Lita Encina is a qualifying widow under Section 8-42-120, C.R.S. Under Section 8-41-501(1)(c)(I) and (II), C.R.S., Oscar Ivan Perez Reyes, Ana Alejandra Perez Reyes and Cynthia Jevita Perez Reyes are qualified dependents and thus were wholly dependent at the time of Claimant's death.

2. Under Section 8-42-121, C.R.S., Lita Encina shall receive 50% of the death benefits payable to Claimant's dependents. The remaining 50% shall be split equally among the three dependent children, Oscar Ivan Perez Reyes, Ana Alejandra Perez Reyes and Cynthia Jevita Perez Reyes.

4. As Oscar Ivan Perez Reyes, Ana Alejandra Perez Reyes and Cynthia Jevita Perez Reyes reach the age of majority or cease to qualify as a dependent child by remaining in a qualifying educational program, that portion of each child's benefits shall be paid to Lita Encina.

5. The amounts accrued between the date of Claimant's death and the date of this order shall not be payable to the minor children as 100% of those proceeds have already been spent in the support of the children and the household.

6. The Court finds that the interests of the minor child Cynthia Jevita Perez Reyes have been well served by her mother Lita Encina, and that appointment of a separate Guardian Ad Litem shall not be necessary.

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

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

DATED: January 21, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS" COMPENSATION NO. WC 4-706-443

ISSUES

The issues for determination are reduction in benefits for a violation of a safety rule and permanent partial disability benefits.

FINDINGS OF FACT

1. Claimant was injured on November 16, 2006, in an industrial accident while employed by Employer.
2. Employer had enacted safety rules requiring that its drivers comply with posted speed limits and that a driver adjust his speed to take into account existing traffic and road conditions.
3. Claimant was provided with copies of the safety rules and was aware of the Federal Motor Carrier Safety Regulations concerning the safe operation of a commercial vehicle.
4. Claimant was injured when the commercial vehicle he was driving overturned on a round-about while exiting I-70.
5. The speed limit posted in the round-about was 20 mph. Claimant had driven on the roundabout prior to the date of the accident and proceeded around the roundabout at what he believed was 15 to 18 mph; a speed that he felt was safe and lower than the posted speed limit.
6. In fact, the vehicle was traveling at a speed of 22 to 24 mph, which is higher than the posted speed limit and too fast for the vehicle to safely traverse the round-about.
7. Claimant's violation of the safety rule was the result of carelessness, negligence, forgetfulness, remissness, or oversight
8. Dr. Ellen Price on September 14, 2007, placed Claimant at maximum medical improvement. Dr. Price assigned an 18% whole person impairment rating to Claimant's impairment from this compensable injury.
9. Insurer filed a Final Admission of Liability on September 21, 2007, admitting the 18% whole person impairment rating. Insurer paid 50% of the permanent partial disability after taking the safety rule violation deduction. In the Final Admission of Liability, Insurer admitted that Claimant had been paid $8,791.11 in temporary total disability benefits after applying a 50% deduction for a safety rule violation.
10. Claimant underwent a Division Independent Medical Examination (DIME) with Dr. Weaver on April 14, 2009. It was determined by the Division of Workers' Compensation that the report was incomplete. Dr. Weaver wrote a letter on May 5, 2008, asserting apportionment was appropriate and gave a 9% impairment rating.
11. Insurer filed a Final Admission of Liability on April 23, 2008, based upon the incomplete DIME.

12. Claimant filed an Application for Hearing on May 13, 2008, objecting to the 9% impairment rating. This Application for Hearing did not list permanent benefits as an issue.
13. The Division of Workers' Compensation issued a Second Incomplete Notice to Dr. Weaver. On May 28, 2008, Dr. Weaver stated that apportionment was not appropriate under the DOWC instructions and rated the Claimant's impairment at 22% whole person.
14. The Division of Workers' Compensation issued a Notice of Completion on May 30, 2008.
15. Claimant did not object to the DIME's final rating of 22%.
16. Respondents filed an Application for Hearing on June 5, 2008, and listed the issue of permanent partial impairment.
17. Dr. Weaver, the DIME physician, rated Claimant's specific impairment at 6% under Table 53 II(c) and found a loss of range of motion of 17% for a combined rating of 22% without apportionment.
18. Dr. Price, an authorized treating physician, rated Claimant's specific impairment at 4% under Table 53 II (b), found a loss of range of motion of 13% and a 2% rating for radiculopathy for a combined rating of 18% without apportionment
19. Dr. Pitzer, an IME physician, rated Claimant's specific impairment at 4% under Table 53 II (b) and found a loss of range of motion of 20%, without apportionment of 23%.
20. Dr. Weaver, in his final report, stated that apportionment was not appropriate under the DOWC instructions. Earlier, prior to the Second Incomplete Notice issued by the DOWC, Dr. Weaver had stated that only 40% of the combined impairment was due to this compensable injury.
21. Dr. Pitzer commented in his report that he did not have the information to warrant apportionment, but that Claimant did have a pre-existing injury.
22. Dr. Price did not apportion.
23. The ratings of Dr. Pitzer and Dr. Price, and the rest of the medical record, support the impairment rating of Dr. Weaver.
24. Dr. Pitzer testified that the Claimant's loss of range of motion was not due to the compensable injury and should not be considered in the rating. This is not persuasive enough to show that it is highly probably that the rating of Dr. Weaver was incorrect.

CONCLUSIONS OF LAW

1. An insurer may reduce benefits by fifty percent if the employee is injured due to a willful violation of a safety rule. Section 8-42-112(1), C.R.S. The term "willful" connotes deliberate intent. Mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission,* 165 Colo. 135, 437 P.2d 548 (1968). The respondents have the burden of proof to establish that a claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995). The question of whether the respondents carried the burden of proof is one of fact. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). It is not necessary to show an injured worker had the safety rule in mind and determined to break it. Rather, willful conduct may be inferred from evidence the injured worker knew the rule and performed the forbidden act. *Bennett Prop-*

erties Co. v. Industrial Commission, 165 Colo. 135, 437 P.2d 548 (1968); *Stockdale v. Industrial Commission,* 76 Colo. 494, 232 P. 669 (1925).

2. Respondents have established by a preponderance of the evidence that Claimant violated a reasonable rule for his safety. The violation was the result of mere carelessness, negligence, forgetfulness, remissness or oversight. Willful conduct is not inferred from the facts presented. Respondents have failed to establish that the violation of the safety rules was willful. Therefore, Insurer may not reduce benefits for a willful violation of a safety rule.

3. Respondents submitted a Final Admission of Liability prior to the completion of the DIME Report. The DIME report was not competed until the Division of Workers' Compensation said it was competed on May 30, 2008. Claimant did not object to the DIME's final rating of 22%. Therefore, Claimant is not estopped from receiving more than a nine percent rating for failing to list the issue of permanent partial disability benefits in the May 13, 2008, Application for Hearing.

4. The rating of Dr. Weaver, the DIME physician, is not the most persuasive. However, Dr. Weaver's rating does find some support in the ratings of Dr. Pitzer, Dr. Price, and the rest of the medical record. Respondents have not shown that it is highly probable that the rating of the DIME physician was incorrect. Respondents have not overcome the rating of the DIME physician by clear and convincing evidence. Section 8-42-107(8)(c), C.R.S.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant permanent partial disability benefits based on an impairment rating of 22% without reductions for apportionment or safety rule violation.

2. Insurer shall pay Claimant temporary total disability benefits without a reduction for safety rule violation.

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

DATED: *January 21, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-738-880

ISSUES

1. Whether Claimant's left shoulder and neck injuries are causally related to the admitted industrial injury dated October 1, 2007.

2. Whether the treatment recommended for Claimant's left shoulder and neck is reasonable and necessary and related to the October 1, 2007 industrial injury.

3. All other issues are reserved.

FINDINGS OF FACT

1. Claimant works as a "low boy" driver/heavy equipment operator for Employer. Claimant's job is labor intensive. His duties include hauling heavy equipment – via semi – to and from job sights, as well as loading, unloading and operating the equipment. The work routinely includes: lifting up to 100 pounds, 30 to 35 times daily; pushing items weighing up to 75 pounds, up to 15 times daily; pulling items weighing up to 100 pounds, 35 - 40 times daily; frequent overhead reaching; regular bending and regular twisting. Prior to October 1, 2007, Claimant did not have any significant problems performing this job, and in fact, Claimant regularly worked substantial overtime and received pay raises for the work he performed. Respondents did not dispute Claimant's representations concerning his job and Claimant's testimony in this regard is found to be credible.

2. On October 1, 2007, Claimant was operating a paver in the course and scope of his employment with Employer. It was very windy that day. At one point, as Claimant was climbing down off the paver, a loose metal smokestack on the paver was blown over and struck Claimant on the right shoulder and neck. It is estimated that the metal smokestack weighed somewhere between 65 to 80 pounds and it was approximately 10 feet long. Claimant saw the smokestack an instant before it struck him but Claimant was unable to avoid being struck. Claimant's testimony in this regard is found to be credible.

3. Claimant was knocked down and to the left, landing on his left shoulder. The smokestack, which had rebounded slightly after striking him the first time, then struck him a second time on the neck and right shoulder after Claimant hit the ground.

4. Claimant first obtained medical care for his injuries on October 3, 2007. Dr. Bradon J. Reiter was assigned as his primary care physician. At the hearing in this matter, on direct examination Claimant testified that, at least initially, he did not believe that he had significantly injured his neck and admitted that he did not report a neck injury. Claimant further testified that his right shoulder was the primary problem initially and that his left shoulder wasn't causing him any significant problems.

5. Dr. Reiter's notes from that initial visit, as well as the paperwork completed by Claimant's wife, do not contain any references to the neck or left shoulder. While Claimant concedes that he did not mention a neck problem, he did mention the left

shoulder to Dr. Reiter. During his deposition, however, Dr. Reiter testified that he did not recall Claimant mentioning the left shoulder.

6. The records from Claimant's initial visit with Dr. Reiter indicate that Claimant fell onto his right side. Those records are inconsistent with Claimant's testimony. Those records are inconsistent with the medical records from Dr. David Reinhard, who began treating Claimant in May of 2008 on a referral from Dr. Reiter. They are also inconsistent with the records of Dr. Caroline Gellrick and Dr. Brian Beatty. Dr. Gellrick performed an IME on Claimant's behalf and Dr. Beatty performed an IME on behalf of Respondents.

7. Overwhelming evidence, however, establishes that Dr. Reiter was mistaken when he wrote that Claimant fell onto his right side. First, Claimant testified that Dr. Reiter did not have Claimant demonstrate how he fell after the smokestack struck him. During his deposition, Dr. Reiter corroborated Claimant's testimony when he admitted that he did not recall having Claimant demonstrate the fall. More important, Claimant also testified that he did demonstrate the fall for Drs. Gellrick, Beatty and Reinhard. All of their records reflect the fact that Claimant fell on his left side after he was struck by the smokestack. Regarding the description of the incident provided by Claimant, at his deposition, Dr. Reinhard testified as follows:

> He described being – or having this high wind blow this 65 to 70-pound smokestack down onto his right shoulder, the response to which was putting his left arm down to brace himself, but being blown – or being knocked down on the ground onto his left side. And then the smokestack that hit him I guess bounced up and then struck him a second time.
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> * * * * *
>
> The patient has described a different mechanism of injury on at least two occasions to me that have been perfectly consistent. (Reinhard Deposition, pages 17 & 18.)

8. Claimant's testimony that he was knocked down onto his left side is corroborated by medical records from the physicians who asked Claimant to demonstrate the mechanism of injury. And, as noted by Dr. Reinhard, Claimant demonstrated the exact same mechanism of injury on more than one occasion and those consistent demonstrations were separated by months. Notably, after reviewing all the records in this case, including Dr. Beatty who testified that he, too, believed that Claimant was knocked down and fell onto his left side. (Beatty Deposition, Page 21) Claimant's allegation that he was knocked down and fell onto his left side as described to Drs. Beatty, Gellrick and Reinhard – is found to be credible and, to the extent Dr. Reiter's initial notes are inconsistent with that testimony, they are deemed to be inaccurate.

9. By October 18, 2007, Claimant reported neck pain to his Osteopath, Dr. Timothy Judd, and received treatment for the condition. By November 5, 2007, Joy Martinez, a physician's assistant employed by Dr. Reiter, reported that Claimant had pain "radiating up into the cervical musculature."

10. Claimant had treatment on his neck prior to the incident at issue in this matter. Prior to October 1, 2007, Claimant underwent bi-annual osteopathic manipulations with Dr. Judd that included adjustments of his cervical spine. Additionally, while Claimant was receiving treatment for double vision in November of 2006, the emergency room physician noted that Claimant did receive "adjustments of his neck." Finally, there is reference to a "cervical strain" in a record dated November 9, 2006. (Claimant's Exhibit No. 16) That record, however, was also generated while Claimant sought treatment for the double vision problem. Otherwise, there is no pre-incident evidence that Claimant was ever diagnosed with a significant cervical injury. There is no pre-incident evidence that any diagnostic studies of the cervical spine were ever ordered or performed. There is no pre-incident evidence that any, regular systematic or invasive medical treatment was recommended for a cervical spine problem. There is no pre-incident persuasive evidence that Claimant was ever disabled by, or in need of treatment for, a specific cervical spine injury.

11. There is no persuasive evidence, prior to October 1, 2007, showing that Claimant had ever been diagnosed with or treated for a specific injury to his left shoulder.

12. Respondents admitted liability for Claimant's right shoulder injury and Claimant underwent surgery on that shoulder in November 2007. Later, Claimant returned to modified work for Employer. Once Claimant began driving while working in the modified duty position, Claimant's left shoulder and neck became severely symptomatic, resulting in increased disability, the onset of headaches and several other symptoms. Once those symptoms arose, Dr. Reiter began making treatment recommendations designed to further diagnose and/or treat the neck and left shoulder problems. Dr. Reiter also referred Claimant to Dr. David Reinhard for further evaluation and treatment of his injuries, including the neck and left shoulder.

13. Claimant underwent a MRI of the cervical spine during a hospitalization in the summer of 2008. It showed, in relevant part, that Claimant had:(1) disc protrusions with ventral indentation of the thecal sac and moderate canal stenosis at C4-5; focal central/right paracentral disc protrusion with compression of the thecal sac and moderate stenosis at C5-6; and a broad based focal central disc protrusion with ventral indentation of the thecal sac and moderate canal stenosis at C6-7.

14. Dr. Caroline Gellrick opined that Claimant's neck and bilateral shoulder problems all relate to the original injury. Dr. Gellrick noted:

> Greater than 50% medically probable that the injuries to the neck and left shoulder are related to the work accident of October 1, 2007, based on the mechanism of fall that the patient describes as well as based on clinical record review, especially Dr. Reinhard's record. Patient presents as a very forthright individual who just wants to return to work. He notes with the return to work with bouncing up and down in the cab the neck pain surfaced. Until that time, he had been off work and the neck did not surface, but when force was applied, the neck symptoms became obvious. The left shoulder pain was noted by history and later therapy rehab notes, which is reasonable as one begins to strengthen the right shoulder, the left, with equal weight distribution, would show up and he does have a history of landing on this as he fell off the paver being hit on the right side.

15. Dr. Gellrick has also made several treatment recommendations including; (1) MRI arthrogram on the left shoulder; (2) EMG studies of both upper extremities; (3) epidural steroid injections; (4) facet blocks, medial branch blocks and/or rhizotomy; (5) physical therapy; and (6) further orthopedic evaluation. The extent of such treatment would, of course, depend on the outcome of diagnostic treatment as well as the efficacy of the facet blocks.

16. Dr. Braden J. Reiter, Claimant's primary care provider, opined that Claimant's left shoulder relates to the original injury, because, "... after he had the surgery on the right shoulder he compensated with the left shoulder, and then when he returned to driving, it required use of the left arm more so because of the weakness in the right arm due to the surgery." (Reiter Deposition, page 20) Dr. Reiter also relates Claimant's neck complaints to the original injury as follows: "I feel that when he returned to driving he was deconditioned, and then bouncing around in the truck caused aggravation of his cervical spine. And that would be related back to his initial injury." (Reiter Deposition, page 21) Dr. Reiter also testified that the treatment recommendations made by Dr. Gellrick are reasonable. (Reiter Deposition, page 12). Dr. Reiter's opinions on causation and medical treatment are credible and persuasive.

17. Dr. David Reinhard opined that Claimant's neck and left shoulder complaints are related to the original injury. Dr. Reinhard opined: "Again, with the mechanism of injury described by [Claimant] on a couple of occasions to me separated by quite a bit of time, the left shoulder injury is very probable based on the fact that he fell on his left side with the weight of this smokestack having struck him." (Reinhard Deposition, page 18.) As for the neck, Dr. Reinhard opined: "... I think the fact that he did have a neck injury is supported both by the records as well as [Claimant's] stories describing the incident." (Reinhard Deposition, page 18) When asked why he believed

that Claimant's neck and left shoulder became more symptomatic after driving, Dr. Reinhard opined: "Just from the driving activity itself. He describes bouncing up and down in the truck and sort of a rougher ride than a private vehicle that would be very commonly identified as a cause of aggravating or triggering neck pain." (Reinhard deposition, page 20) Along with Dr. Reiter, Dr. Reinhard has also agreed that Dr. Gellrick's treatment recommendations are reasonable. Dr. Reinhard's opinions on causation and treatment are credible and persuasive.

18. Claimant injured his right shoulder, left shoulder and neck at the time he was knocked to the ground by the falling smokestack. Additionally, Claimant's original neck and left shoulder injuries were aggravated when he returned to work for Employer. Claimant has proven by a preponderance of the evidence that his left shoulder and neck injuries are causally related to the October 1, 2007 industrial injury.

19. The treatment and diagnostic recommendations made by Drs. Reinhard and Reiter are reasonable and necessary to relieve Claimant from the effects of his neck and left shoulder injuries, and from the aggravation of Claimant's left shoulder and neck injuries sustained when Claimant returned to work for Employer.

CONCLUSIONS OF LAW

1. 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 the 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.2nd 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in the favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201.

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, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

3. The ALJ's factual finding 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).

4. Drs. Gellrick, Reinhard and Reiter– the latter two being Claimant's authorized treatment providers – all agree that Claimant injured his left shoulder and neck at the time of the incident and/or that he aggravated his left shoulder and neck when he returned to driving for Employer. The opinions of Drs. Gellrick, Reiter and Reinhard were found credible and persuasive. Additionally, Claimant's testimony concerning the fall was found credible and persuasive. Claimant has proven by a preponderance of the evidence that his left shoulder and neck injuries are causally related to the October 1, 2007 industrial injury.

5. The Claimant bears the burden of proof to establish his 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).

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

7. Claimant has proven by a preponderance of the evidence that the treatment and diagnostic recommendations made by Drs. Reinhard and Reiter are reasonable and necessary to relieve Claimant from the effects of his neck and left shoulder injuries, and from the aggravation of Claimant's left shoulder and neck injuries sustained when Claimant returned to work for Employer.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the medical expenses that are reasonable and necessary to cure and relieve Claimant from the combined effects of his neck and bilateral shoulder injuries.

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

DATED: January 21, 2009

Barbara S. Henk
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-767-531

ISSUES

The issues determined herein are compensability and temporary total disability ("TTD") benefits. The parties stipulated to medical benefits and the maximum rate of TTD benefits.

FINDINGS OF FACT

1. On May 22, 2008, claimant began work as a construction electrician for the employer. Claimant's job was to assemble a bus duct, consisting of sections of copper plating that came in sections one and one-half to three feet by 12 to 16 feet. A crane lifted the sections in place, but claimant had to use four by four pieces of wood to line the sections up. Claimant then had to bolt the sections together using from eight to 36 bolts that were three to six inches long. He tightened the bolts with a socket wrench. The bolting required claimant to crawl and bend in awkward positions. He had to carry buckets of bolts weighing 20 to 40 pounds.
2. Claimant had some preexisting injuries and problems. He was in a motor vehicle accident in 1989 or 1990, suffering whiplash. He had emergency room treatment only. He started some chiropractic treatment in 1993. His last chiropractic treatment was in 2005 or 2006.
3. On February 14, 1996, claimant fell from a ladder. He sought only emergency room treatment.
4. Since 1986, claimant has suffered seizures. After a seizure, claimant experiences back pain. He last suffered a seizure in July 2007. August 13, 2007, x-rays of his lumbar spine were normal.
5. On Tuesday, July 15, 2008, claimant worked his regular duties starting at 7:00 a.m. He suffered no symptoms. He took his break at 3:30 p.m. in the break trailer. He sat and snacked. He then attempted to arise to return to work, but he suffered low back pain and upper back spasms.
6. Claimant immediately reported to his foreman, Mr. Breslin, that he had done something to his back. Mr. Breslin escorted claimant to the safety trailer, where he reported to Ms. Hans, the medic. Claimant informed her that his back was stiff when he got up from his break. Ms. Hans suspected a lumbar strain and gave claimant some over the counter anti-inflammatory medication. She informed Mr. Graham, the safety manager, that claimant had reported low back pain. Claimant informed Mr. Graham that he suffered the pain, but could not identify the mechanism of injury. Claimant did not request a physician on July 15.
7. On July 16, 2008, claimant returned to work bolting the sections. He did not do any lifting. Claimant continued to perform that lighter work for the rest of the week.
8. On Monday, July 21, 2008, claimant awoke at 3:30 a.m. unable to get up. He called the employer and left messages. At 6:30 p.m., he finally sought treatment at

Penrose Hospital emergency room. X-rays showed L4-5 degenerative disc disease. The physician excused claimant from work for a couple of days.

9. On July 24, 2008, claimant returned to work at the lighter duty job. Claimant continued to perform these job duties until December 23, 2008, when he was laid off due to a reduction in force.

10. On July 25, 2008, claimant requested medical care. The employer representative accompanied him to Dr. Dallenbach on either July 25 or 28, 2008. Claimant reported a history of awkward positioning at work and then being unable to stand up after his break. Dr. Dallenbach diagnosed lumbar strain that was work-related. He prescribed medications and physical therapy and imposed restrictions.

11. On December 9, 2008, Dr. Hall performed an independent medical examination ("IME") for claimant. Claimant reported a history of crawling, reaching, and awkward positioning on the job and the inability to stand after his break. Claimant reported the history of his 1996 fall and occasional chiropractic treatment. Dr. Hall diagnosed lumbar sprain, probable sacroiliac ("SI") joint problems, possible discogenic pain, and myofascial pain. Dr. Hall concluded that claimant suffered a work injury due to the awkward loading of his lumbar spine.

12. Claimant has proven by a preponderance of the evidence that he suffered an occupational disease to his low back resulting directly from the employment or conditions under which work was performed and following as a natural incident of the work for the employer. Claimant's testimony is credible. The opinions of Dr. Dallenbach and Dr. Hall are persuasive. Claimant had some preexisting low back pain and treatment, but he was suffering no problems and was able to work full duty until he had the onset of pain and spasm on July 15, 2008, after working for several hours at his usual job duties.

13. Claimant did not lose more than three days or three shifts of work due to his work injury.

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).

2. In this claim, claimant alleges an occupational disease. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury. An accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). In contrast, an occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). As found, claimant has proven by a preponderance of the evidence that he suffered an occupational disease to his low back resulting directly from the employment or conditions under which work was performed and following as a natural incident of the work.

3. For three days, claimant was unable to return to the usual job due to the effects of the work injury. Consequently, claimant was “disabled” within the meaning of section 8-42-105, C.R.S. *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 not, however, entitled to TTD benefits for July 21-23, 2008, because he did not miss <u>more than</u> three days. 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. Section 8-42-105(1), C.R.S.

ORDER

It is therefore ordered that:

1. The insurer shall pay for all of claimant’s reasonably necessary medical treatment by authorized providers, including the bills for the July 21, 2008 treatment at Penrose Hospital.

2. Claimant’s claim for TTD benefits for the period July 21-23, 2008 is denied.

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

DATED: <u>January 22, 2009</u>

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-690-754

ISSUES

The issue determined herein is whether claimant's claims for additional medical, temporary total disability ("TTD"), temporary partial disability ("TPD"), permanent partial disability ("PPD"), and permanent total disability ("PTD") benefits and for calculation of the average weekly wage are closed by final admission of liability ("FAL").

FINDINGS OF FACT

1. On June 14, 2006, claimant suffered an admitted industrial injury.
2. On June 23, 2008, claimant applied for hearing on the issues of TTD benefits and average weekly wage. Hearing was set for October 7, 2008.
3. Claimant then attended a follow-up Division Independent Medical Examination ("DIME"). The DIME determined that claimant was at maximum medical improvement ("MMI") on May 29, 2008, and suffered 14% whole person permanent impairment, consisting of 11% physical and 3% psychological.
4. On August 26, 2008, respondents applied for hearing on the issues of PPD benefits and average weekly wage, offsets, overpayments, and apportionment. The application indicated a setting date of September 10, 2008, to select the date of the hearing.
5. On September 8, 2008, claimant filed a response to the application for hearing, listing issues of medical, PPD, and PTD benefits.
6. On September 11, 2008, the insurer filed a FAL that admitted for medical benefits to date as well as post-MMI medical benefits. The FAL admitted for TTD benefits through May 28, 2008, denied PTD benefits, and admitted for PPD benefits based upon the 14% whole person rating by the DIME. The FAL admitted that the average weekly wage was $270 until August 4, 2008, when it was reduced to $152.08. The FAL took credit against PPD benefits for an overpayment of TTD and for previous payments of PPD benefits.
7. On September 12, 2008, respondents withdrew their August 26, 2008, application for hearing. They sent their September 12, 2008, letter to the incorrect OAC office and used an incorrect WC number. The motion for summary judgment, response, and reply so not show that a hearing was set on that application and they do not show that OAC improperly permitted a unilateral withdrawal of the application. OAC records show that the application was rejected on September 24, 2008, presumably due to the failure of the parties to set the hearing within 5 days from the setting date.
8. On September 25, 2008, Prehearing ALJ Eley conducted a prehearing conference. Claimant withdrew his June 23, 2008, application for hearing. PALJ Eley sent a memo to the OAC clerk to vacate the October 7, 2008, hearing.

9. At no time before October 21, 2008, did claimant file a written objection to the FAL or file an application for hearing on disputed ripe issues.
10. On October 21, 2008, claimant applied for hearing on the issues of TTD, TPD, PPD, PTD, and medical benefits, and the average weekly wage.
11. The deadline for claimant's application for hearing was October 11, 2008, or the next business day. Claimant did not file an application on any disputed ripe issues within 30 days after the FAL.

CONCLUSIONS OF LAW

1. Respondents seek summary judgment on the grounds that all of the issues are closed by the FAL. OACRP 17 authorizes summary judgment if there is no disputed issue of material fact and the party is entitled to judgment as a matter of law. Section 8-43-203(2)(b)(II), C.R.S., requires that a FAL provide a notice to the claimant that the case will be automatically closed as to the issues admitted in the FAL unless, within 30 days, clamant files a written objection, applies for hearing on any disputed ripe issues, and files a notice and proposal to select a DIME. *See Lobato v. Industrial Claim Appeals Office,* 105 P.3d 220 (Colo. 2005). The September 11, 2008, FAL used the correct DOWC form to provide this notice to the claimant. As a result, claimant was required to file an application for hearing by October 11, 2008, or the next following business day. Claimant did not file his application for hearing until October 21, 2008. Respondents argue that all of the issues were closed because of the untimely application for hearing following the FAL.
2. Claimant's response to the motion conceded that his application for hearing was untimely. Claimant, however, argues that his response to the respondents' August 26, 2008, application for hearing should be reinstated. He cites OACRP 15, which provides that, after a response to an application for hearing, an application may not be withdrawn and hearing vacated except by agreement of all parties or upon order of a judge. Claimant argues that he did not agree and hearing should be set on his response, which listed the issues of medical, PPD, and PTD benefits. Claimant then argues that the TTD and average weekly wage issues should be added to that hearing.
3. Respondents' reply contends that claimant must file an application for hearing <u>after</u> the FAL.
4. Claimant, in citing OACRP 15, has ignored OACRP 8(K), which provides that an application shall be stricken without prejudice if a party does not confirm a hearing date within five days after the date of the setting on the application. That is what happened in the current case. OAC did not improperly permit one party unilaterally to withdraw an application and vacate a hearing. The parties never set the hearing in the first place. Consequently, the August 26 application and September 8 response to the application are moot.
5. Claimant was required to file an application within 30 days after the September 11 FAL if he intended to prevent the closure of the issues admitted in the FAL. He failed to do. His September 8 response to application, raising issues of medical, PPD, and PTD benefits, did not satisfy the statute. Claimant's earlier June 23 application on TTD benefits and average weekly wage apparently was not in any way stricken with prejudice. Claimant simply withdrew that application on September 25, 2008. Whether the September 11 FAL would bar proceeding on the June 23 application for hearing if

claimant had not withdrawn that application is not addressed in this decision. The June 23 application is also irrelevant. Claimant remained free at any time prior to October 11, 2008, to file an application on those issues as well as the issues in his September 8 response. He failed to do so until October 21, 2008. Respondents are correct that the FAL closed the issues of TTD, TPD, PPD, and PTD benefits and the calculation of the average weekly wage because those issues were addressed in the FAL. *Peregoy v. Industrial Claim Appeals Office,* 87 P.3d 261 (Colo.App. 2004).

6. Post-MMI medical benefits pursuant to *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988), are not closed by the FAL, which specifically admitted for such benefits. Respondents remain free to contest the reasonable necessity of any future treatment. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). Either party may apply for hearing on such medical benefits at any time after the FAL. Consequently, claimant's application for hearing on medical benefits is not barred by the FAL and section 8-43-203(2)(b)(II), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant's claims for additional TTD, TPD, PPD, and PTD benefits and the calculation of the average weekly wage are denied and dismissed.

2. The April 8, 2009, hearing may proceed on the issue of post-MMI medical benefits.

DATED: January 22, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-573-129

ISSUES

¬ Did claimant prove by a preponderance of the evidence that his admitted injury proximately caused his right shoulder impingement syndrome?

¬ Did claimant prove by a preponderance of the evidence that his admitted injury proximately caused his wage loss after April 22, 2008?

FINDINGS OF FACT

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

1. Employer operates an electric utility business. Claimant's date of birth is August 16, 1959; his age at the time of hearing was 49 years. Claimant suffered an

admitted work-related injury on February 10, 2003, while working as a lineman for employer.

2. At the time of his injury, claimant was working atop a building near a corner where utility wires attached to the building. A coworker standing in a crane bucket attempted to hand claimant a 200-pound spool of fiber-optic cable, while balancing half of the spool on the side of the crane bucket and half on the top of the building. The spool slipped, causing claimant to rotate his spine while maneuvering the spool to a spot on the roof. Claimant felt pain in his spine from his neck to his buttocks. As the day progressed, claimant also experienced numbness and tingling in his upper extremities.

3. Claimant awoke the following morning with severe pain in his cervical spine, lumbar spine, and upper extremities. Claimant reported his injury to employer, who referred him to Chiropractor Michael Treinen, D.C. Dr. Treinen treated claimant periodically from February 13, 2003, into 2006. Jim Youssef, M.D., eventually performed a lumbar fusion on August 4, 2003, to address claimant's lower back symptoms.

4. At maximum medical improvement, Randal Jernigan, M.D., examined claimant on April 21, 2004, to provide permanent restrictions and a permanent medical impairment rating. Claimant reported that he was unable to sit for more than 30 minutes. Dr. Jernigan determined that claimant likely could not return to work as a lineman.

5. On August 16, 2004, insurer filed a Final Admission of Liability (FAL). Claimant failed to object to the FAL, and his claim closed by operation of law.

6. Claimant worked as a dishwasher for a restaurant from October 2004 to February 2005. From February to June of 2005, claimant worked as an auto technician for Walmart, changing oil and lubricating cars. Claimant worked on the cars from a pit below, requiring him to work with his hands overhead for several hours per day. Claimant returned to work for the restaurant as a maintenance worker from July to October of 2005. Claimant then returned to work as an auto technician for Walmart from November of 2005 to February of 2006.

7. Dr. Treinen examined claimant on June 10, 2005, during the period when he was working for Walmart. Dr. Treinen recorded claimant reporting that his symptoms increased from holding his hands overhead to work on cars. Dr. Treinen characterized claimant's work at Walmart as moderate to heavy manual labor requiring him to frequently lift up to forty pounds. On June 15, 2005, claimant reported to Dr. Treinen right shoulder symptoms including occasional dull pain with weakness. This history of right shoulder symptoms represents the first persuasive documentation of a right shoulder problem since claimant injured himself at employer some 30 months earlier on February 13, 2003. As claimant continued his overhead work at Walmart, his right shoulder complaints worsened, such that, by February 13, 2006, Dr. Treinen documented a frequent burning, stinging, throbbing pain with tingling, stiffness, soreness and weakness.

8. At respondents' request, Henry Roth, M.D., performed an independent medical examination of claimant on January 16, 2007, some 11 months after claimant stopped working for Walmart. Claimant completed a patient drawing and pain questionnaire for Dr. Roth, which shows that claimant was not documenting any right shoulder pain. At that time, Dr. Roth's physical examination of claimant's bilateral shoulders was normal and unremarkable. While Dr. Roth performed specific provocative tests designed to identify shoulder pathology or shoulder complaints, claimant had no signs or symptoms of a shoulder problem at that time. According to Dr. Roth, claimant had no atrophy or tenderness of the muscles of either shoulder, no shoulder pathology by testing, full range of motion, no tenderness of the acromio-clavicular (AC) joint, and no impingement or biceps signs for either shoulder.

9. By order of June 20, 2007, Administrative Law Judge William A. Martinez granted claimant's petition to reopen his claim and ordered insurer to pay for reasonable and necessary medical treatment to address cervical and upper extremity symptoms. Judge Martinez expressly ordered insurer to provide a magnetic resonance imaging (MRI) scan of claimant's cervical spine and electro-diagnostic (EMG) studies of his upper extremities. As found below, insurer has provided claimant the diagnostic studies and treatment Judge Martinez ordered. Claimant however developed a right shoulder impingement syndrome, which respondents deny is related to claimant's injury some 5 years ago.

10. Claimant moved to Texas, where his care was transferred to Charles Hinman, M.D. Dr. Hinman first examined claimant on November 29, 2007, some 19 months after claimant stopped working for Walmart. Dr. Hinman obtained a history of claimant's symptoms from him, absent from that history are complaints of right shoulder pain. Dr. Hinman's physical examination findings indicate claimant displayed full range of motion in both shoulders, with normal motor strength. Dr. Hinman diagnosed cervicothoracic pain, with features of cervical radiculopathy, and narcotic analgesic dependence. Dr. Hinman ordered the cervical MRI and EMG studies of claimant's upper extremities. Dr. Hinman anticipated referring claimant to a pain management specialist for management of his pain medications.

11. On January 10, 2008, claimant complained of pain in both arms with intermittent weakness of grip, causing him to drop objects. Dr. Hinman contemplated referring claimant for treatment of carpal tunnel syndrome (CTS). Dr. Hinman's physical examination findings documented no bilateral shoulder deformity, no shoulder tenderness, full range of motion, and normal rotator cuff motion. Dr. Hinman counseled claimant to quit smoking cigarettes and to pursue cardiovascular conditioning.

12. Dr. Hinman referred claimant to the Capitol Pain Institute for pain management. S. Matthew Schocket, M.D., oversaw claimant's pain management, which involved claimant's attestation to a narcotic contract. Dr. Schocket administered epidural steroid injection (ESI) therapy to claimant's cervical spine. Dr. Schocket administered cervical ESIs on February 4 and March 20, 2008.

13. On March 21, 2008, Dr. Hinman documented subjective weakness in both arms. Dr. Hinman noted he held a long discussion with claimant, advising him that he needed to exercise and to stop smoking. On March 31, 2008, Kumar Sathianathan, M.D., obtained a history from claimant of right shoulder pain, worse with activity. Claimant reported to Dr. Sathianathan that he had experienced these right shoulder symptoms since his injury at employer in 2003. Dr. Sathianathan assessed a right rotator cuff injury.

14. The Judge credits the medical observation of Dr. Roth over claimant's report to Dr. Sathianathan that he had experienced right shoulder symptoms since his injury at employer in 2003. Dr. Roth reviewed and summarized extensive medical records. Crediting Dr. Roth's medical opinion, the Judge finds that the March 31, 2008, report of Dr. Sathianathan represents the first mention by claimant of symptoms, functional deficits, or exam findings suggestive of internal derangement of either shoulder. There is no persuasive medical evidence supporting the history claimant reported to Dr. Sathianathan on March 31, 2008.

15. Dr. Schocket evaluated claimant on April 22, 2008, when claimant reported he was no doing too well. Claimant told Dr. Schocket he wanted to know why nothing is working for him. Claimant reported having a hard time lifting his right arm above his head. Dr. Schocket examined claimant's right shoulder and suspected a rotator cuff tear. Dr. Schocket ordered a right shoulder MRI scan for work-up of claimant's right shoulder symptoms. Pending further work-up of claimant's right shoulder condition, Dr. Schocket imposed work restrictions of no lifting, no pushing or pulling, and no carrying. Dr. Schocket also limited sitting and standing to 30 minutes or less. Crediting Dr. Roth's testimony, the restrictions imposed by Dr. Schocket are designed to protect claimant from further injury to his right shoulder, pending work-up of that condition.

16. Claimant underwent a right shoulder MRI on May 5, 2008. On May 28, 2008, Dr. Hinman noted claimant had undergone two series of ESI therapy that resolved claimant's bilateral hand paresthesia, but not his numbness and weakness. On October 14, 2008, Dr. Hinman reported that EMG studies of claimant's upper extremities revealed bilateral CTS.

17. According to Dr. Roth, the May 5th right shoulder MRI scan revealed findings of an intra-substance tear of the supraspinatus tendon at its insertion and degenerative changes of the AC joint, which are ordinary findings for a man of claimant's age. Crediting Dr. Roth's testimony, the intra-substance tear is the result of a degenerative process (a breakdown of tendon tissue inside the tendon itself involving fraying or failure of the tendon over time), and not the result of acute trauma. Acute trauma typically causes a surface tear of the tendon, and not an intra-substance tear. Dr. Roth wrote in his June 13, 2008, report:

> One should not presume that the recent loss of motion and discomfort at the shoulder is a reflection of an intra-substance supraspinatus rotator cuff tear. [Claimant] has a fast and dramatic loss of motion. His loss of motion

> is not commensurate with a minor supraspinatus tear. **[Claimant] is likely experiencing idiopathic adhesive capsulitis.**

(Emphasis added). Dr. Roth's medical opinion was persuasive in explaining the medically probable cause of claimant's right shoulder condition.

18. Claimant failed to show it more probably true than not that his February 10, 2003, injury proximately caused his right shoulder condition. The Judge credits the medical opinion of Dr. Roth in finding that claimant's intra-substance supraspinatus rotator cuff tear, adhesive capsulitis, and degenerative changes of the AC joint in his right shoulder likely are age-related findings proximately caused by ordinary life changes from activities of daily living. While claimant experienced right shoulder symptoms from his overhead work at Walmart, claimant first experienced symptoms of idiopathic adhesive capsulitis in his right shoulder around March 31, 2008, when he reported such symptoms to Dr. Sathianathan. Claimant's testimony that he suffered bilateral shoulder symptoms as a result of his admitted injury on February 10, 2003, is unsupported by the medical evidence and lacks credibility.

19. Claimant failed to show it more probably true than not that his February 10, 2003, injury proximately caused his wage loss after April 22, 2008. As found, claimant's right shoulder condition was not proximately caused by his injury on February 10, 2003. The Judge credited Dr. Roth's testimony in finding that Dr. Schocket imposed restrictions on April 22, 2008, to protect claimant from further injury to his right shoulder, pending work-up of that condition.

CONCLUSIONS OF LAW

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

A. Relatedness of Right Shoulder Condition:

Claimant argues he has proven by a preponderance of the evidence that his admitted injury proximately caused his right shoulder impingement syndrome. 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 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*.

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 his February 10, 2003, injury proximately caused his right shoulder condition. Claimant thus failed to prove by a preponderance of the evidence that right shoulder condition is compensable.

The Judge credited Dr. Roth's medical opinion in finding claimant's intrasubstance supraspinatus rotator cuff tear, adhesive capsulitis, and degenerative changes of the AC joint in his right shoulder likely are age-related, idiopathic findings proximately caused by ordinary life changes and activities of daily living. The Judge found that claimant first experienced symptoms of idiopathic adhesive capsulitis in his right shoulder around March 31, 2008, when he reported such symptoms to Dr. Sathianathan. The Judge found claimant's testimony that he suffered bilateral shoulder symptoms as a result of his admitted injury on February 10, 2003, unsupported by the medical evidence and lacking credibility.

The Judge concludes claimant's claim for workers' compensation benefits for his right shoulder condition should be denied and dismissed.

B. Temporary Total Disability Benefits:

Claimant argues he has proven by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits from April 22, 2008, ongoing, because his admitted injury proximately caused his wage loss. The Judge disagrees.

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). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

The Judge found claimant failed to show it more probably true than not that his February 10, 2003, injury proximately caused his wage loss after April 22, 2008. Claimant thus failed to prove by a preponderance of the evidence that he is entitled to TTD benefits from April 22, 2008, ongoing.

As found, claimant's right shoulder condition was not proximately caused by his injury on February 10, 2003. The Judge credited Dr. Roth's testimony in finding that Dr. Schocket imposed restrictions on April 22, 2008, to protect claimant from further injury to his right shoulder, pending work-up of his right shoulder condition.

The Judge concludes that claimant's claim for TTD benefits from April 22, 2008, ongoing, 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 for his right shoulder condition is denied and dismissed.

2. Claimant's claim for TTD benefits from April 22, 2008, ongoing, is denied and dismissed.

3. Issues not expressly decided herein are reserved to the parties for future determination.

DATED: _January 22, 2009_

Michael E. Harr,

Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-672-642

ISSUES

Whether Respondents have overcome by clear and convincing evidence the Division Independent Medical Examination (DIME) physician's determination that Claimant suffered a 30% whole person impairment rating as a result of his September 16, 2004 admitted industrial injury.

FINDINGS OF FACT

1. On September 16, 2004 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. Claimant received medical treatment from Bruce B. Cazden, M.D.

2. Dr. Cazden referred Claimant to physical medicine and rehabilitation specialist Nicholas K. Olsen, D.O. for treatment. After conservative treatment, including epidural steroid injections, Dr. Cazden determined that Claimant reached Maximum Medical Improvement (MMI) on January 19, 2006.

3. On February 2, 2006 Claimant returned to Dr. Cazden for an impairment evaluation. Dr. Cazden remarked that Claimant had suffered the following industrial injuries: (1) a "transverse process fracture at L1, L2 and L3;" (2) disc protrusions at L3-L4 and L4-L5; and (3) a left rib cage fracture. Based on Claimant's specific disorders and range of motion deficits, Dr. Cazden assigned him a 19% whole person impairment rating.

4. On August 7, 2006 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Cazden's impairment rating. However, Respondents denied ongoing medical treatment after MMI.

5. Claimant subsequently filed a Petition to Reopen based on a worsening of condition. He asserted that he had experienced increased back pain since he reached MMI. Based on Claimant's testimony and the opinion of John S. Hughes, M.D., ALJ Cain granted Claimant's Petition to Reopen on July 10, 2007.

6. Claimant subsequently obtained medical treatment from Authorized Treating Physician (ATP) Dr. Olsen. On January 23, 2008 Dr. Olsen determined that Claimant had reached MMI. Dr. Olsen assigned Claimant a 5% specific diagnosis impairment for each of Claimant's vertebral fractures at L1, L2 and L3 for a 15% total rating.

7. Dr. Olsen also assigned Claimant a 4% range of motion impairment rating for the lumbar spine. Dr. Olsen's measurements were the following: (1) 53 and 54 degrees for lumbar flexion; (2) 25, 26, and 27 degrees for lumbar extension; (3) 22, 23, and 25 degrees for lumbar right lateral flexion; and (4) 22, 24, and 26 degrees for lumbar left lateral flexion. Combining Claimant's 15% rating for specific disorders with the 4% range of motion deficits, Dr. Olsen assigned Claimant a 19% whole person impairment rating.

8. On January 23, 2008 Respondents filed a FAL consistent with Dr. Olsen's impairment determination. However, on March 8, 2008 Claimant filed a Notice and Proposal to Select a DIME.

9. On June 2, 2008 Claimant underwent an independent medical examination with F. Mark Paz, M.D. Dr. Paz diagnosed Claimant with "remote L1, 2, 3 transverse process fractures" and "degenerative disc disease at the L3/4 and L4/5 levels." Dr. Paz also conducted range of motion testing on Claimant's lumbar spine. He estimated flexion at 30 degrees, extension of less than 10 degrees and right and left lateral flexion of 10 to 15 degrees. Dr. Paz concluded that objective findings did not support Claimant's subjective complaints and agreed with Dr. Olsen that Claimant reached MMI on January 23, 2008.

10. On June 9, 2008 Claimant underwent a DIME with Bennett L. Machanic, M.D. Dr. Machanic diagnosed Claimant with a chronic lower back strain, suggestions of facet arthropathy and possible ongoing discogenic degeneration. He agreed with Dr. Olsen that Claimant had reached MMI on January 23, 2008. However, he assigned Claimant a 30% whole person impairment rating for his September 16, 2004 industrial injuries.

11. The 30% whole person rating included a 5% lower extremity impairment based on decreased sensation in the left leg over the lateral femoral cutaneous nerve. The 5% lower extremity rating converted to a 2% whole person impairment rating.

12. During the DIME Dr. Machanic recorded the following lumbar range of motion measurements: (1) 15, 20 and 20 degrees flexion; (2) 10, 5 and 5 degrees extension; (3) 10, 10 and 10 degrees right lateral flexion; and (4) 10, 10 and 5 degrees left lateral flexion. He thus assigned Claimant an 18% whole person impairment rating for range of motion loss in the lumbar spine.

13. The 30% whole person rating also included a 13% impairment for specific disorders. Dr. Machanic assigned Claimant a 7% specific disorder impairment rating under Table 53, section IIC of the AMA Guides for moderate-to-severe degenerative disc disease. He also noted that Claimant suffered a 5% specific disorder impairment under section IB based on vertebral fractures and added a 1% impairment because Claimant suffered from two level disc problems.

14. On September 11, 2008 Dr. Hughes performed an independent medical examination of Claimant. Dr. Hughes noted that Claimant suffered "visible and palpable

hypertonicity in the left thoracolumbar spine." He explained that he agreed with Dr. Machanic that Claimant had reached MMI on January 23, 2008. However, he also noted that Claimant required maintenance medical treatment. Moreover, Dr. Hughes remarked that Dr. Machanic failed to consider all three of Claimant's transverse process fractures and thus agreed with Dr. Olsen that Claimant had suffered a 15% whole person impairment as a result of specific disorders. Dr. Hughes also determined that Claimant had suffered an 8% whole person intervertebral disc impairment, a 2% left femoral cutaneous neuropathy related whole person impairment and an 18% whole person range of motion impairment. Combining all of Claimant's ratings, Dr. Hughes determined that Claimant had suffered a 37% whole person impairment as a result of his September 16, 2004 industrial injury.

15. On November 3, 2008 the parties conducted the evidentiary deposition of Dr. Paz. He explained that Claimant provided a poor effort during range of motion testing. Dr. Paz stated that there was no medical reason for Claimant's condition to have worsened between the time that Dr. Olsen conducted range of motion testing and the time when Dr. Machanic conducted range of motion testing. He commented that, if there are variations between doctors regarding range of motion testing, the AMA Guides require an explanation for the variation. However, Dr. Machanic did not explain the variation in range of motion measurements.

16. Dr. Paz also testified that it is improper to assign a Table 53 rating under specific disorders for both fractures and intervertebral soft tissue lesions. He commented that there were no objective findings consistent with Claimant's pain reports and Claimant's physical exam was more consistent with a nonorganic condition. Dr. Paz also remarked that the degenerative changes in Claimant's lumbar spine were not causally related to his September 16, 2004 industrial injury. Finally, because there was no evidence of nerve root impingement at the L5 nerve root, Dr. Paz noted that Dr. Machanic improperly assigned Claimant a lower extremity impairment rating.

17. Dr. Paz agreed with Dr. Olsen that Claimant had suffered a 19% whole person impairment. He also noted that Claimant did not require any additional medical treatment for his industrial injury.

18. Respondents have produced clear and convincing evidence to overcome Dr. Machanic's 18% whole person range of motion impairment. ATP Dr. Olsen recorded the following lumbar range of motion measurements for Claimant: (1) 53 and 54 degrees for lumbar flexion; (2) 25, 26, and 27 degrees for lumbar extension; (3) 22, 23, and 25 degrees for lumbar right lateral flexion; and (4) 22, 24, and 26 degrees for lumbar left lateral flexion. Dr. Olsen thus assigned Claimant a 4% whole person impairment rating for range of motion deficits. In contrast, Dr. Machanic recorded the following lumbar range of motion measurements for Claimant: (1) 15, 20 and 20 degrees flexion; (2) 10, 5 and 5 degrees extension; (3) 10, 10 and 10 degrees right lateral flexion; and (4) 10, 10 and 5 degrees left lateral flexion. He thus assigned Claimant an 18% whole person impairment rating for range of motion loss in the lumbar spine. The measurement disparities between Dr. Olsen and Dr. Machanic are significant. Dr. Machanic thus did

not follow the AMA Guides in failing to reconcile or resolve the significant differences between his range of motion measurements and Dr. Olsen's range of motion measurements. Based on the persuasive testimony of Dr. Paz that Claimant provided poor effort during range of motion testing and Dr. Olsen's credible range of motion determinations, Claimant is entitled to a 4% whole person impairment rating for range of motion deficits.

19. Respondents have failed to produce clear and convincing evidence to establish that it is highly probable that Dr. Machanic's ratings, other than range of motion impairments, were incorrect. Dr. Machanic assigned Claimant a 2% whole person impairment rating for decreased sensation in the left leg and a 13% whole person impairment rating for specific spinal disorders that included degenerative disc disease. The credible report of Dr. Hughes supports Dr. Machanic's DIME determinations. In fact, Dr. Hughes assigned Claimant a 15% whole person impairment for three transverse process fractures. He also determined that Claimant had suffered an 8% whole person intervertebral disc impairment and a 2% left femoral cutaneous neuropathy related whole person impairment. Although Dr. Olsen and Dr. Paz did not attribute some of Claimant's symptoms to the September 16, 2004 industrial injury and assigned Claimant a different impairment rating, their opinions constitute a mere difference of medical opinion. Respondents have thus failed to produce unmistakable evidence that Dr. Machanic's impairment determinations, other than range of motion deficits, were incorrect.

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 worker's 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 worker's 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 worker's 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).

4. 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). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The 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 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

5. A DIME physician is required to rate a claimant's impairment in accordance with the AMA Guides. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). Whether the DIME physician properly applied the AMA Guides to determine the impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

6. The AMA Guides specifically address the issue of clinical findings that are inconsistent with the findings in the record. According to the AMA Guides, when clinical findings are inconsistent, "the step of determining the percentage of impairment is meaningless and should not be carried out until communication between the involved physicians or further clinical investigation resolves the disparity." §1.2, *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*; *see Goffinett v. Cocat Inc.*, W.C. No. 4-677-750 (Apr. 16, 2008) (concluding that ALJ properly determined that the respondents has overcome the DIME physician's impairment rating by clear and convincing evidence because the DIME physician had failed to resolve a disparity in range of motion findings as required by the AMA Guides).

7. As found, Respondents have produced clear and convincing evidence to overcome Dr. Machanic's 18% whole person range of motion impairment. ATP Dr. Olsen recorded the following lumbar range of motion measurements for Claimant: (1) 53 and 54 degrees for lumbar flexion; (2) 25, 26, and 27 degrees for lumbar extension; (3) 22, 23, and 25 degrees for lumbar right lateral flexion; and (4) 22, 24, and 26 degrees for lumbar left lateral flexion. Dr. Olsen thus assigned Claimant a 4% whole person impairment rating for range of motion deficits. In contrast, Dr. Machanic recorded the following lumbar range of motion measurements for Claimant: (1) 15, 20 and 20 degrees flexion; (2) 10, 5 and 5 degrees extension; (3) 10, 10 and 10 degrees right lateral flexion; and (4) 10, 10 and 5 degrees left lateral flexion. He thus assigned Claimant an 18% whole person impairment rating for range of motion loss in the lumbar spine. The measurement disparities between Dr. Olsen and Dr. Machanic are significant. Dr.

Machanic thus did not follow the AMA Guides in failing to reconcile or resolve the significant differences between his range of motion measurements and Dr. Olsen's range of motion measurements. Based on the persuasive testimony of Dr. Paz that Claimant provided poor effort during range of motion testing and Dr. Olsen's credible range of motion determinations, Claimant is entitled to a 4% whole person impairment rating for range of motion deficits.

8. As found, Respondents have failed to produce clear and convincing evidence to establish that it is highly probable that Dr. Machanic's ratings, other than range of motion impairments, were incorrect. Dr. Machanic assigned Claimant a 2% whole person impairment rating for decreased sensation in the left leg and a 13% whole person impairment rating for specific spinal disorders that included degenerative disc disease. The credible report of Dr. Hughes supports Dr. Machanic's DIME determinations. In fact, Dr. Hughes assigned Claimant a 15% whole person impairment for three transverse process fractures. He also determined that Claimant had suffered an 8% whole person intervertebral disc impairment and a 2% left femoral cutaneous neuropathy related whole person impairment. Although Dr. Olsen and Dr. Paz did not attribute some of Claimant's symptoms to the September 16, 2004 industrial injury and assigned Claimant a different impairment rating, their opinions constitute a mere difference of medical opinion. Respondents have thus failed to produce unmistakable evidence that Dr. Machanic's impairment determinations, other than range of motion deficits, were incorrect.

ORDER

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

1. Respondents have overcome Dr. Machanic's 18% whole person impairment rating based on range of motion deficits by clear and convincing evidence. Claimant suffered a 4% whole person impairment based on range of motion deficits.

2. Respondents have failed to overcome the reminder of Dr. Machanic's impairment ratings by clear and convincing evidence.

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

DATED: January 23, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-768-272

ISSUES

¬ Did the claimant prove by a preponderance of the evidence that on August 2, 2008, he sustained an injury to his low back arising out of and in the course of his employment as a warehouseman?

¬ Did the claimant prove by a preponderance of the evidence that the alleged industrial injury rendered him temporarily and totally disabled?

¬ Did the claimant prove by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment as a result of the alleged injury?

FINDINGS OF FACT

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

1. On Saturday, August 2, 2008, the employer employed the claimant as an order selector in the employer's warehouse. The claimant worked in the "dry grocery" section. The claimant's duties required him to pick cases of groceries as directed by an electronic order system. This job involved considerable physical effort because the claimant was required to pick up cases of groceries, place them on a pallet, and move them to another location. The claimant's usual hours of work were from 6:00 a.m. to 2:30 p.m. Mr. Ray Roberts supervised the claimant.
2. The claimant had been working for the employer since 1997. In October 2007 the claimant sustained an admitted work-related injury to his left knee. This injury required surgery and caused the claimant to be experience temporary total disability (TTD), and temporary partial disability (TPD) through the end of May 2008.
3. The employer had negotiated a production quota with the claimant's union that required employees in the claimant's job description to pick 200 cases of groceries per hour. Failure to meet the production quota subjected employees to a stepped disciplinary process. The first violation within a twenty-six week period would result in a written warning. The second violation would result in a one-day suspension. The third violation would result in a three-day suspension. The fourth violation would result in a week's suspension. The final violation would result in termination from employment.
4. The stepped disciplinary policy also applied to other types of violations such as attendance.
5. The claimant was familiar with the stepped disciplinary policy. He had received one written warning for a production violation in 2007. He had also received written warnings pertaining to his attendance.
6. Following his release to full duty in June 2008, the claimant was exempted from meeting the production quota for a period of time. However, the claimant was subject to the quota by the end of July 2008. For the week ending July 26, 2008, the claimant averaged only 199 cases of groceries per hour.
7. On August 2, 2008, immediately prior to the commencement of the claimant's shift, Mr. Roberts issued the claimant a written warning for failure to meet the production quota for the week ending July 26, 2008.

8. The claimant signed the August 2, 2008, written warning "under protest." The claimant alleged that the electronic system for picking orders had malfunctioned cutting into his productivity and causing him to miss the quota. The employer investigated the alleged malfunction and made an allowance for the problem by increasing the amount of "down time" that the claimant was permitted. However, the employer persisted in the written warning because, even with the adjustment, the claimant still failed to meet the quota for the week ending July 26, 2008.

9. For the week of July 26, 2008, to August 2, 2008, the claimant's production again fell below the production quota. On August 2, 2008, the claimant was aware of his failure to meet the quota during the previous week, and knew that he would receive a second written warning for substandard production. The violation for the week ending August 2, 2008, would have subjected the claimant to a one-day suspension. However, on August 2, 2008, the claimant was not subject to termination unless he committed three additional production violations within the allotted period of time.

10. The claimant is a plaintiff in an ongoing EEOC class action lawsuit against the employer. Insofar as the lawuit pertains to the claimant, it involves an allegation that the employer permitted the presence in the workplace of symbols that are offensive to the claimant's religon. The claimant testified that approximately 2 years before August 2, 2008, one of the employer's superintendents requested the claimant to meet with the employer's attorneys in the EEOC action. The claimant refused to meet with the attorneys. The claimant testified that since he refused to meet with the attorneys he believes the employer has watched him more closely than it did before and singled him out for unfair treatment, particularly with regard to breaks.

11. The claimant testified that on August 2, 2008, at about 7:30 a.m., he was picking up a case of juice that was located on the floor of the warehouse. The claimant stated that as he turned or twisted to pick up the case he experienced a pop and the onset of pain in his lower back. The claimant immediately reported this incident to Mr. Roberts.

12. When the claimant reported the injury, Mr. Roberts provided the claimant with a document describing the employer's workers' compensation procedures and referred the claimant to the Aurora Medical Center (AMC) emergency room for treatment. AMC was not the employer's usual provider for workers' compensation injuries, but the claimant was sent there because it was a weekend. The document given to the claimant instructed him to return to the employer's warehouse with his "paperwork."

13. The claimant went to the MCA emergency room where Dr. Joseph Loran, M.D, treated him. Dr. Loran diagnosed "acute lumbar strain" and prescribed medications including Valium and Vicodin. The claimant was advised to "follow up with [his] doctor in about three days," to relax in bed for severe back pain and to avoid lifting anything over 15 pounds

14. The claimant did not return to the employer's premises on August 2, 2008. He did speak by telephone with the employer's human resource director, Angel Seydel, on Monday, August 4, 2006.

15. On Wednesday August 6, 2006, the claimant reported to the employer's regular workers' compensation provider, Health One Occupational Medicine and Rehabilitation (Health One). At Health One Dr. John Sanidas, M.D. examined the claimant. The claimant gave a history that he was a warehouseman and the he was "lifting a case and felt a pop and pain in his back." Dr. Sanidas noted the claimant walked with a slight

scoliosis secondary to pain and demonstrated tenderness in the paravertebral muscles bilaterally. Dr. Sanidas stated the claimant had "significant muscle spasm and tenderness to the examination." Dr. Sanidas assessed "lumbosacral strain" and prescribed Vicodin, Flexeril, and 6 treatments of physical therapy. Dr. Sanidas removed the claimant from work until a follow-up visit scheduled for August 11, 2008. Dr. Sanidas completed a Physician's Report of Workers' Compensation Injury (Form WC 164) where he marked a box indicating that his objective findings were consistent with the history of a work related injury.

16. Dr. Sanidas again examined the claimant on August 11, 2008. Dr. Sanidas noted tenderness of the paravertebral muscles and "significant muscle spasm." Dr. Sanidas stated that it was unsafe for the claimant to return to work, but consideration might be given to a light duty position if the claimant showed progress by August 14, 2008.

17. The claimant credibly testified that he attempted to begin physical therapy as directed by Dr. Sanidas. However, when the claimant reported for the first physical therapy session he was advised that the insurer was denying the claim and therapy would not be provided. The claimant then telephoned the insurance adjuster who confirmed that the claim was denied. The ALJ infers from this series of events that the insurer was fully aware that medical treatment was being denied to the claimant because the claim was under denial. Indeed, the ALJ infers that the insurer advised the previously authorized providers that the claim was under denial and payment of their bills was in question. Despite the call from the claimant the insurance adjuster did not refer the claimant to any other providers willing to provide treatment.

18. Following this series of events the claimant sought treatment from his personal medical provider, Kaiser Permanente. However, Kaiser refused to provide additional treatment after it learned of the possibility that the injury was related to a workers' compensation claim.

19. After Kaiser refused to treat the claimant, his was seen by Dr. David Yamamoto. The claimant visited Dr. Yamamoto on referral from his attorney. Dr. Yamamoto examined the claimant on September 2 and September 16, 2008. The claimant provided a history that on August 2, 2008, he felt a pop and experienced pain in his low back when lifting a case of juice weighing 30 to 35 pounds. Dr. Yamamoto assessed a "strain of the lumbar region." Dr. Yamamoto opined that, "This appears clearly to be a workers' compensation case."

20. The claimant proved it is more probably true than not that on August 2, 2008; he sustained a low back injury while lifting a case of juice, and that at the time of the injury the claimant was performing the duties of his employment as a warehouseman. The claimant's testimony that he sustained an injury is found to be credible. The claimant's testimony that he sustained a back injury while lifting a case of juice is corroborated by evidence that he immediately reported an injury to his supervisor and was referred for treatment at the AMC. The claimant followed through and obtained treatment at AMC on August 2, where he was prescribed medications and restricted from performing his work. When Dr. Sanidas examined the claimant on August 6, 2008, the doctor noted muscle spasm and diagnosed a lumbar strain consistent with a work-related injury. The ALJ finds the presence of documented muscle spasm constitutes an objective indication that the claimant had been injured.

21. The ALJ is not persuaded by evidence and the possible inference that the claimant falsely reported the August 2, 2008, injury because he was concerned the employer would terminate him for poor productivity. The ALJ finds that under the employer's stepped disciplinary procedure the claimant was subject to several additional warnings before termination was authorized. The claimant, who was familiar with the stepped disciplinary policy, probably did not have any concern that he was about to be terminated on August 2, 2008. Neither is the ALJ persuaded that the claimant falsely reported the injury because he was angry with the employer over the EEOC matter, or the employer's alleged mistreatment of the claimant stemming from his refusal to meet with the employer's attorneys. The ALJ finds the claimant was a long time employee of the employer, and that the EEOC matter had been pending for approximately two years before the events of August 2, 2008. The ALJ finds it is improbable that the EEOC lawsuit and related issues suddenly incited the claimant suddenly to file a false report of injury on August 2, 2008.

22. The parties stipulated the claimant's average weekly wage (AWW) is $860.

23. The claimant proved it is more probably true than not that he has been temporarily and totally disabled from performing the duties of his regular employment as a warehouseman since August 4, 2008. The medical records from AMC, Dr. Sanidas and Dr. Yamamoto all demonstrate that the claimant has been medically restricted from performing his regular duties since he reported to the emergency room on August 2, 2008. Moreover, the claimant credibly testified that he has not returned to work since August 2, 2004, and he believes he is unable to perform the duties of his pre-injury employment because of his ongoing symptoms.

24. The ALJ concludes that AMC, Dr. Sanidas, Kaiser, and Dr. Yamamoto constitute authorized treating physicians (ATP) for this injury. The employer referred the claimant to AMC and Dr. Sanidas. Dr. Sanidas referred the claimant for physical therapy. However, when the claimant reported for treatment the physical therapy provider refused to render care because it had been informed the claim was denied. The claimant notified the insurer of the physical therapist's refusal to provide treatment by calling the adjuster. However, the adjuster did not appoint a new provider, nor did she direct the claimant to return to Dr. Sanidas. Rather she simply affirmed that the claim would be denied. The ALJ infers from this evidence that the insurer had informed the previously authorized providers that the claim would be denied and that payment of their bills was in question. The ALJ further finds that the insurer led the claimant to believe that no further authorized treatment was available to him. The ALJ finds that in light of these circumstances there were no authorized treating providers willing to render care based solely on their medical judgment, and the insurer declined to appoint willing providers. Thus, the right to select the ATP passed to the claimant. The claimant initially selected Kaiser, but Kaiser refused to provide treatment for non-medial reasons upon learning that the injury was possibly work related. The claimant then selected treatment with Dr. Yamamoto.

25. The ALJ infers from the medical records of AMC, Dr. Sanidas, and Dr. Yamamoto, that the services and treatments provided to the claimant have been reasonable and necessary to cure and relieve the effects of the work related back injury. The providers have diagnosed a back strain and prescribed treatments that they consider appropriate for the claimant's condition. These treatments include medical examinations, medications and physical therapy.

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).

COMPENSABILITY OF ALLEGED INJURY

The claimant alleges that he proved by a preponderance of the evidence that on August 2, 2008, he sustained a low back injury arising out of and in the course of his employment when he picked up a case of juice. The respondents contend the claimant failed to meet his burden of proof. The respondents assert that the evidence establishes the claimant made a false claim of injury because he feared termination resulting from poor productivity, and because he harbored ill will towards the employer as evidenced by the EEOC lawsuit and the claimant's allegations of mistreatment stemming from his refusal to meet with the employer's attorneys. The ALJ agrees with the claimant.

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. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of " element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its 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*, *supra.*

As determined in Findings of Fact 20 and 21, the claimant proved it is more probably true than not that on August 2, 2008, he sustained a low back injury arising out of and in the course of his employment as a warehouseman when he lifted the case of juice. The ALJ credits the claimant's testimony concerning the time, place and cause of the low back injury. As found, the ALJ concludes that the medical records corroborate the claimant's testimony, especially Dr. Sanidas's reports documenting the presence of muscle spasm contemporaneous with the alleged injury. For the reasons stated in Finding of Fact 21, the ALJ is not persuaded by the respondents' argument that the evidence establishes that the claimant falsified the report of injury because he was afraid of termination or because of enmity towards the employer stemming from the EEOC complaint and its aftermath.

TEMPORARY TOTAL DISABILITY BENEFITS

The claimant seeks an award of TTD benefits commencing August 4, 2008, and continuing until terminated by law or order. The ALJ concludes the claimant proved entitlement to an award of TTD benefits.

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*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an

ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

The ALJ concludes the claimant proved he is entitled to an award of TTD benefits commencing August 4, 2008, and continuing. As determined in Finding of Fact 23, the ALJ credits the medical evidence demonstrating that the claimant has been restricted from performing the duties of his regular employment since the date of the injury. Moreover, the ALJ credits the claimant's own testimony indicating that he is unable to perform the duties of his pre-injury employment as a warehouseman. The ALJ concludes the claimant has demonstrated a total wage loss because he credibly testified that he has not returned to any work since the date of the injury.

There is no credible or persuasive evidence that the claimant's right to receive TTD benefits commencing August 4, 2008, is subject to termination at some later date pursuant to § 8-42-105(3). Indeed, the respondents do not even argue that termination of TTD benefits is appropriate if the claimant is entitled to TTD benefits commencing August 4.

MEDICAL BENFEITS

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. 2005. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Section 8-43-404(5)(a), C.R.S. gives the respondents the right in the first instance to select the ATP. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

Section 8-43-404(5)(a) contemplates that respondents will designate a physician who is willing to provide treatment without regard to non-medical issues such as the prospects for payment in the event the claim is ultimately denied. *Lutz v. Industrial Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988). If the authorized treating provider refuses to render treatment for non-medical reasons, such as a belief that the injury in not work related and payment may not be forthcoming from the insurer, the

right of selection passes to the claimant. Where treatment is denied for non-medical reasons the insurer must, upon notice of such denial, forthwith appoint a new authorized provider or the right of selection passes to the claimant. *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1997*); Scoggins v. Air Serv.,* W. C. No. 4-642-757 (ICAO March 31, 2006).

The ALJ concludes that AMC and Dr. Sanidas were authorized providers because the employer referred the claimant to them for treatment. The ALJ concludes that Kaiser and Dr. Yamamoto are also authorized treating physicians. As determined in Finding of Fact 24, the physical therapist to whom Dr. Sanidas referred the claimant refused to provide services for non-medical reasons. Specifically, the physical therapy provider refused to provide treatment because it had been informed the compensability of the claim would be denied. When the insurance adjuster was informed of the refusal to treat, she did not direct the claimant to return to Dr. Sanidas, nor did she appoint a new treating provider or physician. Rather, she simply reaffirmed to the claimant that the claim was denied. The ALJ concludes that in this circumstance the right of selection passed to the claimant because the insurer was refusing to designate a provider that would render treatment regardless of non-medial issues. The claimant initially selected Kaiser. However, Kaiser refused to provide ongoing treatment for non-medical reasons. The claimant then selected Dr. Yamamoto as the authorized provider.

As determined in Finding of Fact 25, the services and treatments provided by AMC, Dr. Sanidas, and Kaiser, and Dr. Yamamoto have been reasonable and necessary to cure and relieve the effects of the claimant's compensable back strain. Therefore, the respondents are liable to pay for these treatments.

ORDER

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

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

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

3. The respondents shall pay temporary total disability benefits commencing August 4, 2008, and continuing until terminated in accordance with law or order. Such benefits shall be paid at the statutory rate based upon the stipulated average weekly wage.

4. The respondents shall pay for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. The respondents are liable for the reasonable and necessary treatments rendered by AMC, Dr. Sanidas, Kaiser, and Dr. Yamamoto.

DATED: January 27, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-747-136

ISSUES

- Relatedness: Whether Claimant's low back condition was caused, accelerated, or otherwise aggravated by her compensable work injury.

- Medical Benefits: Whether Claimant's low back surgery performed on April 9, 2008, was reasonable, necessary, and related to her work injury.

- Medical Benefits: Whether Claimant's low back surgery performed on April 9, 2008, was authorized.

- Termination of Temporary Disability Benefits: Whether Claimant's temporary disability benefits should be terminated as of May 1, 2008.

FINDINGS OF FACT

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

1. On January 7, 2008, Claimant fell in Employer's parking lot fracturing her left ankle. Following the accident, Claimant was taken to the emergency room at Memorial Hospital, where she denied pain in any other location except her left ankle. While at Memorial Hospital, Claimant reported that she had a recent history of a lumbar herniated disc, she reported that she had been treated with three sets of lumbar epidural steroid injections over the past few months, and she reported that she had been improving some.

2. Sometime following the work injury, Claimant began experiencing an increase in her low back symptoms which Claimant attributed to the injury.

3. Claimant had low back and right leg problems prior to her work injury. On December 10, 2001, Claimant underwent a lumbar MRI, which showed a broad based disc herniation projecting posteriorly and to the right at L5-S1, causing displacement of the right S1 nerve root sheath. Claimant testified that these symptoms resolved without further treatment.

4. On September 24, 2007, Claimant was evaluated by Fred Thayer, PA-C, who noted Claimant's complaints of right sciatic nerve area pain which she indicated had been present for three weeks. Mr. Thayer referred Claimant for x-rays, he administered an injection, and he referred her to occupational therapy.

5. The x-ray taken on September 24, 2007, revealed moderate degenerative changes at L5-S1 disc space with loss of disc space height.

6. Claimant's private health insurance carrier authorized 25 occupational therapy appointments. On October 10, 2007, Claimant was seen for the first time at Memorial Hospital Occupational Therapy, complaining of severe right sided low back pain and right lower extremity pain with numbness down her right leg to her foot. Claimant had decreased flexibility, decreased core stability, decreased posture, disturbed sleep, and increased pain with sitting. On October 17, 2007, Claimant notified her therapist that she had no change in pain, and her pain was waking her up at night. Claimant did not feel the occupational therapy was helping her, so she discontinued it. Mr. Thayer referred Claimant for a lumbar MRI and a surgical consultation.

7. A lumbar MRI obtained on October 16, 2007, showed multilevel posterior, disc herniations creating narrowings of the spinal canal. The MRI also showed a L5-S1 protrusion, greatest on the right side, where it contacted the intraspinal portion of right S1 nerve, probably mildly displacing the nerve at that site.

8. On October 23, 2007, Dr. Orderia Mitchell performed a surgical evaluation. On that date, in conjunction with her appointment, Claimant filled out a form entitled "Questionnaire for Chronic Back Patients". In responding to this questionnaire, Claimant described her problem as low back pain, and right buttock, thigh, calf and foot numbness and tingling, worse with sitting or lying down. Claimant further described constant nerve pain in the right low back, leg and foot with numbness and tingling.

9. On October 23, 2007, in the course of his evaluation, Dr. Mitchell obtained a history from Claimant, he reviewed Claimant's lumbar MRIs, and he performed a physical examination. Based on his evaluation, Dr. Mitchell diagnosed Claimant as having multiple level degenerative disc disease, spinal stenosis, with significant foraminal stenosis, L5-S1 right, and facet hypertrophic changes. Dr. Mitchell recommended Claimant undergo a trial of epidural steroid injections at L5-S1, "to hopefully alleviate her leg pain and improve her symptoms."

10. Dr. Mitchell discussed with Claimant the possibility of surgery, but he wanted to try a more conservative approach to start. Dr. Mitchell opined that as of October 23, 2007, Claimant had a surgical lesion at L5-S1. Dr. Mitchell knew that low back surgery was inevitable, but he did not know when it would occur.

11. Claimant received right sided, L5-S1, lumbar epidural steroid injections on October 29, 2007, November 12, 2007, and December 10, 2007. The injections improved, but did not resolve Claimant's symptoms. The low back and right leg symptoms were symptomatic just prior to Claimant's work injury.

12. Immediately following the injury on January 7, 2008, Claimant's dislocated left ankle was put back into place, and later that day, Claimant underwent a left ankle open

reduction internal fixation procedure by Dr. Richard Meinig. Claimant was released from the hospital the following day.

13. Claimant was non-weight bearing on her left leg for at least four weeks. Claimant was at home, and her physicians directed her to use a walker around her house. Claimant was completely off of work until March 3, 2008.

14. On January 8, 2008, Claimant filled out a form entitled "Claimant Statement". In her statement, Claimant described her work injury as a left dislocated trimalleolar fracture. Claimant filled out a pain diagram showing the location of her injury as being at the left ankle. Claimant did not indicate that she injured her low back as a result of the accident, nor did Claimant identify her low back as an injured area in her pain diagram.

15. Claimant followed up with Dr. Meinig on January 11, 2008 and January 18, 2008, but Dr. Meinig's reports for those dates of service make no mention of low back complaints. Following Claimant's work injury, there was no documentation of any low back or right leg complaints until January 23, 2008.

16. On January 23, 2008, Claimant filled out a claim questionnaire in which she indicated to a prior history of low back and right leg pain, numbness and tingling, with three lumbar epidural steroid injections. Claimant further indicated that her low back and right leg symptoms were 75% resolved prior to January 7, 2008 injury.

17. On January 28, 2008, Claimant began treating with Dr. Cynthia Lund at Memorial Health System's Occupational Clinic. During that visit, Claimant complained of the same low back and right leg problems she had prior to her work accident. Dr. Lund recommended consultations with Dr. Meinig for the left ankle, and Dr. Mitchell for the low back, and she further recommended a lumbar MRI, and a lumbar epidural steroid injection for pain control. Dr. Lund also noted that she felt Claimant twisted her low back when she fell which exacerbated her pain in addition to use of the walker.

18. Claimant's February 4, 2008, lumbar MRI showed stable disc and facet degenerative changes, stable neural foraminal narrowing at L3-4, L4-5, and L5-S1, and a resolved extruded left sided L4-5 disc fragment.

19. The physicians who have compared the pre and post work injury lumbar MRIs have opined that there were no changes in Claimant's underlying pathology. Specifically, Dr. Charles Seibert, a neuroradiologist, opined that the chronic multilevel spondylosis abnormalities preexisted the work injury, and the disc, facet and foraminal abnormalities at L5-S1 also preexisted the work injury. None of those abnormalities showed progression or aggravation when the post-accident MRI was compared with the pre-accident MRI. Dr. Mitchell also compared the lumbar MRIs and opined that Claimant's pre work injury and post work injury lumbar MRIs were essentially the same.

20. On February 11, 2008, Claimant underwent a lumbar epidural steroid injection which helped Claimant's low back and right leg pain for a couple of weeks.

21. Claimant saw Dr. Mitchell on March 10, 2008. Dr. Mitchell opined that if Claimant failed conservative treatment, she would probably need a microdiscectomy on the right L5-S1. According to Dr. Mitchell, Claimant still had the symptoms he had seen her for on October 23, 2007. Dr. Mitchell indicated that the work injury caused a slight gait change, but he admitted that the only difference in Claimant's low back and right leg from before and after her work injury was Claimant's subjective report of increased pain.

22. On March 17, 2008, Dr. Lund reported that Claimant's left ankle was much better, but Claimant had ongoing sciatica in her right low back with numbness in her leg and foot.

23. On March 31, 2008, Claimant had a nerve conduction test which was interpreted as showing an acute L5-S1 radiculopathy. Dr. Mitchell opined that the radiculopathy was present prior to the January 7, 2008 work injury. On April 1, 2008, Dr. Mitchell reviewed the EMG results, and he documented that Claimant was seeking something more aggressive. Dr. Mitchell recommended a lumbar L5-S1 discectomy. Surgery was scheduled for April 9, 2008.

24. On April 1, 2008, Dr. Lund took Claimant completely off of work. Prior to that date, Drs. Meinig and Lund, had authorized Claimant to return to modified work (four hours per day) beginning March 3, 2008. On March 17, 2008, Dr. Lund continued Claimant on modified work (six hours per day). Claimant testified that by April 1, 2008, her ankle injury was not preventing her from working full time; rather, she was having difficulty working due to her back condition and the associated prescription pain medications.

25. On April 3, 2008, Dr. Robert Messenbaugh, an orthopaedic surgeon, performed a record review. Dr. Messenbaugh concluded that: (1) Claimant was in need of the microdiscectomy even before the work injury, (2) the recommended low back surgery was for pathology identified prior to the work related injury, and (3) the January 7, 2008,incident was in no way responsible for the need for surgery.

26. On April 7, 2008, Insurer sent a letter to Dr. Mitchell denying authorization for the requested low back surgery based on relatedness. Claimant elected to go forward with the surgery anyway. The low back surgery was not an emergency surgery.

27. Dr. Mitchell's April 9, 2008, operative report documents a pre and post operative diagnosis of a right L5-S1 herniated disc, degenerative disc disease in the lumbar spine, lumbar spine foraminal stenosis, facet hypertrophic changes, and congenitally short pedicles. Dr. Mitchell performed a L5-S1 discectomy, L5-S1 foraminotomy, and a L5-S1 mesiofacetectomy.

28. Dr. Mitchell admitted that Claimant would have needed the April 9, 2008, surgery even without the January 7, 2008, work injury. According to Dr. Mitchell, the January 7, 2008, accident did not cause any new pathology in Claimant's back. Dr. Mitchell also

admitted that an altered gait caused by the left ankle injury did not change the pathology in Claimant's back.

29. According to the General Admission of Liability filed on June 18, 2008, Insurer paid Claimant temporary total disability benefits from January 8, 2008, thru March 4, 2008, and temporary partial disability benefits from March 4, 2008, thru June 8, 2008. Benefits were terminated on June 8, 2008, secondary to Claimant's return to full duty work.

30. On May 1, 2008, Respondents filed a petition to terminate Claimant's temporary disability benefits from that date forward. In their petition to terminate benefits, Respondents argued that Claimant's lost wages after her April 9, 2008, low back surgery were directly related to the low back surgery, which was unrelated to her work injury.

31. On June 2, 2008, Dr. Meinig responded to Respondents' counsel's May 8, 2008 letter, indicating Claimant's left ankle injury was at MMI. Dr. Meinig indicated that Claimant did not need any work restrictions for her left ankle injury. On June 16, 2008, Dr. Lund responded to Respondents' counsel's letter. Dr. Lund also opined that Claimant's left ankle injury was at MMI.

32. In a report dated June 26, 2008, Dr. Hendrick Arnold, an orthopaedic surgeon, provided his opinion that Claimant's lumbar spine degenerative changes were preexisting, and the need for Claimant's lumbar surgery predated her work injury.

33. On June 30, 2008, Dr. Lund opined Claimant was at MMI for all aspects of her work injury. Dr. Lund released Claimant at full duty work with no restrictions.

34. On August 29, 2008, Dr. Mitchell wrote Claimant's counsel indicating that he felt Claimant's work injury aggravated her pre-existing problems requiring early operative intervention. Subsequently, Dr. Mitchell admitted that the work injury caused no change in pathology. Dr. Mitchell also admitted that even without the work injury, Claimant would have needed the surgery at some point, and it could have been on the exact same date as the date the surgery actually took place. Dr. Mitchell testified that the April 9, 2008, surgery was the result of pre-existing pathology which he felt was worsened by the fall. Dr. Mitchell admitted the only change caused by the accident was Claimant's subjective complaints of increased pain. Dr. Mitchell opined that 90 percent of the need for surgery was due to her pre-existing condition, and 10 percent was due to the work injury. Dr. Mitchell further indicated that in his opinion, the work accident was not the straw that broke the camel's back.

35. Dr. Mitchell also testified that the lumbar epidural steroid injections Claimant underwent in October, November and December 2007 were designed to provide temporary relief and delay the eventual need for surgery.

36. Dr. Arnold testified that based on his review of Claimant's MRIs, Claimant had clear lumbar structural changes that had been known to be progressing since 2001. Dr.

Arnold reiterated that the objective pathologic structural changes present on the October 2007 lumbar MRI were the same on the February 2008 lumbar MRI relative to L5-S1. Dr. Arnold testified that in his opinion, to a reasonable degree of medical probability, Claimant's pre work injury spinal problems were the cause of the need for surgery in April 2008. He noted that his opinion was supported by objective evidence, including the lumbar MRIs, and Claimant's identical symptoms as documented before and after the work injury. Dr. Arnold indicated that there was no objective evidence of any change in Claimant's low back following the January 7, 2008, work related injury, which contributed to his opinion that the work injury did not cause the need for surgery.

37. Based on the foregoing, Claimant has failed to establish that it is more probably true than not that her low back problems were caused by, aggravated by, or accelerated by her work injury. Both Drs. Mitchell and Arnold opined that Claimant's preexisting low back pathology did not change following the work injury. These opinions are based on the MRIs taken before and after the industrial injury. The only possible change was Claimant's subjective complaints that her back pain was worse in January 2008 than in the fall of 2007. Given that the medical records from the fall of 2007 reflect that Claimant's low back pain was increasing over time, it is more probable that Claimant's increased back pain in January 2008 is attributable to the natural progression of her underlying pathology combined with the steroid injections wearing off. There is no credible or persuasive evidence that the work injury caused her back pain to increase or accelerated the need for surgery.

CONCLUSIONS OF LAW

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

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. 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. 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).

Relatedness

4. An industrial aggravation of a preexisting medical condition can result in a compensable injury as long as the aggravation is the proximate cause of the need for treatment. *H&H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). However, when a claimant experiences symptoms while at work it is for the ALJ to determine whether subsequent need for treatment was caused by an industrial aggravation of a pre-existing condition or by the natural progression of the pre-existing condition. The mere experience of symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the pre-existing condition. Resolution of that issue is also one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

5. Claimant is entitled to medical benefits only if the claimant can establish that the need for additional medical treatment is proximately caused by the aggravation of the pre-existing condition and not simply a direct and natural consequence of that condition. *Merriman v. Industrial Commission,* 210 P.2d 448 (Colo. 1949); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990) *cf. Valdez v. United Parcel Service*, 728 P.2d 340 (Colo. App. 1986); *Witt v. James J. Keil, Jr.*, WC. No. 4-225-334 (April 7, 1998).

6. As found, Claimant has not established by a preponderance of the evidence that the fall on January 7, 2008, caused or otherwise aggravated or accelerated her preexisting low back condition. Claimant had undergone treatment within one month of her work injury, and Claimant continued to be symptomatic just prior to the work injury. Thus, the need for treatment was already present at the time of the work injury.

7. Furthermore, Dr. Mitchell testified that the steroid injections Claimant had received were to provide temporary relief of her symptoms and delay the eventual need for surgery. Both Drs. Mitchell and Arnold opined that Claimant's preexisting low back pathology did not change following the work injury. These opinions are based on the MRIs taken before and after the industrial injury. The only potential change was Claimant's subjective complaints that her back pain was worse in January 2008 than in the fall of 2007. Given that the medical records from the fall of 2007 reflect that Claimant's low back pain was increasing over time, it is more probable that Claimant's increased back pain in January 2008 is attributable to the natural progression of her underlying pathology combined with the steroid injections wearing off. There is no persuasive or credible evidence that the work injury caused her back pain to increase or accelerated the need for surgery.

Medical Benefits

8. Claimant bears the burden of proof of showing that medical benefits are causally related to a work-related incident. *See Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Once causation is established, Claimant is only entitled to medical benefits reasonably 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. Section 8-42-101(1)(a), C.R.S.

9. Because the Judge has found that Claimant's low back condition is not causally related to her work injury, Claimant is not entitled to medical treatment to cure and re-

lieve the effects of her low back condition. Respondents are not responsible for providing medical benefits associated with Claimant's low back condition. Such medical benefits include, but are not limited to, the surgery performed on April 9, 2008. Because the surgery was not related to the industrial injury, the ALJ need not address whether it was authorized.

Temporary Disability Benefits

10. Section 8-42-103(1)(a), C.R.S., requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain temporary total disabililty benefits. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Claimant need not prove that the work related injury was the "sole" cause of his wage loss to establish eligibility for those benefits. *Lindner Chevrolet v. Industrial Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995).

11. As found, Respondents have established that Claimant's wage loss between April 9, 2008, and June 8, 2008, was due to an intervening event rather than the industrial injury. Claimant's attending physicians, Drs. Meinig and Lund, had authorized Claimant to return to modified work (four hours per day) beginning March 3, 2008. On March 17, 2008, Dr. Lund continued Claimant on modified work (six hours per day). On April 1, 2008, Dr. Lund restricted Claimant to no work. Claimant testified that by April 1, 2008, her ankle injury was not preventing her from working full time. She testified that she was having difficulty working due to her back condition and the associated prescription pain medications. Claimant underwent back surgery on April 9, 2008, which prevented her from working full duty until June 8, 2008. Based on the evidence, there is no causal connection between Claimant's work injury and her inability to work between April 9, 2008, and June 8, 2008. Because Claimant's back condition is not related to the work injury, Respondents have established that Claimant's temporary disability benefits should be terminated as of May 1, 2008, which is the date set forth in Respondents' Petition to Terminate.

ORDER

It is therefore ordered that:

1. Claimant's low back condition was not caused, aggravated or accelerated by her work related injury.

2. Claimant's low back surgery was the result of the natural progression of her preexisting condition. Therefore, Claimant's request to have Respondents pay for the low back surgery performed by Dr. Mitchell on April 9, 2008, and all other post work injury treatment related to her back, is denied and dismissed.

3. Respondents' request to terminate temporary disability benefits from the date of Respondents' petition to terminate benefits, May 1, 2008, and ongoing, is granted.

4. Issues not expressly decided herein are reserved to the parties for future determination.

DATED: January 27, 2009

Laura A. Broniak
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-774-566

ISSUES

The issues determined herein are compensability, medical benefits, temporary total disability ("TTD") benefits, and penalty for late reporting. The parties stipulated to some medical benefits and to an average weekly wage of $455.52.

FINDINGS OF FACT

1. The employer has an excavation and paving business. He has no office and has no posters notifying employees about the need to report work injuries.
2. Claimant has worked for the employer for eight or nine seasons. He has to lift to 75 pounds, bend, operate equipment, and other tasks.
3. From time to time, claimant also worked on some weekends for Dean Smith, helping with grading, welding, removing tracks from equipment, and other tasks. In the summer of 2008, claimant worked one time for Smith to hammer out a truck hood.
4. On September 15, 2008, claimant arrived at the assigned site in Woodland Park to move equipment to the job site. Claimant unchained a roller from a trailer. He then reached across the roller to start it in order to back it off the trailer. He stepped in a hole in the trailer and twisted his low back. He grabbed the roller and did not fall to the ground.
5. Claimant reported to the employer that he had fallen in the hole, but he did not report any back injury at that time and made no request for medical care. Claimant worked his normal job duties on September 15, 2008, including a lot of shoveling. Claimant worked his usual job for the rest of the week, through Thursday, September 18, 2008. No work was scheduled for Friday.
6. Claimant experienced increasing right-sided low back pain throughout the week and over the weekend.
7. On Sunday, September 21, 2008, claimant called the employer and left a voice mail that he was unable to work. The employer returned the call early on the morning of Monday, September 22, 2008, and informed claimant that no work was available that week. Claimant reported that he was going to the chiropractor due to his low back pain. Claimant was unsure that he reported a work injury at that time; he only thought that he "probably" told the employer. The employer responded that claimant should do what he needed to do and should take a couple of days. The employer testified that claimant did not report a work injury on that day. The employer's testimony is persuasive.
8. On September 22, 2008, claimant sought care from Chiropractor Swain. Claimant reported a history of stepping in a hole one week earlier and then suffering worsen-

ing low back pain. Chiropractor Swain treated claimant on September 22, 24, and 26. Claimant discontinued the treatment because he was not improving.

9. The employer contends that claimant only reported a work injury on approximately September 26, 2008. He alleges that claimant requested that they make a false statement that claimant fell off the trailer. The employer refused. The employer did not refer claimant for medical care.

10. On Monday, September 29, 2008, the employer came to claimant's residence to retrieve the company truck that claimant had driven. At that time, claimant gave him a written report that he had suffered the low back injury on September 15, 2008. Claimant had done research on the internet and found the requirement that he give a written report of the injury.

11. The employer did not immediately refer claimant for medical care, although he contacted his insurer.

12. On October 10, 2008, claimant sought care at Penrose Hospital emergency room. Claimant reported a history of stepping into the hole and injuring his low back. X-rays showed multiple levels of degenerative disc disease in the lumbar spine and retrolisthesis at L2-3 and L3-4.

13. Claimant then received an October 8, 2008, letter from the employer, providing a list of four possible medical providers.

14. On November 6, 2008, Dr. Dickson examined claimant, who reported the history of stepping into the hole and twisting his low back. Dr. Dickson diagnosed lumbar strain with radicular symptoms. She prescribed medication and a magnetic resonance image ("MRI"). She imposed restrictions against lifting over 10 pounds, pushing or pulling over 20 pounds, or doing any crawling, kneeling, squatting, or climbing.

15. The November 14, 2008, MRI showed mild degenerative disc disease at L2 through S1, moderate right neural foraminal stenosis at L4-5, and mild canal and foraminal stenosis at other levels.

16. The employer called claimant on numerous occasions and left a message for claimant regarding his status. Claimant acknowledged receiving the voice mail messages, but he did not call the employer back. At no time did the employer make a written offer of modified duty for the claimant.

17. Dr. Dickson referred claimant to Dr. Ross. On December 1, 2008, Dr. Ross examined claimant and recommended right sacroiliac ("SI") joint injection, which was performed on December 10 with 80% improvement in pain.

18. Dr. Dickson referred claimant to Colorado Sports and Spine Center for physical therapy.

19. The preponderance of the evidence demonstrates that claimant suffered an accidental injury to his low back arising out of and in the course of his employment on September 15, 2008. Contrary to the employer's testimony, the mechanism of injury makes complete sense. The hole, which the employer admits existed, was on the right side of the trailer. The ignition switch was on the left side of the roller. Claimant would logically reach across the roller to start it. Claimant probably mentioned the accident to the employer on that date, but he admits that he did not then report a back injury. Claimant had some preexisting low back degenerative conditions, but he was not disabled and did not require medical treatment until after the September 15 accident. Contrary to the employer's allegation, claimant did not fabricate the history of stepping into the hole on

September 15. Claimant reported that same history to the chiropractor on September 22, 2008.

20. The parties stipulated that the treatment by Penrose Hospital, Dr. Dickson, Dr. Ross, the physical therapist, and all referrals for testing was authorized.

21. The preponderance of the evidence shows that the treatment by Chiropractor Swain was unauthorized. Claimant did not report to the employer that he suffered a back injury and required medical treatment until after his treatment with the chiropractor ended on September 26, 2008. Claimant was not impliedly authorized to select the chiropractor because, prior to September 26, he had not provided the employer with sufficient information that would make a reasonably conscientious manager realize that claimant needed medical treatment for a work injury.

22. The preponderance of the evidence demonstrates that claimant was unable to perform his regular work duties commencing September 22, 2008. Claimant's job required moderate to heavy lifting and bending. The restrictions that Dr. Dickson imposed on November 6, 2008, precluded claimant from performing his regular duties. The employer never provided a written offer of modified employment.

23. Respondents failed to prove by a preponderance of the evidence that claimant was responsible for termination of his employment. Claimant was unable to return to work due to the effects of the work injury. The employer never offered modified work in writing. The employer merely considered claimant to have "abandoned" his job because he did not call or return to work. The employer never informed claimant that his employment had been terminated.

24. Claimant did not make a written report of the work injury until September 29, 2008. The employer, however, did not have the required posters in the workplace to inform claimant of his need to make a written report on an injury within four days.

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). In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improb-

ability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found, claimant has proven by a preponderance of the evidence that he suffered an accidental injury to his low back on September 15, 2008.

2. 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). Respondents are 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 from the insurer or an ALJ. *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 treatment by Chiropractor Swain was not impliedly authorized. The other treatment was stipulated.

3. As found, commencing September 22, 2008, 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).

4. Because claimant's injury was after July 1, 1999, sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. apply. Those identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, claimant causes his wage loss through his own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo.App. 2002). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). Thus, the fault determination depends upon whether claimant performed some volitional act or otherwise exercised a degree of con-

trol over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). As found, claimant was not responsible for his termination from employment.

5. Respondents seek a penalty against claimant for late reporting of his injury. Section 8-43-102(1), C.R.S., requires that claimant provide written notice of the occupational disease to the employer within four days. If the notice is not given, claimant may be penalized. Respondent has the burden of proof to show a late report, but claimant has the burden to prove that the employer did not post the required notices. *Postlewait v. Midwest Barricade*, W.C.No.4-139-000 (Industrial Claim Appeals Office, December 1, 1994). The preponderance of the evidence demonstrates that the employer did not provide the requisite notices to the employees about the duty to report the injury in writing within four days. Consequently, no penalty is appropriate for late reporting.

ORDER

It is therefore ordered that:

1. The insurer shall pay all of claimant's reasonably necessary medical treatment by authorized providers for the work injury, including the bills of Penrose Hospital, Dr. Dickson, Dr. Ross, Colorado Sports and Spine, and the diagnostic tests.
2. Claimant's request for payment of the bills of Chiropractor Swain is denied and dismissed.
3. The insurer shall pay to claimant TTD benefits at the rate of $303.68 per week commencing September 22, 2008, and continuing thereafter until modified or terminated according to law.
4. Respondents' request for a late reporting penalty against claimant 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.

DATED: January 28, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-770-995

ISSUES

The issues to be determined by this decision concern compensability, medical benefits, and TTD benefits related to an alleged injury to Claimant's bilateral upper ex-

tremities. If this claim is compensable, the parties stipulated that Claimant's AWW was $690.24, that Claimant's authorized treating physicians are Dr. Mark Paulsen and Dr. Thomas G. Mordick, and that Claimant stopped working on September 16, 2008. Claimant bears the burden of proof, by a preponderance of the evidence, on all issues heard.

FINDINGS OF FACT

1. Claimant has worked for Employer for approximately four years. Claimant's job assignment from 2004 to 2007 was a "CR manager." She worked primarily at the front end of Employer's grocery store, where she performed a variety of tasks including supervising and scheduling employees, assisting customers, counting money and being in charge of the safe, cashiering and bagging groceries as needed, and generally working as a "jack-of-all-trades."

2. Claimant began experiencing discomfort bilaterally in her hands in 2005 while she was working as the CR manager.

3. On July 13, 2006, Claimant complained to a physician of bilateral hand swelling at the end of the day. She also complained of pain and numbness in the morning.

4. Claimant's job assignment changed from manager to human relations work in December 2007.

5. On January 3, 2007, Claimant complained to her doctor of numb and swollen hands at night for the past several months. She also noted a weight gain.

6. On January 18, 2007, Claimant was seen at Centura Health. The examiner's clinical impression of Claimant's condition was bilateral carpal tunnel syndrome.

7. Claimant worked in the human relations job until February 2008, when her job assignment changed to "markdowns." In that job, she scanned products on shelves with a hand-held device and changed "tickets."

8. In April 2008, Claimant was re-assigned to work in the dairy. In the dairy, Claimant's job duties included unloading merchandise including four to six pallets per week containing milk crates and fruit juices. She also stocked store coolers with items such as milk, juices, yogurt, eggs, cheese, and sour cream.

9. On June 18, 2008, Claimant complained of left thumb/wrist discomfort, finger swelling for one year, and achiness in her fingers.

10. On June 19, 2008, Dr. Jeff Lipke reported the following history: "For the last year, she has noted diffuse swelling in both hands and fingers. It seems to be more in the distal hand and proximal finger area involving the metacarpophalangeal joints and proximal interphalangeal joints. Symptoms are always there. She is not able to get her

rings off. The swelling seems to be worse in the morning, but there is swelling and stiffness throughout the day. It does not seem to get better with activity nor does it necessarily get worse…. Denies any specific injury to either hand." Dr. Lipke's assessment was left DeQuervain's tenosynovitis, left carpal tunnel symptoms, diffuse hand swelling, uncertain etiology (and a bony prominence on the Claimant's left foot).

11. On July 19, 2008, Dr. Timothy Bohlender noted Claimant's recent examination by Dr. Lipke, assessed bilateral carpal tunnel problems, and referred the Claimant to Dr. Mordick for follow-up.

12. On August 8, 2008, Dr. Mordick noted a history of bilateral hand numbness that had "been going on for about a year."

13. Claimant reported a work-related injury to her upper extremities with a date of injury of August 29, 2008.

14. Claimant stopped working as a result of her symptoms on September 16, 2008.

15. On September 2, 2008, Dr. Mark Paulsen recorded a history of symptoms in both hands since about June 2008, and said that the symptoms started only after lifting heavy dairy cases. This history is inconsistent with Claimant's testimony and medical records that indicate that symptoms consistent with bilateral CTS began as early as 2005, and that Claimant complained of symptoms consistent with CTS to medical providers in 2006 and 2007, as well as 2008. It is also inconsistent with her report to Dr. Lipke in June that her symptoms did not get better or worse with activity.

16. Dr. Paulsen wrote that Claimant had bilateral CTS, work-related. Other than the history that he recorded, which is inconsistent with other histories contained in the medical records, Dr. Paulsen did not state the basis for his conclusion that the CTS was work-related.

17. Claimant testified credibly that she had swelling or discomfort in her wrists as early as 2005, but the symptoms became worse after she began working in the dairy.

18. On September 4, 2008, Dr. Mordick noted that EMG testing confirmed bilateral CTS that corresponded to Claimant's symptoms. He noted that Claimant had had a cortisone injection the previous week that did not help, and in fact made her symptoms worse. Dr. Mordick recommended surgery for a carpal tunnel release. Dr. Mordick did not offer an opinion on the cause of the CTS.

19. No physician has offered the opinion that the Claimant's DeQuervain's tenosynovitis, which was assessed only by Dr. Lipke, was caused, aggravated, or accelerated by her activities at work.

20. Dr. Robert Watson examined the Claimant, took a thorough history, and over the past several years has conducted an extensive review of the published medical literature on CTS.

21. Dr. Watson testified that the factors most closely associated with CTS are not activity or use of the extremities but age (from the early 40s to the late 50s), female gender, a body mass index of 26 or above, pregnancy, and diabetes, arthritis, or thyroid problems. Dr. Watson testified that the common factors among these characteristics or diseases are excessive edema or adipose tissue, which may cause CTS by narrowing the carpal tunnel.

22. Dr. Watson testified that most of the published studies on CTS have determined that there is no association between CTS and activity on the job, contrary to popular thought. He testified that in the few journal articles in which a cause/effect relationship between occupational activity and CTS is identified, the studies were deficient in their design or analysis, and that most studies now reach a contrary conclusion. He testified that among cashiers, a study indicated that the prevalence of CTS was less than in the general population, which suggests that cashiering as an activity may actually provide some protection from CTS. He said that among the recent scientific studies on CTS, only one occupation, meat cutting, has been identified as a cause of CTS.

23. Claimant's date of birth is April 15, 1962, and she is 46 years old. Symptoms that are consistent with CTS first arose in 2005, at which time she was 42 or 43 years old.

24. Claimant is 5 feet 2 ½ inches tall and weighs about 170 pounds. Her body mass index, according to Dr. Watson's calculations, is 32.2.

25. Claimant has three of the risk factors for developing CTS, which are her age, gender, and body mass index.

26. It is found that the Claimant's CTS developed before she began working in the dairy, probably in 2005 or 2006 when she was working as a manager performing a variety of duties, many of them involving supervision of personnel and business matters not requiring substantial use of her upper extremities.

27. Claimant's symptoms have not improved since she stopped working in September 2008.

28. Dr. Watson testified credibly and persuasively that Claimant's job duties probably did not cause her CTS. In Dr. Watson's opinion, the CTS developed independently of the Claimant's activity at work and was more likely associated with her age, gender, or body mass index.

29. Dr. Watson testified credibly and persuasively that the Claimant's job duties did not accelerate or aggravate her CTS. The increase in symptoms in 2008 is attributable

to the natural progression of the disease, not an acceleration or aggravation caused by Claimant's duties at work.

30. The fact that Claimant's CTS developed over time as she performed a variety of different duties at work, the fact that Dr. Lipke reported in June of 2008 that the symptoms which had been present for one year did not seem to get better or worse with activity, the fact that Claimant's symptoms continued even after she stopped working, and Dr. Watson's testimony that CTS is not generally caused by activity but is associated with other non-occupational factors, are persuasive. It is found that the Claimant's CTS was not caused, aggravated, or accelerated by her employment.

31. Claimant's DeQuervain's tenosynovitis was not caused, aggravated or accelerated by Claimant's employment or by an accident at work.

CONCLUSIONS OF LAW

1. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 235 (Colo.App. 2004). The facts in a workers' compensation case may not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

3. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered an injury or occupational disease arising out of and within the course and scope of employment. Section 8-41-301(1)(c), C.R.S. 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 ALJ. *Faulkner,* 12 P.3d at 846.

4. An injury occurs "in the course of" employment when a Claimant demonstrates that the injury occurred within the time and place limits of her employment. *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo.App. 1991). The "arising out of" requirement requires the Claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich,* 379 P.2d at 383.

5. In a claim for an injury sustained in an accident, a claimant must prove both that an "accident" occurred and that an injury resulted from the accident. Accident refers to an "unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. "Injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). The victim of an industrial accident is not entitled to workers' compensation benefits unless an "accident" results in a compensable "injury." Compensable injuries involve an "injury" which requires medical treatment or causes disability. *H&H Warehouse v. Victory*, 805 P.2d 1167, 1169 (Colo.App. 1990).

6. Claimant has failed to prove by a preponderance of the evidence that she was involved in an accident at work on or around August 28, 2008, or that she suffered an injury on that date.

7. Section 8-40-201(14), C.R.S., defines an occupational disease as one that results directly from the conditions under which work was performed, is a natural incident of the work, can fairly be traced to the employment as a proximate cause, and "does not come from a hazard to which the worker would have been equally exposed outside of the employment." The requirement that the hazard not be one to which Claimant was equally exposed outside of employment effects the "peculiar risk" test and serves to insure that the disease is occupational in origin. *Anderson v. Brinkhoff*, 899 P.2d 819 (Colo. 1993).

8. The question of whether a claimant has proven that a particular disease was caused by a work-related hazard is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App. 1999). It is not necessary that the ALJ determine what hazards or exposures outside of Claimant's work caused or aggravated Claimant's disease because Claimant has the burden of proof to establish that the conditions of the employment were a direct and proximate cause of the alleged occupational disease.

9. Dr. Watson's testimony is persuasive that the cause of Claimant's condition probably was not her activities at work and that there is a stronger scientific correlation between Claimant's gender, age, and body mass index as risk factors for CTS than an occupational exposure. Claimant has failed to prove by a preponderance of the evidence that the condition in her fingers, thumbs, hands, and wrists, whether diagnosed as bilateral CTS, DeQuervain's tenosynovitis, or both, was caused by the conditions under which her work was performed, was a natural incident of the work, could be fairly traced to her work as a proximate cause, and did not come from a hazard to which she would have been equally exposed outside of her employment.

10. Even though Claimant has not proved that her activities at work caused the condition in her hands and wrists, the condition may nevertheless be compensable if her employment aggravates, accelerates, or combines with the condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo.App. 2004). 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 condition or by the natural progression of the preexisting condition. *Harris v. Golden Peaks Nursing Home*, W.C. No. 4-680-878 (ICAO, June 4, 2008), *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, August 18, 2005). 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 or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo.App. 1995); *Harris v. Golden Peaks Nursing Home*, supra; *Cotts v. Exempla, Inc., supra.* The question of whether Claimant met her burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo.1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo.App. 2000).

11. Claimant has failed to establish by a preponderance of the evidence that hazards of her employment caused, intensified, accelerated, or aggravated the disease process in her fingers, thumbs, hands, and wrists. The credible and persuasive medical and other evidence fails to show that it is more probably true than not that Claimant's bilateral CTS or DeQuervain's tenosynovitis is an occupational disease arising out of and in the course of her employment with Employer. The claim for workers' compensation benefits must therefore be denied.

ORDER

It is therefore ordered that Claimant's request for workers' compensation benefits is denied and dismissed.

DATED: *January 28, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-729-124

ISSUE

The issue for determination is compensability.

FINDINGS OF FACT

1. Notice of the hearing was sent to Claimant at 2020 East Bijou Street, Colorado Springs, CO 80909. That is the address given by Claimant on his Workers' Claim for Compensation and the most recent address of record with the Division of Workers' Compensation.

2. No evidence was introduced from which it could be concluded that Claimant sustained a compensable injury.

CONCLUSIONS OF LAW

Claimant did not appear for this hearing. However, Notice of Hearing was sent to Claimant at an address he gave and at address on file with the Division of Workers' Compensation. An order may enter against Claimant. Rule 23, OACRP.

A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.

Claimant did not provide any evidence that he is entitled to benefits. No evidence concerning compensability of this claim has been introduced. Claimant has failed to meet his burden of providing entitlement to benefits. The claim must be denied and dismissed.

ORDER

It is therefore ordered that this claim is denied and dismissed.

DATED: *January 29, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-659-122

ISSUES

Whether the Claimant has proven by a preponderance of the evidence that he should be determined to be permanently and totally disabled and entitled to permanent total disability benefits under Section 8-42-111(1), C.R.S.

Whether Respondents correctly calculated Claimant's benefits for admitted whole person and mental impairment benefits and the application of the statutory cap under Section 8-42-107.5, C.R.S.

Whether Respondents should be entitled to credit for or to collect an overpayment of $15,202.84 as claimed in the Final Admission of Liability dated May 8, 2008.

FINDINGS OF FACT

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

1. Claimant was employed by the Employer on April 8, 2005, when he suffered a compensable work related injury. On that date, claimant fell off a four-foot ladder, struck his head, and momentarily lost consciousness.

2. Claimant was seen by the employer's designated provider at Concentra Medical Center on April 11, 2005, at which time claimant was evaluated by physician's assistant Donald Downs, PA-C. At the time of this evaluation Claimant did not complain of any neck, back or extremity pain or injury. PA Downs noted that claimant was oriented times 3 with normal mentation. A gross examination of the skull revealed no evidence of trauma. PA Downs noted that bending at the waist and stooping caused vertigo. He also noted that claimant's visual acuity was normal with no deficits in his visual fields. PA Downs' assessment was: face/scalp contusion; concussion – brief loss of consciousness; scalp laceration. Claimant was released to modified duty at that time with restrictions that included no function in a safety sensitive position and no driving or operating machinery.

3. On May 19, 2005 Claimant was again evaluated by PA Downs at which time claimant complained of increased headache and some nausea without vomiting. Claimant denied having any visual disturbances. PA Downs noted that with flexion at the waist, fingertips to toes and return to neutral, Claimant exhibited some sings of dizziness and instability. A complaint of dizziness was also noted with upward and backward gaze. PA Downs referred claimant to Eric Hammerberg, M.D., for consultation and treatment.

4. Claimant was seen by Dr. Hammerberg on June 2, 2005. After examination, Dr. Hammerberg recommended that claimant be referred to an ENT specialist for evaluation of possible otolith reposition maneuvers.

5. On July 6, 2005, Claimant was evaluated by PA Downs who noted that Claimant was working within the restrictions given, although a complaint of dizziness and pressure headaches were present. Claimant's work restrictions were: no prolonged standing and/or walking longer than tolerated; unable to drive or operate machinery' and may not function in a safety sensitive position.

6. Claimant was seen by Dr. Hammerberg, a neurologist, on June 2, 2005. Dr. Hammerberg's assessment was post-traumatic headache; post-concussion syndrome and post-traumatic vertigo. After examination, Dr. Hammerberg recommended that claimant be referred to an ENT specialist for evaluation of possible otolith reposition maneuvers.

7. Claimant was seen by ENT specialist Nicolette Picerno, M.D., on July 12, 2005. Dr. Picerno noted that ENG testing showed claimant had benign positional vertigo on the right with a right-sided peripheral weakness. Dr. Picerno felt that this diagnosis would respond very well and quickly to canalith reposition maneuvers and vestibular rehabilitation.

8. Claimant underwent a canalith repositioning procedure on July 22, 2005. Claimant returned to see Dr. Picerno on August 2, 2005. Dr. Picerno noted in her neurologic exam that claimant's immediate, recent and remote memory were normal and that his capacity for sustained mental activity and abstract thinking was within normal limits. She also reported that claimant's benign positional vertigo had resolved following the canalith repositioning procedure.

9. On July 26, 2005, PA Downs evaluated Claimant and noted that Claimant had finished his vestibular rehabilitation and that claimant's dizziness and positional vertigo had resolved. PA Downs further noted that Claimant continued to work within the restrictions. Claimant continued to complain of a headache that was constant and aching in nature but relieved well with medications. PA Downs' assessment was: head injury with continued headache; post concussion syndrome; resolved positional vertigo.

10. On September 8, 2005 Claimant reported to Dr. Sharon Walker that the dizziness had returned about 2 weeks prior after he had run out of medication. Dr. Walker felt that these increased symptoms were due to not taking the medication.

11. On November 17, 2005 Dr. Hammerberg referred Claimant to Dr. Thomsa Politzer for evaluation of oculomotor dysfunction. On December 15, 2005 Dr. Hammerberg noted that Claimant's headaches were at a frequency of three times per day, lasting about one hour each time.

12. Dr. Politzer initially evaluated Claimant on December 13, 2005 and recommended near point lenses and a course of vision rehabilitation training to address Claimant's visual complaints including double vision, blurred vision and difficulty reading.

13. On January 20, 2006 Dr. Politzer noted that Claimant was showing overall improvement with his vision. Dr. Politzer recommended continued therapy. As of April 27, 2006 Dr. Politzer reported, and it is found, that Claimant's headaches and reading were improving and his double vision had resolved.

14. Dr. Politzer evaluated Claimant on August 31, 2006 for complaints of ongoing headache and double vision. Dr. Politzer opined, and it is found, that Claimant was stable with regards to his visual symptoms with a nonphysiologic diplopia and visual field loss. Dr. Politzer had no clear underlying diagnosis to explain these symptoms.

15. Claimant was seen by Dr. Chang on June 27, 2006. During questioning by the physician, Claimant frequently blinked his eyes stating that he had visual problems. Claimant reported that with any sustained activity for more than a few minutes his headaches would worsen causing visual problems including diplopia and blurred vision. Claimant reported that he then develops dizziness from the headaches and visual problems. Claimant also reported dizziness and imbalance feeling that the room was spinning around him. Dr. Chang noted that a nonphysiologic gait pattern with inconsistent unsteadiness and further noted that claimant was able to stand on his heels and toes

without a problem. Dr. Chang indicated that he highly suspected a pain disorder with psychological factors and medical condition which was influencing claimant's physical symptoms. Dr. Chang was going to try to confer with Dr. Politzer regarding the vision issues as his findings were suggestive of a functional overlay and he could not exclude a convergence disorder, as well as symptom magnification.

16. Dr. Chang referred Claimant to Dr. Carbaugh for a psychological evaluation and on September 20, 2006 Claimant was seen by Ron Carbaugh, Psy.D. Dr. Carbaugh noted that claimant appeared in absolutely no acute emotional distress during the evaluation. He also noted that behaviorally claimant had a somewhat incongruent smile on his face while describing his various symptoms and problems. Dr. Carbaugh noted that claimant turned his head freely and rapidly when not focused on pain. At other times, he noted that claimant's pain behavior appeared to be somewhat dramatic and theatrical. Dr. Carbaugh noted that claimant reported his current physical problems as: 1) headaches, 2) blurred vision during the headaches, 3) nausea during the headaches, and 4) dizziness. Dr. Carbaugh noted that claimant's pain behavior and surface affect during his clinical interview were entirely inconsistent with claimant's subjectively reported pain intensity. Dr. Carbaugh had claimant take a Pain Presentation Inventory test. He noted that claimant's symptom report on the test statistically matched that of others whose pain experience was being consciously and intentionally exaggerated secondary to psychosocial issues, i.e. factitious disorder**.** Dr. Carbaugh felt that claimant's overall clinical presentation was strongly suggestive of a prominent contribution of nonorganic factors to his pain report and/or behavior. Taken as a whole, Dr. Carbaugh felt that claimant's clinical presentation suggested a conscious element to his symptom magnification, i.e. factitious disorder or malingering. He noted that it was very clear that claimant's symptom presentation was distorted by psychological and/or compensatory secondary gains. Dr. Carbaugh further stated, and it is found, that while continuing to report a variety of physical and cognitive symptoms, Claimant's surface affect argued against any acute emotional distress.

17. Claimant was seen by Edward Jacobson, M.D., September 27, 2006 for an audiological evaluation upon referral from Dr. Chang. Claimnt reported to Dr. Jacobson that his primary symptom was dizziness described as actual vertigo present near-daily and initiated and/or exacerbated when looking upward or down and with rapid or quick changes in body position or movement. Claimant reported imbalance and difficulty with tandem walking. Dr. Jacobson noted that Claimant reported use of prescription eyeglasses for the past year prescribed by Dr. Politzer. Dr. Jacobson opined that despite the otoscopic appearance of claimant's eardrum on the right, there was nothing that would indicate a present and active middle ear conductive component to account for the reported auditory/vestibular symptoms. He noted there was also nothing by test or history that would be consistent with a perilymphatic fistula or fistula tract injury, inner ear concussion, or occasionally reported so-called traumatically-induced cochlear hydrops that would account for claimant's dizziness or reported auditory symptoms.

18. Surveillance video was obtained of Claimant's activities on October 25, 2006. The video shows Claimant walking normally with a drink in his hand and carrying a sack after exiting a convenience store. Claimant bends over and returns to an upright position rapidly. Claimant stands normally and bends his head while conversing with another individual. Claimant is later seen carrying a car door with a friend without any difficulty walking. Claimant is then later seen bent over working with a friend removing parts from under the hood of a vehicle. At one point, Claimant is seen to step with one leg and stand with that leg on a tire laying on the ground. After assisting the friend with removing parts from under the hood of the vehicle, Claimant is seen to use his hand to fit parts together including use of fine dexterity with smaller parts removed from the vehicle. Claimant then is seen pulling a cart with a box and car parts on it without assistance from his two friends. Claimant is seen later carrying a toolbox on his own as well. Throughout these activities Claimant is not wearing any glasses and does not exhibit any eye movements or blinking. Claimant's activities depicted in this video are inconsistent with claimant's complaints to Dr. Politzer, Dr. Chang, Dr. Jacobson and Dr. Carbaugh.

19. Dr. Kristin Mason assumed treatment of Claimant from Dr. Chang. Dr. Mason evaluated Claimant on November 13, 2006 and obtained a history from Claimant that his activity level was mainly at home and that he did not do much activity there. Dr. Mason issued a report dated November 14, 2006 after reviewing surveillance videos of claimant's activities on October 25, 2006. Dr. Mason noted that during the duration of the video, claimant did not demonstrate any of the pain behaviors, any evidence of loss of balance or any of the nonphysiologic findings that had been observed during office visits and testing of claimant. She noted that claimant described to her a fairly homebound existence that was clearly different from what was demonstrated on the video she reviewed. Dr. Mason indicated that it had been clear for some time that there was a discrepancy between objective testing and claimant's subjective complaints.

20. Claimant was referred to Dr. Suzanne Kenneally, PsyD for a neuropsychological evaluation that was performed over three days from October 31, November 7 and November 16, 2006. Dr. Kenneally issued a report dated November 27, 2006. Dr. Kenneally noted that claimant had a particularly atypical behavioral presentation. He was observed to spontaneously roll his eyes and blink frequently and then make a series of facial gestures including squinting, frowning, and rubbing his forehead. Dr. Kenneally noted that claimant would maintain this behavior over 10-15 minute periods unless engaged in activity, at which time the frequency of this behavior would decline markedly. She also noted that claimant also mentioned that bright light hurt his eyes yet he declined to have the lights in the room diminished stating that it made no difference.

21. Dr. Kenneally noted that claimant failed his validity tests. She noted that claimant's performance on the Test of Memory Malingering was below that seen in patients with documented traumatic brain injury. She indicated that scoring in this range required intentional provision of wrong answers. To intentionally provide incorrect responses, the patient must perform a complex cognitive process of remembering the correct answer and intentionally providing the wrong answer. As a result, she noted that

claimant could be considered to have provided intentionally poor effort on testing and his results would be considered not representative of his current capabilities.

22. Dr. Kenneally also noted that claimant failed the Behavioral Dyscontrol Scale at the severely impaired level by being unable to learn simple sequential motor behaviors. She indicated that these results were in stark contrast to claimant's observed behavior in the clinic. She noted he was able to independently perform complex functions on his cell phone, looking up and recognizing various phone numbers, arranging his transportation needs independently, and follow all verbal directions presented to him. She noted that claimant's ability to comprehend spoken English, noted when he would often begin to answer a question posed in English prior to full translation, was a complex cognitive task indicating intact attention and verbal skills. She indicated that a person able to perform those functions would not obtain moderately to severely impaired scores on tests of verbal memory and attention. She indicated that claimant had factitious disorder with predominantly physical signs and symptoms

23. On March 1, 2007, Dr. Mason noted that claimant failed the visual portion of his driving evaluation with corrected visual acuity of 20/100 in the left eye for far vision and 20/70 in the right eye. Dr. Mason noted that this was a significant departure from that found with Dr. Politzer. She noted that claimant was also found to be colorblind even though the claimant denied having a history of that problem. He also came out with visual field abnormalities. She noted that claimant showed abnormalities on some of the cognitive testing they gave, although he previously had invalid neuropsychologic testing and some invalid response to Dr. Politzer's screening as well. In her assessment, Dr. Mason noted that claimant had visual issues. She indicated that claimant had presented fairly nonphysiologically with Dr. Politzer in the past. She suspected that was what he was presenting with at his driving evaluation as well. The ALJ finds that the results of the driving evaluation done do not represent nor accurately depict Claimant's ability to drive a vehicle for the purpose of commuting to and from work.

24. Surveillance video was obtained of Claimant's activities on May 18, 2007. Claimant is seen helping a friend work on an irrigation or sprinkler system. During the course of the video, claimant bends over and squats multiple times for several minutes at a time without any problem. It also shows claimant using a hack saw multiple times to cut off small parts of the PVC pipe requiring use of hand/eye coordination. Claimant is also seen to walking in a normal fashion, talk, gesture with his arms and move his head freely. Claimant does not exhibit any signs of dizziness or imbalance. Claimant is clearly able use a hacksaw to make precise cuts into PVC pipe without problem. Claimant is also seen talking on a cell-phone while standing and moving his head. Claimant is later seen to bend/stoop to pick up items of trash off the ground. During this video Claimant was not seen to wear any glasses or exhibit any blinking or other unusual eye movements.

25. On June 5, 2007 Claimant was evaluated by Matthew Brodie, M.D. Dr. Brodie noted that Dr. Mason confirmed with him that there were issues of a factitious disorder present. He noted that there was a question of degree of objective disability

and that there was a mismatch between subjective complaints and objective findings. Upon examination, Dr. Brodie noted, and it is found, that claimant did not demonstrate any evidence of vestibular deficit upon body positional transfers or spontaneous movements of his head or neck. He indicated that he agreed with Dr. Mason that claimant was at MMI.

26. On June 7, 2007, Dr. Mason placed claimant at MMI. In her assessment, Dr. Mason indicated that claimant was status post mild traumatic brain injury with factitious disorder with respect to cognitive complaints, invalid neuropsychologic testing and subjective reports of posttraumatic headaches. She also noted that claimant showed symptom magnification that was severe at times. She assigned claimant a 5% impairment rating for vestibular dysfunction and 2% for depression stable on medications, for a combined rating of 7% whole person.

27. In accordance with Dr. Mason's determination of MMI and her impairment rating, Respondent's filed a Final Admission of Liability on July 16, 2007 admitting for a 5% whole person impairment entitling Claimant to $15,948.02 in PPD benefits. Respondent's separately admitted for a 2% psychological impairment entitling Claimant to $4,448.04 in MIB benefits.

28. L. Barton Goldman, M.D., performed a Division IME on August 30, 2007. Dr. Goldman noted that the claimant's records in terms of his neurological and psychological issues raised some strongly concerning questions regarding how well an examiner could take claimant's subjective complaints at face value. However, he recommended that just to give claimant the benefit of the doubt that he should see a Spanish speaking psychologist and neuropsychologist for evaluation. As such, he opined that claimant was not at MMI pending the recommended evaluations. Dr. Goldman specifically recommended Dr. Walter Torres, PhD and Dr. Gina Navarette PhD to perform these evaluations.

29. In accordance with Dr. Goldman's opinion that Claimant was not at MMI, Respondents filed a General Admission of Liability on December 20, 2007 to reinstate TTD benefits effective June 5, 2007, the previously determined date of MMI. Respondent's also claimed credit for PPD benefits of $15,498.02 (sic) and for the MIB benefits of $4,448.04.

30. Claimant was seen by Walter Torres, Ph.D., on November 20, 2007. Dr. Torres observed that claimant's affect was somewhat unusual in that he manifested a slight and persistent smile that did not match the content of the conversation or the nature of their interaction. Dr. Torres indicated that he did not have the opportunity to review Dr. Carbaugh's psychological report and admitted that he only had limited records to review. Dr. Torres recommended neuropsychological evaluation to assess the reported cognitive symptoms.

31. Claimant was seen by Gina Navarrete, Ph.D., on March 7, 2008, for a neuropsychologic evaluation. Dr. Navarette noted that she had contacted Dr. Politzer

who told her that he found claimant's subjective complaints were not consistent with objective findings and he saw no reason for further follow-up since the prescription lenses were still working. Claimant reported to Dr. Navarette that the onset of his headaches was whenever he had to focus mentally. Dr. Torres noted that during her testing, it was clear that claimant was not putting forth good effort. She noted that claimant's performance on a couple of tests that specifically measure effort was extremely poor. She noted that he obtained below cut-off scores on the Test of Memory Malingering and Rey 15-Item Test. Because of claimant's questionable validity she noted that claimant's neuropsychological test results were not an accurate representation of his present neurocognitive functioning. Dr. Navarette indicated that during her evaluation there were many indications that lead her to conclude that claimant's performance on testing was not valid. It was apparent on behavioral observation that he not only put forth poor effort on testing, but tried to exaggerate cognitive deficits. She noted that claimant's reported diplopia interfering with his testing was difficult to believe. She suspected a significant degree of intentional symptom exaggeration and it was her professional opinion that there was strong evidence to suggest factitious disorder or malingering. She indicated that it was difficult to tell whether his exaggeration of symptoms and poor effort were meant to feign cognitive symptoms for psychological reasons or were due to secondary gain issues from external incentives. She noted that while it was not uncommon for Hispanic individuals to express symptoms in an exaggerated fashion, Claimant's expressed symptoms went beyond cultural expectations. The ALJ finds Dr. Navarette's assessments and opinions to be credible, persuasive and are found as fact.

32. Claimant returned to Dr. Goldman for a follow-up Division IME on May 1, 2008. In his impressions, Dr. Goldman noted that claimant had subjective waxing and waning post-traumatic headaches and vertigo secondary to his work related injury in the presence of probable factitious disorder. He also noted probable pain disorder with psychological factors and probable factious disorder. He further noted that claimant had complaints of sexual dysfunction of unclear etiology and stated that it was a difficult condition to specifically diagnose in a case in which 4 different psychologists documented increasingly objective signs of factitious disorder. On examination, Dr. Goldman noted that claimant's behaviors were dramatically bizarre though only on direct examination. He noted that after his direct examination, claimant's squinting, blinking, and temporarily abnormal gait all returned to normal. Dr. Goldman felt that claimant had reached MMI at that time.

33. In his report, Dr. Goldman specifically noted that a very strong argument could be made that claimant should not be assigned any particular impairment rating since the primary conditions under consideration were substantially subjective, nonfocal, and presented within the context of both unconscious and conscious magnification. However, he noted there was some very mild evidence of residual vestibular problems, however inconsistent earlier in the records. Therefore, he assigned claimant a 2% impairment rating for anxiety due to the need for ongoing medication maintenance. He also noted that in "extending the benefit of the doubt (and there is quite a bit of doubt in this matter)" he suggested a high class II vertigo impairment rating which would

equate to a 10% impairment rating. Overall, Dr. Goldman assigned claimant 12% impairment rating.

34. In accordance with Dr. Goldman's follow up DIME report of May 1, 2008, Respondents filed a Final Admission of Liability dated May 8, 2008. Respondents admitted for 10% whole person impairment and a 2% mental impairment. The Insurer claimed credit for all PPD previously paid and requested reimbursement of an overpayment of $15,202.84.

35. As reflected in the Final Admission of May 8, 2008, Claimant received a total of $59,816.37 for TTD and TPD benefits from the date of injury to the date of MMI established by Dr. Goldman, May 1, 2008. Insurer asserted that Claimant was only owed an additional $183.63 for PPD benefits. Insurer did not claim any offset for TTD benefits paid against the admitted MIB benefits of $4,448.04.

36. Surveillance video was obtained of Claimant's activities on August 7, 2008. The video shows claimant working at landscaping activities. Claimant is seen using a gasoline powered weed eater and vigorously starting the weed eater by himself without difficulty. The video also shows claimant wearing and using a gasoline powered backpack type leaf blower. At one point, claimant is seen lifting and closing the back door of a large trailer on his own. Claimant is later seen again using the weed eater and leaf blower at a different location by himself and without difficulty. Claimant is also seen jogging at one point during the video from the back of the trailer to the front of the truck pulling the trailer and obtaining a large leaf-bag or sack from the truck. Claimant is seen working by himself without assistance and without any sign of imbalance, vertigo or difficulty with hand/eye coordination. Claimant does not wear glasses during these activities, although a pair of sunglasses were placed around the band of the straw hat worn by Claimant while performing these activities but were not used during the activities depicted in the video.

37. Surveillance video was also obtained of Claimant's activities on August 9, 2008. Claimant is again seen working for at landscaping activities on this date. Again, Claimant is not seen to wear glasses. Claimant is seen in the video lifting and carrying a ladder on two occasions without difficulty. Claimant is seen throughout the course of the video bending over picking up branches and raking leaves and branches as well. At no time, does claimant exhibit difficulty with the tasks he is performing. The videos from August 7 and August 9, 2008, show no indication that claimant was having any difficulty completing the tasks that he was performing. Claimant is seen to walking normally, be able to balance for a short period on one leg, and to perform as part of a landscaping crew.

38. Claimant testified at hearing that he wears tinted lenses and has lost a lot of his sight. He testified that if he tries to exercise, lift or walk fast his head hurts and his vision blurs. He testified that he does not walk by himself because he is afraid of becoming dizzy. He testified that he no longer helps his wife out around the house because he trembles and has cut himself. He testified that he has problems bending,

squatting and is unable to perform any maintenance work around his house. The ALJ finds that the entirety of Claimant's testimony regarding his physical restrictions, ability to engage in activities and to work not to be credible or persuasive.

39. Claimant's wife testified that claimant gets sick and vomits two to three times a day. However, this is inconsistent with his medical records in which Claimant denied vomiting since shortly after his injury. Claimant's wife also testified that claimant suffered a second injury when he returned to work for his employer in which he cut himself and that she shaves him because he cuts himself. Claimant's wife testified that he withdraws from noise and activity around the house and has experience sexual dysfunction since the injury. The ALJ finds that this testimony is only a recitation of what Claimant's wife observes and represents manifestations of lack of function on the part of Claimant that are not credible or persuasive.

40. Mike Hernandez performed a vocational evaluation of claimant on August 13, 2008. Claimant reported to Mr. Hernandez that he had completed 11 years of education in Mexico and took two courses in the United States in chemicals and mercury that were conducted in English. Claimant reported that he had lived in the U.S. for approximately 20 years.

41. After reviewing all of claimant's medical records and his verbal history, Mr. Hernandez opined that claimant had retained or regained the ability to perform work. He noted that claimant was able to work in the medium work category per a Functional Capacity Evaluation done in February 2007. Based on claimant's educational background, he felt that claimant could consider jobs in the medium, light, and sedentary physical demand categories as well as unskilled or semi-skilled in terms of aptitude. Mr. Hernandez identified the following types and classes of jobs which he felt Mr. Pineda would able to perform on a part or full-time basis and which exist in his commutable labor market: assembler, ticket taker, fast food worker, light janitorial, dish washer, busser, flagger, clothing sorter, laundry attendant, cafeteria attendant, sandwich maker, cook helper, and kitchen helper. Mr. Hernandez forwarded these 14 job titles with DOT job descriptions to Dr. Mason for her opinion. Dr. Mason indicated that of the 14 jobs, claimant could perform 10 of the identified jobs. Mr. Hernandez opined that claimant was employable and had several vocational options available to him.

42. Mr. Hernandez considered Claimant's potential driving restrictions in reaching his opinion that Claimant was employable and able to earn a wage. In reaching his opinion, Mr. Hernandez placed more weight on objective data regarding any claimed mental or cognitive impairment of Claimant. Subsequent to issuing his vocational report, Mr. Hernandez had an opportunity to review the surveillance videos submitted into evidence at hearing. Mr. Hernandez testified that the surveillance videos only solidified his opinion that claimant was a capable of obtaining employment.

43. Lee White performed a vocational evaluation of Claimant and issued a report dated August 11, 2008. Mr. White opined that Claimant was not employable. Mr. White discounted many of the adverse findings and opinions in Claimant's medical re-

cords from treating and evaluating physicians. Mr. White relies primarily on the Claimant's subjective complaints of inability to function.

44. The ALJ resolves the conflicts between the opinions of Mike Hernandez and those of Lee White concerning Claimant's employability and ability to earn a wage in favor of the opinions of Mr. Hernandez as being the most credibly and persuasive. The opinions of Mr. Hernandez are supported in the medical records by the opinions of Dr. Mason and by the activities of Claimant depicted in the various surveillance videos taken at several different times during Claimant's course of medical treatment and evaluation. The opinion of Mr. Hernandez that Claimant remains employable and able to earn a wage is found as fact.

45. The ALJ finds that Claimant has failed to prove, by a preponderance of the evidence, that he is unable to earn any wages in the same or other employment. The Claimant has failed to prove that he is permanently and totally disabled. Section 8-40-201(16.5)(a), C.R.S.

46. Respondents correctly computed Claimant's entitlement to PPD benefits and MIB benefits in the May 8, 2008 Final Admission of Liability.

CONCLUSIONS OF LAW

47. 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).

48. 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.

49. Permanent total disability, as defined in § 8-40-201(16.5), C.R.S., means an employee is unable to earn any wage in the same or other employment. As amended in 1991, this statute established a strict definition of permanent total disability. The phrase, "to earn any wages in the same or other employment, provides a real and nonillusory bright line rule for the determination whether a claimant has been rendered permanently totally disabled." *Lobb v. Indus. Claim Appeals Off.*, 948 P.2d 115 (Colo.

App. 1997) The burden of proof in establishing permanent total disability is on the employee to prove that he is unable to earn any wages in the same or other employment. In order to meet the burden of proof established by this statute, claimant must prove permanent total disability by a preponderance of the evidence. The question of whether claimant has carried this burden is one of fact for resolution by the administrative law judge. See *Eisnach v. Indus. Comm'n*, 633 P.2d 502 (Colo. App. 1981).

50. For purposes of permanent total disability, "any wages" means more than zero. *McKinney v. Indus. Claim Appeals Off.*, 894 P.2d 42 (Colo. App. 1995). In *McKinney* the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from receiving permanent total disability benefits. *See also Christie v. Coors Transportation*, 933 P.2d 1330 (Colo. 1997). In determining whether a claimant is permanently totally disabled, the ALJ may consider his age, education, prior work experience, vocational training, overall physical condition, mental capabilities, and the availability of the work claimant can perform. *See Sandoval v. Sam & Ray's Frozen Foods*, W.C. No. 4-125-205 (ICAO Nov. 30, 1993). The critical test is whether employment exists that is reasonably available to claimant under his particular circumstances. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). the claimant fails to prove permanent total disability if the evidence establishes that it is more probable than not that the claimant is capable of earning wages. *Duran v. MG Concrete Inc.,* W.C. No. 4-222-069 (September 17, 1998).

51. In deciding whether 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 expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). 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).

52. As found, Claimant has failed to carry his burden of proving that he is incapable of earning any wages and to prove that he is permanently and totally disabled. Mr. Hernandez opined that claimant is in fact employable and capable of earning a wage. Mr. Hernandez identified 14 job types in which he felt claimant was capable of obtaining employment. Of those 14 identified job types, claimant's treating physician, Dr. Mason, opined that claimant was capable of working in 10 of those positions. Furthermore, claimant was clearly able to work for at landscaping activities without difficulties supporting Mr. Hernandez' opinion that Claimant is able to earn a wage.

53. As found, Claimant's testimony and the testimony of Claimant's wife regarding Claimant's alleged physical, cognitive, emotional and visual limitations is not credible. Claimant's testimony regarding his symptoms and limitations is wholly contradicted by his behavior captured on the surveillance videos depicting activity at several different times during Claimant's course of medical treatment and evaluation. Claimant's

medical records detail a history of significant symptom magnification and factitious disorder from not one by several of Claimant's treating and examining physicians including the DIME physician, Dr. Goldman. The opinions of Mr. White concerning Claimant's employability and ability to earn a wage are not persuasive in that he relies heavily on Claimant's representations of his symptoms and limitations which are not credible.

54. In this case, claimant is able to obtain and maintain employment within his labor market and earn wages. Employment exists that is reasonably available to claimant given his particular circumstances, including his age, education and training, transferable skills, prior work experience, labor market and restrictions. Claimant did not prove that he is unable to earn any wages in the same or other employment. Claimant is, therefore, not permanently and totally disabled.

55. Section 8-42-107.5 limits the amount of temporary disability and permanent disability benefits an injured may receive based on the whole person impairment rating assigned at the time of MMI. Under the statute as it existed at the time of claimant's injury in April of 2005, an injured worker's benefits were capped at $60,000 if his impairment rating was 25% or less and $120,000 if his impairment rating was greater than 25%. Because Claimant's overall whole person impairment was less than 25% Claimant is limited to combined TTD, TPD and PPD benefits of $60,000.

56. Respondents filed a Final Admission on May 8, 2008, based on Dr. Goldman's 10% whole person impairment rating and 2% mental impairment rating. As of the date of the final admission, claimant had received $59,816.37 in temporary disability benefits. The final admission asserts that there was a $15,202.84 overpayment for previously paid PPD benefits. This overpayment, however, was not utilized in considering the amount of indemnity benefits that were still available under the $60,000 cap. Based on the $59,816.37 in temporary disability benefits that had been paid, there was $183.63 remaining under the cap. As such, respondents admitted for only $183.63 in PPD benefits. Respondents also admitted for $4,448.04 in mental impairment benefits in addition to the benefits for TTD, TPD and PPD subject to the statutory cap. These benefits were also not considered in determining the amount of indemnity benefits left under the cap. Claimant's assertion that Respondents miscalculated claimant's PPD award is incorrect and claimant is not entitled to any additional PPD benefits.

57. The ALJ concludes that the evidence is insufficient to show whether Claimant has been overpaid $15,202.84 as claimed by Respondents. It is simply not clear to the ALJ how this figure was arrived at. There is some evidence that this figure derives from the PPD admitted in the original Final Admission filed in June 2007 that then was not taken as an offset against additional TTD admitted in the December 2007 General Admission. However, the ALJ cannot make this determination from the evidence presented. While it may well be true that Claimant has been overpaid and that Respondents should be entitled to recover such an overpayment, the ALJ declines to make a determination of this issue at this time.

ORDER

It is therefore ordered that:

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

Claimant's claim for additional PPD or MIB benefits and/or that Respondents incorrectly calculated the statutory cap on such benefits is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED: January 29, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 3-966-319

ISSUES

The issues determined herein are whether Dr. Struck refused to treat claimant, respondents' request for a change of physician, and claimant's request for attorney fees.

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on December 21, 1989.
2. Claimant was later determined to be permanently and totally disabled. She received ongoing medical benefits, including treatment by Dr. Timothy Hall.
3. On June 19, 2007, the insurer requested a Medical Utilization Review ("MUR") proceeding concerning the treatment by Dr. Hall. The MUR panel unanimously recommended a change of physician be made from Dr. Hall.
4. On February 15, 2008, the Director of the Division of Workers' Compensation ("Director") entered his order for a change of provider in accordance with section 8-43-501, C.R.S. The order stated, ". . . every effort should be made to explore the possibility of an interdisciplinary rehabilitation program."
5. On February 22, 2008, respondents stated to claimant that they welcomed suggestions about a new treating physician.
6. Claimant filed an appeal from the Director's order. Claimant, through counsel, indicated that he intended to continue to obtain treatment from Dr. Hall and would not participate in selecting a new physician.
7. On May 21, 2008, Timiann Flores, on behalf of the Director, notified the parties that the Director has been unsuccessful in finding three physicians willing to take over claimant's care. Ms. Flores stated that only Dr. Terry Struck was willing to treat. Ms. Flores stated that the respondent could choose Dr. Struck, the parties can try again to

agree upon a new provider, or the parties may make other suggestions about how to provide a new physician for claimant.

8. On May 29, 2008, respondents agreed to Dr. Struck. On May 30, 2008, Ms. Flores notified the parties that respondents had selected Dr. Struck.

9. The insurer set an appointment with Dr. Struck for July 1, 2008, and notified claimant of that fact.

10. On June 26, 2008, Dr. Struck reported that claimant had not completed the required new patient paperwork and had told her office staff that he did not wish to switch physicians. Dr. Struck stated, "In light of all of the above, I do not feel comfortable in accepting and respectfully decline to accept [claimant] as a patient."

11. On July 8, 2008, respondents notified the Director that Dr. Struck is refusing to accept claimant as a new patient. Respondents requested that the Director contact Dr. Polanco, Dr. Ridings, and Dr. Castrejon in an effort to locate a new authorized treating physician. Respondents stated that they wised to be prepared with a new authorized treating physician to resume care as soon as the appeal is completed.

12. On July 29, 2008, Ms. Flores wrote to the parties to indicate that it was inappropriate for the Director to provide an additional list of physicians pursuant to the MUR process. Ms. Flores wrote, "Since a new provider was identified issues such as whether the claimant is refusing to submit to an examination or whether the doctor is refusing to treat due to non-medical reasons are outside the UR process and may be best addressed by an administrative law judge."

13. On August 8, 2008, claimant's attorney wrote to the Director to request that he reconsider the letter from Ms. Flores.

14. On August 27, 2008, the Director wrote that the MUR process ends once a new physician is designated. Because the new physician has been designated, there was nothing further for the Director to do pursuant to the statute. The Director stated that he was unaware of any further action that the Division could take.

15. On August 27, 2008, respondents filed an application for hearing on the issue of "authorized provider." The application stated, "This application is filed so that when all appeals are exhausted and if the MUR is affirmed, a new ATP will be ready to assume care. Respondents are seeking order from ALJ regarding new ATP."

16. Claimant requested that respondents withdraw the application for hearing. Respondents refused to do so, indicating that the Director was unable to find another physician who was willing to treat claimant and that the Director had advised that respondents must apply for hearing on the issue of the new medical provider.

17. Claimant filed a response to the application for hearing, raising the issues of penalties and attorney fees for filing an application on an issue not ripe.

18. On September 2, 2008, Judge Krumreich issued his order affirming the February 15, 2008, order of the Director, and Judge Krumreich stated that Dr. Struck was the new authorized treating physician.

19. The record evidence is unambiguous that Dr. Struck has declined to accept claimant as a patient due to non-medical reasons.

20. The Director and Ms. Flores did not "order" respondents to apply for hearing on the issue.

21. Respondents' August 27, 2008, application for hearing was not for an issue not ripe for determination. No procedural bars existed to determination of respondents' application for hearing.

CONCLUSIONS OF LAW

1. Respondents applied for hearing to determine if Dr. Struck had refused to treat claimant due to a non-medical reason and to have the Judge define a procedure to select a new authorized treating physician. Section 8-43-501, C.R.S., sets forth the MUR process. In summary, a panel of physicians conducts a review of the medical records and each panel member makes findings about the care of the treating physician and makes recommendations about whether claimant should have a change of authorized treating physician. The Director is required to give "great weight" to the panel recommendations. Section 8-43-501(4), C.R.S., sets forth the procedure to select a new authorized treating physician. If the Director orders a change of provider, the parties have seven days in which to agree upon a new physician. If they parties cannot reach agreement, the Director shall select three providers. The party who was successful in the MUR process selects the new authorized treating physician from that list. The statute also provides that any party, including the authorized treating physician, may appeal the Director's order for a change of physician. The Judge conducts a record review only. A party may then file a petition to review the Judge's order. WCRP 10-8(B) provides:

> If the claimant chooses to remain under the care of the provider under review during the period of appeal resolution, the payor shall be responsible for payment of medical bills to the provider until an order on appeal is issued. If the insurance carrier, employer or self-insured employer prevails on appeal, the claimant may be held liable by the prevailing party for such medical costs paid during the appeal period.

Neither the statute nor the WCRP make any further provisions for selection of another authorized treating physician once the Director selected Dr. Struck. The Director is correct that his involvement with the MUR process ends with the selection of the new authorized treating physician. The Director and Ms. Flores did not "order" respondents to apply for hearing on the issue, but merely noted that one was an option.

2. As found, the record evidence is unambiguous that Dr. Struck declined to accept claimant as a new patient, due to non-medical reasons. There was no reason to call Dr. Struck to testify; her report was unequivocal that she declined to treat.

3. If the Judge has authority to select a new treating physician, the Judge declines to do so at the present time. Respondents have not selected a new treating physician after Dr. Struck's refusal to treat. Claimant has not yet completed his appeal from the order for a change of physician. Claimant has continued to accept treatment only from Dr. Hall.

4. Claimant seeks attorney fees against respondents pursuant to section 8-43-211(2)(d), C.R.S., for requesting a hearing on issues that are not ripe for adjudication

at the time of the application for hearing. "Ripeness" in this context refers to a disputed issue concerning which there is no legal impediment to immediate adjudication. *Olivas-Soto v. Industrial Claim Appeals Office* 143 P.3d 1178 (Colo. App. 2006); *BCW Enterprises, Ltd. v. Industrial Claim Appeals Office* 964 P.2d 533 (Colo. App. 1997); *Maestas v. Wal Mart Stores, Inc.*, W.C. No. 4-717-132 (Industrial Claim Appeals Office, January 22, 2009). Contrary to claimant's argument, no legal impediment prevented determination of the issues in respondents' application for hearing. Section 8-43-501(2)(e), C.R.S., prohibits any party from requesting a hearing concerning a change of physician until the MUR proceedings have become final. For purposes of this section, the proceedings became final once the Director selected Dr. Struck. Claimant's appeal of the Director's order for a change of physician continues through normal appellate procedures even though the MUR process is complete. Consequently, section 8-43-501(2)(e), C.R.S., no longer prohibited respondents' application for hearing. Although respondents alleged an issue about whether Dr. Struck refused to treat, that issue is nonexistent. No procedural bar exists to decide the issue, but the decision is that she unequivocally refused to treat. Nothing in the statute or rules required any other actions before selecting a new treating physician. Theoretically, the Judge could select a new treating physician. That would be an extremely unwise action, especially in the current setting. That issue can better be decided at a later time when the information is more complete. Nevertheless, no procedural bar exists to the application for hearing when filed. Consequently, claimant is not entitled to attorney fees.

ORDER

It is therefore ordered that:

1. The insurer's request for an order designating a new authorized treating physician is denied and dismissed.
2. Claimant's request for attorney fees is denied and dismissed.
3. All matters not determined herein are reserved for future determination.

DATED: January 30, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-754-105

ISSUES

The issues for determination are compensability, average weekly wage, temporary partial disability benefits and temporary total disability benefits.

FINDINGS OF FACT

1. On November 12, 2007, Claimant was employed by Employer. Claimant had worked for Employer since July 2007.

2. Claimant was leaving work after his shift ended on November 12, 2007, when he was injured. Claimant tripped and fell on the uneven sidewalk leading from Employer's building to the parking lot where Claimant had parked his vehicle. Claimant fell face first, hitting his face, hands, arms and the front of his body on the sidewalk.

3. The accident did not occur during working hours. The accident did not occur on Employer's premises. Walking back to his vehicle after work was not contemplated by the employment contract.

4. Claimant was not required to drive his vehicle to work for Employer. Claimant was not required to use his vehicle in order to perform his job duties. Claimant was not required to park his vehicle such that he unavoidably traveled over the area where the accident occurred.

5. Claimant reported his injuries to his supervisor on November 13, 2008. He was referred to the Rose Medical Center emergency room. Claimant received treatment for his injuries from his primary treating physician and other providers.

6. Employer reported the broken cement where Claimant fell to the city and asked for it to be repaired.

7. On the date of the injury, November 12, 2007, Claimant was earning $12.73 per hour and was scheduled to work 40 hours per week. Claimant received a raise on February 1, 2008, to $14.24 per hour, at which time he was still scheduled to work 40 hours per week. Claimant's work hours were reduced to 20 hours per week on July 21, 2008, through July 26, 2008. Claimant was laid off by Employer on July 29, 2008, because Employer could no longer accommodate his restrictions given by his authorized treating physicians.

CONCLUSIONS OF LAW

To qualify for recovery under the Workers' Compensation Act of Colorado, Claimant must show that he was performing services arising out ofand in the course of his employment at the time of his injury. Section 8-401-301(1)(b), C.R.S. (2008). For an injury to occur "in the course of employment", Claimant must demonstrate the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, (Colo.App.1991). The "arise out of" requirement is narrower than the "in course of" requirement. For an injury to arise out of employment, Claimant must show a causal connection between the employment and injury such that the injury had its origins in his work-related function and is sufficiently related to those functions to be considered part of the employment contract. *Industrial Commission v. Enyeart*, 81 Colo. 521, 256 P.2d

314, (1927). Claimant must prove the statutory requirements by a preponderance of the evidence. *City of Boulder v. Streeb*, 706 P.2d 786, (Colo. 1985). An injury arises out of and in the course of employment when there is a "nexus" between the activity that caused the injury and the usual circumstances of the job, so that the activity may be considered and incident of employment.

The general rule is injuries sustained "going to and coming from work" are not compensable. *Barry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 423 P.2d 208, (1967); *Perry v. Crawford & Co.*, 677 P.2d 416 (Colo.App. 1983). There is an exception when a "special circumstance" creates a casual relationship between the employment and the travel beyond the sole fact of the employee's arrival at work. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo.App. 1999). In general, a claimant who is injured while coming from work does not qualify for recovery because such travel is not considered to be performance of services arising out of and in the course of employment. *Industrial Commission v. LaVachm*, 165 Colo. 433, 439 P.2d 359, (1968); *Varsity Contractors v. Baca,* 709 P.2d 55, (Colo.App. 1985).

In *Madden v. Mountain West Fabricators*, *supra,* the Supreme Court held that a number of factors should be considered when determining whether special circumstances warrant recovery under the Act. Those factors include, but are not limited to: 1) whether the travel occurred during working hours; 2) whether the travel occurred on or off the employer's premises; 3) whether the travel was contemplated by the employment contract; and 4) whether the obligations or conditions of employment created "zone of special danger" out of which the injury arose.

The accident occurred when Claimant was leaving work after his shift ended. He was injured when he tripped and fell on the sidewalk leading from Employer's building to a parking lot where he parked his vehicle. The accident did not occur during working hours. The accident did not occur on Employer's premises. Walking back to his vehicle after work was not contemplated by the employment contract. There is no evidence to support Claimant's argument that Claimant was walking to a secured parking lot where he was required to park his vehicle. The obligations or condition of employment did not create a "zone of special danger" out of which the injury arose. Claimant has not shown that he was required to drive his vehicle to work for Employer. Claimant was not required to use his vehicle in order to perform his job duties. Claimant was not required to park his vehicle such that he unavoidably traveled over the area where the accident occurred. Claimant has failed to establish a nexus between the sidewalk on which the Claimant tripped and fell and where the Claimant parked his vehicle.

Claimant has not established by a preponderance of the evidence that the accident occurred in the course and scope of his employment. The claim is denied and dismissed.

ORDER

It is therefore ordered that the claim is denied and dismissed.

DATED: *January 29, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts