OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. UR 20090001

ISSUES

Whether Claimant has overcome, by clear and convincing evidence, the MUR panel's finding and the Director's Order ordering a change in provider in accordance with C.R.S. §8-43-501(3)(c)(I).

FINDINGS OF FACT

Based upon the record submitted, the ALJ finds as fact:

1. Claimant sustained an admitted injury on August 7, 2001 as the result of an altercation at work. Claimant was employed as a master plumber by -, Inc. Claimant has not returned to work since the date of injury.

2. Claimant came under the care of Provider beginning October 25, 2004. Claimant had been referred to Provider by Dr. Daniel Bennett, M.D.

3. Dr. Bennett began treatment of Claimant on June 3, 2004. Claimant had been referred to Dr. Bennett for consultation for the provision of interventional spine diagnostics/therapeutic recommendations for ongoing right groin pain status post arteriogram and to provide interventional pain recommendations. Dr. Bennett stated in his New Patient Consultation report of June 3, 2004 that he did not recommend opioid analgesics, as opioids for this type of pain are rarely helpful.

4. At a follow-up consultation on August 10, 2004 Dr. Bennett prescribed Claimant a trial of the medication Actiq. The medication Actiq is a narcotic medication in the nature of an opiate analgesic administered through use of lozenges or lollipops. On September 10, 2004 Dr. Bennett prescribed Duragesic patches in addition to Actiq. Duragisic is also a narcotic pain medication.

5. At the time he began treatment with Provider, Claimant completed a Patient Questionnaire. Claimant was asked to rate his pain and its effect on his ability to stand or sit; engage in social activities; walk; participate in recreational activities; and perform work. Claimant was asked to rate the effect of his pain on these activities on a scale from 0 to 5, with 0 being "pain usually or severely interferes" and 5 being "pain rarely interferes". Claimant rated his pain's interference in each of the categories of activities as a "1" being between "usually or severely interferes" and "occasionally interferes".

6. On October 25, 2004 Claimant presented to Provider with complaints of severe and persistent right lower extremity/inguinal and right 2nd finger pain, right 2nd finger paresthesias, and worsening of premorbid depression secondary to the work injury of August 7, 2001. Provider continued the medications Duragesic and Actiq. Provider and Claimant executed an Informed Consent on the use of pain control with opioid medications and an Opioid Agreement.

7. As part of the Informed Consent, Claimant understood that Provider would be the only one to decide when and how the patient is to increase the opioid dosage. Claimant also understood that the stated use of such medications was not to eliminate pain but rather to reduce pain to allow the patient to perform many activities of daily living as well as social activities. Claimant further understood that he should follow Provider's directions and not increase the opioid dose on his own. Claimant further understood that any evidence of uncontrolled dosage escalation would be followed by tapering and discontinuance of opioid medication.

8. As part of the Opioid Agreement Claimant agreed to use the medications only as prescribed.

9. In a report dated December 2, 2004 Provider stated he had reviewed an IME report from Dr. Ramaswamy. Provider specifically noted Dr. Ramaswamy's opinion that Dr. Ramaswamy agreed with Dr. Bennett that narcotics would not be helpful to Claimant and more likely would give him chronic problems. Provider continued to prescribe Claimant Duragesic and Actiq and instructed Claimant to remain off work.

10. At a follow-up evaluation on December 14, 2004 Provider noted that Claimant reported notably symptom improvement with Duragesic but that Claimant admitted he was "addicted to it". Claimant was also consuming five Actiq 800mcg per day stating that between the Duragesic and Actiq they were pretty much conquering his pain. Provider decreased the dose of Duragesic and instructed Claimant to remain off work. At a follow-up visit on January 3, 2005 Provider prescribed Claimant a single point cane in view of his frequent falls.

11. At a follow-up evaluation on February 22, 2005 Provider noted that Claimant had admitted to consuming Actiq in excess of the prescribed dose. Provider also noted that Claimant had constipation secondary to notable opioid use/consumption. Provider instructed Claimant to remain off work, increased the dose of Duragesic and continued the Actiq. At a further follow-up on April 14, 2005 Claimant stated to Provider that he had started "going out of lollipops like they've been going out of style" in reference to his consumption of Actiq.

12. At a follow-up evaluation on May 12, 2005 Provider increased the dosage of Duragesic and continued the Actiq. Provider reported that Claimant denied notable change in his right hand symptoms and that Claimant's right lower extremity/inguinal pain was "on me every day, 24/7".

13. At a follow-up evaluation on August 8, 2005 Provider again noted that Claimant reported consuming Actiq in excess of the dose prescribed. Claimant stated then "I'm totally out of lollipops". Provider instructed Claimant to continue using Duragesic and Actiq at the previously prescribed dosages. On August 22, 2005 Provider noted that Claimant had was consuming 7 to 10 Actiq per day stating "I'm popping them like candy". When asked about his depression by Provider on August 22, 2005 Claimant stated: "I don't know. I sit in a stupor most of the time."

14. On September 7, 2005 Provider asked Claimant if he appreciated notable improvement in his pain with the increased dosage of Duragesic. Claimant replied "Probably no, but maybe it did. It's hard to tell". Provider decreased the dosage of Duragesic from 150 mcg to 125 mcg and also tried Claimant on Dilaudid instead of Actiq. On October 6, 2005 Provider instructed Claimant to discontinue Dilaudid and resume Actiq at 800mcg every four to six hours, as needed.

15, At a follow-up evaluation on October 27, 2005 Claimant reported to Provider that his right hand pain and paresthesias were "Same", his right lower extremity/inguinal pain was "Worse". In response to Provider's inquiry about his depression Claimant stated: "I don't know, I would have to say it's worse…I feel totally, utterly worthless…"

16. On February 27, 2006 Provider noted that Claimant felt he was doing "downhill" and reported notable difficulties performing necessary activities of daily living skills including housekeeping and self-care.

17. On May 22, 2006 Provider instructed Claimant to continue using a raised toilet seat with grab bars, 4-wheeled walker and a single point cane.

18. Provider placed Claimant at maximum medical improvement on July 11, 2006 and assigned 39% whole person impairment. In the report of July 11, 2006 Provider noted that the Actiq dosage had been increased. Provider was encouraging Claimant to obtain authorization for essential services for housekeeping tasks. Provider instructed Claimant to continue using his 4-wheeled walker and to remain off work.

19. On October 10, 2006 Provider prescribed Claimant a manual wheelchair.

20. Dr. Edwin Healey, M.D. performed an IME on May 2, 2007. Dr. Healey is a Board Certified physician in Occupational Medicine and Neurology and is also a Diplomate of the American Board of Pain Medicine. Claimant stated to Dr. Healey that he had become immobile from right groin, leg and testicular pain and required use of a wheelchair since December 2006. In his report, Dr. Healey reviewed and extensively summarized the medical records from Provider, other physicians who had treated or evaluated Claimant for the work injury and medical records from the Veterans' Administration regarding Claimant's medical care prior to the injury and since the injury at that facility.

21. At the time of Dr. Healey's IME in May 2007 Claimant stated to this physician that his chronic pain completely interferes with work outside the home,

relationships with others, sleep and enjoyment of life. Claimant further noted to Dr. Healey that he was completely dependent upon his wife for care and performing activities of daily living.

22. In his review of records, Dr. Healey noted the results of an evaluation from the Urology clinic at the Veterans' Administration that concluded that Claimant had a long-standing problem of erectile dysfunction most likely due to multiple high doses of opioids.

23. Dr. Healey opined that Claimant should immediately be tapered off the multiple opioid medications and that any required pain management should be done with use of simple analgesics or non-steroidal anti-inflammatory drugs. Dr. Healey further opined that the high doses of Duragesic and Actiq were not necessary and were probably contributing to Claimant's erectile dysfunction. Dr. Healey opined that there appeared to be major secondary gain issues present with Claimant and recommended Claimant be seen by a different pain specialist.

24. In a report from a follow-up evaluation of Claimant on June 28, 2007 Provider recited in detail the recommendations made by Dr. Healey. Provider disagreed with Dr. Healey's assessment that Claimant did not require essential services for housekeeping. Provider did not comment upon or otherwise address Dr. Healey's opinions on the continued use of opioid medication or the recommendation for evaluation by another pain specialist. Provider continued to prescribe Claimant Duragesic and Actiq without decrease in dosage.

25. In a report of a follow-up evaluation on August 9, 2007 Provider stated that subsequent treatment will be dependent, in large part, upon impressions and recommendations made during an impending DIME to be done by Dr. Gareth Shemesh, M.D.

26. Dr. Shemesh performed a DIME of Claimant on September 17, 2007. In his review of records, Dr. Shemesh specifically noted a recommendation from treating psychologist, Dr. Ron Carbaugh, that attempts be made to try to detoxify Claimant off narcotic medications.

27. Upon physical examination Dr. Shemesh noted Claimant to exhibit significant pain behaviors with significant symptom magnification. Dr. Shemesh further noted numerous inconsistencies on examination.

28. Dr. Shemesh agreed that Claimant had reached maximum medical improvement. Dr. Shemesh concurred with Dr. Healey that Claimant did not require the large amounts of opioid analgesics being prescribed by Provider. Dr. Shemesh recommended that Claimant be weaned off these medications over the next 6 to 12 months.

29. In a follow-up evaluation report of November 19, 2007 Provider recited in detail the findings and recommendations contained in the DIME report of Dr.

Shemesh, including Dr. Shemesh's recommendation that Claimant be weaned from the narcotic medications. Provider continued to prescribe Claimant Duragesic and Actiq at the same dosages and did not address or discuss Dr. Shemesh's recommendation for weaning from these medications.

30. Dr. Kathy McCranie performed an IME on January 10, 2008. Claimant presented to Dr. McCranie in a wheelchair stating his wife does everything for him. Dr. McCranie agreed with Dr. Shemesh that Claimant should be weaned off of the opioid medications and recommended referral into a Chronic Pain Management program as the best chance for success in weaning from the opioid medications.

31. In a follow-up evaluation report of March 25, 2008 Provider recited in detail the findings and recommendations of Dr. McCranie. Provider specifically noted that Dr. McCranie had agreed with Dr. Shemesh's recommendation for weaning Claimant from the narcotic medications being prescribed by Provider. Provider stated that Dr. McCranie had failed to express any supporting rationale for her assertion that Claimant be weaned off the narcotics. Provider further stated that although Claimant is clearly dependent upon his prescribed opioid medications Claimant had failed to demonstrate associated aberrant behaviors secondary to the use of these medications. Provider did not state or provide explanation of what "associated aberrant behaviors" would be considered sufficient to question Claimant's continued use of opioid medications.

32. At a follow-up evaluation with Provider on April 23, 2008 Claimant was referred for testing of his testosterone levels to assess the status of his opioid induced hypogonadism. At an evaluation on June 24, 2008 Provider referred Claimant for Prostate Specific Antigen (PSA) level in view of his continued testosterone replacement therapy secondary to opioid induced hypogonadism.

33. On August 29, 2008 Insurer made a request to the Director for Utilization Review of Provider. Insurer's Request for Utilization Review was supported by a Case Report from Barbara Poelma, RN and the July 16 and July 24, 2008 statements of Dr. Healey expressing his recommendation that Provider's ongoing treatment of Claimant with high does opioids undergo Utilization Review and his opinion that such treatment was not appropriate.

34. Under the provisions of Section 8-43-501 (3)(a), C.R.S. the Director appointed three physicians to serve as the members of the Utilization Review committee. Those physicians were Dr. Katharine Leppard, M.D., Dr. Glen Kelley, M.D., and Dr. Albert Hattem, M.D.

35. Dr Leppard prepared a Medical Utilization Review report dated December 10, 2008. Dr. Leppard summarized the medical records from various physicians and psychologists who had previously treated or evaluated Claimant. Dr. Leppard concluded that Provider's care was not reasonably necessary. Dr. Leppard characterized Claimant's use of narcotic medications as "extremely high" and not reasonable in light of recommendations from numerous other physicians that

these medications should be tapered. Dr. Leppard considered the dosage of narcotics to be excessive.

36. Dr. Leppard recommended that Provider not continue to treat Claimant. Although Dr. Leppard felt that Provider's care was within the April 2007 Chronic Pain Disorder Guidelines of the Division, Dr. Leppard opined that the narcotic doses were so unbelievably high and could not be reasonably justified. Dr. Leppard further noted that Claimant's functional status had not improved under Provider's care and had in fact progressively worsened.

37. Dr. Kelley prepared a report dated November 19, 2008. Dr. Kelley opined that Provider's care was reasonably necessary but not reasonably appropriate according to accepted professional standards. Dr. Kelley noted that Provider had continued to prescribe high dose narcotics despite multiple recommendations that Claimant be tapered off these medications and that no documentation was found that treatment of Claimant with this level of narcotics was significantly improving Claimant's pain or function. Dr. Kelley further opined that the Medical Treatment Guidelines for chronic pain state that patients treated with chronic narcotic medications need to show evidence of improved function or reported pain. For this reason, Dr. Kelley felt that Provider's care did not utilize the Medical Treatment Guidelines adopted by the Division.

38. Dr. Kelley noted that Provider had not provided any documentation of why Provider rejected the recommendations of other physicians to taper Claimant's narcotic medications. Dr. Kelley opined that Provider should not continue to treat Claimant. Dr. Kelley further opined that some of Claimant's ongoing health issues were iatrogenically produced by Provider continuing to feed into Claimant's cycle of narcotic dependence.

39. Dr. Hattem prepared a Utilization Review Report dated November 15, 2008. Dr. Hattem concluded that Provider's care was not reasonable and necessary nor reasonably appropriate according to accepted professional standards in light of physiatric and psychiatric opinions that Claimant be detoxified; a previous history of significant psychiatric problems placing Claimant at risk to addiction; lack of objective evidence of a pain generator and Provider's deviation from the Medical Treatment Guidelines.

40. Dr. Hattem opined that Provider's treatment did not utilize the Medical Treatment Guidelines. Dr. Hattem specifically referred to page 51 of the Chronic Pain Disorder Guidelines in concluding and stating that narcotic analgesics are to be used contingent on certain obligations or goals being met by the patient. In addition, there should be documentation of sustained improvement of pain control and or functional status, including return to work with the use of opioids. Dr. Hattem recommended that Provider not continue to treat Claimant.

41. The Director issued an Order-Utilization Review dated Janaury 23, 2009. The Director ordered that a change of provider be made in accordance with

Section 8-43-501, C.R.S. The Director found that the majority of the Utilization panel's members agreed Provider's care was not reasonably necessary to cure and relieve Claimant of the effects of the on-the-job injury and that Provider's care did not follow the Medical Treatment Guidelines. These findings of the Director are supported by the reports of Dr. Kelley and Dr. Hattem.

42. The Director found that the Utilization Review panel unanimously found that Provider's care was not reasonably appropriate according to accepted professional standards and that a change of provider be ordered. This finding of the Director is supported by the reports of Dr. Leppard, Dr. Kelley and Dr Hattem.

43. The Director's Order ordering that a change of physician be made is supported by the Director's findings of fact and conclusions of law, the reports of the Utilization Review panel and the credible, persuasive evidence in the record.

44. Claimant filed an Application for Appeal from Director's Order – Utilization Review on February 27, 2009. Provider has not appealed or otherwise challenged the Director's Order that a change of physician be made.

45. With his appeal document Claimant submitted a written statement providing his version and perceptions of his medical treatment and the treatment he has received from Provider. Claimant has not presented any other persuasive records to rebut the findings of the Utilization Review Committee. Claimant states that he cannot get in or out of a bathtub without the help of his wife. Claimant admits that treatment he received from Dr. Bondi to improve his circulation provided a lot of pain relief. Claimant states he continues to live in chronic pain. Claimant has not returned to work.

46. Claimant has failed to overcome the findings of the Utilization Review committee consisting of Dr. Leppard, Dr. Kelley and Dr. Hattem by clear and convincing evidence. The findings of the Utilization Review committee are supported by the medical records of Dr. Healey, Dr. Shemesh and Dr. McCranie as well as those of the Provider. Provider's own records establish that Claimant has been on high doses of narcotic/opioid pain medications that have not significantly decreased Claimant's pain or improved his function and that have in fact contributed to Claimant developing constipation, erectile dysfunction and hypogonadism as found by Dr. Kelley in his report.

CONCLUSIONS OF LAW

1. The purpose of the Medical Utilization Review ("MUR") statute is to provide a method to review and remedy medical services which may not be reasonably necessary or reasonably appropriate in light of accepted professional standards. *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994). In this Utilization Review proceeding, the ALJ applies the procedural law in effect at the time this Utilization Review was commenced by the Insurer and any

procedural statutory amendments enacted subsequently. *Rook v. Industrial Claims Appeals Office,* 111 P.3d 549 (Colo. App. 2005. cert. denied 2005).

2. The provisions of Section 8-43-501, C.R.S. govern requests for MUR. A party appealing an order specifying that a change of provider be made bears the burden of overcoming the MUR panel's findings by clear and convincing evidence. Section 8-43-501(5)(a), C.R.S. Clear and convincing evidence is highly probable and free from serious or substantial doubt. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995). A fact or proposition has been proven by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. The ALJ is required to give great weight to the findings of the MUR panel. Section 8-43-501(5)(a), C.R.S. Unless the assessment of the MUR panel is entirely arbitrary or based upon factors other than medical considerations, the ALJ may not substitute his judgment for the assessment of the Provider's care made by the MUR panel. *Rook, supra at 553.*

3. As found, Claimant has failed to overcome the MUR panel's findings by clear and convincing evidence. The Director's Order that a change of physician be made is fully supported by the findings of the MUR panel and is in accordance with the applicable law. The assessment of the MUR panel here was not entirely arbitrary or based upon factors other than medical considerations. The MUR panel's findings here are supported by reports from numerous other physicians who have expressed disagreement with Provider's use of opioid medications for Claimant and who have recommended that these medications be tapered and discontinued. The Provider's own records support the findings of the MUR panel that Provider's care has not been reasonably necessary or reasonably appropriate. The Provider's continued prescription of high doses of opioid medications have not significantly reduced Claimant's pain or allowed Claimant to increase his level of function. The Provider's own statements of purpose in using these medications as set out in the Informed Consent executed by Claimant and Provider have been contradicted by Provider's care. Even when Claimant violated the terms of the Opiate Agreement by escalating the dosage Provider continued to prescribe the medications and on his own escalated their dosage. Provider himself has failed to abide by the Opiate Agreement that required tapering and discontinuance of the medications upon Claimant's escalation of dosage. The Provider has consistently failed to adequately address recommendations from other physicians regarding Claimant's use of opioid medications. The MUR panel's findings and the Director's Order for a change of physician are amply supported by the record and have not been overcome by clear and convincing evidence.

ORDER

It is therefore ordered that:

The Director's Utilization Review Order of January 23, 2009 ordering a change of physician is AFFIRMED.

All matters not determined herein are reserved for future determination.

DATED: June 8, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-428-270

ISSUES

Whether the final admission of liability (FAL) filed by the Respondent on October 10, 2008, obligates Respondent as a matter of law to pay the Claimant permanent total disability (PTD) benefits commencing December 14, 2007.

Based upon the conclusion that the FAL did not create such an obligation, the other issues endorsed for hearing were considered to be no longer ripe for adjudication.

BACKGROUND

On June 23, 2009 the undersigned ALJ issued Findings of Fact, Conclusions of Law and Order granting Summary Judgment in favor of the Respondent on the issue endorsed herein. At hearing, Claimant argued that the order was improper, as it did not address the issue as endorsed. On further reflection and reconsideration the ALJ agrees and by this order vacates the Findings of Fact, Conclusions of Law and Order granting Summary Judgment and specifically strikes the findings of fact.

FINDINGS OF FACT

As the issue endorsed involves whether or not the FAL, as filed, on its face creates an obligation on the part of the Respondent for PTD, no findings of fact are necessary, other than the facts as stated on the FAL.

Respondent filed an FAL in this matter on October 10, 2008. The Benefit Summary area was completed substantially as follows:

BENEFIT SUMMARY (Check box & list amount for admitted benefits)

☒Medical to Date (total) $	100,781.10	Permanent Partial Disability (PPD):
☒Disfigurement (total) $	0.00	Whole Person Impairment _24_ % Age 50_
☒Vocational Rehabilitation Services (total) $	0.00	or
☒Temporary Total Disability (TTD) (total) $	139,890.50	Scheduled Impairment _0_% Part of Body Code ___
☒Temporary Partial Disability (TPD) (total) $	355.22	Scheduled Impairment _0_% Part of Body Code ___
☒Stipulation $	0.00	(See page 2 for Part of Body Codes)
☒Permanent Total Disability (PTD)	0.00	

☐Safety Rule Violation ☐Offset (Attach Calculation)

CONCLUSIONS OF LAW

Claimant contends that the only legally plausible interpretation is that the Respondent admitted for PTD but failed to indicate a proper amount by indicating $ 0.00 in the amount area.

Respondents contend that they were indicating that they were denying liability for PTD by checking the box and then indicating a payment of $ 0.00.

On its face the document clearly raises questions as to what is intended by this document. The document seems to have told the reader that PTD was admitted for. The document also seems to have told the reader that no payment for PTD would be forthcoming. The ALJ concludes that the document is ambiguous and would require extrinsic evidence to determine what was intended.

The FAL filed by Respondent on October 10, 2008 is ambiguous and as a matter of law does not obligate Respondent to pay the Claimant PTD benefits commencing December 14, 2007.

ORDER

It is therefore ordered that:

Claimant's request for an order determining that the FAL filed by Respondent on October 10, 2008 as a matter of law obligates Respondent to pay the Claimant PTD benefits commencing December 14, 2007, is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATE: June 24, 2009

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-559-137

ISSUES

The sole issue determined herein is liability for medical benefits, specifically right humeral head replacement surgery.

FINDINGS OF FACT

1. On September 1, 2002, claimant suffered an admitted right shoulder injury while working as a plumbing specialist for the employer. He struck a large steel support with the anterior aspect of a slightly abducted and extended right shoulder. Following this incident, claimant had substantial pain and inability to raise his right hand.

2. Claimant also resided on a 172-acre farm, raising 18 head of cattle.

3. A November 5, 2002, magnetic resonance image ("MRI") of the right shoulder showed a complete tear of the supraspinatus tendon without retraction, mild acromioclavicular ("AC") joint hypertrophy, and possible complete tear of the bicipital tendon. Dr. David Weinstein has opined that the Claimant's mechanism of injury is consistent with causing the type of damage noted on MRI specifically a torn rotator cuff.

4. On November 5, 2002, Dr. Farnworth performed a right shoulder anterior acromioplasty with rotator cuff repair. Dr. Farnworth found that claimant had suffered a complete rotator cuff tear, which had retracted and required Dr. Farnworth to carefully grasp the retracted portion

of the rotator cuff with a clamp to bring it back to its insertion site at the greater tuberosity. Dr. Farnworth utilized two separate bioabsorbable suture anchors placed in the bone in order to encourage repair of the cuff by bringing the cuff back to the bony trough created during surgery. Claimant also underwent anterior acromioplasty during the same procedure.

5. After the surgery, claimant was unable to perform all of the farm duties he previously performed. His wife's uncle resided with claimant and his wife and he did most of the chores for the next two years.

6. Following surgery, claimant was involved in post surgical rehabilitation and his condition improved. Claimant was still unable to do heavy lifting.

7. On February 5, 2003, Dr. Rehman, the authorized treating physician, reexamined claimant, who reported minor pain with some radiation to the upper extremity, but no systemic symptoms. Claimant reported that he had symptoms 30% of the time. Dr. Rehman released claimant to return to work.

8. On February 19, 2003, Dr. Rehman determined that claimant was at maximum medical improvement ("MMI") without permanent impairment.

9. Although claimant was capable of returning to work in his usual position for the employer, he had functional limitations and was never pain free. Over time, claimant's pain and dysfunction worsened and by approximately October 2006, he experienced progressively worsening anterolateral pain, particularly when raising his right arm. Additionally, claimant suffered crepitus of the right shoulder joint.

10. Claimant received no treatment for his right shoulder from February 19, 2003, to February 5, 2007.

11. On February 5, 2007, claimant returned to Dr. Nweke and reported right shoulder pain.

12. In March 2007, claimant bought bags of soil at the employer's place of business. The employer loaded the bags into claimant's truck. Claimant never unloaded them from his truck.

13. On April 12, 2007, claimant returned to the offices of Pueblo Bone and Joint Clinic, where Dr. Simonich evaluated him. Claimant reported six months worsening right shoulder pain.

14. Imaging studies revealed proximal humeral head migration with subacromial space narrowing and small subacromial spur near the AC joint. The studies showed moderate glenohumeral degenerative changes, but no other bony lesions or abnormalities. Dr. Simonich diagnosed recurrent rotator cuff tear. He

ordered a MRI to evaluate the supraspinatus tendon and gave claimant samples of Celebrex.

15. On April 26, 2007, Dr. Simonich documented that claimant had undergone a rotator cuff repair by Dr. Farnworth in 2002, but had early failure after the first surgery based on his symptoms. He noted that the MRI demonstrated a fairly large recurrent tear measuring about 2 centimeters and retracted about 8-12 millimeters with bioabsorbable anchors in the humeral head and a possible SLAP lesion. Dr. Simonich noted that claimant had a "failed versus recurrent" rotator cuff tear.

16. On June 18, 2007, Dr. Simonich documented that claimant had suffered a massive right shoulder rotator cuff tear due to failed prior repair from 2002. Dr. Simonich further concluded that claimant's current pathology is probably related to his original injury. Dr. Simonich recommended consideration of a re-repair and possible augmentation with graft jacket collagen.

17. Claimant denied any subsequent injury to his right shoulder following the original rotator cuff injury and subsequent original repair. Claimant lives on a ranch and testified that during the time frame following his original industrial injury and surgery, he had assistance in performing duties on the ranch and did not have to lift bales of hay because the hay bales he bought were large bales of hay each weighing in excess of several hundred pounds. Claimant testified that to feed his cattle, he would simply take a flake of hay weighing of no more than a couple pounds and feed it to his animals that are located close to the large bales of hay. Additionally, claimant testified that, although he had a rental property, he did not reinjure his shoulder while involved in any of maintenance of this property.

18. On August 15, 2007, Dr. David Weinstein examined claimant and agreed that claimant had a right shoulder massive rotator cuff tear. Dr. Weinstein recommended a shoulder arthroscopy with rotator cuff repair.

19. On October 25, 2007, Dr. Simonich reexamined claimant and reviewed an additional MRI study, which demonstrated:

> [R]ecurrent supraspinatus tendon tear measuring 8-12 mm and retracted all the way to the glenoid rim. There is some proximal humeral head migration. The long head biceps tendon is ruptured and there are some early degenerative changes at the greater tuberosity which are unchanged. There has been significant recurrent tear extension with further retraction probably making this a probably, extremely difficult tear to repair with a high re-tear rate probable in the 30 to 50 percent range if at all reparable.

20. Respondents authorized the attempted re-repair and claimant underwent surgical intervention on November 14, 2007. During the surgical procedure, five opus suture anchors were implanted, although one was a "missed deployment."

Consequently, four opus anchors became part of the structural repair of claimant's rotator cuff. Dr. Simonich noted:

> We used the opus smart stitch system and placed two mattress sutures in it and then we tried to use this to sort of stretch the tissue and see if we could obtain any length to it. The tendon was probably technically repairable, but he had to have his arm abducted in about 80 to 90 degrees in order to even come close to reaching his normal insertion point. So we decided that maybe we would keep it abducted in about 30 to 40 degrees but medialize his insertion point. I don't think we were horribly confident that this would work long-term, but we think it was technically feasible to do, so we used a bur and we actually denuded some of the cartilage and the subchondral bone and medializing our greater tuberosity insertion point down to the subcortical bleeding bone.
>
> At this point, we felt that we had gotten four solid anchors for our supraspinatus repair. It was essentially brought laterally enough to be in contact with the bleeding bone bed, but the repair was under a fair amount of tension. I don't think there was anything else I could do to augment this repair. I guess a graft jacket would have been a possible augmentation but some of the literature doesn't support its use for extending the length of the rotator cuff tendon.

21. Following his November 14, 2007 surgery, claimant was referred for post-surgical rehabilitation to include formal physical therapy.

22. Unfortunately, claimant's attempted re-repair failed. On March 4, 2008, Dr. Simonich noted that the repair had probably failed.

23. On April 28, 2008, Dr. Nicholas Olsen performed an independent medical examination ("IME") for respondents. Dr. Olsen concluded that he was unable to relate claimant's current symptoms to the original work injury or to the surgery in 2002. According to Dr. Olsen, claimant had "several years of excellent functioning according to the medical records which do not support a failed surgery in November, 2002 that had simply decompensated". While Dr. Olsen agreed with Dr. Simonich's treatment suggestions, he disagreed that the Claimant's recurrent rotator cuff tear was a work-related condition. Rather, Dr. Olsen opined that it was possible that claimant's rotator cuff simply wore out due to a degenerative process. In support of his contention, Dr. Olsen cited records that indicated that claimant did fairly heavy work outside of his occupational responsibilities. Ultimately, Dr. Olsen reached the conclusion that claimant's need for additional surgery on November 14, 2007, did not arise out of a work incident.

24. Dr. Weinstein reevaluated claimant on May 21, 2008, and noted that the second rotator cuff repair failed. Dr. Weinstein noted that claimant's failure to respond to his surgery would indicate that he has an irreparable rotator cuff tear at this point. Dr.

Weinstein injected 10cc of 1% lidocaine in the posterior subacromial space and claimant was able to elevate to 105 degrees, indicating that pain was the major limitation for elevation overhead.

25. Claimant requested authorization to proceed forward with a humeral head replacement surgery recommended by Dr. Weinstein. The request was denied and Claimant filed an Application for Hearing asserting entitlement to additional medical benefits related to his original industrial injury of December 16, 2008.

26. In his deposition testimony, Dr. Weinstein opined that, while Dr. Simonich performed a reasonable attempt to repair the rotator cuff re-tear, the procedure simply failed. Dr. Weinstein noted that the percentage of patients who have unsuccessful rotator cuff repairs depends on the definition. On study showed that 93% of massive rotator cuff repairs do not heal completely, although most of the patients do pretty well. He concluded that even if some of the tendon fails, a patient could still have a good outcome. Dr. Weinstein thought that about 85% of the time, patients with massive rotator cuff repairs do pretty well and only 5% clinically fail. In claimant's case, the repair failed and the humeral head has migrated superior to rub the acromion. He thought that claimant had chronic changes because of the migration and the subacromial space narrowing. Dr. Weinstein concluded that the failure of the repair was related to the original work injury, in the absence of other trauma.

27. Dr. Nicholas Olsen testified by deposition and opined that, if a rotator cuff surgery were to fail, it would fail within the first three months when most of the healing has been seen. Dr. Olson testified that recent medical literature establishes failure rates for rotator cuff surgeries in the range of approximately 10%. He thought that claimant's initial cuff repair surgery had succeeded. Dr. Olsen conceded that there is no independent evidence of a separate trauma to explain claimant's recurrent rotator cuff tear. Dr. Olsen concluded that the recurrent pathology in claimant's shoulder was due to decreased vascular supply to the rotator cuff as part of the aging process, which could lead to degenerative tears. Dr. Olsen thought that neither the second cuff repair surgery nor the recommended humeral head replacement surgery were reasonably necessary to cure or relieve the effects of the work injury.

28. Claimant has proven by a preponderance of the evidence that the humeral head replacement surgery is reasonably necessary to cure or relieve the effects of the admitted September 1, 2002, right shoulder work injury. The November 5, 2002, rotator cuff repair improved claimant's condition, but he was never symptom-free. Although he sought no treatment from February 19, 2003, until February 5, 2007, he continued to suffer pain and limitations in his right shoulder. On April 12, 2007, claimant reported to Dr. Simonich that he noticed worsening right shoulder pain for 6 months. The insurer authorized the November 14, 2007, surgery to repair the right rotator cuff, although the prospects for repair were not good. That surgery failed and claimant then needed the right humeral head replacement surgery as a consequence of the failure of the rotator cuff repair. Dr. Weinstein and Dr. Simonich are more persuasive than Dr. Olsen that the current humeral head replacement surgery is related to the original 2002 work injury.

The absence of medical reports from February 2003 to February 2007 gives one pause as to whether claimant simply had a new cuff tear. Nevertheless, the presence of continuing symptoms after the first repair makes it more likely that he did not have a complete healing and that the second tear was a consequence of the first tear.

CONCLUSIONS OF LAW

1. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). As found, claimant has proven by a preponderance of the evidence that the right humeral head replacement surgery is reasonably necessary to cure or relieve the effects of the admitted September 1, 2002, right shoulder work injury.

ORDER

It is therefore ordered that:

1. The insurer shall pay for claimant's right humeral head replacement surgery.

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

DATED: June 10, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-578-575

ISSUE

Whether Claimant has established by a preponderance of the evidence that he is entitled to reopen his worker's compensation claim pursuant to §8-43-303(1), C.R.S. based on fraud.

FINDINGS OF FACT

1. On July 16, 2002 Claimant suffered admitted industrial injuries to multiple body parts during the course and scope of his employment with Employer. While Claimant was moving a vending machine on a dolly the machine tipped over and pinned him to the ground.

2. Respondents filed a Final Admission of Liability (FAL) on June 8, 2004. Respondents acknowledged the following extremity impairment ratings: (1) 11% for the right knee; (2) 6% for the left knee; and (3) 13% for the right shoulder. Claimant's injuries thus warranted a total 30% extremity impairment rating. The FAL noted that Claimant had reached Maximum Medical Improvement (MMI) on May 13, 2004. Respondents also admitted that Claimant was entitled to receive maintenance medical benefits after reaching MMI.

3. Claimant subsequently underwent a Division Independent Medical Examination (DIME) with Guy L. Cook, D.O. In a report dated April 26, 2005 Dr. Cook assigned Claimant the following extremity impairment ratings: (1) 13% for the right shoulder; (2) 9% for the right knee; and (3) 33% for the left knee. Dr. Cook also assigned Claimant a 10% whole person impairment rating for his lumbar spine. Claimant's ratings converted to a total 21% whole person impairment.

4. On September 26, 2005 the parties entered into a "Stipulation and Motion for Approval." Respondents agreed to pay Claimant an additional $14,000 of permanent impairment. The parties stipulated that $8,925.29 of the $14,000 was for the 10% whole person impairment of the lumbar spine assigned by Dr. Cook. The parties further agreed that the remaining $5,074.71 of the $14,000 was for a 6% additional impairment of Claimant's left leg.

5. On October 27, 2005 ALJ Harr approved the parties' Stipulation. Neither party appealed ALJ Harr's Order. Accordingly, the Order became final on November 17, 2005.

6. On November 12, 2008 Claimant filed a Petition to Reopen his claim. On December 12, 2008 Respondents filed an objection to the Petition to Reopen.

7. Claimant testified at the hearing in this matter. He stated that medical providers Lynne Fernandez, M.D. and Kevin Page, P.A. committed fraud that justifies the reopening of his claim. He asserted that Dr. Fernandez and P.A. Page fraudulently noted in medical reports that he suffered an injury to his left shoulder while he was in the military. Claimant thus contends that his case should be reopened so that he can re-litigate the cause of his left shoulder condition.

8. In contrast to Claimant's assertion, medical records reveal that Claimant did not disclose to Dr. Fernandez or P.A. Page that he had suffered a left shoulder injury in the military. On August 26, 2002 Dr. Fernandez reported that Claimant had multiple prior injuries as a result of his military activities as a paratrooper. She noted that he had suffered left ankle, knee, hip and torn biceps injuries. Dr. Fernandez also commented that Claimant had left arm biceps atrophy due to an old injury. However, Claimant did not mention any left shoulder pain.

9. In an August 2, 2002 visit with P.A. Page Claimant explained that he suffered from weak left elbow flexion as a result of a military injury. P.A. Page also reiterated that Claimant demonstrated considerable atrophy of his left biceps. However, Claimant did not recount any left shoulder pain.

10. The records of Dr. Fernandez and P.A. Page demonstrate that Claimant did not mention any shoulder pain or connect any left shoulder condition to military activities. Moreover, a review of medical records reveals that Claimant suffered from significant preexisting left shoulder atrophy that was unrelated to his industrial injuries.

11. On June 4, 2003 Claimant underwent an independent medical examination with Gregory Reichhardt, M.D. Dr. Reichhardt noted that Claimant exhibited "marked atrophy about the left shoulder." Dr. Reichhardt then asked Claimant whether his left shoulder condition was related to his July 16, 2002 industrial injury. Claimant responded that his left shoulder problems were not caused by his industrial injury. He explained "this was an old shoulder problem and that all of his left shoulder problems were related to his previous shoulder injuries."

12. On May 13, 2004 Authorized Treating Physician (ATP) John S. Hughes, M.D. examined Claimant. Claimant reported that he suffered from left shoulder pain and Dr. Hughes diagnosed him with "left shoulder arthrosis." Nevertheless, Dr. Hughes did not assign Claimant a permanent impairment rating for his left shoulder condition.

13. On April 20, 2005 Claimant underwent a DIME with Dr. Cook. Dr. Cook remarked, "I was unable with medical probability to determine impairments for the left upper extremity due to the significant pre-existing atrophy noted by the original physicians who treated this patient" for his industrial injuries. He thus did not assign Claimant any permanent impairment rating for his left upper extremity.

14. On February 5, 2008 Claimant underwent a second Independent medical examination with Dr. Reichhardt. Dr. Reichhardt recounted the history of Claimant's left shoulder condition. He asked Claimant about all of the injuries he had sustained in the military. Claimant responded that during a parachute jump he had experienced a hard landing and injured his ankles, knees and lower back. He specifically denied that he had suffered any shoulder injuries. Dr. Reichhardt recounted that, although there was a "sketchy reference" to Claimant's left shoulder in the initial emergency room evaluation shortly after his industrial injury, he did not complain of any additional left shoulder problems. Dr. Reichhardt also commented that, during the June 4, 2003 independent medical examination, Claimant had attributed all of his left shoulder problems to

previous injuries. However, during the current examination, Claimant denied any "significant preexisting left shoulder problems" and instead noted that all of his left shoulder problems were related to his industrial injuries.

15. Dr. Reichhardt noted that there was documentation of atrophy to Claimant's left upper arm dating back to August 2, 2002. He opined that "[i]t is medically probable that atrophy that would have been prominent at this time was unrelated to his 07/16/02 work related injury. At that time, it was also specifically noted that the work injury did not make the left arm complaints worse." Dr. Reichhardt also remarked that medical records revealed Claimant had suffered a left shoulder dislocation at the age of 13. Dr. Reichhardt thus persuasively explained that, based on Claimant's prior left shoulder dislocation and a "preexisting injury to his shoulder resulting in deltoid and upper arm atrophy," Claimant's left shoulder degenerative changes and SLAP tear were not surprising. He therefore concluded it was unlikely that Claimant's left shoulder condition was related to, or aggravated by, the July 16, 2002 industrial injuries.

16. Claimant has failed to demonstrate that it is more probably true than not that Dr. Fernandez or P.A. Page falsely represented a material fact. Furthermore, Claimant has not proven that Dr. Fernandez or P.A. Page intended to make a false representation about the origin of Claimant's left shoulder condition. Initially, Claimant did not mention any shoulder pain or connect any left shoulder condition to military activities while visiting Dr. Fernandez or P.A. Page. They simply noted that Claimant had suffered a variety of military injuries unrelated to the left shoulder and mentioned that Claimant exhibited preexisting atrophy of the left biceps. Furthermore, a review of the extensive medical records reflects that Claimant suffered from significant preexisting left shoulder atrophy that was unrelated to his July 16, 2002 industrial injuries. As persuasively noted by Dr. Reichhardt, Claimant's left shoulder atrophy constituted a preexisting condition that was not caused or aggravated by his July 16, 2002 industrial injuries. Claimant's assertion that Dr. Fernandez and P.A. Page fraudulently commented that he suffered an injury to his left shoulder while in the military was thus immaterial to a determination of his permanent impairment rating or the extent of his industrial injuries. Claimant has therefore failed to demonstrate any fraud or misrepresentation that warrants the re-opening of his Workers' Compensation claim.

CONCLUSIONS OF LAW

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

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

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

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

4. Section 8-43-303(1), C.R.S. provides that a workers' compensation award may be reopened on the basis of fraud. To establish fraud or material misrepresentation a party must prove the following:

> (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) Knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation or concealment of the fact with the intent that it be acted upon; [and] (5) Action based on the representation or concealment resulting in damage.

In Re Arczynski, W.C. No. 4-156-147 (ICAP, Dec. 15, 2005). Where the evidence is subject to more than one interpretation, the existence of fraud is a factual determination for the ALJ. *Id.*

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that Dr. Fernandez or P.A. Page falsely represented a material fact. Furthermore, Claimant has not proven that Dr. Fernandez or P.A. Page intended to make a false representation about the origin of Claimant's left shoulder condition. Initially, Claimant did not mention any shoulder pain or connect any left shoulder condition to military activities while visiting Dr. Fernandez or P.A. Page. They simply noted that Claimant had suffered a variety of military injuries unrelated to the left shoulder and mentioned that Claimant exhibited preexisting atrophy of the left biceps. Furthermore, a review of the extensive medical records reflects that Claimant suffered

from significant preexisting left shoulder atrophy that was unrelated to his July 16, 2002 industrial injuries. As persuasively noted by Dr. Reichhardt, Claimant's left shoulder atrophy constituted a preexisting condition that was not caused or aggravated by his July 16, 2002 industrial injuries. Claimant's assertion that Dr. Fernandez and P.A. Page fraudulently commented that he suffered an injury to his left shoulder while in the military was thus immaterial to a determination of his permanent impairment rating or the extent of his industrial injuries. Claimant has therefore failed to demonstrate any fraud or misrepresentation that warrants the re-opening of his Workers' Compensation claim.

ORDER

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

Claimant's Petition to Reopen his Workers' Compensation claim on the basis of fraud is denied and dismissed.

DATED: June 2, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-601-867

ISSUES

The following issues were raised for consideration at hearing:

A.Should Respondents be permitted to offset 50% of the mandatory federal reduction taken against Claimant's Social Security disability benefits paid for attorneys' fees in seeking such award?

B.Should Respondents be permitted to take an overpayment based upon the cost-of-living adjusted amount of benefits awarded, or are they limited to the originally awarded benefit calculation?

FINDINGS OF FACT

1. Claimant was working within the course and scope of her employment on September 30, 2003, when she sustained injuries to her lumbar spine.

Respondents have admitted liability for a 46% permanent whole person impairment.

2. Claimant was determined to be eligible for Social Security Disability Insurance (SSDI) benefits, a federal disability benefit, on January 21, 2008. Claimant was awarded SSDI benefits beginning in April 2004. The initial SSDI monthly benefit was $677.00 per month.

3. In December of each year from 2004 to 2007, Claimant received cost-of-living adjustments. Claimant's eligibility for SSDI was not determined until January 2008. As of that date, Claimant's SSDI monthly benefit amount was $764.60 per month.

4. The past due benefits awarded was calculated to be $32,160.00 for April 2004 through December 2007. That total past-due benefit award included benefits at the yearly increased value according to the cost-of-living adjustments.

5. Claimant's SSDI award was reduced for attorney fees in the amount of $5,221.00. An expense of $509.50 for an expert vocational evaluation in connection with the SSDI claim was charged to Claimant by experts in order to obtain the favorable award.

6. Respondents filed a Final Admission of Liability on January 22, 2009, claiming an offset for SSDI benefits between April 1, 2004, and June 23, 2008, in the amount of $17,346.68, plus an additional $86.58 per week from August 8, 2008, through December 8, 2008. Respondents thereafter claimed an offset of $78.12 per week as an offset against ongoing permanent total disability benefits.

7. The parties stipulated to the following facts that have been adopted by the ALJ:

a. Respondents insisted Claimant apply for Social Security benefits;

b. Respondents never offered any assistance by way of provision of representation or advance of costs, nor provided any other assistance of any kind to Claimant in applying for or seeking an award of SSDI benefits;

c. The Employers' First Report states the date of hire was August 5, 2003; and

d. The date of injury was September 30, 2003.

CONCLUSIONS OF LAW

A. Should Respondents be permitted to offset 50% of the mandatory federal reduction taken against Claimant's Social Security Disability benefits paid for attorneys' fees in seeking such award?

Under Section 8-42-103(1)(c), C.R.S., Respondents may reduce the aggregate benefits payable for permanent total disability benefits by an amount equal to one-half of SSDI benefits granted to Claimant.

The Colorado Court of Appeals in *St. Vincent's Hospital v. Alires*, 778, P.2d 277 (Colo. App. 1989), held that an employer and insurer were not entitled to offset workers' compensation benefits from that portion of the lump sum Social Security Disability benefits awarded to Claimant which was withheld from payment to her as attorney's fees. In *Jones v. Industrial Claim Appeals Office*, 892 P.2d 425 (Colo. App. 1994), the Court confirmed how the offset should be calculated. The Court found that, because attorney's fees are deducted before calculation of the offset, the Claimant and the insurer each bear one-half of the fees.

The costs of $509.50 must also be deducted pursuant to *County Workers' Compensation Pool v. Davis*, 817 P.2d 521 (Colo. 1991).

Respondents shall be permitted to offset 50% of the mandatory federal reduction taken against Claimant's Social Security Disability benefits paid for attorneys' fees and costs in seeking such award.

B. Should Respondents be permitted to take an overpayment based upon the cost-of-living adjusted amount of benefits awarded or are they limited to the originally awarded benefit calculation?

When determining the amount of offset for SSDI that respondents may be entitled, events occurring after the injury which increase the amount of SSDI benefits may not be seen to lead to an increased offset to respondents. *Englebrecht v. Hartford Accident & Indemnity Co.,* 680 P.2d 231 (Colo. 1984). Therefore, cost-of-living increases to SSDI benefits do not increase the offset available to respondents. *Id. See Martinez v. Industrial Commission*, 746 P.2d 552 (Colo. 1987); *Dietiker v. Colorado Kenworth* W.C. 2-933-575 (ICAO, Jan. 5, 1993). "*Engelbrecht, supra,* stands for the proposition that the respondents are entitled to an offset based on the initial award of SSDI benefits to the claimant and his dependents, and later cost-of-living adjustments to the initial award do not affect the offset." *Id.*

Respondents may not take an offset based on the cost-of-living adjusted amount of benefits awarded. Respondents are limited to the originally awarded benefit calculation.

The SSDI offset must be based upon the original award of $677.00 per month. This results in a weekly offset of $78.12 per week. The overpayment must be based on the overpayment from April 1, 2004, the date of entitlement to SSDI benefits, until December 8, 2008, when Respondents began taking the offset. During this time there was an overpayment of $19,117.08. Both the attorney's fees and the costs incurred by Claimant in the Social Security claim need to be taken into consideration. These total

$5,730.50. Therefore, one-half of this must be deducted from the overpayment, resulting in an overpayment of $16,251.83.

Although not listed as an issue in either party's proposed order, both parties have addressed the issue of the Medicare premium deducted from the SSDI benefits. There is no legal basis in either the statute or the case law for deducting the Medicare premium from the offset allowed Respondents. This is the premium that Claimant must pay for her insurance and should not be deducted from the overpayment made by Respondents.

It is therefore concluded that Respondents have overpaid benefits in the amount of $16,251.83.

ORDER

Respondents may offset benefits payable to Claimant by $16,251.83.

All matters not determined herein are reserved for future determination.

DATED: *June 12, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-603-270

ISSUE

The following issue was raised for consideration at hearing:

1. Whether Claimant sustained her burden of proof to establish that she is unable to earn wages and therefore is permanently totally disabled (PTD).

FINDINGS OF FACT

Having considered the evidence presented at hearing and the parties' post hearing position statements, the following Findings of Fact are entered.

1. Claimant sustained a compensable injury when a co-worker raped her on January 28, 2004.

2. Claimant has not worked in over five years. Prior to the January 28, 2004 industrial injury, Claimant overcame her handicap of being deaf and Claimant was a

functioning member of society. She held jobs at both McDonalds and Wendy's fast food chains and worked in a management role at Wendy's. Claimant was educated in a school for the deaf in California where she earned a high school diploma. Claimant was sexually assaulted as a child.

3. Prior to the January 28, 2004 assault, Claimant could ride the bus to work and earn regular income. Prior to her industrial injury, Claimant was very close with her mother and lived with her. After January 28, 2004, Claimant nursed her mother through an illness until her mother's death of COPD. After the assault, Claimant became fearful of leaving her home and unable to interact with anyone but her immediate family. Claimant described her relationship with her mother and brother as stormy with frequent angry verbal exchanges. Now, Claimant is completely dependent on her brother and sister-in-law for a place to live and meeting her basic needs. Her brother and sister-in-law have two children. Claimant's brother and his spouse do not sign and speak Spanish to each other.

4. Claimant's average weekly wage is $255.50. At this wage, Claimant was able to meet her needs and contribute to her well-being. Claimant had medical treatment for her January 28, 2004 work injuries and she was placed at maximum medical improvement (MMI) on March 11, 2005. Claimant was assigned a return to work without restrictions. After Claimant was placed at MMI, she tried to commit suicide on August 30, 2005. Claimant was placed in an in-patient program for seven days at Fort Logan Mental Health Hospital. Claimant underwent psychological counseling from September 2005 to November 2006 at MHCD. Claimant's treatment was terminated when Claimant was non-compliant for failing to appear for appointments. Starting in October 2004 Claimant was returned to working four hours per day. In fact, Claimant never returned to work following the January 2004 rape.

5. Respondents admitted liability in a November 2005 Final Admission of Liability for a 6% whole person rating based on the assessment of the Division independent medical evaluation (DIME) of Dr. Salwa Hanna, M.D. Dr. Hanna diagnosed Claimant with Post Traumatic Stress Disorder along with anxiety and depression. Dr. Hanna agreed with the March 11, 3005 MMI date. Dr. Hanna thought Claimant needed to return to work.

6. Claimant contends that she is unable to earn any wages and that she should be deemed PTD. Respondents contend that Claimant can earn wages and that she is not PTD.

7. Based on the totality of the credible and persuasive testimony and documentary evidence, it is found and concluded that Claimant established by a preponderance of the evidence that she is unable to earn any wages and is therefore entitled to PTD benefits. In this regard, the ALJ found the testimony and reports of James M. Gracie, Ed.D., Hannah Evans, Ph.D., and Mark Litvin, Ph.D. most credible and persuasive. The ALJ considered the testimony and report of Tim Shanahan, but found it to be less credible and persuasive than the information provided by Dr. Mark

Litvin, Mr. Gracie and Ms. Evans. The ALJ also considered the medical reports of Dr. Yvonne Nelson, M.D., the authorized treating physician.

8. On August 31, 2004, Cynthia Johnsrud, M.D. gave Claimant a psychological evaluation and diagnosed her with adjustment disorder with anxiety, and posttraumatic stress disorder. Claimant failed to appear for three appointments with Dr. Johnsrud and then appeared 25 minutes late for the August 31 appointment. Dr. Johnsrud opined: "I do believe she was raped in the technical sense but it was not as traumatic, it seems, as some rapes are." In her report she also recommends that Claimant can benefit from 6-10 sessions of psychotherapy.

9. Claimant disliked Dr. Johnsrud, M.D. because she believed that the doctor blamed the rape on Claimant. Dr. Johnsrud evidenced this opinion in her report where she stated that Claimant acquiesced to being kiss by the perpetrator in order to "get him off of her" and she did not yell when the rape occurred. Claimant did not yell when raped Dr. Johnsrud reported because she did not want to draw attention. Dr. Johnsrud thought this behavior was unusual and suspected Claimant of malingering.

10. Dr. Laura Klein, M.D. evaluated Claimant and concluded that Dr. Johnsrud's opinions may have accurately reflected Claimant's behavior based on their mode of communication. Dr. Klein's May 2007 report states that Claimant is less expressive and emotive when communicating through sign language but became, during Dr. Klein's examination, more expressive and natural when communicating through lip reading and her own word.

11. Following the January 2004 rape, Claimant was treated at the St. Anthony's North Hospital Emergency Room and released. Thereafter, Claimant treated with her primary care physician, Dr. Archuleta. Claimant started treatment with the authorized provider of medical care, Dr. Yvonne Nelson, M.D. in June 2004.

12. After conservative treatment, on March 11, 2005, Dr. Nelson had treated Claimant conservatively for the symptoms of her assault and placed Claimant at maximum medical improvement on this date. Claimant was referred to Dr. Johnsrud for treatment by Dr. Nelson. Following the referral, Claimant only had the one August 31, 2004 meeting with Dr. Johnsrud, which was unsatisfactory. Claimant was determined to have recovered and no longer suffering from an exacerbation of pre-existing depression and anxiety symptoms. Dr. Nelson released Claimant to return to work without restrictions or impairment. .

13. On October 5, 2005, Dr. Hanna, performed a DIME with diagnoses of posttraumatic stress disorder, anxiety and depression. In her report Dr. Hanna also states that Claimant's travel has been markedly impaired, and that her sleep and social functioning is also impaired, mainly due to fear. Since the assault claimant has suffered anxiety attacks to the point of passing out. Claimant was given a 6% whole person permanent impairment rating.

14. A part of Dr. Hanna's assessment she stated: "I feel at this time that the Claimant should concentrate her efforts on finding some type of employment and advised her to do so to get on with her life and get over her past memories…"

15. On January 10, 2006, Mark E. Litvin, Ph.D conducted a vocational rehabilitation evaluation. He states that Claimant afraid to leave the house alone and pulls away and reacts quickly when she is touched, even if it is accidental contact. Claimant takes medication for depression, high blood pressure and diabetes. She has post-traumatic stress disorder; persistent symptoms include increased arousal, such as insomnia, irritability, emotional outburst, difficulty concentrating, hyper vigilance and exaggerated startle responses. Given all these factors, it is his opinion that as a result of this work-related incident, Claimant can no longer obtain or maintain any regular employment or earn any wages.

16. On March 7, 2006, Tim Shanahan, CRC, CDMS, QRC performed a Vocational/Employability Assessment. After reviewing the records, evaluating Claimant's release without restrictions, interviewing Claimant, and reviewing the labor market information, it is Mr. Shanahan's opinion that claimant would be employable, based on the medical opinions indicating no objective or clinical findings to suggest any disability, at this point, from claimant's injury. It is concluded that there are employment opportunities available that claimant is capable of performing and in which she could earn wages.

17. On September 9, 2006, Hannah I. Evans, Ph.D, a forensic psychologist, performed a mental health assessment of Claimant. Evidence shows that Claimant suffered significant psychological injury as a result of the assault. It is simplest to characterize the injuries in two general modalities: one cognitive, dealing with thought processes, intellectual functioning, memory, and distractibility. The other emotional, dealing with her feelings states. Therefore, it is Dr. Evans opinion to a reasonable degree of scientific certainty that Claimant suffered a significant change in her psychological functioning as a result of the assault.

18. On March 9, 2007, James M. Gracey, Ed.D., a vocational rehabilitation consultant. Dr. Gracie's evaluation of Claimant included seeing Claimant two times over a two and one half year period. Dr. Gracie saw no improvement in Claimant's condition aver that period.

19. Dr. Gracey agreed with Dr. Litvin's conclusion in his 2006 report that Claimant is not employable. He also agrees with Dr. Evans, who recommended intensive impatient and outpatient psychiatric services. Dr. Gracey shared the opinion with Dr. Evans that without treatment Claimant will remain unemployed and probably unemployable.

20. Dr. Gracey, Dr. Litvin, and Dr. Evans' opinions about Claimant's ability to return to work were found to be most credible and persuasive. On September 26, 2008, Dr. Evans opined, to a reasonable degree of psychological and scientific certainty that

Claimant continues to suffer both chronic PTSD and Major Depressive Disorder caused by the sexual assault.

21. Respondents contend that Claimant's application for hearing is a challenge to the DIME physician's determination of MMI and impairment rating. Respondents argued that Claimant failed to timely object to the DIME's determination and to request a hearing, and now her attempt to prove PTD is unfounded. Respondents contend that the treatment recommended by Claimant's expert witnesses is curative treatment and Claimant was placed at MMI on March 11, 2005 and is not entitled to curative treatment.

22. It is found and concluded that Claimant proved by a preponderance of the evidence that she is unable to earn wages and is therefore PTD. This conclusion is based on the credible and persuasive testimony and medical reports of Dr. Gracie and Dr. Evans and the medical report of Dr. Litvin. Further persuasive evidence was contained in the medical reports of Dr. Nelson and Dr. Johnsrud from whom there is no credible or persuasive evidence that Claimant received curative treatment.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. 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 leaves the trier-of-fact, after considering all 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. A Workers' Compensation case is decided on its merits. Section 8-43-201, supra. The facts in a Workers' Compensation case must be interpreted neutrally, neither in favor or the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, supra. The judge's factual findings concern only the evidence and inferences that are found to be dispositive of the issues involved that; that the judge has not addressed every piece of evidence and every inference that might lead to conflicting conclusions and has rejected evidence and inferences contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v Industrial Claims Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. Section 8-4-201(16.5)(a), C.R.S. defines permanent total disability as the inability to earn "any wages in the same or other employment." *Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997). The determination whether claimant is incapable of earning wages in the same or other employment is to be based upon the ALJ's consideration of a number of "human factors". *Christie v. Coors Transportation* Co., 933 P .2d 1330 (Colo. 1997). These factors include claimant's physical condition, mental ability, age, employment history, education, and the "availability of work" the

claimant can perform. *Weld County School District RE-12 v. Bymer,* 955 P .2d 550 (Colo. 1998). The test for determining the "availability of work" is whether employment exists "that is reasonably available to the claimant under his or her particular circumstances." *Weld County School District RE-12 v. Bymer,* 955 P .2d 550 (Colo. 1998). Furthermore, if the evidence shows the claimant is not physically able to sustain employment the ALJ need not find the claimant is capable of earning wages. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001). Moreover, because permanent total disability is based upon a claimant's impaired access to the labor market, medical evidence is neither required nor dispositive of permanent total disability. *Baldwin Construction Inc. v. Industrial Claim Appeals Office,* 937 P .2d 895 (Colo. App. 1997).

4. Based on the totality of the evidence and considering human factors, it is concluded that Claimant is unable to earn wages and therefore is PTD. Claimant's mental status since the rape, combined with her limited work experience in the fast food industry, and her deafness make Claimant unemployable or unable to sustain employment.

5. Respondents' evidence was considered and rejected. The evidence was remarkable for exhibiting that Claimant was put through her paces and moved though the system without proper treatment causing her condition to remain the same. Claimant's difficulty with communication further complicated that treatment.

ORDER

It is therefore ordered that:

1. Respondents shall be liable to Claimant for PTD benefits.

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

All matters not determined herein are reserved for future determination.

DATED: June 25, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-637-444

ISSUES

- Does the ALJ have statutory authority to review the order of a PALJ holing that an unlicensed doctor may attend an independent medical examination, or is that order interlocutory and not subject to immediate review? Similarly, does the ALJ have statutory authority to review a PALJ's ruling that the respondents have not waived their right to an independent medical examination?

- Did the PALJ correctly rule that an unlicensed doctor is a "physician" within the meaning of § 8-43-404(2), C.R.S., and therefore entitled to attend an independent medical examination requested by the respondents?

- Did the PALJ correctly rule that the respondents did not waive their right to an independent medical examination where the selected physician refused to examine the claimant in the presence of an unlicensed physician?

FINDINGS OF FACT

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

1. On January 30, 2009, the claimant filed an Application for Hearing listing issues of disfigurement, permanent partial disability benefits, permanent total disability (PTD) benefits, and "overcoming the Division IME."

2. The respondents filed a Response to Application for Hearing listing various issues including denial of permanent total disability status, overpayments, credits and offsets, and refusal of a job offer.

3. A prehearing conference was held before PALJ Purdie on March 26, 2009. At the prehearing conference PALJ Purdie considered several issues including: (1) Respondents' motion to compel attendance of claimant at an independent medical examination (IME) without the presence of John Emerson, M.D., a plastic surgeon who had surrendered his medical license; (2) Respondents' motion to terminate claimant's right to pursue benefits; (3) Respondents' motion to vacate hearing; (4) Other issues not pertinent here.

4. On April 15, 2009, PALJ Purdie entered a written Prehearing Conference Order. PALJ Purdie ruled that Dr. Emerson should be permitted to attend any future IME regardless of whether his license to practice medicine had been surrendered. PALJ Purdie concluded that, for purposes of § 8-43-404, C.R.S. a "physician" is "any person who has earned an M.D. degree from an accredited medical school regardless of whether that person is currently licensed to practice medicine." However, PALJ Purdie went on to rule that the respondents "have not waived their right to an independent medical examination." PALJ Purdie ruled that the issue of PTD was not ready for adjudication at the hearing scheduled for May 13, 2009, and permitted the claimant to withdraw the issue subject to preservation of all claims and defenses. PALJ Purdie further stated that:

> The hearing date of May 13, 2009, shall be utilized for the parties to request review of this Pre-hearing Order. Specifically, Respondents may appeal this PALJ's determination that the term "physician" includes individuals who have a medical degree but are not licensed to practice medicine and claimant may appeal this PALJ's determination that respondents have not waived their right to an independent medical evaluation."

5. The matter proceeded to hearing on May 13, 2009. Pursuant to PALJ Purdie's order, the issues were limited to review of PALJ Purdie's rulings that Dr. Emerson could be defined as a "physician" for purposes of § 8-43-404, and that the respondents had not "waived" their right to an IME.

6. At hearing, counsel for the parties advised the ALJ that the "waiver" issue results from the fact that the physician the respondents designated to conduct an IME of the claimant refuses to do so if Dr. Emerson is permitted to attend the IME. It is the claimant's position that this conduct by the designated IME physician constitutes a "waiver" of the respondents' right to obtain any IME.

7. At hearing the parties stipulated that Dr. Emerson was formerly licensed to practice medicine in the State of Colorado. However, Dr. Emerson surrendered his license and is not currently licensed to practice medicine in Colorado.

8. At hearing the ALJ directed the parties to brief the issue of whether PALJ Purdie's order is currently subject to review by the ALJ in light of the provisions of § 8-43-207.5, C.R.S., and the Colorado Supreme Court's decision in *Industrial Claim Appeals Office v. Orth,* 965 P.2d 1246 (Colo. 1998).

CONCLUSIONS OF LAW

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

STATUTORY AUTHORITY OF ALJ TO CONDUCT IMMEDIATE REVIEW OF PALJ'S RULINGS

The ALJ concludes that he lacks statutory authority to conduct any review of PALJ Purdie's rulings at this stage of the proceedings. The ALJ concludes that PALJ Purdie's rulings are interlocutory and not subject to review by an ALJ until such time as there is a hearing on the underlying substantive issues concerning the claimant's entitlement to benefits.

Section 8-43-207.5(2), C.R.S. grants a PALJ authority to issue "interlocutory orders." This provision further states that a PALJ may order party to participate in a prehearing conference and make "evidentiary rulings." Section 8-43-207.5(3) provides that an order of a PALJ is "binding on the parties," and that "such an order shall be interlocutory."

In *Industrial Claim Appeals Office v. Orth*, 965 P.2d 1246 (Colo. 1998), the court addressed the question of whether a PALJ's order approving a settlement agreement was a final order subject to review or was an "interlocutory order" not subject to review under the statute. The court noted that the General Assembly has not always treated the terms "final judgment" and "interlocutory order" as mutually exclusive terms, and concluded that the use of the term "interlocutory" in § 8-43-207.5 is ambiguous. The court resolved the ambiguity and concluded that a PALJ's order approving a settlement is not an interlocutory order because the statute expressly grants authority to a PALJ to approve a settlement in accordance with § 8-43-204, and that settlements approved under the statute are the equivalent of an "award" subject to review under § 8-43-301 (2), C.R.S.

However, the *Orth* court did not end its analysis there. In an apparent effort to clarify the meaning of the term "interlocutory" and its application to the workers' compensation adjudicatory process the court reviewed the legislative history of § 8-43-207.5, noting that the purpose behind the statute was to "reduce the case loads of the ALJs" by clearly defining the prehearing conference. 965 P.2d at 1253. In this regard, the court stated the following:

> "To illustrate, it makes sense to treat a PALJ's order relating to a prehearing conference as interlocutory (i.e. not immediately appealable) because a prehearing conference,

> by definition, is followed by a full hearing before the director or an ALJ. *See* 8-43-207.5(1) (any party may request a prehearing conference "at any time not less than ten days prior to formal adjudication on the record of any issue before the director or an [ALJ]"). Thus, the propriety of a PALJ's order may be addressed at the subsequent hearing. In contrast, an order approving a settlement pursuant to section 8-43-204 concludes the case, subject only to the Act's review and reopening provisions. [Citations omitted]." 965 P.2d at 1254.

Thus, the *Orth* court held that the term "interlocutory" refers to a PALJ's order that is preliminary to conduct of a "full hearing" involving "formal adjudication" of any issue before the director or an ALJ. The court's interpretation is entirely consistent with the statutory scheme that prohibits a PALJ from determining issues of fact. Section 8-43-207.5(1), C.R.S. Indeed, the power to determine issues of fact, and hence the power to resolve substantive claims for awards of benefits, is reserved to the director and ALJs serving in the OAC. Section 8-43-201, C.R.S.; § 8-43-207(1)(k), C.R.S. It logically follows that in order to give effect to the legislative directive that PALJ orders be treated as "interlocutory," to reduce ALJ caseloads, and to preserve the integrity and effectiveness of the "prehearing" scheme the Supreme Court concluded that an ALJ may not review a PALJ's prehearing order except in connection with a "full hearing" that encompasses formal adjudication of some underlying claim for benefits or penalties.

Moreover, the *Orth* court's construction of the term "interlocutory," and its conclusion that an ALJ may review a PALJ's interlocutory order only at a subsequent hearing involving full adjudication of a substantive claim, is consistent with the court's recitation of the legislative history. As the court recognized, the legislative purpose of the prehearing scheme is to reduce ALJ workloads by resolving certain preliminary issues through the prehearing process. However, this purpose would not be served if any evidentiary or discovery order issued by a PALJ were subject to immediate "appeal" to or review by an ALJ without regard to concurrent resolution of a pending claim for benefits. To the contrary, such a procedure would increase the workloads of the merits ALJs by encouraging parties to appeal preliminary PALJ rulings with which they disagree. ALJ time needed to conduct evidentiary hearings for resolution of substantive claims for benefits would be diverted to resolving "appeals" from interlocutory PALJ orders.

Finally, in holding that a PALJ's order approving a settlement agreement is not an "interlocutory" order, the *Orth* court considered it significant that an order approving a settlement agreement is considered an "award" of benefits under the Act. The court's reasoning is consistent with decisions holding that an order constitutes an "award" for purposes of the reopening provisions of the Act when it has the effect of granting or denying benefits. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Brown & Root, Inc. v. Industrial Claim Appeals Office,* 833 P.2d 780 (Colo. App. 1991).

Finally the ALJ considers the foregoing interpretation of the *Orth* decision to be consistent with the views expressed by the ICAO is a series of decisions. For example, in *Brownson-Rausin v. Valley View Hospital,* W.C. No. 3-1010431 (ICAO October 3, 2006), the ICAO, relying on *Orth*, held that an ALJ erred when, at a merits hearing on permanent total disability benefits, the ALJ concluded that he lacked jurisdiction to review a PALJ's pre-hearing order denying the claimant's request to allow a physical therapist to attend a functional capacities evaluation. In *Romero v. The Design Center,* W.C. No. 4-459-920 (ICAO February 27, 2007), the ICAO ruled that an ALJ properly dismissed a "petition to review" a PALJ's order striking an application for hearing on the issue of penalties. The ICAO held that the PALJ's dismissal of the application for hearing was not intended to foreclose adjudication of the penalty issues, that the order was "interlocutory," and under *Orth* the PALJ's order could "properly [be] reviewed by an OAC ALJ in connection with a hearing." Similarly, in *Quinn v. Tire Centers, LLC,* W.C. No. 4-712-600 (ICAO October 9, 2007)), the ICAO ruled that a claimant waived his right to have the panel review a PALJ's order denying a motion to consolidate where the claimant did not raise the propriety of the order before the ALJ at the merits hearing on the compensability of the claim. The panel stated that the "claimant could have sought review of the PALJ's interlocutory order by the ALJ as prescribed by the Colorado Supreme Court" in the *Orth* decision.

It follows that the respondents' appeal of the PALJ's order is interlocutory and not currently subject to review by the ALJ because there is no claim for benefits or penalties currently pending before the ALJ. Similarly, PALJ Purdie's ruling that the respondents have not waived their right to obtain an IME is interlocutory and not currently subject to review.

The ALJ has considered the respondents' contention that "judicial economy" will not be served if PALJ Purdie's order is treated as interlocutory. The respondents state that if the claimant is ultimately found to be permanently and totally disabled "an appeal would certainly be taken and, if successful, the matter would be remanded for a new hearing." Of course, this argument applies to many preliminary rulings and does not address the overall statutory objective of saving the time of ALJ's by relieving them of the obligation to conduct immediate appellate review of interlocutory rulings by a PALJ. Moreover, it is certainly possible that once the case is presented to an ALJ on the underlying substantive claims that the ALJ could elect to consider PALJ Purdie's rulings prior to receiving evidence on the merits. Such an approach would save considerable time (if the ALJ determines that PALJ Purdie's ruling was incorrect) because the ALJ could then continue the matter to permit the IME without Dr. Emerson's presence.

In light of this conclusion the ALJ need not address the statutory construction issue of whether PALJ Purdie correctly held that Dr. Emerson is a "physician" for purposes of § 8-43-404. Neither must the ALJ determine whether PALJ Purdie correctly ruled that the respondents have not waived their right to conduct an IME.

ORDER

IT IS THEREFORE ORDERED that the issues of whether PALJ Purdie correctly ruled with respect to Dr. Emerson's presence at the IME, and whether she correctly ruled that the respondents' have not waived their right to an IME, are **DISMISSED WITHOUT PREJUDICE.**

DATED: June 9, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-647-601

ISSUES

The following issues were raised for consideration at hearing:

1) whether Claimant has established by a preponderance of the evidence that he is entitled to reopen his claim based upon a change in medical condition;

2) whether the Claimant has established by a preponderance of the evidence that he is entitled to reopen his claim based upon an alleged mistake;

3) whether the Claimant is barred by the legal doctrine of claim preclusion from asserting his claim of change in medical condition and/or mistake.

FINDINGS OF FACT

1. Claimant is a former welder/fabricator who suffered work injuries on February 26, 2005 involving his right shoulder and neck.

2. Claimant received authorized medical care that included two surgeries on his right shoulder. A subacromial decompression was performed by Dr. David Matthews on May 25, 2005, and arthroscopic debridement and further subacromial decompression with a distal clavicle resection on December 15, 2005, performed by Dr. Wiley Jinkins. In addition, Claimant underwent cervical spine fusion surgery from C5-T1 on October 23, 2006. Surgery was performed by Dr. Roger Sung.

3. On January 26, 2007, Claimant's medical care was transferred to Dr.

Darrel Quick. At that time, Claimant's medical history was reviewed. X-rays revealed a 4-level cervical fusion with slight angulation at the C4-5 level. Dr. Quick noted that Claimant was on pain medications and that his right shoulder pain is "pretty stable." It was further noted that Claimant was not able to return to his previous job, so he is retraining at the Jones School of Real Estate.

4. On April 20, 2007, Dr. Quick placed Claimant at maximum medical improvement (MMI). Claimant was assessed with 22% permanent impairment of the right upper extremity and 24% whole person impairment for the cervical spine. Claimant's final diagnosis included: 1) work related cervical discogenic injury and pain, status post anterior cervical discectomy and fusion with progressive improvement; 2) occupational right shoulder injury with two surgical procedures; 3) pain disorder and reactive depression, resolved; 4) chronic pain in the right shoulder and spine. Maintenance care was recommended. Dr. Quick stated that, as far as Claimant's work status, he would recommend a permanent lifting restriction of 10 pounds and no overhead work above the shoulder level.

5. A final admission of liability was filed on May 18, 2007 based upon Dr. Quick's finding of MMI and permanent impairment. The final admission of liability admitted to a scheduled impairment of 22% of the right upper extremity and 24% whole person for Claimant's cervical spine. The final admission of liability denied liability for medical benefits after MMI.

6. The parties thereafter entered into a stipulation concerning permanent disability benefits on August 20, 2007. The stipulation was approved by order dated August 22, 2007. Claimant agreed not to object to the new final admission of liability and the claim closed, subject to the reopening provisions of the statute. The Respondent-Insurer filed a new final admission of liability on August 28, 2007.

7. Claimant continued to be seen by the ATP, Dr. Quick, for maintenance care. At no time did Dr. Quick revoke Claimant's MMI status. Dr. Quick imposed additional work restrictions, "0-4 hours per day as tolerated," effective October 22, 2007 based upon Claimant's complaints of increased neck and right shoulder pain.

8. On January 14, 2008 Claimant filed a petition to reopen based upon change in medical condition. In connection with his petition to reopen, Claimant underwent a vocational evaluation and employability assessment by Louis Phillips, at the request of his attorney. In a report dated May 26, 2008, Mr. Phillips opined that Claimant should be considered permanently and totally disabled. Mr. Phillips concluded that there was a noticeable change/worsening in Claimant's condition, which led to the additional work restrictions as imposed by Dr. Quick in October 2007.

9. Claimant underwent an independent medical examination (IME) with Dr. Douglas C. Scott on May 20, 2008 at the request of the Respondent-Insurer. Dr.

Scott opined that Claimant did not suffer an objective worsening of his medical condition since being placed at MMI by the ATP on April 20, 2007. Dr. Scott made recommendations with respect to Claimant's permanent work restrictions, and he made recommendations with respect to Claimant's use of chronic pain medications.

10. Claimant's petition to reopen dated January 14, 2008 was the subject of a hearing held on June 18, 2008 before ALJ Peter J Cannici. At that hearing, Claimant testified of the difficulties he experienced performing real estate work, driving, as well as problems with dizziness while getting dressed, and when he brings his chin close to his chest, like he is about to "pass out." In the Findings of Fact, Conclusions of Law and Order dated July 24, 2008 the ALJ cited the testimony of the ATP, Dr. Quick, and the Respondents' IME physician, Dr. Scott. The ALJ concluded that the Claimant failed to establish that he suffered a worsening of his medical condition after he reached MMI. According to the ALJ, the medical evidence revealed that although Claimant experienced a waxing and waning of his symptoms since he reached MMI on April 20, 2007, his condition has remained stable. The ALJ cited and credited the testimony of Dr. Quick who explained that although Claimant's subjective complaints changed during the course of his maintenance care, there was no objective medical evidence reflecting a change in Claimant's condition. The ALJ also cited the testimony of Dr. Scott who opined that there was no objective change in Claimant's medical condition since he reached MMI. The Claimant's petition to reopen his clam based upon a change (worsening) of medical condition was denied.

11. Claimant filed another petition to reopen dated September 19, 2008 Claimant now alleges that his change in medical condition is the result of a left knee injury, which he attributes to dizziness and "blackout spells" resulting from his prior neck surgery. Alternatively, Claimant alleges that he should be entitled to reopen his claim based upon his mistaken belief that he would be able to continue working at the time the final admission of liability was filed in August 2007.

12. At hearing, Claimant testified that he first sought treatment for his left knee with his family physician, Dr. Walton, on February 26, 2008. Claimant presented with a history of fluid on his left knee since October 2007. Dr. Walton noted that there was no known injury and constant swelling since October. Claimant was scheduled for an MRI which revealed a medial meniscus tear. Claimant was referred to an orthopedic for further evaluation.

13. Claimant was next examined by Dr. Michael Feign, an orthopedic surgeon, on March 17, 2008. According Dr. Feign: "The patient slipped twisting his knee getting out of the tub back in September (2007) and started having increased swelling in his knee and since that time it has not improved and continues to bother him." There is no mention of dizziness. Dr. Feign diagnosed an unstable medial meniscus tear and he recommended arthroscopic surgery.

14. Dr. Quick testified by deposition on April 1, 2009. He testified that Claimant was examined for maintenance care purposes on March 31, 2008. This was the first time Claimant mentioned his knee problem. According to Dr. Quick, Claimant stated that he had fallen from his tub and had been diagnosed with a torn meniscus and that he was scheduled for surgery. Dr. Quick further testified that he was not informed by Claimant that the knee injury was work related. Dr. Quick did not refer Claimant to any authorized medical providers for treatment for his left knee.

15. Dr. Quick testified that, in his opinion, the left knee injury is not work related. Dr. Quick testified that his opinion was based upon a review of the records of the orthopedic, Dr. Feign, and the lack of history attributing Claimant's fall in the tub or his left knee injury to dizziness. Dr. Quick testified that he was requested, in a letter from Claimant's counsel, to review medical information in his chart and to offer an opinion as to whether Claimant's left knee injury was either directly or indirectly related to his worker's compensation claim. He subsequently received and reviewed medical records, including records from Dr. Feign and from the Penrose St. Francis Hospital where Claimant was admitted on September 8, 2008. According to Dr. Quick, the conclusion was that Claimant had a number of tests performed at the hospital to determine if Claimant had a "chin tuck" abnormality which would pinch the vertebral arteries causing him to pass out, and this was never really found to be the problem based upon the hospital evaluation.

16. At hearing, the Claimant testified that he experienced dizziness and blackout spells that he attributed to his prior neck surgery. Claimant further testified that this is what caused him to fall in his tub at home in October of 2007, resulting in a left knee injury. The ALJ does not find the Claimant's testimony to be credible. The Claimant was seen by the ATP, Dr. Quick, on multiple occasions for maintenance care in October and December 2007, and Claimant did not report any knee injury following a fall from a dizzy spell at home. Claimant was seen by Dr. Walton on February 26, 2008 and he reported fluid in his knee and swelling since October 2007 with no mention of a fall or dizziness. Claimant was examined by Dr. Feign, an orthopedic, on March 17, 2008 and he reported a fall in his tub resulting in a knee injury. There is no mention of dizziness. The Claimant's statement that he fell in his tub at home, twisting and injuring his left knee, as a result of dizziness as alleged, is not corroborated by the treatment records.

17. Claimant was admitted to Penrose St. Francis Hospital on September 8, 2008. Claimant presented with a history of 2 syncopal episodes within 4 days of his admission. Testing included echocardiogram, EKG, CT scan of the brain, CT scan of the cervical spine, and multiple scans of the carotid and vertebral vessels. The test results revealed a "classic 3-vessel aortic arch" and no evidence of significant stenosis of the carotid or deep vertebral arteries. According to the discharge summary report prepared by Dr. Michael Noble: "We

did a number of tests trying to figure out of he did have chin tuck abnormalities and vertebral blood flow that might account for his syncope or near syncope and this was never really found to be the problem after all the tests were done."

18. Dr. Douglas Scott testified at hearing. Dr. Scott testified that there was no evidence that the problem with dizziness or syncope was related to Claimant's neck surgery or neck injury. He opined that the tests performed at Penrose St. Francis Hospital in September 2008 were to determine the etiology of Claimant's symptoms, given his history of blackout spells and dizziness. The hospital tests, including MRI scans and CT arteriography studies of the neck in the "chin-tuck" maneuver, failed to demonstrate any significant stenosis of the carotid or deep vertebral arteries. There was no evidence of any reduction in arterial blood flow to the head through the vertebral or carotid arteries, in either the neutral or the neck-flexed, chin-tucked position.

19. Dr. Scott agreed with the conclusions reflected in the discharge summary report that the etiology of Claimant's dizziness and reported black out spells was unclear. The ALJ finds the testimony of Dr. Scott to be credible and persuasive.

20. Even assuming that Claimant did fall and injure his left knee as a result of dizziness, the ALJ finds that the more credible and persuasive medical evidence negates any causal relationship between the dizziness or syncopal episodes and the work related neck injury. The ALJ credits the testimony of both Dr. Quick and Dr. Scott, and the ALJ cites the findings of the test results from Penrose St. Francis Hospital. Accordingly, the ALJ finds that, given the totality of the medical evidence, the Claimant's dizziness or syncopal episodes are not causally related to his admitted neck injury.

21. The ALJ further finds that the Claimant has failed to establish by a preponderance of the evidence that he was mistaken in his belief that he could continue working and, as such, Claimant is not entitled to reopen his claim. Claimant's MMI status has never been revoked. Claimant was evaluated for purposes of a claim for permanent total disability in connection with his previous petition to reopen. The vocational assessment and employability report of Claimant's expert, Louis Phillips, was prepared prior to the previous hearing on Claimant's petition to reopen claim. Claimant testified as to the difficulties he was experiencing performing real estate work at the prior hearing.

22. The ALJ further notes that, at the prior hearing on June 18, 2008, Dr. Scott disagreed with Dr. Quick's work restrictions that limited Claimant to 0-4 hours per day. Dr. Scott testified that there was no objective basis upon which to impose additional work restrictions. The testimony of Dr. Scott was found to be credible and it was cited by the ALJ in his Findings of Fact, Conclusions of Law, and Order dated July 24, 2008. Claimant now alleges mistake, but in essence Claimant argues once again that he has "worsened" because he has additional restrictions and subjectively worse symptoms. The Claimant's testimony regarding mistake is simply not persuasive and the ALJ finds that if there was a

mistake by Claimant, it is not the type of alleged mistake that justifies reopening.

23. Claimant has failed to establish a mistake that warrants reopening. Although Claimant argues that his subjective symptoms have worsened, and that additional work restrictions have been imposed, his prior petition to reopen based upon an alleged worsening of medical condition was denied. Claimant now seeks the very same relief, namely, an "opportunity" to pursue a claim for permanent total disability, even though there has been no change in his condition. Considering the totality of the evidence, the ALJ finds that there is no mistake of fact that would entitle Claimant to reopen the claim.

CONCLUSIONS OF LAW

1. 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). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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 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).

3. 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).

4. Section 8-43-303, C.R.S. authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. *Cordova v. Industrial Claim Appeals Office,* 197 P. 3d 220 (Colo. App. 2008); *Maclaughlin/Kramer v. Capital Pacific Holdings*, W.C. 4-491-883 (ICAO March 23, 2009). The reopening authority granted to the ALJ is permissive, and whether to reopen a claim is within the sound discretion of the ALJ when the statutory criteria have been met.

5. In order for Claimant to receive additional temporary disability benefits after reaching MMI, the Claimant must show that his worsened medical condition caused additional physical restrictions resulting in greater impairment of Claimant's temporary work capacity than existed at the time of MMI. *City of Colorado Springs v. ICAO*, 954 P.2d 637 (Colo. App. 1997); *Giammarino v. Contemporary Services Corp.,* W.C. 4-546-027 (ICAO November 22, 2006). The rationale for this holding is that once a Claimant reaches MMI, any impairment of earning capacity is permanent and compensated by permanent disability benefits. Absent revocation of Claimant's MMI status, and an increase in his permanent impairment, it cannot be argued that Claimant has suffered a worsening of condition that has caused an impairment of his earnings capacity beyond that which was contemplated at the time Claimant received his permanent disability benefits award.

6. The ALJ credits the testimony of Dr. Quick and Dr. Scott who opined that there was no causal relationship between Claimant's left knee injury and the admitted neck injury. The ALJ concludes that Claimant has failed to establish, by a preponderance of the evidence, that he suffered a worsening of his medical condition so as to warrant reopening of the claim.

7. In *Fisher v. Wal-Mart Stores, Inc.,* W.C. 4-247-158 (ICAO August 20, 1998), Claimant's petition to reopen was denied under similar facts. In *Fisher*, the Claimant's argued that the respondents' admission for permanent partial disability was mistaken because the treating (rating) physician changed his mind and opined that the Claimant was permanently and totally disabled. Claimant suffered a compensable low back injury, underwent lumbar fusion surgery and was assessed with 34% whole person impairment. The authorized treating physician placed Claimant at MMI and stated that Claimant should be limited to light duty, sedentary work. After the final admission of liability was filed, Claimant returned to the treating physician for a "routine follow up" examination and the physician reported that the Claimant's condition had "not changed any." In an addendum to his follow up note, the treating physician further reported that, "we should probably consider (Mr. Fisher) to be permanently and completely disabled from competitive and active employment." The Claimant thereafter filed a petition to reopen based upon mistake of fact. The AJL denied the petition to reopen and the ICAO affirmed. It was held that, if anything, the treating physician merely changed his opinion concerning the probable consequences of the Claimant's restrictions and his ability to work within those restrictions; the ICAO further affirmed the ALJ's conclusion that if there was a mistake of fact, this was not the type of mistake which warrants reopening.

8. In the present claim, Claimant's mistake of fact, as alleged, is not the type of mistake that warrants reopening. While Dr. Quick changed his mind concerning Claimant's work restrictions, this in and of itself did not constitute a change in condition. Further, Dr. Scott previously testified that there was no objective basis upon which to change Claimant's work restrictions. His testimony

was found to be credible. Under the totality of the circumstances, the petition to reopen based upon an alleged mistake of fact is denied.

9. Finally, the respondents assert that the petition to reopen should be barred by the legal doctrine of "claim preclusion." In *Holnam, Inc. v. Industrial Claim Appeals Office,* 159 P. 3d 795 (Colo. App. 2006), *cert. denied,* May 21, 2007, the Court reviewed the elements for claim preclusion and specifically held that for a claim in a second proceeding to be precluded by a previous judgment, there must exist: 1) finality of the first judgment; 2) identity of the subject matter; 3) identity of the claims for relief; and 4) identity or privity between parties to the actions. In analyzing whether there is identity of the claims for relief, the focus is not on the specific claim asserted or the name given to the claim. Instead, the same claim or cause of action requirement is bound by the injury for which relief is demanded, and not sought by the legal theory on which the person asserting the claim relies. *See, Esola v. Publication Printers Corp.,* W.C. 4-671-535 (ICAO August 8, 2007). Claim preclusion bars relitigation not only of all claims actually decided, but of all claims that might have been decided if the claims are tied by the same injury. *Esola, id.*

10. The ALJ finds that there was finality of the first judgment, as reflected in the Findings of Fact, Conclusions of Law, and Order of ALJ Cannici dated July 24, 2008. There was identity of the subject matter, namely Claimant's petition to reopen claim based upon an alleged worsening of medical condition related to his admitted work injuries suffered on February 26, 2005. The claim for relief was the same; namely, an alleged change in condition resulting in further work restrictions and an alleged inability to continue working in the same capacity. Finally the parties in both hearings were the same. The knee injury which gives rise to the current claim is alleged to have occurred in October of 2007, although Claimant did not seek medical treatment until February 2008 following which he underwent surgery in April 2008. This all took place prior to the hearing on Claimant's previous petition to reopen claim. In addition, while Claimant now asserts a mistake of fact regarding his ability to continue to work on a full time basis or in the same capacity, he is seeking the same relief. The fact that Claimant now alleges mistake or fact whereas he previously alleged a worsening of medical condition does not entitle him to relitigate the same issue arising out of the same claim. Claimant seeks the same relief and is barred form doing so under the doctrine of claim preclusion.

ORDER

It is therefore ordered that:

1. The Claimant's petition to reopen claim based upon an alleged change (worsening) of medical condition is denied and dismissed.

2. The Claimant's petition to reopen claim based upon an alleged mistake is denied and dismissed.

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

DATE: June 12, 2009

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-649-073

ISSUES

The issues determined herein are maximum medical improvement ("MMI"), permanent partial disability ("PPD"), and post-MMI medical benefits.

FINDINGS OF FACT

1.Claimant has been employed as a math teacher for the employer for 15 years.

2.Claimant suffered an admitted industrial injury in this case when she sat on a cafeteria bench, which broke, causing claimant to fall to the floor.

3.On February 15, 1993, claimant suffered a previous injury to her low back and arm in a motor vehicle accident.

4.On October 22, 1997, claimant suffered a previous admitted work injury when a television fell, striking her on the head. A magnetic resonance image ("MRI") of her temporomandibular joints ("TMJ") showed degeneration. Claimant was treated for TMJ and headache problems as well as neck and closed head injuries. On February 28, 2000, the insurer in WC 4-397-846 filed a final admission of liability ("FAL") for PPD benefits based upon 27% whole person impairment and for post-MMI medical benefits.

5.On March 8, 2001, claimant suffered a previous admitted work injury when she fell, injuring her low back and left shoulder. A May 4, 2001, MRI of the lumbar spine showed a herniated disc at L5-S1 with severe nerve impingement. A July 21, 2001, MRI of the left shoulder showed a tear in the biceps tendon and in the supraspinatus. Dr. Ciccone injected the left shoulder. Dr. Sung performed surgery on July 31, 2001, to

repair the L5-S1 herniated disc. Claimant settled W.C. No. 4-506-872 on August 12, 2002.

6.On December 16, 2003, claimant reported to her principal that she had suffered the accidental injury when the table broke. Claimant reported that her right leg was pinned under the bench and she injured her low back and mid back. Claimant and Mr. Reed prepared a written accident report, on which claimant marked a pain diagram. The original of that document was not produced at hearing, although two different photocopied versions were marked and one was admitted with foundational testimony. The employer prepared an employer's first report of injury that claimant injured her neck, mid back, lower back, and right calf. She was referred to Dr. Fortunato for treatment.

7.On December 16, 2003, Dr. Fortunato examined claimant, who reported a history of previous cephalgia, head injury, hearing loss, tinnitus, low back injury, and other problems. Claimant reported a history of the bench collapsing, striking her right calf, and injuring her back on the left side. Claimant did not report any left shoulder injury at that time. Contrary to claimant's testimony, she did not report a left shoulder injury, which Dr. Fortunato refused to examine or treat. Dr. Fortunato diagnosed right calf contusion and left lumbar injury.

8.By December 26, 2003, Dr. Fortunato noted that the right calf injury was resolved, although claimant continued to suffer low back pain.

9.A February 29, 2004, MRI showed an annular tear and disc bulge at L4-5 without nerve root compression. Dr. Fortunato referred claimant to Dr. Castro for chiropractic treatment.

10.On March 19, 2004, Dr. Castro examined claimant, who reported the history of the table collapsing, striking her calf. She did not report any left shoulder injury, although Dr. Castro was specifically treating the low back injury. He provided chiropractic treatment through July 7, 2004, with only some improvement.

11.On June 3, 2004, Dr. Richman examined claimant, who reported the history of the bench breaking, causing claimant to fall onto her buttocks with immediate onset of low back and buttock pain. Claimant did not report any left shoulder injury. She reported her previous low back injury, but did not report her previous left shoulder injury.

12.On June 23, 2004, Dr. Malis examined claimant, who reported the history of the bench collapsing, catching her leg under it. Claimant did not report any left shoulder injury. Dr. Malis did not refuse to examine or treat a left shoulder injury because the employer's first report of injury did not list the left shoulder injury.

13.On August 12, 2004, Dr. Richman reexamined claimant and suspected lumbar facet origins for claimant's continuing low back pain. He referred her to Dr. Baer for medial branch blocks. Dr. Baer administered two sets of the blocks, with good symptom response by claimant.

14.On February 1, 2005, Dr. Malis referred claimant to Dr. Sacha for consideration of a medial nerve ablation (radiofrequency rhizotomy). On February 25, 2005, Dr. Sacha examined claimant, who reported the history of the bench breaking, causing her to fall. She also reported the history of her two previous work injuries. Dr. Sacha recommended a rhizotomy at L4-5 and L5-S1, with a goal of 50% reduction of pain symptoms. Dr. Sacha did not inform claimant that she had only a 50% likelihood of success from the rhizotomy. Dr. Sacha indicated that he would want to reexamine claimant two weeks after the rhizotomy.

15.On March 31, 2005, Dr. Sacha reported that he performed the two-level rhizotomy. Claimant denies that the procedure occurred and denies that she took off work on that day. She produced a computer record printout of her leave use during the relevant time period, but the employer did not have a computerized leave system at the relevant time. Any leave used by claimant had to be manually input into the computer system in order for the computer record to show leave used in 2005.

16.On April 19, 2005, Dr. Hattem examined claimant, who reported that she had decided not to have the rhizotomy because she was not satisfied with the prospect of only 50% reduction in her pain symptoms. Claimant reported that she suffered pain of 8 or 9 on a 1 to 10 scale at that time. Dr. Hattem determined that claimant was at MMI. He determined 10% permanent impairment based upon 5% for specific disorders of the lumbar spine and 5% for range of motion loss. Dr. Hattem then considered the December 27, 2001, determination of 8% for specific disorders and 5% for range of motion due to the prior low back injury. He then determined that claimant had no permanent impairment from the current injury.

17.On May 4, 2005, the insurer filed a FAL, denying liability for PPD and post-MMI medical benefits.

18.Claimant requested a Division Independent Medical Examination ("DIME"). The attorney for claimant struck the name of another physician, allowing Dr. Kenneth Finn to be selected as the DIME physician. On September 28, 2005, Dr. Finn performed the DIME. Claimant reported a history of the bench falling, causing injury to her low back, left shoulder, and bilateral wrists. Dr. Finn reviewed the medical records, which showed no report of any left shoulder injury after the December 16, 2003, injury. Dr. Finn also reviewed medical records of the left shoulder injury following the 2001 work injury. Dr Finn concluded that claimant did not suffer left shoulder and wrist injuries as a result of the admitted 2003 injury. Claimant reported that she did not have a rhizotomy. Dr. Finn reviewed the March 31, 2005, record by Dr. Sacha of the rhizotomy and concluded that claimant had received the rhizotomy. Dr. Finn agreed with Dr. Hattem that claimant was at MMI on April 19, 2005. Dr. Finn measured 5% impairment due to loss of lumbar range of motion. He also determined 7% impairment for specific disorders of the lumbar spine due to the L4-5 annular tear. Dr. Finn noted that claimant already suffered 13% impairment from the 2001 injury to the lumbar spine. He determined that claimant had no impairment from the 2003 work injury.

19.On October 10, 2005, the insurer filed a FAL. On October 26, 2005, the insurer filed an amended FAL to correct the amount of temporary disability benefits admitted. The insurer denied liability for any PPD benefits, but admitted for post-MMI medical benefits.

20.Claimant timely objected and applied for hearing. The April 5, 2006, hearing before Judge Walsh dealt only with respondents' argument that the claim was closed by FAL and with claimant's allegation that the DIME determination by Dr. Finn should be invalidated due to a conflict or appearance of a conflict on the part of Dr. Finn. Judge Walsh determined that the claim was closed by FAL. The Court of Appeals ultimately reversed and remanded for determination of the DIME conflict issue that had been tried at the April 5, 2006, hearing. On May 22, 2008, Judge Walsh issued his order denying claimant's request to strike the DIME report by Dr. Finn.

21.On January 8, 2009, Dr. Watson performed an IME for respondents. Claimant reported a history of falling on her low back and left arm, injuring her left shoulder, left arm, and low back. She also reported grinding her teeth due to pain from the injury. Dr. Watson agreed that claimant was at MMI on April 19, 2005. Dr. Watson agreed that claimant had no permanent impairment from the 2003 injury after the previous injury impairment rating was apportioned.

22.On February 12, 2009, Dr. Hall performed an IME for claimant. Dr. Hall had previously treated claimant in the aftermath of her 1997 head and neck injury. Claimant reported that in 2003, she fell on her low back and then on her upper back and shoulder area. Claimant also reported increased TMJ problems due to clenching of her teeth. Dr. Hall informed claimant that she had better than 50% probability of success from the rhizotomy. Dr. Hall concluded that claimant was not at MMI. He recommended that she proceed with the rhizotomy and with TMJ treatment. Dr. Hall also concluded that claimant had injured her left shoulder in the 2003 injury. He criticized Dr. Finn for diagnosing posterior element or sacroiliac ("SI") joint pain and then determining 7% impairment for specific disorders based upon the L4-5 annular tear.

23.Dr. Hall testified that he did not think that the L4-5 annular tear was of clinical significance. He agreed that facet dysfunction was the most likely diagnosis, although he also thought that SI joint dysfunction could be a secondary problem. He recommended SI injections if the rhizotomy did not succeed. Dr. Hall did not think that claimant's headaches or TMJ dysfunction was separately rateable.

24.No clear and convincing evidence demonstrates that the MMI and impairment determinations by the DIME are incorrect. Usually, the MMI and rating determinations involve some questions of medical judgment by the physicians. In this very strange case, claimant denies having the rhizotomy by Dr. Sacha, in spite of the medical record of the procedure. Certainly, mistakes can be made. "Chart lore" can develop in which mistakes get repeated from physician to physician. Patient charts can be confused. It is odd that the record evidence does not contain any reexamination by Dr. Sacha after performing the rhizotomy.

25.On the other hand, other strange conflicts in the record evidence exist. Claimant alleges that she told Dr. Fortunato and Dr. Malis about a left shoulder injury, but they told her they refused to treat such an injury because it was not in the employer's report. Their records contain not even a history of such complaints. Only Dr. Finn recorded first recorded a history of a left shoulder injury from the 2003 accident. He then carefully determined that the left shoulder problem was not due to the latest accident. Claimant produced a different version of the December 16, 2003, accident report. Claimant's exhibit 134 and 896 showed pain markings on the back of the left shoulder, as well as the bilateral neck, low back, and right calf. The written description of the injury listed the low and mid-back, left shoulder/arm pain, and neck pain. Claimant provided foundation to admit the exhibit. Respondents introduced no evidence to explain the foundation for their offered exhibit KK, which omitted the pain marking on the left shoulder and contained arrows for bilateral neck pain that were different than on claimant's exhibit. Respondents' exhibit also omitted the reference to left shoulder/arm pain as well as neck pain. Respondents' offered exhibit was a much poorer quality photocopy than claimant's exhibit. The conflict in the exhibits is hard to explain and no testimony was offered. Apparently, at least one party altered a document from its original state. Claimant had a motive to do so. The record evidence does not demonstrate a motive for the employer to do so.

26.The altered exhibit, the lack of medical history of a left shoulder injury report to Dr. Fortunato or Dr. Malis, and the dispute regarding the occurrence of the rhizotomy lead the finder of fact to find that claimant's testimony is false and not reliable. One strange conflict might be explainable, but so many such strange conflicts point to claimant's lack of veracity rather than a wide-ranging conspiracy against claimant or an amazing set of coincidences.

27.Claimant's attack on Dr. Finn for a conflict or an appearance of a conflict of interest misses the mark. Although claimant was precluded from relitigating the motion to strike the DIME report because Judge Walsh had already determined that issue, she was permitted to argue that a "conflict" helped to demonstrate that the DIME determinations were overcome. Claimant continued to argue that Dr. Finn had a duty to disclose an adversarial relationship with claimant's attorney. Nothing in the WCRP requires a DIME disclosure. If the DIME has a conflict or appearance of conflict, he must not accept the DIME assignment for the case. Disclosure and waiver of a conflict is not an option. Dr. Finn's destruction of his file regarding his complaint to the Supreme Court about claimant's attorney has little impact on the facts of this case. Dr. Finn's opinion about claimant's attorney is of little consequence. Claimant's allegation of an adversarial relationship is not persuasive. Dr. Finn testified persuasively that he evaluates all patients and DIME claimants without regard for their attorney. Furthermore, the issues in this case do not involve the usual DIME medical judgments about further treatment. Dr. Finn, quite normally, relied on the medical records to determine that claimant did not injure her left shoulder and that she had already had the rhizotomy. The finder of fact has also found those same facts. Nothing in Dr. Finn's report shows the slightest indication that his determinations are driven by some ongoing animosity toward claimant's attorney.

28.Consequently, claimant was at MMI on April 19, 2005, as determined by Dr. Finn, Dr. Hattem, and Dr. Watson. Dr. Hall's contrary opinion that claimant is not at MMI because she needs the rhizotomy, TMJ treatment, and left shoulder evaluation is not persuasive.

29.Claimant suffered no permanent impairment as a result of the 2003 work injury. Dr. Finn made a considered medical judgment that the proper analysis was to provide a 7% rating based upon the L4-5 annular tear in addition to the 5% for range of motion deficits. That same 5% impairment for range of motion deficits was found for the 2001 injury. Dr. Finn, in addition to Dr. Hattem and Dr. Watson, apportioned the previous 2001 award of 13% impairment and concluded that claimant had no additional impairment due to the 2003 injury.

30.Claimant has failed to prove by a preponderance of the evidence that she needs post-MMI treatment in the form of the rhizotomy, injection treatment of the annular tear, evaluation and treatment of the left shoulder, evaluation of tinnitus, and evaluation of TMJ dysfunction and headache. As found, claimant had the rhizotomy, apparently with not much success. As found, she did not injure her left shoulder in the 2003 injury. The record evidence does not demonstrate that claimant's preexisting tinnitus, TMJ dysfunction, and headache were aggravated by the 2003 injury, requiring additional treatment. Claimant had low back pain from the 2003 injury. Claimant's later reports of other problems are not credible or persuasive. Dr. Hall's recommendation of additional treatment for the 2003 injury is not persuasive.

CONCLUSIONS OF LAW

1. Section 8-42-107(8)(b)(III), C.R.S., provides that the determination of the DIME with regard to MMI shall only be overcome by clear and convincing evidence. The DIME determination of causation is binding unless overcome by clear and convincing evidence. *See Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Cudo v. Blue Mountain Energy Inc.*, W.C. No. 4-375-278 (Industrial Claim Appeals Office, October 29, 1999). 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). In this case, the DIME, Dr. Finn, determined that claimant was at MMI on April 19, 2005. Consequently, claimant must prove by clear and convincing evidence that this determination is incorrect.

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

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The

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

Reasonable and necessary treatment and diagnostic procedures are a prerequisite to MMI. MMI is largely a medical determination heavily dependent on the opinions of medical experts. *Villela v. Excel Corporation*, W.C. Nos. 4-400-281, 4-410-547, 4-410-548, & 4-410-551 (Industrial Claim Appeals Office, February 1, 2001). As found, claimant has failed to prove by clear and convincing evidence that the MMI determination by Dr. Finn is incorrect.

2. The medical impairment determination of the DIME is also 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). As found, claimant has failed to prove by a preponderance of the evidence that the DIME determination of no impairment is incorrect.

3. 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). The insurer admitted liability for reasonably necessary medical benefits after MMI. The insurer remains free to contest the reasonable necessity of any future treatment. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). As found, claimant has failed to prove by a preponderance of the evidence that she needs post-MMI treatment in the form of the rhizotomy, injection treatment of the annular tear, evaluation and treatment of the left shoulder, evaluation of tinnitus, and evaluation of TMJ dysfunction and headache.

ORDER

It is therefore ordered that:

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

2. Claimant's claim for additional medical benefits for a rhizotomy, injection treatment of the annular tear, evaluation and treatment of the left shoulder, evaluation of tinnitus, and evaluation of TMJ dysfunction and headache is denied and dismissed.

DATED: June 19, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-662-964

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 16, 2009 and June 1, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 3/16/09, Courtroom 3, beginning at 8:34 AM, and ending at 5:00 PM; and, 6/1/09, Courtroom 1, beginning at 8:30 AM, and ending at 11:27 AM).

At the conclusion of the hearing, the ALJ established a briefing schedule (briefs to be filed electronically). Claimant's opening brief was filed on June 9, 2009. Respondents' answer brief was filed on June 15, 2009. On June 16, 2009, Claimant indicated that he would not be filing a reply brief. The matter was deemed submitted for decision on June 16, 2009.

ISSUES

The issues to be determined by this decision concern permanent total disability (PTD), reasonably necessary medical benefits, and bodily disfigurement. During the hearing, Respondents withdrew their affirmative issue of whether the Claimant was barred from PTD benefits on the ground that the Claimant rejected an offer of modified employment. Claimant has the burden of proof, by a preponderance of the evidence, on all issues remaining for determination.

FINDINGS OF FACT

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

1. On September 9, 2005, the Claimant sustained an injury to his cervical spine while working for employer.

2. On October 21, 2005, Claimant underwent a cervical fusion by Robert T. Vraney, M.D. On October 13, 2006, Dr. Vraney noted the fusion to be solid. On April

27, 2007, B. Andrew Castro, M.D., reviewed claimant's MRI (magnetic resonance imaging) studies, noted the "solid fusion", and stated that he did not recommend any further surgical intervention.

3. Jeffrey A. Wunder, M.D., originally placed Claimant at maximum medical improvement (MMI) on September 21, 2006. Prior to doing so he ordered a Functional Capacity Evaluation (FCE) and that test was completed on September 19, 2006.

4. At Dr. Wunder's request, Claimant began treating with psychologist Peter J. Vicente, Ph.D., on April 25, 2006. After multiple psychological tests Dr. Vicente was of the opinion that "The patient is not focused on compensation or litigation gains, nor is malingering an issue." Dr. Vicente's report also states that "there is no indication of a strong addiction potential."

5. The FCE conducted on September 19, 2006 found that the Claimant could only lift 10 pounds on an occasional basis, had to take unscheduled breaks during testing, and fell in the "below competitive" range for many of the tests administered due to increased neck pain. The validity testing conducted during that FCE found that the Claimant gave a consistent effort. There were no findings of submaximal effort on that FCE's validity testing. Several of the tests were stopped due to concerns for the Claimant's safety. The ALJ finds that the restrictions imposed in the FCE were temporary, one and one-half years before the Claimant reached MMI, and were superseded by the permanent restrictions imposed by Claimant's authorized treating physicians (ATPs).

6. Ultimately, Dr. Wunder, who had been an ATP since March 2006, and the Claimant's current primary treating physician, placed the Claimant at MMI on April 28, 2008, and rated him with a 23% permanent impairment to his cervical spine (whole person). Dr. Wunder recommended one year of maintenance medications. He assigned permanent work restrictions of a maximum 20 pounds lift, pull, or carry, with occasional overhead work.

7. On August 7, 2008, the Claimant underwent a follow up Division Independent Medical Examination (DIME) with Kristin D. Mason, M.D., who agreed with Dr. Wunder's MMI date of April 21, 2008. Dr. Mason rated the Claimant with 26% impairment to his cervical spine and with 2% mental impairment. Dr. Mason declined to rate permanent impairment to Claimant's right lower extremity (RLE) or for swallowing issues.

8. Respondents filed a Final Admission of Liability (FAL), consistent with the opinions of Dr. Mason. Claimant initially challenged, but later withdrew his challenge to the opinions of the DIME.

9. Claimant does not have a high school diploma or GED. His work history is entirely in the restaurant industry. He was employed as an executive chef with

Employer as of September 9, 2005, and prior to that had worked as an executive chef, line chef, sous chef, saucier, and owned his own restaurants.

10. Claimant's work as an executive chef with Employer required that he supervise the functions of the kitchen, including ordering food, receiving food, cooking food, working as a line cook, washing dishes, mopping floors, heavy cleaning, lifting, bending, and a lot of cooking. There were times when he was the only one present in the kitchen. Physical requirements of his work as an executive chef required being able to maneuver ninety (90) pound boxes of meat, and repetitive use of his upper extremities for cutting, chopping, lifting pans, making sauces, lifting racks of clean dishes, and mopping. Katie Montoya, Respondents' vocational expert, is of the opinion that Claimant can no longer perform his executive chef job.

11. Claimant has looked for work since he last worked, but he does not believe that he is physically able to perform any of the jobs he has applied for. Claimant has not been offered any jobs or interviews for jobs for which he has applied. He has applied for jobs posted on-line and jobs identified by Katie Montoya, Respondents' vocational expert, but he does not believe that he can physically perform any of those jobs due to his limitations, many of which are self imposed and not consistent with his ATPs' permanent medical restrictions. Claimant has also sought work through Workforce Colorado, but was referred to the Division of Vocational Rehabilitation. He has not been offered any vocational rehabilitation services through the Division of Vocational Rehabilitation (DVR). This fact is neutral because the ALJ can neither infer that Claimant did **not** meet the DVR's criteria nor that Claimant was **not** capable of being vocationally rehabilitated.

Medical Opinion

12. The restrictions of medical providers, including Dr. Wunder and Matthew Brodie, M.D., as well as the opinions of Dr. Mason and Tashoff Bernton, M.D., are more persuasive and credible than the limitations of Doris Shriver, Claimant's vocational expert. The ALJ finds that Shriver's restrictions are not supported by the weight of the medical evidence.

13. Dr. Wunder, an ATP, was of the opinion that the Claimant's only current objective findings are restricted cervical range of motion and some sensory deficits in the left C-6 distribution which have changed over time. On March 3, 2008, Claimant's electrodiagnostic studies that had been previously considered abnormal, were interpreted as normal.

14. Dr. Wunder referred the Claimant for a functional capacity evaluation (FCE). In the report of the FCE, the evaluator noted that "the findings from this evaluation be correlated with objective physical findings and is subject to further interpretation and determination of validity by the treating physician. Dr. Wunder stated that an FCE is like a diagnostic test, such as an MRI. It needs to be interpreted by a

physician in light of clinical information. The ALJ finds Dr. Wunder's opinion in this regard persuasive and credible.

15. Dr. Wunder assigned the Claimant permanent work restrictions of lifting, pushing, and pulling of up to 20 pounds on an occasional basis, and "that the claimant is also restricted to occasional work and occasional reaching overhead." Dr. Wunder based his restrictions on information that could be objectively verified, the history of surgery, the FCE, and his twenty three years of medical experience in dealing with patients with similar conditions.

16. Dr. Bernton agreed with the restrictions of Dr. Wunder, but stated that Claimant "is probably able to function at a greater level than this."

17. According to Dr. Wunder, it is not reasonable to rely on the Claimant's subjective report of symptoms in assigning work restrictions. Multiple other physicians, including Dr. Brodie, Dr. Mason, and Dr. Bernton have questioned the reliability of Claimant's subjective complaints.

18. Dr. Bernton noted in his April 3, 2007 report that the Claimant has "developed a large number of pain complaints which are either unexplained on an objective basis or disproportionate to those findings which are present." Dr. Bernton states that "conscious magnification of symptoms and misrepresentation of functional ability (e.g. malingering) is present in this case."

19. Dr. Mason commented in her DIME report that, at times "it appears he does somewhat distort his report and there have been some inconsistencies of his presentation." The ALJ finds that this independent opinion of a DIME corroborates Dr. Bernton's opinion concerning magnification of symptoms, thus, enhancing Dr. Bernton's credibility in this regard.

20. Dr. Brodie was of the opinion that "there are non-organic factors driving this case." According to Dr. Brodie, Claimant's diagnostic studies and "documented organic illness would not constitute the need for him to not be able to return to his gainful employment," and that his perceived disabilities are being primarily driven by subjective complaints of pain.

21. Dr. Wunder was of the opinion that the "patient's reported functional disability has been in excess of objective findings."

22. The ALJ finds that the permanent work restrictions assigned by Dr. Wunder take into account the Claimant's objective and subjective complaints and are reasonable.

23. Following his surgery, the Claimant was diagnosed with a deep venous thrombosis (DVT), for which he received medical treatment.

24. Claimant has complained of RLE pain and limitations that he attributes to the DVT. However, the medical evidence shows that the DVT healed and should not be causing functional limitations. In discussing the Claimant's right leg, Dr. Mason, the DIME, noted "the patient is, to some extent, exaggerating his complaints. I do not find anything objectively wrong with the leg. Multiple subsequent vascular studies have shown resolution of the blood clot and he has been viewed on at least some of the surveillance videotapes to present a different functional picture with respect to gait than he presents in the office." Dr. Mason stated there was no objective basis for assigning a permanent impairment. Claimant withdrew his challenge to the DIME and thus his challenge to this opinion.

25. Claimant testified that he is ambidextrous, but that he is basically right handed. Claimant has alleged difficulties with his right upper extremity (RUE) as a result of his injury. Diagnostic studies have been performed which have revealed no abnormalities in the RUE. Multiple physicians, including Dr. Wunder, Jeffrey Sabin, M.D., and Dr. Bernton, are of the opinion that Claimant's RUE complaints are not related to his work injury. Both Dr. Wunder and Dr. Bernton stated that Claimant has no limitation with respect to the use of his RUE. Claimant's complaints of symptoms in the RUE are not supported by objective medical evidence.

26. Dr. Mason's report noted that the mechanics of Claimant's swallowing was affected by his cervical fusion hardware, but she did not find that he had a rateable impairment for that condition. She did provide him with a two percent (2%) whole person rating for his psychological condition, which had stabilized with medication, and a 26% whole person impairment to his cervical spine, which included an impairment rating for sensory deficits in his left upper extremity. Claimant also testified regarding his swallowing difficulties. The DIME, however, specifically noted that there was no impairment for swallowing, nor has Claimant identified any credible work restrictions as a result of any swallowing issues.

27. Gary Gutterman, M.D., a psychiatrist and an ATP, is of the opinion that Claimant is "capable or returning to the workforce from a psychiatric and cognitive perspective."

28. Dr. Mason, the DIME, completed mental impairment worksheets, and rated Claimant with a 2% mental impairment due to his condition being stable on medication. Dr. Mason completed a Mental Impairment Worksheet and noted no impairment in activities of daily living, including travel, social functioning, thinking, concentration, judgment, or adaptation to stress. Claimant withdrew challenge to DIME.

29. Dr. Bernton was of the opinion that the Claimant is capable of working full time within the restrictions outlined by Dr. Wunder.

30. Dr. Wunder and Dr. Bernton were each of the opinion that there is no medical basis for the assignment of work restrictions on the Claimant's ability to sit,

stand, or walk. Dr. Bernton further was of the opinion that there is no medical basis for Claimant's allegation that he would need to take unscheduled breaks during a workday.

31. Christopher Ryan, M.D., who testified on behalf of the Claimant, last saw Claimant on January 16, 2009. Dr. Ryan was of the opinion that Claimant could lift 20 lbs. only occasionally and was restricted from lifting and carrying 10 lbs. frequently. Dr. Ryan also restricted neck movements and overhead activities. The ALJ finds that Dr. Ryan did **not** persuasively relate many of his restrictions to the Claimant's work-related injury of September 9, 2005. The ALJ resolves the conflict between the opinions of Dr. Ryan and the opinions of ATP Dr. Wunder and Respondents' IME doctors, Dr. Bernton and Dr. Brodie in favor of Drs. Wunder, Bernton and Brodie. Therefore, the ALJ finds that the three later physicians' opinions outweigh the opinion of Dr. Ryan.

Commutable Labor Market

32. There is a dispute concerning the Claimant's commutable labor market. Manning Pickett, M.D., and Christopher Ryan, M.D., both stated opinions that the Claimant is restricted from extended driving.

33. Dr. Wunder was of the opinion that it would be reasonable for the Claimant to take a short break of 5 to 10 minutes after driving 45 minutes to an hour before continuing to drive. Claimant's injuries do not otherwise limit his ability to drive. Claimant maintains a valid Colorado driver's license.

34. Neither Dr. Pickett nor Dr. Ryan provided a persuasive explanation concerning the medical basis of the Claimant's alleged inability to drive long distances within the restrictions outlined by Dr. Wunder. To the extent that their opinions are based on Claimant's report of RLE pain, as noted by the DIME, Dr. Mason, the DVT healed and there is nothing objectively wrong with his leg.

35. At the time of his injury, Claimant was living in Wheat Ridge. During this claim, he moved to Bailey, Colorado. Therefore, his commutable labor market extends to a 45-minute drive from Bailey. The ALJ takes administrative notice that this would include parts of the Metro Denver area.

36. Claimant testified that he has difficulty driving and when he drives, he stops to take breaks. Claimant's testimony that he is unable to drive for extended periods of time without multiple breaks is contradicted by the testimony of investigator Chris Selle who observed the Claimant driving his vehicle continuously for 60 minutes.

37. Public transportation is available from Pine Junction, which is 10 miles away from Claimant's home, to the Denver metro area. Dr. Wunder and Dr. Bernton each persuasively expressed opinions that the Claimant has no restrictions in his ability to use public transportation.

38. According to Katie Montoya, Respondents' vocational expert, and based on the opinions of Dr. Wunder and Bernton concerning the Claimant's ability to drive, plus the availability of public transportation to the Denver metro area from Bailey, the Claimant's commutable labor market includes the Denver metro area.

Vocational Experts

39. Katie Montoya, Respondents vocational expert, performed a vocational evaluation of Claimant that included a personal interview. Montoya performed a variety of computer analysis, a review of occupational job descriptions and the Dictionary of Occupational Titles (DOT), a review of job openings, and she contacted potential employers.

40. According to Montoya, the Claimant is not capable of returning to work as an Executive Chef, his pre-injury occupation.

41. According to Montoya, the Claimant "is a skilled individual" and has acquired various skills through his work history including restaurant ownership, restaurant management, supervising and evaluating staff, ordering food, inventory, customer service, putting together events, scheduling, interviewing, quality control, and making establishments profitable. Claimant's work history documenting these skills and his "extensive computer skills" is contained in his resume [admitted into evidence as Respondents' Exhibit A-1]

42. Claimant contends that his education level has precluded him from certain jobs. Claimant admitted, however, to telling medical providers that he had graduated from high school when he had not. Shriver agreed that the Claimant had significant skills in the food service industry that could substitute for education requirements. Claimant did not need a high school diploma to complete or perform work as reflected in his work history. During that work history, Claimant developed transferable skills for work he could perform within his current restrictions.

43. Montoya stated that, in evaluating vocational capabilities, it is more reasonable to rely on the opinions of treating physicians regarding a Claimant's work restrictions. In reaching her conclusion that Claimant is employable, Montoya relied on the restrictions of Dr. Wunder and Dr. Brodie, as well as the restrictions of the DIME, Dr. Mason, and Dr. Bernton. Montoya observed that the restrictions of these four physicians were consistent with one another, and the ALJ so finds. Montoya noted that these restrictions essentially allow for a sedentary to light work classification. The consistency of the restrictions among medical providers makes the restrictions highly persuasive and credible.

44. Montoya is of the opinion that Claimant is capable of performing jobs including customer service, cashier, food service supervisor, host, sandwich maker, order clerk. Montoya is further of the opinion that Claimant has the capacity to return to even higher level jobs by using previous contacts and knowledge of the food service

industry. According to Montoya, each of these jobs is within Claimant's vocational capabilities and within the restrictions of Dr. Wunder, Dr. Brodie, Dr. Bernton, and Dr. Mason. Montoya is of the opinion that these jobs are available within Claimant's commutable labor market.

45. Doris Shriver, Claimant's vocational expert, is of the opinion that Claimant is not capable or earning wages. Shriver and the Claimant stated that, before the day of the hearing, Shriver had never met Claimant. Shriver is of the opinion that "non exertional limitations", including the Claimant's inability to sit, stand, walk, and reach, resulted in a vocational profile which rendered the Claimant unemployable and that it was not even worth it for Claimant to apply for any jobs.

46. The reliance by Shriver on Claimant's "non-exertional" limitations in support of her opinions that Claimant is unemployable is not consistent with the medical evidence, including the testimony of Dr. Wunder and Dr. Bernton, and the reports of Dr. Brodie and DIME Dr. Mason. Shriver's opinions are based on Claimant's subjective report instead of the objective medical findings. The fact that the critical mass of Shriver's opinion that Claimant is unemployable is her heavy reliance on Claimant's subjective limitations and not on the medical restrictions of Claimant's primary ATP and the DIME physician substantially undercuts the persuasiveness of Shriver's ultimate opinion that Claimant is unemployable.

47. Montoya acknowledged that, if she only considered what Claimant reported about his physical capabilities, Claimant would not be able to work, but to do so would require her to disregard the medical evidence.

48. Montoya was of the opinion in her testimony and in her report that, after considering the objective information, Claimant's medical status, his entire vocational profile, Claimant maintains the capacity to return to work.

49. The opinions of Katie Montoya are more consistent with the medical evidence and are more credible and persuasive than the opinions of Doris Shriver. The ALJ finds that the Claimant is able to earn wages within his medical restrictions and his entire vocational profile.

50. Claimant's age, transferable skills, work restrictions, and ability to commute to the Denver labor market via public or private transportation demonstrates that he is capable of earning wages.

51. Claimant has failed to prove, by a preponderance of the evidence that he is incapable of earning wages in the competitive job market. Therefore, Claimant has failed tom prove that he is permanently and totally disabled. The Claimant reached MMI on April 28, 2008.

Continued Medical Treatment/Post-MMI Maintenance Treatment

52. According to the opinions of Dr. Wunder, the ATP, and Dr. Bernton, Claimant's request for treatment with narcotic medications is no longer reasonable and necessary.

53. A respectable minority, Dr. Ryan, agrees that Dr. Pickett's treatment, including the continued prescription of narcotics, is reasonably necessary. The ALJ resolves this conflict in favor of the opinions of Dr. Wunder and Dr. Bernton and against Dr. Ryan's opinion.

54. Dr. Wunder has provided extensive treatment and referrals to the Claimant including radiological studies, electrodiagnostic studies, specialist referrals, and other care. Dr. Ryan, called to testify by the Claimant, expressed the opinion that the care provided by Dr. Wunder has been appropriate, that Dr. Wunder has made necessary referrals, and "went the extra mile and then some" in his treatment of Claimant. Dr. Bernton was of the opinion that the care provided by Dr. Wunder to Claimant has been in compliance with the Division of Workers' Compensation Medical Treatment Guidelines.

55. When Dr. Wunder received an unexpected result of a random urine drug screen, which included the presence of marijuana and the absence of a prescribed medication, Dr. Wunder determined that it was no longer reasonable and necessary for the Claimant to be treated with narcotic medications. Other physicians, such as Dr. Brodie, an ATP, have raised questions about drug seeking behavior by Claimant.

56. Claimant has received medication from Dr. Pickett without the knowledge of Dr. Wunder. Dr. Ryan and Dr. Wunder each agreed that it is inappropriate for the Claimant to be receiving medications from multiple physicians.

57. When Dr. Wunder refused to prescribe further narcotic medications, Claimant obtained narcotic medications from Dr. Pickett. Dr. Bernton noted that "It is common in such situations with patients to seek another physician who may be willing to prescribe habituating medications; however, I believe this would be medically contraindicated."

58. Claimant desires to treat with Dr. Pickett because Dr. Pickett has been willing to provide narcotic medications and support Claimant's claims of disability where other physicians treating the Claimant for this claim have refused.

59. Dr. Bernton cautioned in his April 3, 2007 report that the failure of treating physicians to take into account the Claimant's misrepresentation of his symptoms would result in inappropriately prolonged medical care and inappropriately expanded disability. Dr. Wunder is aware of these issues in his treatment of Claimant. There is a question whether Dr. Pickett is considering these issues in his treatment of Claimant with narcotic medications that Dr. Wunder will not prescribe.

60. Dr. Bernton was of the opinion that there are non-narcotic treatments that would be reasonable to manage Claimant's pain complaints.

61. Dr. Wunder is still willing to continue to treat the Claimant for the effects of his work injury.

62. Claimant is seeking narcotic and other medication from Dr. Pickett. Claimant has demonstrated non-compliance with the narcotics contract with Dr. Wunder, obtaining medications and other substances on a surreptitious basis. The medical treatment that the Claimant is requesting from Dr. Pickett, principally continued narcotic prescriptions is not causally related to, or reasonably necessary to treat Claimant's admitted injury. Therefore, Claimant has failed to prove, by preponderant evidence that Dr. Pickett's narcotic prescriptions are causally related to, or reasonably necessary to treat the Claimant for the effects of his admitted injury. The lidocaine cream recommended by Dr. Pickett is reasonable and necessary treatment for the Claimant, and related to the injuries he sustained on September 9, 2005. Dr. Pickett recommended the lidocaine cream to provide pain relief that Claimant was not able to get from patches, because the hair on his body made it difficult for him to use adhesive patches, which he had tried previously.

63. Claimant was being prescribed Oxy IR, a narcotic medication, by ATP Dr. Wunder until Dr. Wunder obtained the results of a urine screen dated October 13, 2008. Dr. Wunder stopped Claimant's narcotic medication after that urine screen, and on December 15, 2008 stated that he no longer needed to see Claimant. Dr. Pickett has since prescribed OxyIR and a lidocaine cream for Claimant. The ALJ finds that the lidocaine is reasonably necessary to treat the Claimant's work-related condition. The Oxy-IR is **not** reasonably necessary.

Disfigurement

64. Claimant manifested a three-inch surgical scar on the front, right side of his neck, plainly visible to public view and causally related to his admitted injury.

CONCLUSIONS OF LAW

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

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo.

App. 131, 134 P. 254 (1913). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, the ultimate opinion of Katie Montoya that Claimant is employable is based on more reliable study and underlying medical opinion than the opinion of Doris Shriver that Claimant is unemployable because Doris Shriver relied on Claimant's subjective (non-exertional) limitations and failed to appropriately take into account the permanent medical restrictions imposed by Claimant's ATPs and corroborated by independent medical examiners. Therefore, the ALJ resolves this conflict in the ultimate employability opinion in favor of Katie Montoya's opinion and against Doris Shriver's opinion. Also, as found, the opinions of the ATP, Dr. Wunder, and Dr. Brodie, and Dr. Bernton, concerning Claimant's permanent medical restrictions are persuasive, credible and only disputed by Dr. Ryan.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits, beyond those admitted by the Respondents. §§ 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001).
As found, the Claimant has failed to sustain his burden with respect to permanent total disability and the reasonable necessity of continued narcotic prescriptions by Dr. Pickett. Insofar as Respondents impliedly argued, in their answer brief, that Dr. Pickett should be de-authorized as a treating physician, Respondents failed to establish that de-authorization of Dr. Pickett is warranted. As found, a respectable minority, Dr. Ryan, agrees that Dr. Pickett's treatment is appropriate, but the ALJ found the majority opinion in this regard more persuasive and credible.

c. An employee is permanently and totally disabled if he is unable to earn any wages in the same or other employment. § 8-40-201(16.5)(a) C.R.S. (2008). In determining whether a claimant is permanently and totally disabled, an ALJ may consider the claimant's "human factors," including the claimant's age, work history, general physical condition, education, and prior training and experience. *Weld County School District RE-12 v. Bymer,* 955 P.2d 556 (Colo. 1998); *Holly Nursing Care Center v.*

Industrial Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Joslin's Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The test for permanent total disability is whether employment exists that is reasonably available to the claimant under her particular circumstances. *Id.* This means whether employment is available in the competitive job market, which a claimant can perform on a reasonably sustainable basis. It does **not** mean that an injured worker can actually find a job that he can perform within his medical restrictions. As found, Claimant has worked as an executive chef (a high-level job in the restaurant business) and owner of a restaurant. According to Katie Montoya, Claimant has significant transferable skills. As found, even Montoya conceded that if she accepted Claimant's self imposed restrictions, it would then be her opinion that the Claimant could not work. Montoya, however, accepted the permanent medical restrictions of the ATPs and, based on these restrictions, was of the opinion that Claimant is employable. As found, the ALJ determined that Claimant is employable and **not** permanently and totally disabled.

d. Respondents are liable only for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. (2008); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994). It is a claimant's burden to prove that an industrial injury is the cause of a subsequent need for medical treatment, whether that treatment is in the form of maintenance medical care or care designed to cure or relieve the effects of the industrial injury. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The Claimant bears the burden of proof to establish the right to specific medical benefits, by a preponderance of the relevant evidence. *See Valley Tree Service v. Jimenez,* 787 P.2d 658 (Colo. App. 1990). Claimant's request for treatment with narcotic medications is no longer reasonable and necessary, based on the persuasive and credible testimony of Dr. Wunder and Dr. Bernton, which, as found, resolves the medical issue against treatment with narcotic medications.

e. The Claimant has sustained a serious permanent disfigurement to areas of Claimant's body normally exposed to public view. *See* § 8-42-108 C.R.S.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant's claim for permanent total disability benefits is hereby denied and dismissed. The Final Admission of Liability, dated September 5, 2008, is hereby affirmed, adopted, and incorporated by reference herein as if fully restated.

B. Claimant's request for continued treatment with narcotic medications by Manning Pickett, M.D., is hereby denied and dismissed as not reasonably necessary to treat the effects of the admitted injury. Respondents' implied request to de-authorize Dr. Pickett as an authorized treating physician is hereby denied and dismissed. Jeffrey A. Wunder, M.D., and Dr. Pickett remain the Claimant's authorized treating physicians for

the provision of treatment to maintain the Claimant at maximum medical improvement and to prevent a deterioration of his work-related condition.

C. Claimant is awarded disfigurement benefits in the amount of $500.00 for the three-inch surgical scar on the front, right side of the his neck, as described in the above Findings.

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

DATED this_____day of June 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-669-749

ISSUES

The sole issue determined herein is a penalty against respondents pursuant to section 8-43-304, C.R.S., for violation of OACRP.

FINDINGS OF FACT

1.Claimant suffered an admitted industrial injury on November 26, 2005.

2.On August 15, 2008, Mr. Irwin, the previous attorney for respondents, filed an Application for Hearing and Notice to Set ("application") on the issues of compensability and maximum medical improvement ("MMI").

3.Mr. Irwin filed the Application to obtain a ruling regarding the relatedness of various body parts and injuries to the admitted work injury.

4.On August 26, 2008 claimant's attorney, Mr. Mullens, filed a motion to strike respondents' application. On September 4, 2008, claimant filed her response to the application, adding issues of penalties and attorney fees against respondents.

5.On September 5, 2008, Mr. Irwin filed an objection to the motion. Claimant's motion was denied on September 9, 2008. A Notice of Hearing was issued on September 5 for a December 10, 2008, hearing.

6.Mr. Irwin and Mr. Mullens have one of the most dysfunctional, conflicted relationships ever manifested by two opposing attorneys. Mr. Irwin developed a policy of never orally communicating with Mr. Mullens.

7.At 2:43 p.m., October 17, 2008, Mr. Irwin sent a facsimile transmission of a letter to Mr. Mullens, which stated as follows:

> "Pursuant to the September 22, 2008 MMI and impairment report of Dr. Quick, respondents will be filing a Final Admission of Liability consistent therewith. Therefore, the issues endorsed by respondents in their current Application for Hearing are moot. It is respondents' intent to withdraw their Application for Hearing and to cancel the hearing scheduled for December 10, 2008. Please inform in writing by the close of business Tuesday, October 21, 2008, as to whether or not claimant has any objection to the withdrawal of respondents' Application for Hearing and the currently-scheduled hearing date."

8.Mr. Irwin wanted to withdraw the application and vacate the December 10 hearing because after respondents filed the application, the authorized treating physician, Dr. Quick, issued a report indicating that the claimant had reached MMI for all conditions and that Dr. Quick's report rendered the issues set forth in respondents' application moot.

9.Mr. Irwin gave Mr. Mullens a period of about five days to respond to proposed actions before taking action because that had been his custom and practice with Mr. Mullens on previous cases. Mr. Irwin believed that if Mr. Mullens were out of the office when the October 17, 2008 correspondence was received, another staff member from Mr. Mullens' office would review the correspondence and respond by October 21, 2008.

10.On October 21, 2008, the insurer filed a final admission of liability.

11.On October 22, 2008, respondents filed a Notice of Withdrawal of Application for Hearing and a Hearing Cancellation form. The cancellation form for the December 10 hearing contained a check in the box verifying that respondents had conferred and the opposing party agreed to cancel the hearing. Mr. Irwin instructed his legal assistant to prepare and file these documents.

12.Mr. Irwin canceled the hearing because Mr. Mullens had not contacted him to object to vacating the hearing, as he requested in his October 17, 2008 letter. Mr. Irwin believed Mr. Mullens would not object to canceling the hearing because previously Mr. Mullens had filed a motion seeking to strike Mr. Irwin's August 15, 2008 application.

13.After respondents filed the cancellation form, Mr. Mullens mailed a letter to Mr. Irwin, objecting to canceling the hearing unless respondents paid claimant's attorney fees and costs. Mr. Irwin received this letter on October 23, 2008.

14.On October 23, 2008, claimant filed her motion to retain the December 10, 2008 hearing date. On November 3, 2008, Mr. Irwin filed an objection to that motion. On November 4, 2008, claimant's motion was granted.

15.The hearing went forward as scheduled on December 10, 2008 and claimant proceeded on her endorsed issues against respondents. On February 19, 2009, Judge Walsh issued his order denying a penalty for alleged dictation of medical care, but awarding claimant attorney fees and costs for the application for hearing on an unripe issue of MMI.

16.Mr. Irwin filed a cancellation form without agreement of all parties or an order of a Judge. Mr. Irwin had no reasonable basis to believe that Mr. Mullens agreed to cancel the December 10, 2008, hearing. The failure of Mr. Mullens to respond within four calendar days after the faxed October 17 letter would reasonably satisfy Mr. Irwin's obligation to confer prior to filing a motion to vacate the December 10 hearing. It did not provide a reasonable basis for Mr. Irwin to believe that claimant agreed to cancel the hearing. Mr. Irwin's filing of the cancellation form with the check in the box to verify that all parties agreed was an unreasonable violation of OACRP 15.

17.OACRP 15 is not an order of the Director of the Division of Workers' Compensation or of an administrative law judge.

CONCLUSIONS OF LAW

1. Claimant seeks a penalty pursuant to section 8-43-304(1), C.R.S. due to respondents' alleged violation of OACRP 15. Section 8-43-304(1), C.R.S. provides in pertinent part for penalties of up to $500 per day if respondent "violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel . . ." "Order" is defined in section 8-40-201(15), C.R.S., "'Order' means and includes any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge." "Director" is defined as the Director of the Division of Workers' Compensation. Section 8-40-201(5), C.R.S. Violations of orders of an ALJ may be subject to penalties pursuant to section 8-43-304, C.R.S. *Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001).

2. Under section 8-43-304(1), claimant must first prove that the disputed conduct constituted a violation of statute, rule, or order. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995); *Villa de Wayne Gomez Demolition & Excavating,*

Inc., W.C. No. 4-236-951 (ICAO, January 7, 1997). Second, if the respondent committed a violation, penalties may be imposed only if the respondent's actions were not reasonable under an objective standard. *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals* Office, 114 P.3d 97 (Colo. App. 2005); *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003); *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). The standard is "an objective standard measured by the reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676, (Colo.App., 1995).

3. OACRP 15 provides:

> After a response to an application is filed, the application may not be withdrawn and the hearing may not be vacated except upon the agreement of all parties or upon the order of a judge. If the parties agree to the withdrawal of the application the applicant must promptly notify the OAC of the agreement to vacate the hearing. Notification shall be made by letter, facsimile or telephone.

4. As found, respondents committed an unreasonable violation of OACRP 15 by filing the cancellation form with the check in the box to verify that all parties agreed.

5. Nevertheless, OACRP 15 is not an "order" or "duty enjoined by the Director or Panel" within the meaning of section 8-43-304, C.R.S. The OACRP were promulgated by the Department of Personnel and Administration, outside the jurisdiction of the Division of Workers' Compensation, which is under the authority of the Department of Labor and Employment. Section 24-50.3-104(3)(g), C.R.S. (2008) gives the Executive Director of the Department of Personnel and Administration ("DPA Executive Director") exclusive authority to "promulgate procedural rules governing the conduct of hearings before the office of administrative courts." The OACRP were promulgated by the DPA Executive Director on October 26, 2005, and expressly repealed any rules promulgated by the Director of the Division of Workers' Compensation for conduct of OAC hearings. *See Statement of Statutory Authority, Basis and Purpose, Colorado Department of Personnel and Administration*, 1 CCR 104-3 (2005). The DPA Executive Director did not enact the OACRP under the title or authority of an Administrative Law Judge. The OACRP were not orders "arrived at" by an administrative law judge, the Director, or the panel pursuant to Section 8-40-201(15), C.R.S. (2008).

6. Claimant's argues that "Chief Judge Directive 21" by the Director of OAC changes the status of OACRP to those of the Director of the Division of Workers' Compensation. That policy is titled "Discovery: Division of Workers' Compensation" and provides:

> 1. Section 8-43-201, C.R.S., gives the Administrative Law Judges (ALJs) of the Office of Administrative Courts (OAC) original, concurrent

> jurisdiction with the Director of the Division of Workers' Compensation (DOWC) to deal with contested workers' compensation matters. When the OAC is dealing with contested workers' compensation matters, it stands in the shoes of the DOWC – it is the agency.
>
> 2. Ordinarily, discovery concerning non-parties is limited to depositions upon an order of an ALJ. Discovery concerning the agency itself (DOWC or OAC) is even more limited. Absent a compelling reason, discovery is limited to a public records request under the State Public Records Act, Section 24-72-201 et seq., C.R.S., or an order of an ALJ after a hearing on the issue of "compelling reason for discovery concerning the agency." ¨

This policy statement by the OAC Director and Chief Judge does not change the statutory provision that penalties may only be imposed for violation of an "order" of an ALJ or a "duty enjoined" by the Director of the Division of Workers' Compensation or the Panel, but does not include a rule adopted by the DPA Executive Director. Chief Judge Directive 21 appears to attempt to limit the availability of discovery from the Division of Workers' Compensation in claims between claimants and respondents. It does not address violations of rules of either division.

7. To the extent that claimant argues OAC must be able to enforce the OACRP, section 8-43-207(1), C.R.S., provides several enumerated powers to the ALJ, including issuing orders, controlling the entire course of the hearing, making evidentiary rulings, and disposing of procedural issues. Section 8-43-207(1)(e) and (p), C.R.S. (2008) and OACRP 2(B) apply the CRCP to workers' compensation hearings. As such, an ALJ is empowered to impose sanctions found in the CRCP where appropriate in workers' compensation hearings. Parties should not understand that they may flout OACRP with impunity. Violation of such rules may be remedied by simply reinstating an improperly canceled hearing, or imposition of far more severe sanctions, including exclusion of issues and evidence. Nevertheless, penalties under section 8-43-304, C.R.S., are not available as a remedy.

8. Penalties may not be imposed for violations not specifically enumerated in § 8-43-304(1). *Eller v. Boulder Valley School District*, W.C. No. 4-694-053, (Industrial Claim Appeals Office, April 10, 2009), held that penalties could not be imposed for violation of rules announced in supreme court opinions, although penalties could be imposed for the same conduct if proscribed by rules of the Director of the Division of Workers' Compensation. Consequently, respondents' violation of OACRP 15 is not subject to a penalty pursuant to section 8-43-304, C.R.S.

9. Claimant argued at hearing that respondents' assertion that C.R.S. §8-43-304 does not apply to violations of the OACRP is an affirmative defense that must be specifically pled. Claimant's argument is without merit because claimant bears the initial burden of establishing that the penalty she is seeking is permissible and legally authorized under the Workers' Compensation Act.

ORDER

It is therefore ordered that:

1. Claimant's claim for a penalty against respondents for violation of OACRP 15 is denied and dismissed.

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

DATED: June 11, 2009

Martin D. Stuber
Administrative Law Judge

SUPPLEMENTAL ORDER
WORKERS' COMPENSATION NO. WC 4-683-101

ISSUES

The issue for determination is Claimant's request for penalties to be assessed against Insurer.

FINDINGS OF FACT

1. Claimant filed the Application for Hearing and Notice to Set on September 9, 2008. Claimant requested penalties and alleged Insurer did not reimburse Claimant for her mileage expenses in a timely manner as required by Rule 16-11 (A)(2), C.R.S. Claimant requested that she be reimbursed for her mileage for authorized medical care. Claimant mailed to Insurer on June 5, 2008, two requests for mileage reimbursement. One request was for $19.71, and one was for $150.12. Payment was due on July 5, 2008, thirty days later. Insurer timely paid the request for $19.71. The adjustor testified that only one was paid initially because she did not realize that there were two different requests. Due to the difference in the amount, the adjustor should have known there were two different requests. Claimant's counsel wrote to Insurer on July 30, 2008, and advised of the mistake. There was further follow-up from Claimant's counsel's office. Insurer mailed the check for $150.12 on September 22, 2008.

2. Insurer paid temporary total disability (TTD) benefits late. A check was due on August 21, 2008, and was paid on August 27, 2008, six days late. A second check was due on October 30, 2008, and was paid on November 10, 2008, eleven days late. Insurer has a computer system, "Autopay," to issue TTD checks timely. These payments "fell off" Autopay, as payments do under Insurer's system from time to time. Insurer is aware that payments occasionally

fall off of Autopay, but has not fixed Autopay or had its adjustors look at every TTD claim every two weeks to assure that the payment has not "fallen off" the system. Insurer knows that some TTD payments will be late under this system. These two checks were a total of 17 days late.

3. Other TTD checks were also paid late. Claimant's counsel had directed that Claimant's checks be sent to counsel's office at 225 N. Fifth Street in Grand Junction. Counsel advised Insurer of a change of address on July 31, 2007, September 20, 2007, and January 2, 2008. A TTD check due November 15, 2007, was received one day late because it was sent to the previous address. A TTD check due December 27, 2007, was received six days late because it was sent to the previous address. A TTD check due January 10, 2008, was received four days late because it was sent to the wrong address. The adjustor had difficulty getting the computer system to recognize the address change because of the different ways the system treats addresses of law firms and individual attorneys. The adjustor knew or should have known of this quirk of the Insurer's computer system, and entered the address change in such a way that would have had the TTD checks sent to the correct address. The checks were received a total of eleven days late.

4. Rule 16-11(A)(3), WCRP, requires an insurer to reimburse a claimant for the cost of authorized services within thirty days after the receipt of the bill. Insurer has violated Rule 16-11(A)(3), WCRP. Insurer failed to take the action that a reasonable insurer would take to comply with that rule. The violations were timely cured. However, Claimant has established by clear and convincing evidence that Insurer knew or should have known that it was in violation of Rule 16-11(A)(3), WCRP.

5. Section 8-42-105(2)(a), C.R.S., and Rule 5-6(B), WCRP, requires Insurer to pay temporary disability benefits at least once every two weeks. Insurer has violated a Rule, an order, or the Workers' Compensation Act. Insurer failed to take the action that a reasonable insurer would take to comply with the Act, or the rules. The violations were timely cured. However, Insurer knew or should have known that it was in violation.

6. Claimant had no other source of income. Claimant had to get food from her mother and from the food bank. It was hard for Claimant to pay her bills. Claimant was assessed late charges. Claimant borrowed money from her mother. Christmas 2007 was stressful for Claimant. Claimant had to apply for public assistance. Claimant's car insurance was cancelled. The harm to Claimant from the late payments was significant - more than minor, but not catastrophic.

CONCLUSIONS OF LAW

1.Claimant filed the Application for Hearing and Notice to Set on September 9, 2008. Claimant requested penalties and alleged that Insurer did not reimburse Claimant for her mileage expenses in a timely manner as required by Rule 16-11(A)(2), WCRP. The reverence to subsection (A)(2) was an error. Claimant actually seeks a penalty for violation of Rule 16-11(A)(3), WCRP.

2.Requests for a penalty must be specifically plead. Section 8-43-304(4), C.R.S. The purpose of the section is to require notice to the insurer of the alleged conduct that must be corrected so as to afford an opportunity to cure. *Ficco v. Owens Brothers Concrete Company,* W.C. No. 4-546-848 (ICAO, May 30, 2007).

3.Claimant's application does allege a failure to timely reimburse for mileage expenses. Although the correct rule was cited, there was in incorrect cite to the subsection. Nonetheless, the application adequately informed Insurer of the basis upon which the penalty was sought and afforded an opportunity to cure. The penalty was specifically plead.

4.It has been found that Insurer has violated a rule, an order, or the Workers' Compensation Act. An insurer fails to obey an order if it fails to take the action that a reasonable insurer would take to comply with the order. The insurer's action is therefore "measured by an objective standard of reasonableness." *Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965, 967 (Colo.App. 2003). The reasonableness of an insurer's action depends on whether the action was predicated on a rational argument based in law or fact. *Jiminez v. Indus. Claim Appeals Office, supra,* 107 P.3d at 967. Insurer failed to take the action that a reasonable insurer would take to comply with the Act, the rules, or the Order.

5.If a violation is cured within twenty days of the Application for Hearing, the party seeking the penalty must show by clear and convincing evidence that the alleged violator know or reasonably should have known of the violation. Section 8-43-304(4), C.R.S. Insurer did cure the violations in a timely manner. Claimant has established by clear and convincing evidence that Insurer knew or should have known that it was in violation, and therefore a penalty will be assessed.

6.In assessing a penalty, it is proper to consider principles of "proportionality" derived from the due process and excessive fines clauses. *See Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424 (2001). Factors relevant to this determination include the degree of the violator's culpability, the relationship between the penalty and the harm caused to the "victim" of the violator's conduct, and sanctions imposed in other cases. *Cooper Industries v. Leatherman Tool Group, supra*; *McOmber v. Associated Business Products, supra*; *Strombitski v. Man Made Pizza, Inc.,* W. C. No. 4-403-661 (ICAO, 2005). Those factors were considered in setting the amounts of the

penalties. In particular, Claimant's had no other source of income, she had to get food from her mother and from the food bank, it was hard for her to pay her bills, she was assessed late charges, she borrowed money from her mother, Christmas 2007 was stressful, she had to apply for public assistance, and her car insurance was cancelled. The harm to Claimant was significant - more than minor, but not catastrophic.

7.Claimant requested that she be reimbursed for her mileage for authorized medical care. Claimant mailed the request to Insurer on June 5, 2008. Insurer mailed the check for $150.12 on September 22, 2008. For this violation, a penalty of $1.00 per day will be assessed from July 5, 2008, to July 30, 2008 (25 days, $25.00), and a penalty of $10.00 per day from July 30, 2008, to September 22, 2008 (54 days, $540.00), for a total penalty of $565.00.

8.Insurer paid TTD benefits late. A check was due on August 21, 2008, and was paid on August 27, 2008, 6 days late. A second check was due on October 30, 2008, and was paid on November 10, 2008, 11 days late. These two checks were a total of 17 days late. Insurer did cure the violations in a timely manner. Claimant has established by clear and convincing evidence that Insurer knew or should have known that it was in violation, and therefore a penalty will be assessed. A penalty will be assessed at the rate of $50.00 per day, for a total of $850.00.

9.Other TTD checks were also paid late when Insurer did not change the address the checks were sent to. The checks were received a total of 11 days late. Insurer did cure the violations in a timely manner. Claimant has established by clear and convincing evidence that Insurer knew or should have known that it was in violation, and therefore a penalty will be assessed. A penalty will be assessed at the rate of $25.00 per day for this violation, for a total penalty of $275.00.

10.The total penalty assessed is $1,690.00. $1,267.50 (75%) shall be paid to Claimant and $422.50 (25%) shall be paid to the Subsequent Injury Fund. Section 8-43-304(1), C.R.S.

ORDER

It is therefore ordered that Insurer shall pay a penalty of $1,267.50 to Claimant and $422.50 to the Subsequent Injury Fund. All matters not determined herein are reserved for future determination.

Dated: *June 19, 2009*

Bruce C. Friend, Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-694-053

ISSUES

Whether Claimant is entitled to an award of penalties under Section 8-43-304(1), C.R.S. for violation of WCRP 18-6(A) and/or Section 8-47-203(1), C.R.S. based upon representatives from Employer and Insurer meeting with the ATP on October 11, 2006 and January 8, 2007 without notification to Claimant and without Claimant's presence at the meetings.

FINDINGS OF FACT

Based upon the evidence presented at hearing and contained in the record, the ALJ finds as fact:

1. Claimant alleged that she sustained a compensable injury on June 28, 2006 arising out of and in the course of her employment with Employer. After reporting of the injury, Employer designated Arbor Occupational Medicine, Dr. James Rafferty, D.O. to treat Claimant for her alleged injuries. The parties do not dispute that Dr. Rafferty is an ATP.

2. Dr. Rafferty evaluated Claimant on June 28, 2006. Claimant complained of head, neck and low back pain from falling over backwards in a chair. Dr Rafferty's diagnosis was: "presumptive strains, cervical and thoracic spines".

3. Hearing was previously held on February 14, 2008 before ALJ Michael E. Harr. By Order dated June 20, 2008 ALJ Harr denied and dismissed Claimant's claim for compensation and benefits for the June 28, 2006 injury.

4. Paula Lowder is a claims adjuster for CCMSI, a third-party claims administrator for the self-insured Employer. Ms. Lowder was the adjuster assigned to Claimant's claim for the alleged June 28, 2006 injury. Ms. Lowder took over adjusting responsibilities for Claimant's claim in August 2006.

5. On October 11, 2006 Ms. Lowder attended a medical staffing with Dr. Rafferty and Jeanne Aguilar, the Director of Human Resources for Employer. At this staffing, Claimant's pending claim was discussed. Claimant was not notified in advance of this medical staffing with the ATP nor was Claimant in attendance at the staffing. Ms. Lowder attended this staffing at the request of Employer. The staffing consisted of the physician explaining the status of the claim, the type of treatment being given and the treatment plan. Ms. Lowder did not ask questions of the physician.

6. On January 8, 2007 Ms. Aguilar attended a medical staffing with Dr. Rafferty and a physician's assistant, Mary Ellen Brandon. At this staffing, Claimant's pending claim was again discussed. Claimant was not notified in advance of this medical staffing with the ATP nor was Claimant in attendance at the staffing.

7. The point of the staffing meetings with the ATP was so Employer could be current with the ATP's treatment and plan of treatment. The staffing meetings were initiated by the Employer.

8. Jeanne Aguilar prepared notes from the staffing meetings with the Dr. Rafferty. Ms. Aguilar's note of the October 11, 2006 staffing concerning Claimant's claim reflects: "consistent from medical perspective. Ruptured disc in neck. Recommend epidural steroid injection. Not good candidate for surgery. Prior accidents, but didn't report neck pain after surgeries. Probably would get a rating."

9. Ms. Aguilar's note from the January 8, 2007 staffing concerning Claimant's claim reflects: "C5 and 6 cervical disc herniation. Neck pain consistent. Two cervical epidurals."

10. Director Bob Summers issued an Order on November 18, 2008 concerning the claim for penalties for an alleged violation of WCRP 18-6(A) as claimed by Claimant in this case. Director Summers specifically found:

> "It should be noted that the intent of Rule 18-6 is to set a fee for reimbursement of the physician when there is a conference. The Rule is not intended to set standards for when a conference is required, and should not be read to prohibit an employer from ever talking to an authorized treating physician without the claimant being present. On the other hand, certain conversations between an employer and an authorized treating physician are clearly inappropriate."

11. The Director issued an Interpretive Bulletin dated May 22, 2002 addressing issues concerning the privacy of medical information in relation to the required exchange of medical reports in workers' compensation matters. In this interpretive Bulletin the Director commented upon the provisions of Section 8-47-203(1), C.R.S. The Director stated that Section 8-47-203(1), C.R.S. provides that filing a claim for workers' compensation is deemed to be a limited waiver of the doctor-patient privilege that applies to the injury or disease that is the subject of the case.

12. At hearing, Claimant presented the testimony of Dr. John Hughes, M.D. Dr. Hughes is a Board Certified occupational medicine physician. In his testimony, Dr. Hughes did not offer any opinion on whether a violation of the WCRP or of a statutory provision of the Workers' Compensation Act had occurred. Dr. Hughes opinions on the propriety of in-person meetings with an ATP were offered from Dr. Hughes perspective as a physician considering the guidelines from the American College of Occupational Medicine. Dr. Hughes testified that the phrase "limited waiver" found in Section

8-47-203(1), C.R.S. is ambiguous. Dr. Hughes acknowledged that differing opinions exist among occupational medicine physicians concerning the appropriateness of "staffings" with the physician outside of the presence of the patient.

13. At hearing, Claimant presented the testimony of Mack Babcock, Esq. Mr. Babcock is an attorney licensed in the State of Colorado since 2002. Mr. Babcock has represented both Claimants and Employers in workers' compensation claims. Mr. Babcock expressed the opinion that ex parte meetings with the ATP were not permissible based upon his interpretation of the Workers' Compensation Act, the WCRP, the CRCP, case law and Ethical opinions issued by the Colorado Supreme Court regulating the conduct of licensed attorneys. Mr. Babcock admitted that he had no direct authority for this opinion. Mr. Babcock admitted that nothing in the WC Act or the WCRP directly prohibited the type of staffing meetings as were held between Ms. Aguilar, Ms. Lowder and the ATP in this case. Mr. Babcock acknowledged that the provisions of Section 8-47-203(1) do not specifically prohibit such staffing meetings and that reasonable minds can differ on this issue. Mr. Babcock interprets the phrase "limited waiver" in Section 8-47-203(1), C.R.S. to limit the medical information being waived to the information on the medical conditions related to or at issue in a claim for Workers' Compensation benefits and not the form of communication with the ATP. Mr. Babcock stated that the specific language of Section 8-47-203(1) does not proscribe the method of communication with the ATP.

14. Mr. Babcock testified that the language of WCRP 18-6(A) is ambiguous. Specifically, Mr. Babcock testified that the term "all parties" found in WCRP 18-6(A) is not clear as to whether it refers to all legal parties to a claim for benefits or only to those persons (parties) who are going to attend a conference with an ATP or other physician. Mr. Babcock testified that in his opinion WCRP 18-6(A) does not apply to meetings with an ATP other than "conferences" where all parties are present. Mr. Babcock stated his opinion that the staffing meetings here were not "conferences" or "Samms conferences" (referring to the case of *Samms v. District Court,* 908 P.2d 520 (Colo. 1985). Mr. Babcock testified that no violation of WCRP 18-6(A) had occurred based upon the facts of this case. Mr. Babcock opined that Employer and Insurer here had an objectively reasonable basis to conduct staffing meetings with the ATP without notice to or attendance by Claimant in light of the Director's February 5, 2008 letter because such staffing meetings were not "conferences" as referenced in WCRP 18-6(A).

15. Claimant also presented the testimony of Barb Furutani, Esq. at hearing. Mr. Furutani is a licensed attorney in Colorado who represents claimants in workers' compensation matters. Mr. Furutani testified that the phrase "limited waiver" found in Section 8-47-203(1), C.R.S. is not defined in the statute. Ms. Furutani expressed her opinion that the "limited waiver" of Section 8-47-203(1) prohibits any ex parte communication with an ATP. Ms. Furutani relied upon the provisions of Section 13-90-107, C.R.S. and case law for this opinion. In Ms. Furutani's opinion the term "limited" in Section 8-47-203(1) means that a claimant must receive notice about any communication with an ATP because the statute says the waiver of the doctor-patient privilege is "limited".

16. In a letter dated January 30, 2008 Ms. Furutani requested clarification from the Director concerning the meaning of "conference" found in WCRP 18-6(A). In her letter, Mr. Furutani asserted that her discussions with treating physicians were not "conferences" under WCRP 18-6(A) to which the opposing party or attorney needed to receive advance notice of. The Director replied by letter dated February 5, 2008 stating that the rule was intended to apply when there is a conference, for example a *Samms* conference. The Director further stated that the rule was not intended to set standards or address communication with a doctor in general. By using the word "conference" it was meant to cover a situation when all parties are getting together with a doctor. The Director stated that when holding a "conference" (emphasis supplied) all parties should be present and there must be notice 24 hours in advance. The Director was addressing the provisions of WCRP 18-6(A) as they existed prior to amendment.

17. Respondents presented the testimony of Thomas L. Kanan, Esq. at hearing. Mr. Kanan is a licensed attorney in Colorado who represents employers and insurers in workers' compensation matters. Mr. Kanan testified that the term "conference" used in WCRP 18-6(A) is not clear and could mean different things to different people. Mr. Kanan interpreted WCRP 18-6(A) as applying only to *Samms* conferences. Mr. Kanan opined that no violation of WCRP 18-6(A) had occurred under the facts of this case. In Mr. Kanan's opinion, the staffing meetings held in this case fell under the provisions of WCRP 18-5 and not 18-6(A) because they were not "conferences" as used in WCRP 18-6(A).

18. Pamela Lowder, as the adjusted assigned to handle Claimant's claim for workers' compensation benefits for the alleged injury of June 26, 2006, was a person who was necessary to resolve the claim as contemplated in Section 8-47-203(1), C.R.S.

19. The ALJ further finds that Jeanne Aguilar, as the Director of Human Resources for Employer, was a person who was necessary to resolve the claim of Claimant for an alleged injury of June 26, 2006 as contemplated by Section 8-47-203 (1), C.R.S.

20. Based upon the conflicting opinions of the witnesses and the evidence presented, the ALJ finds that Employer and Insurer had an objectively reasonable basis to believe that conducting staffing meetings with the ATP on October 11, 2006 and January 8, 2007 without prior notice to Claimant and without Claimant's attendance were not violations of WCRP 18-6(A) or Section 8-47-203(1), C.R.S.

21. The ALJ finds that Respondents' did not violate Section 8-47-203(1), C.R.S. by conducting staffing meetings with the ATP without prior notice to Claimant and without Claimant's attendance on the dates at issue here.

22. The ALJ finds that the staffing meetings held on October 11, 2006 and January 8, 2007 were not "conferences" as contemplated by WCRP 18-6(A) because they were not situations when all parties were meeting with the doctor. The ALJ further finds that Employer and Insurer did not violate WCRP 18-6(A) under the facts of this case by failing to give Claimant 24 hours notice of the staffing meetings with the ATP.

CONCLUSIONS OF LAW

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

Ripeness of Claimant's claim for penalties under Section 8-47-203(1), C.R.S.:

24. Respondents argue that Claimant's January 28, 2009 Application for Hearing alleging a penalty for violation of Section 8-47-203(1), C.R.S. is either not ripe for adjudication or is barred by the doctrine of claim preclusion. Respondents argue that attorney's fees should be awarded against Claimant under Section 8-43-211(2)(d) for endorsing an unripe issue. The ALJ disagrees that either of these principles serve to preclude determination of Claimant's claim for penalties under Section 8-47-203(1), C.R.S. The ALJ does not agree that Claimant endorsed an unripe issue for hearing sufficient to support an award of fees and costs under Section 8-43-211(2)(d), C.R.S.

25. As Respondents correctly point out, both of Claimant's claim for penalties for violation of WCRP 18-6(A) and Section 8-47-203(1), C.R.S. arise out of the same factual basis. That basis being that on two occasions a representative of the Employer or the Insurer met with the ATP to discuss Claimant's claim without prior notification to Claimant and without Claimant being in attendance at the meeting. Respondent's reason that because the ALJ initially granted a Motion for Summary Judgment as to the alleged WCRP 18-6(A) violation, no real or immediate controversy existed regarding whether a violation of Section 8-47-203(1), C.R.S. existed. This reasoning fails because the ALJ in his order on the Motion for Summary Judgment specifically noted that he was not deciding whether a violation of Section 8-47-203(1), C.R.S. had occurred or whether the conduct at issue here fell within the provisions of Section 8-47-203(1). Thus, contrary to Respondents argument, there was a real and immediate controversy regarding whether Respondents' conduct would support imposition of a penalty for violation of Section 8-47-203(1). The simple fact that a determination was made that a set of facts did not support a penalty under the Rule does not mean that a real and immediate controversy did not exist about whether that same set of facts could support imposition of a penalty for violation of a statutory provision of the Act. Although they may be based upon common facts, the controversies are separate and distinct.

26. Respondents further argue that the doctrine of claim preclusion bars Claimant's claim for penalties for violation of Section 8-47-203(1). Respondents reason that this issue was one that could have been decided in connection with Claimant's claim for penalties for violation of WCRP 18-6(A) and since the claims for penalties are all tied to the same set of facts or conduct, the claim for penalties under Section 8-47-203(1) is barred by claim preclusion. The ALJ disagrees with Respondents argument and analysis. The first requirement for application of the doctrine of claim preclusion is finality of the judgment. *Holnam, Inc. v. Indus. Claim Appeals Office,* 159 P.3d 795, 798 (Colo. App. 2006). Here, Claimant appealed the Order granting summary judgment in Respondent's favor on the claim for penalties and the matter was remanded back to the ALJ for further proceedings. Thus, no final order or judgment has been entered on Claimant's claim for penalties and claim preclusion is not applicable under the facts of this case. *See*, *Rantz v. Kaufmanlegal,* 109 P.3d 132 (Colo. 2005) (judgment that is on appeal is not a final judgment for purpose of application of issue preclusion).

The statutory basis for imposition of penalties:

27. The imposition of penalties under Section 8-43-304(1) is a two-step process. First, it must be determined whether a party has violated the Act in some manner, failed to carry out a lawfully enjoined action, or violated an order. If a violation is found, it must then be determined if the violator acted reasonably. *See, Allison v. Indus. Claim Appeals Office,* 916 P.2d 623 (Colo. App. 1995).

28. Under Section 8-43-304(1) penalties may be imposed when a party (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the Director or Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or Panel. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001). Failure to comply with a procedural rule is a failure to obey an "order" within the meaning of Section 8-43-304(1). *Pioneers Hosp. v. Indus. Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005). Section 8-43-304 is penal in nature and is to be narrowly and strictly construed. *Support, Inc. v. Indus. Claim Appeals Office,* 968 P.2d 174 (Colo. App. 1998).

29. The reasonableness of a party's action depends upon whether the actions were predicated on a rational argument based on law or fact. *Diversified Veterans Corporate Center v. Hewuse,* 942 P.2d 1312 (Colo. App. 1997). The party's actions are measured by an objective standard of reasonableness. *Jimenez v. Indus. Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003). The standard is "an objective standard measured by the reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676, (Colo. App., 1995).

30. The party seeking imposition of a penalty bears the burden of proof. *Martin v. CobreTire/Bridgstone Firestone,* W.C. No. 4-453-804 (October 4, 2004). In this

case, Claimant seeks imposition of penalties against Respondents and bears the burden of proof by a preponderance of the evidence.

Application of Section 8-47-203(1), C.R.S. to the facts:

31. Section 8-47-203 "Access to files, records, and orders" provides at subsection (1):

> "Notwithstanding the provisions of section 8-47-202, the filing of a claim for compensation is deemed to be a limited waiver of the doctor-patient privilege to persons who are necessary to resolve the claim. . ."

32. As found, both Ms. Aguilar and Ms. Lowder were persons necessary to resolve Claimant's claim for benefits. By filing a claim for compensation, Claimant made a limited waiver of her doctor-patient privilege to Ms. Aguilar and Ms. Lowder. Thus, within the limitations of that waiver, Ms. Aguilar and Ms. Lowder were permitted to obtain information from physicians such as the ATP here who have examined and provided Claimant with medical treatment in connection with her claim for compensation.

33. At issue here is the meaning and scope of the term "limited waiver" found in Section 8-47-203(1) and whether that term encompasses and applies to prohibit the conduct at issue in this case and therefore give rise to a claim of penalties for violation of Section 8-47-203(1). The term "limited waiver" as found in Section 8-47-203(1) is not defined within that statute. Nor is the term "limited waiver" defined in the general definitions section of the Act, Section 8-40-201, C.R.S. The term "limited waiver" is not used elsewhere within the Act. The ALJ has not found any case law interpreting that statutory section and term. In attempting to interpret the meaning of the term "limited waiver" and apply it to the facts of this case, the ALJ looks for guidance to the case law that has dealt with interpretation and application of the doctor-patient privilege. Such an analysis addresses Claimant's argument that the language of Section 8-47-203(1) imports into the Act the doctor-patient privilege codified at Section 13-90-107(1)(d), C.R.S.

34. The physician-patient privilege in Section 13-90-107(1)(d) is impliedly waived when a patient-litigant, Claimant here, places her physical condition at issue as the basis of a legal claim or affirmative defense. *Weil v. Dillon Companies, Inc.,* 109 P. 3d 127 (Colo. 2005); *Sheid v. Hewlett Packard,* 826 P.2d 396 (Colo. App. 1991). The language of Section 8-47-203(1) recognizes this principle by providing that the filing of a claim for compensation is a waiver of the doctor-patient privilege. The implied waiver is limited to records, information or communications relating to the specific claims alleged and is not a waiver of the entirety of a patient's medical records. *Alcon v. Spicer,* 113 P. 3d 736, 739–741, (Colo. 2005). The privilege is not waived with respect to communications unrelated to the claim or defense. *Alcon,* supra at 739. The language of Section 8-47-203(1) recognizes this principle by providing that the waiver of the doctor-patient privilege resulting from the filing of a claim for compensation is "limited".

35. The inquiry then is whether the limited nature of the waiver of the doctor-patient privilege in Section 8-47-203(1) extends to prohibit the type of contact with the ATP at issue in this case. As Claimant notes, nothing in the language of Section 8-47-203(1) addresses oral communication with a physician. It is well established that missing or non-existent provisions may not be read into the Act. *Krause v. Artcraft Sign Co.,* 710 P.2d 480 (Colo. 1985). Therefore, the literal language of Section 8-47-203(1) does not address the type of contact with the ATP at issue in this case and would not provide Claimant with a basis for a claim for penalties under Section 8-43-304(1) based upon the facts presented. Nor can such a prohibition be read into the Act to provide Claimant with a basis for her claim for penalties under Section 8-43-304(1).

36. Claimant argues that the limited nature of the waiver under Section 8-47-203(1) encompasses a prohibition against the type of contact with an ATP at issue here. Claimant relies upon the holdings in *Reutter v. Weber,* 179 P.3d 977 (Colo. 2007) and *Samms v. District Court,* 908 P.2d 520 (Colo. 1995) in support of her argument. The ALJ is not persuaded that these cases support Claimant's argument under the facts of this case.

37. In *Reutter* the Colorado Supreme Count addressed the issue of whether a patient was entitled to attend interviews of medical providers where the providers did not possess any residually privileged information. The Court specifically rejected the argument that the holding in *Samms* entitled the patient to notice and an opportunity to attend such interviews. *Reutter* at 982. The Court held that *Samms* does not create a blanket rule that entitles a plaintiff (claimant, in the Workers' Compensation context) to attend any interview with a medical provider regardless of the circumstances. *Reutter* at 980. The Court in *Reutter* analyzed the patient's entitlement to notice and an opportunity to attend an interview with a physician by looking at whether the physician was likely to have residually privileged information that would be subject to protection under the physician-patient privilege. In *Reutter,* because there was no evidence that the physicians sought to be interviewed possessed any residually privileged information, the Court held that plaintiff was not entitled to attend the interviews. Here, there is no credible or persuasive evidence that the ATP possessed any residually privileged information. Based upon the analysis by the Court in *Reutter* the ALJ concludes that Claimant was not entitled to notice and an opportunity to attend the medical staffings with the ATP at issue here. To conclude that Claimant was entitled to notice of the meetings when she was not entitled to attend would elevate form over substance. Respondents therefore did not violate or exceed the limited waiver provisions of Section 8-47-203(1) under the facts of this case. The ALJ does not find persuasive Claimant's argument that the limited waiver in Section 8-47-203(1) applies only to the release of medical reports or records. Such a result would read non-existent language into the Act and is inconsistent with the analysis of the privilege by the *Reutter* Court. Claimant has failed in her burden to prove entitlement to penalties for a violation of Section 8-47-203 (1) under the facts of this case.

Application of WCRP 18-6(A) to the facts:

38. The language of WCRP 18-6(A) in effect at the time of the conduct at issue in this case provided:

> "Telephone or face-to-face conferences shall be related to the injured worker's treatment. All parties shall receive actual notification from the requesting party in advance and within 24 hours of scheduling."

39. The ALJ previously entered summary judgment against Claimant on her claim that the meetings with the ATP violated WCRP 18-6(A). In their Order of Remand the Panel remanded the matter to the ALJ for further proceedings to determine Claimant's entitlement to penalties based upon Employer's failure to comply with the applicable version of WCRP 18-6(A). Contrary to Claimant's argument, the Panel did not determine that a violation of WCRP 18-6(A) occurred but rather only that the ALJ erred in concluding as a matter of law that WCRP 18-6(A) did not apply to provide a basis for a claim for penalties.

40. In his February 5, 2008 letter responding to an inquiry from Ms. Furutani the Director attempted to clarify the meaning of the term "conferences" as found in the version of WCRP 18-6(A) applicable in this case. There, the Director stated that the term "conferences" meant a situation when all parties were getting together with a doctor. The effect of the Director's February 5, 2008 letter addressing this issue was not considered by the ALJ in the summary judgment proceeding nor by the Panel in its Order of Remand. Because witnesses have testified that WCRP 18-6(A) contains ambiguous terms, specifically the terms "conferences" and "All parties" the ALJ addresses the interpretation of these terms as applied to the facts of this case in order to make a determination as to whether WCRP 18-6(A) provides Claimant with a basis for penalties under the facts.

41. As found above, there is a clear divergence of opinion on the meaning of the term "conferences". The Director's construction and interpretation of the Rules is generally entitled to great weight and should not disturbed unless plainly erroneous or inconsistent with the rule or underlying statute. *Timberline Sawmill & Lumber, Inc. v. Indus. Claim Appeals Office,* 624 P.2d 367 (Colo. App. 1981). Giving deference to the Director's construction and interpretation of the term "conferences" in the applicable version of WCRP 18-6(A), the ALJ concludes that this term applies to situations when all of the persons (parties) involved in a claim for compensation seek or plan to meet with a physician. Further, the Director's letter interpreting WCRP 18-6(A) applies the requirement of 24 hours notice to "all parties" to the situation when a "conference" is being held. Applying that construction or interpretation to the facts of this case, the staffing meetings here held solely between representatives from Employer or Insurer and the ATP were not "conferences" under WCRP 18-6(A) and Claimant was not entitled to 24 hours notice of the meetings. Such an interpretation and application to the facts of this case is consistent with the expert opinion of Mr. Babcock who was called as a witness by Claimant in support of her claim for penalties for violation of WCRP 18-6 (A). Crediting the Director's interpretation and the opinion of Mr. Babcock, the ALJ

concludes that Claimant failed to meet her burden of proof to show a violation of WCRP 18-6(A) under the facts of this case.

The existence of an 'objectively reasonable' basis::

42. Although the ALJ concludes that Claimant has failed to prove violations of Section 8-47-203(1) or WCRP 18-6(A) under the facts of this case, the ALJ feels it necessary to address the objective reasonableness of Respondents' conduct that is at issue here. As found above, both the medical and legal communities acknowledge a difference of opinions on the issues presented in this case and the application of Section 8-47-203(1) and WCRP 18-6(A) to the facts. Both hold strong and reasoned beliefs on both sides of the issues. In light of such a divergence of opinions, the ALJ concludes that it cannot be said that Respondents were objectively unreasonable in their actions to meet with the ATP to conduct medical staffing of Claimant's case without prior notice to the Claimant of the meeting and without Claimant's attendance at the meeting. In reaching this and the above conclusions, the ALJ should not be understood as saying that ex-parte meetings or communications with a physician are per se reasonable or permitted. Whether such meetings or communications are reasonable or permitted may well depend upon an analysis such as used by the Court in *Reutter* applied to the individual facts of each case.

ORDER

It is therefore ordered that:

1. Claimant's claim for penalties under Section 8-43-304(1) for a violation of Section 8-47-203(1) is denied and dismissed.

2. Claimant's claim for penalties under Section 8-43-304(1) for a violation of WCRP 18-6(A) is denied and dismissed.

3. Respondents' claim for attorney fees and costs under Section 8-43-211(2)(d) is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED: June 19, 2009

Ted A. Krumreich
Administrative Law Judge

ISSUES

➢The issue for hearing was Claimant's petition to reopen his workers' compensation claim and permanent partial disability benefits, if applicable.

➢The parties stipulated that Dr. Lopez of LaPlata Family Medicine is and was Level II certified when he provided care to and evaluated claimant.

➢The parties stipulated that Dr. Leslie S. Harrington is and was Level II certified when she evaluated claimant.

➢The parties stipulated that Dr. Gordon K. Lindberg is not and was not Level II certified when he provided care and evaluated claimant.

FINDINGS OF FACT

1. Claimant is a 46 year old employee of Respondent-employer who suffered an admitted injury on August 21, 2006 when he was working with liquid propane and a flash fire occurred. Claimant suffered injuries to his bilateral forearms, wrists, hands, neck and face.

2. Claimant initially was evaluated at Mercy Regional Medical Center on the date of the injury. Based upon the extensive burns Claimant received, it was determined that Claimant would require specialty care. Claimant was transferred to University of Colorado Hospital on the date of the injury and was treated by Dr. Lindberg. Claimant underwent debridement of the burns with curettage under generalized anesthesia. Claimant underwent a total of three debridement procedures before being discharged by Dr. Lindberg in good condition on September 1, 2006. Claimant was instructed to follow up with Dr. Lindberg once every week upon discharge.

3. Claimant returned to University of Colorado Hospital on September 7, 2006 for re-examination by Ms. Henderson, a nurse practitioner. Claimant was instructed on moisturizing his wounds, advised on sun protection and had his prescriptions refilled. Claimant returned to Dr. Lindberg on September 14, 2006. Dr. Lindberg noted that Claimant's neck was essentially healed and no further intervention was warranted. Dr. Lindberg noted that Claimant's bilateral upper extremities were status post transite placement with the transite having fallen off, indicating that the healing process is ongoing. Claimant did not have any signs of infection and was instructed to continue his moisturizing cream and physical therapy exercises.

4. Claimant was re-evaluated by Ms. Henderson on September 28, 2006. Claimant denied any ongoing pain. Ms. Henderson noted that Claimant's bilateral upper extremities were completely healed with hyperemic-colored skin. Ms. Henderson reported that Claimant had good range of motion of his wrists, fingers and elbows, and Claimant's face was completely healed with normal-appearing colored skin. Claimant was instructed to continue to follow up with University of Colorado Hospital in one month.

5. Claimant was referred for care in Durango with Dr. Lopez on October 12, 2006. Claimant reported to Dr. Lopez that he was not currently experiencing any pain. Dr. Lopez referred the Claimant to San Juan Hand Therapy for work on improving his range of motion and released Claimant to return to modified duty. Claimant returned to Dr. Lopez on October 23, 2006 for re-examination. Claimant reported he went to a couple of sessions of physical therapy and the therapist thought he had full range of motion and did not need further therapy. Dr. Lopez noted that the erythema was fading and sensation was normal with full range of motion. Claimant was to follow up with Dr. Lopez in two weeks.

6. Claimant returned to University of Colorado Hospital on November 2, 2006 with reports of no itching or pain and good range of motion with all fingers and both hands. Claimant was instructed to continue with the lotion and scar massage and to return to the clinic in 1 to 2 months for follow up. Claimant was next evaluated by Dr. Lopez on November 6, 2006 and reported being released from physical therapy with good range of motion. Dr. Lopez noted that there was no need for further therapy and placed Claimant at maximum medical improvement ("MMI") with no impairment.

7. Respondents filed a Final Admission of Liability ("FAL") on November 20, 2006. Claimant did not object to the FAL and his claim was closed as a matter of law pursuant to Section 8-43-203(2)(b)(II). The FAL specifically denied any liability for medical benefits after MMI.

8. Claimant returned to University of Colorado Hospital on September 6, 2007 for his one-year follow up with Dr. Witt. Claimant complained to Dr. Witt of symptoms including mild itching and prickling sensation to his right extremity. Dr. Witt noted that Claimant's burns had healed with hypopigmented skin with no sign of erythema, edema or induration.

9. Claimant was referred to Dr. Harrington on March 20, 2008. Dr. Harrington opined that Claimant had residual dysethesias in both upper extremities as well as changes in activities of daily living as a result of the burns. Dr. Harrington noted that Claimant's dysthesias would likely continue for several years. Dr. Harrington provided Claimant with an impairment rating of 11% whole person for his burns and agreed that Claimant was at MMI.

10. Dr. Harrington's report was forwarded to Dr. Lopez by Claimant on June 16, 2008. Dr. Lopez opined that Claimant's condition had not worsened since

being placed at MMI because the range of motion and nerve symptoms were present in 2006, but expected to resolve with the passage of time. Dr. Lopez otherwise agree with Dr. Harrington's report. The ALJ finds the response by Dr. Lopez compelling insofar as Dr. Lopez acknowledges that Claimant could have received an impairment rating as of the date he was placed at MMI on November 6, 2006, but his symptoms were thought to be ones that would resolve over time. Insofar as the symptoms did not resolve over time, this constitutes a mistake on the part of Dr. Lopez.

11. Claimant testified at hearing that he has ongoing complaints including prickling sensation in extreme temperature changes and sensitivity to cold and heat. Claimant also complained of chemical hypersensitivity on his arms. Claimant testified that these sensitivities are different than before the burn injury. The ALJ finds Claimant's testimony credible.

CONCLUSIONS OF LAW

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

1. Section 8-43-303(1), C.R.S., 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 ….

2. The ALJ may grant a reopening of a closed claim based on any mistake of fact that calls into question the propriety of a prior order, even in a case where benefits were properly denied on the then existing evidence. *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). The ALJ must determine whether a mistake occurred and whether it was the type of mistake that justifies reopening. *Travelers Insurance Co. v. Industrial Commission*, 646 P.2d 399 (Colo. App. 1981). When determining whether a mistake justifies reopening, the ALJ may consider whether the mistake could have been avoided through the exercise of available remedies and due diligence, including the timely presentation of evidence. *Garcia v. Qualtek Manufacturing*, W.C. No. 4-391-294 (ICAO August 13, 2004). *Standard Metals Corp. v. Gallegos* thus recognizes the ALJ may properly consider whether newly discovered evidence was available at the time of the original hearing and could have been presented by the exercise of due diligence. *Huckabee v. Colorado Memory Systems*, W.C. No. 4-151-013 (ICAO February 25, 1994).

3. The ALJ finds that Claimant has met his burden of proof by a preponderance of the evidence that his claim should be reopened based upon a mistake. The ALJ finds the report from Dr. Lopez credible that Claimant's range of motion was impaired as of November 6, 2006 and was expected to improve. The fact

that the range of motion did not improve represents a mistake that justifies reopening of his claim.

4. Claimant argues that Respondents are compelled to admit for the 11% whole person impairment rating based upon their failure to request a Division Independent Medical Examination ("DIME") within 30 days of receiving the impairment rating from Dr. Harrington. The ALJ disagrees.

5. At the time Respondents received the impairment rating from Dr. Harrington, Claimant's case was closed as a matter of law. Claimant has cited to no authority, and the court is unaware of any case that would require Respondents to request a DIME on a case that is closed.

ORDER

It is therefore ordered that:

1. The Claimant's petition to reopen is granted.

All matters not determined herein are reserved for future determination.

DATED: June 18, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-707-838

ISSUES

- Did Respondents overcome the Division IME opinion regarding permanent impairment by clear and convincing evidence?

- Did Claimant prove by a preponderance of the evidence that he is entitled to maintenance medical treatment?

- The parties stipulated at the hearing that Claimant's average weekly wage is $958.07 as of the date of MMI.

FINDINGS OF FACT

1. Claimant was employed as a laborer working on the striping crew for the employer. In October, 2006, employer placed ten (10) six (6) gallon buckets of highway paint inside the maintenance shop in Durango, Colorado. The lids to the buckets of paint were opened to allow the paint to dry for disposal purposes.

2. In November, 2006, Claimant began developing symptoms including blurred vision, chest pain, and headaches. Claimant was evaluated in the emergency room on December 6, 2006 with symptoms including sore throat, headache, and chest pain. Claimant was diagnosed with chemical exposure and instructed to keep out of the area with the chemicals and only work in a well ventilated area.

3. Claimant was referred for medical treatment with Stephen Johnson, M.D. Claimant was first examined on December 7, 2006 with reports of headaches for approximately two weeks with a more recent onset of light-headedness, tightness in his chest, visual blurring, and a sore throat. Dr. Johnson diagnosed Claimant with apparent toxic fume exposure that he determined was most likely from the open paint cans. Claimant was evaluated by Dr. Jernigan on December 8, 2006 with complaints of blurry vision. Claimant returned to Dr. Jernigan on December 11, 2006 with complaints of significant headache and shortness of breath in addition to blurry vision.

4. Claimant was eventually taken off of work by Dr. Johnson on January 2, 2007 after Claimant reported a significant worsening of his headaches. Claimant was re-evaluated by Dr. Johnson on January 9, 2007 and reported continued problems with severe headaches and reports of problems with his memory. Because of Claimant's continued problems with his vision, Dr. Jernigan prescribed Claimant glasses. Claimant was eventually released to return to work without restrictions on February 14, 2007. After another onset of worsening headaches, Dr. Johnson took Claimant off of work again on March 21, 2007.

5. Claimant was referred for an IME with Dr. J. Tashof Benton on January 29, 2007. Dr. Bernton, in addition to his evaluation, also reviewed the indoor air assessment conducted by employer on January 27, 2007 to determine the levels of volatile organic compounds ("VOCs") present in the facility. Claimant reported symptoms to Dr. Bernton of blurry vision, decreased vision, headaches, some numbness of his right thumb and forefinger, sore throat and chest pain. Dr. Bernton noted that according to the indoor air assessment, all of the compounds that were found to be present in the facility were several orders of magnitude below the permissible exposure levels established by OSHA. After completing his examination of Claimant, Dr. Bernton opined that Claimant's symptoms, including his visual symptoms and reported headaches, were not related to toxic exposure or Legionnaire's disease, or any other potential exposure he had.

6. On April 11, 2007, Claimant returned to Dr. Johnson. After reviewing Dr. Bernton's medical report, Dr. Johnson advised Claimant that there was no further

treatment indicated and placed Claimant at MMI with no recommendations for maintenance care.

7. Claimant underwent a Division-sponsored Independent Medical Examination ("DIME") on August 17, 2007 with Dr. Edwin Healy. Dr. Healy opined that Claimant was not at MMI and recommended Claimant be evaluated by a neurologist or headache specialist and undergo a brain MRI. Dr. Healy provided Claimant with a PPD rating of 5% whole person for Episodic Neurological Disorders of slight severity.

8. Claimant returned to Dr. Johnson for additional treatment and was eventually placed at MMI by Dr. Johnson on June 19, 2008 with a 15% whole person impairment rating. Dr. Johnson also recommended periodic follow up visits. At the time Claimant was placed at MMI by Dr. Johnson, Claimant reported his headaches were reasonably under control. Claimant returned to Dr. Healey on October 29, 2008 for the follow up DIME. Dr. Healy agreed that Claimant was at MMI and concurred with Dr. Johnson's impairment rating of 15% whole person for episodic neurological disorder of slight severity. Dr. Healey noted that Claimant continued to experience mild memory problems and disequilibrium problems.

9. Respondents had the DIME report from Dr. Healy reviewed by Dr. Bernton. Dr. Bernton disagreed with Dr. Healy's impairment rating and opined in his deposition that the burden of relating Claimant's symptoms to his chemical exposure cannot be met in this case. Dr. Bernton took issue with Dr. Healy's impairment rating insofar as Dr. Healy does not provide a diagnosis on which a work-related impairment can be based.

10. Respondents do not appear to dispute that Claimant has suffered a compensable workers' compensation claim as a result of his exposure to chemicals at work, as compensability is not at issue in this claim. Respondents do argue, however, that Claimant's subjective symptoms cannot be caused by the chemical exposure Claimant experienced.

11. The ALJ finds that the opinion of Dr. Healey regarding the extent of Claimant's permanent impairment is supported by the report of Dr. Johnson. The ALJ finds that Respondents have not shown that it is highly probable and free from substantial doubt that Dr. Healy's impairment rating is incorrect. The ALJ finds that the report and testimony from Dr. Bernton demonstrate a difference of medical opinion as to whether Claimant's symptoms could be caused by the chemical exposure in this case.

12. The ALJ finds that due to Claimant's ongoing subjective complaints, and the recommendation from Dr. Johnson that Claimant have periodic follow up visits, a general order of maintenance medical benefits is appropriate in this case. Respondents, obviously, will retain the right to dispute any specific maintenance medical treatment in the future.

CONCLUSIONS OF LAW

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

1. Sections 8-42-107(8)(b)(III) and (c), C.R.S., provide that the determination of a DIME physician selected through the Division of Workers' Compensation 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).

2. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. Industrial Claim Appeals Office*, *supra.*

3. As found, Respondents have failed to overcome the opinion of Dr. Healy that the claimant suffers from a 15% whole person impairment by clear and convincing evidence.

4. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

5. As found, Claimant has proven by a preponderance of the evidence that he is entitled to future maintenance treatment.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant permanent partial disability benefits of 15% whole person based upon an AWW of $958.07

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

All matters not determined herein are reserved for future determination.

DATED: June 18, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-713-200

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 4, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 6/4/09, Courtroom 3, beginning at 8:31 AM, and ending at 9:54 AM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel, giving Respondents 3 working days after receipt thereof within which to file objections. The proposed decision was filed on June 11, 2009. No timely objections were filed. After a consideration of the proposal, the ALJ has modified it and, as modified, hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern medical benefits; specifically, whether the use of Lyrica as prescribed by the Claimant's authorized treating physician (ATP), Jennifer Loucks, M.D., is causally related to the work-related

osteoarthritis and reasonably necessary to cure and relieve the effects of the Claimant's compensable on-the-job injury.

FINDINGS OF FACT

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

1. Claimant suffered a compensable occupational disease while working for the Employer. This was determined by the previously issued order of ALJ Peter J. Cannici, dated July 27, 2009. ALJ Cannici determined that the Claimant's osteoarthritis was an occupational disease caused by his work activities. The Claimant also has rheumatoid arthritis that is not part of his work-related injury.

2. The Claimant has received treatment for his arthritis from Dr. Loucks, who is a rheumatologist. The Claimant has been treating with Dr. Loucks for several years.

3. Dr. Loucks prescribed the drug, Lyrica, for treatment of the Claimant's pain. In her May 13, 2009 report, Dr Loucks stated that the Claimant responded well to the Lyrica in reducing his pain caused by his **osteoarthritis**. Dr. Loucks also stated that the Claimant's use of Lyrica allowed her to avoid prescribing narcotic pain medication, thus, helping to prevent dependence and addiction that chronic pain sufferers can develop.

4. According to the Claimant, since taking Lyrica he has experienced a reduction in pain in his hands, knees and feet. The Claimant stopped taking Lyrica for about two months early in 2009 and the pain returned. When he went back on Lyrica the pain was again reduced.

5. Annu Ramaswamy, M.D., an occupational physician, performed an independent medical examination (IME) of the Claimant on behalf of the Respondents. Dr. Ramaswamy testified and stated in his medical reports that Lyrica is primarily used for the treatment of paresthesias, which is numbness and tingling. He stated that the FDA (Federal Drug Administration) had not approved Lyrica for treatment of osteoarthritis. He conceded that osteoarthritis can be a **painful** condition. He also stated that a study showed Lyrica to be effective in a small percentage of osteoarthritis sufferers that was not significant enough to justify prescribing Lyrica for treatment of the condition. In the face of Claimant's pain relief from the use of Lyrica, Dr. Ramaswamy did not provide a persuasive explanation of why the small percentage of osteoarthritis sufferers was not **significant enough** to justify prescribing Lyrica.

6. On cross-examination, Dr. Ramaswamy stated that any drug can be used for treatment of a condition even though it has not been approved by the FDA for that

specific use. Implicit in his opinion is that the drug must not be specifically prohibited. There is no indication that the use of Lyrica for the treatment of pain from osteoarthritis is prohibited. Dr. Ramaswamy also stated that Lyrica was safer than narcotic medication.

7. The ALJ finds that the Claimant receives relief from his work-related osteoarthritis symptoms through the use of Lyrica, as prescribed by Dr. Loucks. While studies may show that it is not effective for many osteoarthritis sufferers, the Claimant has testified credibly that it is effective for him. Lyrica is a reasonable and safer alternative than the use of potentially dangerous and addictive narcotics.

8. ALJ Cannici previously found that the Claimant's osteoarthritis was caused by his work with Employer. In his Order, ALJ Cannici ordered the payment of reasonably necessary medical benefits and temporary total disability benefits. Consequently, ALJ Cannici entered an appealable order on July 27, 2007, and no timely appeal thereof was filed. Nonetheless, Respondents retain the right to challenge the reasonable necessity of medical treatment at any time.

9. The Claimant has been actively receiving treatment from Dr. Loucks, who is a rheumatologist. Dr. Ramaswamy is an internist and an occupational physician. The specialty of Dr. Loucks is more closely focused on the treatment of osteoarthritis than that of Dr. Ramaswamy, and Dr. Loucks' area of expertise is specifically more relevant to the treatment of Claimant's work-related osteoarthritis. Also, the fact that she is the ATP who has been treating the Claimant for a long period of time, as opposed to a one-time IME engaged by the insurance carrier for a causality opinion, offers one more indicator of enhanced weight and credibility to Dr. Loucks' opinion. Therefore Dr. Loucks' opinion carries more weight, and is more credible and persuasive than Dr. Ramaswamy's opinion, when addressing the treatment of osteoarthritis.

10. The ALJ finds the Claimant's testimony that Lyrica has helped control his pain credible and persuasive. The ALJ can find **no** other motive on Claimant's part than to treat his osteoarthritis. Indeed, the Claimant stated that he wanted to avoid narcotics and Lyrica helps him to do that. This enhances the Claimant's credibility.

CONCLUSIONS OF LAW

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

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197

(Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, Dr. Loucks, the ATP, has more specific expertise in the treatment of osteoarthritis than one-time IME Dr. Ramaswamy (an internist and occupational physician) because Dr. Loucks is a rheumatologist who has treated the Claimant for a long period of time. Therefore, her opinion that Lyrica provides Claimant with relief from his work-related **osteoarthritis** is more credible and persuasive than Dr. Ramaswamy's opinions to the contrary. As Claimant's ATP, Dr. Loucks' opinions are entitled to more weight than Dr. Ramaswamy's opinions, which were based on a one-time examination and a review of some medical literature. Also, as found, Claimant's testimony concerning the relief Lyrica offered him was persuasive and credible.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. § 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has sustained his burden of proof with respect to the causal relatedness and reasonable necessity of his Lyrica prescription.

c. The Workers Compensation Act, §8-42-101, C.R.S. (2008), provides that the employer shall provide medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury." To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's Lyrica prescription is causally related to his compensable osteoarthritis. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. (2008). *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, Claimant's Lyrica prescription is reasonably necessary to cure and relieve the effects of his compensable

osteoarthritis. Lyrica is a better alternative than narcotic pain relievers and the Claimant would prefer to use Lyrica rather than addictive narcotics.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay for the prescription medication Lyrica as prescribed by Dr. Loucks, subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this_____day of June 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-714-186

ISSUES

- Where the respondents file a final admission of liability, and the claimant contests the final admission by requesting a Division Independent Medical Examination, may the respondents then withdraw the final admission and force the claimant to prove a compensable occupational disease by a preponderance of the evidence?
- If the respondents may withdraw the final admission, did the claimant prove by a preponderance of the evidence that he sustained a compensable occupational disease proximately caused by the hazards of his employment as a bus driver?
- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of ongoing medical benefits after maximum medical improvement?

FINDINGS OF FACT

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

The claimant alleges that he sustained a compensable occupational disease that affects his cervical spine.

The employer hired the claimant as a school bus driver in November 2001. For ten years prior to accepting the school bus job the claimant owned his own business as

a heavy equipment operator. The claimant drove a front-end loader and a large truck used to transport paving materials. The claimant admitted that this work required repetitive neck motion, particularly when he was involved in paving jobs. The claimant was required to use rearview mirrors and look over his shoulder when backing up. The claimant also admitted that he experienced considerable jarring, particularly when he was working off-road. The claimant worked approximately 50 hours per week during paving season.

The claimant testified that he had some occasional back and neck symptoms while he was working as a heavy equipment operator.

The claimant testified that his job as a school bus driver requires him to be on duty for 6 hours per day with some overtime. Overtime is most frequent in the spring when children go on field trips and other expeditions. The claimant drives a regular route that requires him to pick up students and deliver them to school in the morning and to take them home in the afternoon. The claimant is off duty between the morning and afternoon shifts.

The claimant testified that operating the school bus requires him to engage in neck motion approximately every 5 seconds that he is driving. The claimant stated that he checks four rearview mirrors mounted on the sides and hood of the bus, and an overhead mirror used to observe children riding on the bus. The claimant also frequently moves his neck when loading and unloading children. Such movement is necessary to watch for potential hazards around the bus. The claimant stated that one-half of his route requires him to drive into the country where he encounters potholes and washboard roads.

The claimant testified that in the spring of 2006 he experienced neck symptoms that caused him to seek treatment from his chiropractor, Dr. Maurice Tiahrt, D.C. The claimant obtained the treatment in June 2006 and he recalled that the problems resolved over the summer while he was no longer driving the school bus. However, when he returned to work in the fall of 2006 the symptoms recurred. The claimant recalled that he returned to Dr. Tiahrt, who referred him to a physician. At that time the claimant reported to the employer that he believed he had sustained a work related injury.

The claimant has a lengthy and complicated medical history involving several parts of his body. The claimant had 4 surgeries on his left knee in the 1980's.

On March 25, 1996, Dr. A. Lee Gordon examined the claimant. The claimant reported a history of "a couple of months of numbness and tingling" in the middle and ring fingers of the left hand. Dr. Gordon noted a positive Tinel's sign at the elbow for the ulnar nerve. Dr. Gordon diagnosed mild "cubital tunnel left elbow."

On January 16, 2003, the claimant sought chiropractic treatment from Dr. Tiahrt. At that time the claimant reported left upper back pain, but no neck pain.

On March 20, 2003 Dr. Timothy Allen, M.D. performed an electrodiagnostic study of the claimant's left upper extremity. Based on the study Dr. Allen diagnosed moderate to severe carpal tunnel syndrome (CTS) with nerve compression.

On February 10, 2004, Dr. Gordon noted that the claimant had a history of CTS since "October 2002." Dr. Gordon noted "night time paresthesias and numbness while driving," and that electrical studies confirmed severe CTS. On February 23, 2004, the claimant underwent a left carpal tunnel release surgery.

In December 2004 the claimant presented to Dr. Gordon with a history of numbness and paresthesias in the right hand. Electrical studies showed bilateral CTS. Dr. Gordon diagnosed right CTS. The claimant underwent a right carpal tunnel release in January 2005.

Dr. Richard Johnson, M.D., examined the claimant on February 11, 2005. The claimant reported pain in both shoulders for one week, with the left side worse than the right. The pain was "excruciating" at night and tended to improve with daytime activities. Dr. Johnson referred the claimant to Dr. Michael Thakor, M.D., for evaluation.

Dr. Thakor examined the claimant on February 25, 2005. The claimant reported severe pain along the anterior aspect of both shoulders and pain in the left knee. Dr. Thakor diagnosed "inflammatory polyarthritis." Dr. Thakor prescribed Prednisone for treatment of the claimant's inflammatory condition.

In March 2005 Dr. Thakor reported the claimant had improved some with Prednisone, but he continued to experience "significant pain in his left shoulder." Dr. Thakor prescribed Vicodin for the pain. In May 2005 Dr. Thakor added the drug Methotrexate. On August 19, 2005, Dr. Thakor formally diagnosed the claimant's condition as rheumatoid arthritis (RA).

Dr. Thakor has continued to treat the claimant for RA. At his deposition testimony on May 7, 2009, the claimant stated that he is still taking Prednisone and Arava, and that Dr. Thakor prescribed these drugs for treatment of his RA.

Dr. Tiahrt's notes reflect that on June 7, 2006, the claimant sought chiropractic treatment for the first time since 2003. The claimant gave a history of neck pain, stiffness and numbness on the left side. Dr. Tiahrt diagnosed C6-7 and T1 disc problems on the left side. Dr. Tiahrt also provided chiropractic treatment on June 12, 2006.

After a lapse in treatment the claimant returned to Dr. Tiahrt on October 9, 2006. Dr. Tiahrt diagnosed a "subluxation complex with disc symptoms at C5 and C6. Dr. Tiahrt referred the claimant for additional evaluation. On October 9 Dr. Tiahrt issued a

written statement opining that the "reoccurring injury to [the claimant's] cervical spine appears to be of the repetitive nature and related to his work."

After Dr. Tiahrt issued his opinion the claimant reported to his employer that he believed he had sustained a work-related injury. The employer referred the claimant for treatment at Poudre Valley Hospital.

On October 12, 2006, Linda Starks, N.P., examined and treated the claimant. The claimant gave a history that he was a school bus driver for five years. The claimant advised Ms. Starks that in May 2006 he experienced pain in his neck and left shoulder, but the pain resolved after he stopped driving during the summer months. However symptoms of neck and trapezius pain returned after he resumed his job in the fall. The claimant was also experiencing numbness and tingling in the left fourth and fifth fingers. The claimant disclosed his history of RA but opined that his pain was different than RA pain. The claimant was diagnosed with a cervical strain and trapezius strain. Physical therapy and Skelaxin were prescribed.

The claimant received conservative treatment for his condition through the remainder of 2006. Treatment included physical therapy and a referral for chiropractic treatment.

The claimant underwent a cervical MRI study on December 20, 2006. The MRI showed evidence of kyphoscoliosis of the cervicothoracic spine and multi-level degenerative changes of the cervical discs and facet joints, including a mild degenerative anterolisthesis of C4 on C5, mild central canal stenosis from C4-5 through C6-7, and moderately severe C7 through T1 neuroforaminal narrowing.

Dr. Jeannette Mercer, M.D., became an authorized treating physician in January 2007. On January 4, 2007, Dr. Mercer noted the cervical MRI showed multilevel degenerative disc and facet joint degeneration, moderately severe bilateral foraminal stenosis at C4-5 and C5-6, severe bilateral foraminal stenosis at C6-7, and moderately severe right and severe left C7-T1 foraminal narrowing. Dr. Mercer diagnosed neck pain with dysesthesias in the arm most likely to [sic] foraminal narrowing that is severe in the lower levels of the cervical spine." Dr. Mercer prescribed physical therapy and consideration of steroid injections.

On January 25, 2007, Dr. Mercer noted the claimant was reporting that his symptoms of numbness in the fourth and fifth fingers of the left hand tended to improve with use of his home cervical traction device. The claimant also stated that he believed driving the bus was "exacerbating the numbness and tingling" and asked to be taken off of work to see if the symptoms would improve. Dr. Mercer agreed to take the claimant off of work for one week.

The claimant returned to Dr. Mercer on February 2, 2007. At that time Dr. Mercer stated the claimant had continued to do home traction and had been off work for one week. Dr. Mercer assessed an "improved neck strain radicular symptoms being

improved by cervical traction." Dr. Mercer released the claimant to return to work at full duty.

On March 27, 2007, Dr. Mercer opined that the claimant's "cervical condition" is related to his job as a bus driver. Dr. Mercer stated the claimant, "did not have neck pain or numbness and tingling in his hands before this job and it got better when he was off for the summer." Dr. Mercer further opined that none of the claimant's complaints "are due to his pre-existing rheumatoid arthritis."

At some point in the early spring of 2007 the claimant underwent lumbar surgery. Dr. Donn Turner, M.D, apparently performed this surgery. The claimant does not allege that his low back condition and need for surgery is related to the alleged occupational disease. The procedure performed is described as a left L-4 hemilaminectomy, a left L-5 hemilaminectomy, a decompression of the L4-S1 nerve root, and an L5-S1 diskectomy.

On May 4, 2007, Dr. Mercer assessed "cervical pain with resultant dysesthesias in the left hand." Dr. Mercer referred the claimant to Dr. Turner for an assessment and surgical consultation. On May 15, 2007, Dr. Turner examined the claimant and reviewed the MRI results. Dr. Turner opined the claimant had a left C8 radiculopathy secondary to a left C7-T1 herniated disc that "more or less obliterates the neural foramen." Dr. Turner recommended a C7-T1 hemi laminectomy and discectomy and a C8 foraminotomy.

The insurer authorized the procedure recommended by Dr. Turner, and the surgery was performed on June 19, 2007. On June 29, 2007, the claimant reported to Dr. Turner that his left hand numbness was fifty percent improved, but he had experienced some increased weakness. The claimant testified that overall his symptoms significantly improved after the surgery.

On October 26, 2007, the claimant told Dr. Mercer he was experiencing some "electrical-type shock sensations" starting in the trapezius area running down the posterior aspect of the shoulder. Dr. Mercer referred the claimant to Dr. Jeffrey Wunder, M.D., for EMG studies to determine if there was any compression neuropathy.

Dr. Wunder examined the claimant and performed EMG studies on November 20, 2007. Dr. Wunder reported that the physical examination and EMG studies were not suggestive of cervical radiculopathy, but they were consistent with left ulnar neuropathy at the elbow with significant denervation. Dr. Wunder noted that the cause of the left ulnar neuropathy "is certainly questionable on the basis of history."

On November 27, 2007, Dr. Frederick P. Scherr, M.D., examined the claimant. The claimant reported that his symptoms were primarily in his left hand, especially the fourth and fifth fingers, and "not so much his neck." The claimant expressed the opinion that the weakness in his hand and fingers was related to the neck surgery performed by Dr. Turner. Dr. Scherr advised the claimant that, in his opinion, the hand problems were

unrelated to the neck and were primarily attributable to ulnar nerve entrapment at the elbow. The claimant disagreed with Dr. Scherr because he had not experienced weakness before the surgery. Dr. Scherr further advised the claimant that he did not think the claimant's work as a bus driver caused the entrapment of the ulnar nerve. Dr. Scherr explained that he thought the claimant's neck and arm complaints were most likely attributable to degenerative changes resulting from the claimant's long history of heavy contracting work. Dr. Scherr referred the claimant to Dr. Wunder for continuation of medical care.

Dr. Wunder examined the claimant on December 11, 2007. Dr. Wunder noted the claimant's history of RA and the absence of any specific mechanism of injury. Dr. Wunder further noted that there was no clear indication of cervical radiculopathy, but the EMG studies were consistent with ulnar neuropathy. Dr. Wunder stated that ulnar neuropathy could simulate symptoms of C7 and C8 radiculopathy. Dr. Wunder opined that the claimant's neck condition is a "natural progression of his underlying" RA, and that he has "probably always had ulnar neuropathy at the elbow." Dr. Wunder agreed with Dr. Scherr that the claimant's symptoms are probably not related to driving a school bus. Dr. Wunder also completed a WC 164 form opining that the claimant reached maximum medical improvement (MMI) on December 11, 2007, with no permanent impairment.

On December 20, 2007, the respondents filed a Final Admission of Liability (FAL). The respondents attached Dr. Wunder's WC 164 and narrative report of December 11, 2007, to the FAL. The FAL admitted the claimant reached MMI on December 11, 2007 with no permanent impairment and denied liability for ongoing medical benefits after MMI. The claimant timely filed an objection to the FAL and a notice and proposal to select a Division-sponsored medical examination (DIME) physician.

On December 20, 2007, the claimant returned for a follow-up visit with Dr. Turner. Although the claimant was "much better" than when Dr. Turner last saw him, the claimant shill reported pain in the left scapula with numbness and tingling of the ulnar two fingers of the left hand splitting the ring finger. Dr. Turner opined the claimant still had some C8 radiculopathy manifested as scapular pain. Dr. Turner stated the claimant was not at MMI because he might require surgery to stabilize that space. Dr. Turner noted the claimant had been diagnosed with ulnar nerve entrapment at the left elbow and opined that this was an "accumulative problem or additive problem even though it is unrelated to his original work injury."

Dr. William Basow, M.D., saw the claimant on December 21, 2007, for the purpose of assessing an impairment rating. Dr. Basow examined the claimant, reviewed the medical records, and made note of the difference of opinion between Dr. Turner and Dr. Wunder concerning whether or not the claimant had cervical radiculopathy. Dr. Basow opined the claimant was at MMI with 18 percent whole person impairment. The impairment rating was based on a Table 53 specific disorder of the cervical spine, reduced range of motion in the cervical spine and a two-level surgical

procedure. Dr. Basow also noted the claimant has cubital tunnel syndrome (ulnar neuropathy) documented by EMG studies and opined that this condition is not work related. Dr. Basow stated the cubital tunnel syndrome may be secondary to the RA and suggested the claimant discuss ulnar nerve transposition with his rheumatologist.

On March 10, 2008, the respondents filed a motion to withdraw the admissions of liability and hold the DIME examination in abeyance. Citing the opinions of Dr. Scherr and Dr. Wunder, the respondents took the position that since the claimant had contested the December 2007 FAL they were legally entitled to withdraw their admissions of liability and contest the compensability of the claim. The respondents further contended the DIME should be held in abeyance since compensability is a "threshold issue" that is determined on the preponderance of the evidence standard without regard to the DIME physician's opinion. However, on March 25, 2008, PALJ Purdie denied the motion to hold the DIME in abeyance.

On April 30, 2008, Dr. Caroline Gellrick, M.D., performed an independent medical examination (IME) at the respondents' request. Dr. Gellrick examined the claimant and reviewed his extensive medical records. On April 30 the claimant reported he was suffering from left-sided neck pain with some radiation into the left shoulder blade and paresthesias of the left finger with some numbness. Dr. Gellrick stated that she agreed with the findings of Dr. Wunder and Dr. Scherr that the claimant's conditions were not related to his employment as a bus driver. Dr. Gellrick stated that she agreed the claimant's neck condition "can be the natural progression" of the claimant's RA, particularly with his "pre-existing employment." Dr. Gellrick explained that RA would "account for most of his problems that he is experiencing currently and for the ulnar neuropathy and previously, the carpal tunnel syndrome." Dr. Gellrick noted the claimant had no history of a particular incident such as a slip and fall or car accident that would explain his symptoms, and that driving in and of itself "would not account for this." Dr. Gellrick assessed 11 percent whole person impairment, but opined none of the impairment is work related.

Dr. Brian Shea, D.O., performed a DIME on May 9, 2008. At that time the claimant's chief complaints were left lower neck pain radiating into the left upper back and left ulnar forearm "stingers-paresthesias." The claimant gave a history of lower neck and left upper back discomfort over the past several years prior to claiming a work-related injury. The claimant advised Dr. Shea that he was essentially symptom free when off for the summer and not driving a school bus. Dr. Shea also reviewed the claimant's medical records. Dr. Shea diagnosed myofascial pain syndrome of the cervical and upper thoracic region, active treatment for RA, status post C7 and C8 surgeries, and left ulnar neuropathy per ENG of November 2007. Dr. Shea recognized that there are "various opinions for and against whether this injury" is related to the claimant's work driving a bus. Dr. Shea opined that the claimant's condition is work related "due to Dr. Mercer's treatment for over a year and the patient's cervical surgery being done, and that his symptoms get noticeably better without driving a school bus." Dr. Shea assigned an 18 percent whole person impairment rating.

In December 2008, the claimant underwent another lumbar surgery following a fall at home. The claimant does not allege that this surgery is related to the alleged occupational disease.

Dr. Wunder testified by deposition on October 13, 2008, and November 21, 2008. Dr. Wunder testified that RA is an autoimmune disease that attacks the spine and peripheral joints, and is associated with "mononeuropathies" including ulnar neuropathy and CTS. Dr. Wunder explained that RA results in mononeuropathies when a nerve passes through a joint that is affected by RA. Dr Wunder stated that the cause of RA is unknown. Dr. Wunder noted the claimant was diagnosed with RA in 2005, and was diagnosed with left ulnar nerve compression at the elbow as early as 1996. Dr. Wunder stated that the claimant's duties as a bus driver might elicit symptoms of RA, but he opined the performance of the work did not cause or contribute to the claimant's RA pathology and did not aggravate the RA. Dr. Wunder reiterated his opinion that the claimant's degenerative cervical condition is not related to the claimant's employment, but it is instead the result of degenerative changes caused by RA. Dr. Wunder also reiterated that he disagrees with Dr. Turner that the claimant had cervical neuropathy. Instead Dr. Wunder opined the claimant has long-standing ulnar neuropathy dating to 1996.

On October 16, 2008, Dr. Turner again examined the claimant. Dr. Turner opined the claimant was still suffering from "recurrent left C7 versus C8 radiculopathy." Dr. Turner recommended cervical spine films and an MRI. Dr. Turner stated that the need for these tests is "obviously related to his previous injury" and should be covered.

On October 23, 2008, Dr. Scherr wrote to respondents' counsel concerning Dr. Turner's recommendation for a cervical MRI. Dr. Scherr opined that a cervical MRI would more than likely demonstrate "pathology." However Dr. Scherr stated that:"Determining whether or not that pathology was due directly to the bus-driving injury with the [employer] or was due to the natural progression of a degenerative condition and/or his previous occupation which obviously would be more intensive on his neck than I believe bus-driving would be, those would be some questions that I would wonder about."

On October 24, 2008, Dr. Gellrick wrote to respondents' counsel concerning Dr. Turner's recommendation for a cervical MRI. Dr. Gellrick stated that the question of whether the claimant needed an MRI was one for the treating physician. However, she opined that any need for the MRI would not be "referable to the job" and should be covered under personal medical insurance.

Dr. Gellrick testified by deposition on October 14, 2008, and March 31, 2009. Dr. Gellrick testified she is board certified in family practice medicine, is level II accredited, and spends eighty-five percent of her time practicing occupational medicine. Dr. Gellrick treats injured workers and often performs DIME examinations.

During her testimony Dr. Gellrick discussed Dr. Shea's opinions concerning causation as expressed in the DIME report. Dr. Gellrick opined that the fact Dr. Mercer referred the claimant to Dr. Turner for a surgical evaluation under the workers' compensation claim, and the fact that the surgery was paid for by the insurer, does not mean the claimant's neck condition falls under "work comp." Dr. Gellrick explained that she saw "no accountability for the rheumatoid arthritis" that was diagnosed prior to the surgery and didn't know why the insurer failed to challenge liability for the surgery. Further Dr. Gellrick opined that there is nothing in the AMA Guides that directs a physician to base a causation determination on whether an insurer has previously admitted liability for the claim. Dr. Gellrick further disputed Dr. Shea's reliance on the fact that the claimant's symptoms diminished or disappeared in the summer when he was not driving a bus. Dr. Gellrick explained that persons with arthritis generally feel better in warm weather and experience more symptoms in colder weather. Dr. Gellrick also stated that she was not surprised that someone with RA would experience symptoms of the disease when driving a bus, but that fact did not change her causation analysis.

The claimant failed to prove it is more probably true than not that the alleged hazards of his employment as a bus driver (frequent neck movement) caused the claimant's neck and upper extremity symptoms, or that the hazards of employment aggravated or accelerated any pre-existing condition. To the contrary, the persuasive evidence establishes that it is more likely than not that the claimant's neck and upper extremity symptoms result from pre-existing RA and the related condition of ulnar neuropathy of the left upper extremity.

The ALJ credits the reports and opinions of Dr. Wunder insofar as Dr. Wunder opined that the claimant's degenerative cervical condition and left ulnar neuropathy are most probably the result of the natural progression of the claimant's pre-existing RA, not the alleged hazards of driving a bus. Dr. Wunder persuasively explained that RA is an autoimmune disease of unknown origin that attacks the spine and peripheral joints. Dr. Wunder persuasively explained that RA is a progressive disease that can cause degeneration of the spine. In addition RA can cause neuropathies, including ulnar neuropathy, when a nerve passes through the damaged joint. Here, Dr. Wunder noted that the claimant has a long history of joint problems (including left ulnar neuropathy dating to 1996), and was formally diagnosed with RA in 2005, approximately one year before he reported the alleged occupational disease. Further, Dr. Wunder explained that it is logical that the claimant would experience symptoms of RA when performing the movements required of a bus driver, but this does not mean the movements are playing any causal role in the disease process.

Dr. Wunder's opinions are corroborated by the persuasive reports and opinions of Dr. Gellrick. Dr. Gellrick persuasively opined that the RA would account for most of the claimant's current problems as well as the previously diagnosed ulnar neuropathy and CTS. Dr. Gellrick credibly testified that it is not surprising that the claimant experienced fewer symptoms in the summer when he was not driving a bus since persons with RA often feel better in warmer weather. Dr. Gellrick also corroborated Dr.

Wunder's opinion that it would not be surprising for someone with RA to experience symptoms of the disease when driving a bus. Finally, Dr. Wunder's opinions are substantially corroborated by those expressed by Dr. Scherr.

The ALJ is not persuaded by the opinions of Dr. Tiahrt, Dr. Mercer, Dr. Turner, Dr. Shea or any other person that opined the claimant sustained a compensable occupational disease caused by exposure to the hazards of driving a bus. None of these physicians produces a credible and persuasive rebuttal to Dr. Wunder's opinion that the claimant's symptoms are caused by the natural progression of the pre-existing and well-documented RA. For instance, several of these physicians, including Dr. Mercer and Dr. Shea, place reliance on the temporal relationship between driving the bus and the presence or absence of claimant's symptoms. However, the ALJ does not find these opinions to be compelling because they do not persuasively address or refute Dr. Wunder's and Dr. Gellrick's point that driving a bus at work can elicit the symptoms of RA without playing any causal role in the disease process. Moreover, Dr. Shea's opinion is based, in part, on the fact that the respondents admitted liability early in the history of this case. However, the respondents' legal actions and claims management practices do not constitute persuasive evidence concerning the medical cause of the claimant's symptoms, and Dr. Shea is not qualified to interpret the significance of the respondents' legal decisions.

Evidence and possible inferences inconsistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as specifically 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).

WITHDRAWAL OF FINAL ADMISSION OF LIABILITY AND BURDEN OF PROOF REGARDING COMPENSABILITY

The respondents contend they are entitled to withdraw the FAL filed on December 20, 2007, and place the burden of proof on the claimant to establish that he sustained an injury or occupational disease arising out of and in the course of his employment. The claimant contends the respondents' FAL admits that the claimant sustained and injury arising out of and in the course of employment, and that the DIME physician's finding that the claimant sustained impairment caused by the injury is binding on the respondents unless overcome by clear and convincing evidence. The ALJ agrees with the respondents' argument that the claimant bears the burden of proof to establish a compensable occupational disease

Section 8-43-203(2)(d), C.R.S., provides that: "Hearings may be set to determine any matter, but, if any liability is admitted, payments shall continue according to admitted liability." Colorado appellate courts have held, with respect to General Admissions of Liability (GAL's), that this provision requires an insurer to pay in accordance with an admission until such time as it procures an order from an ALJ permitting it to revoke the admission in whole or in part. Further, where the insurer seeks to withdraw the GAL on grounds that the claimant did not sustain an injury arising out of and in the course of employment, the burden of proof rests with the claimant to establish that a compensable injury occurred in the first instance. *Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo. App. 2001).

However, the issue is somewhat different where the respondents seek to withdraw an FAL and require the claimant to prove that he sustained a compensable injury. Section 8-43-203(2)(d) provides that: "Once a case is closed pursuant to this subsection (2), the issues closed may only be reopened pursuant to section 8-43-303." Section 8-43-203(2)(b)(II), C.R.S., creates a mechanism designed to "promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy." The statute, in connection with other provisions of the Act, accomplishes this objective by establishing "procedures for DIMEs, FALs, settlements and hearings." *Peregoy v. Industrial Claim Appeals Office,* 87 P.3d 261 (Colo. App. 2004).

Where, as here, the claimant objects to an FAL and requests a DIME under the procedures established in § 8-42-107.2, C.R.S., the FAL does not become "final" nor does it "close the claim". To the contrary, § 8-43-203(2)(b)(II) provides that the claimant need not apply for a hearing on any disputed issue until after the completion of the

DIME. Conversely, the respondents have 30 days from the date the DIME report is filed to file an FAL or to file an application for hearing to dispute any determination of the DIME physician. *See also*, § 8-42-107.2(4), C.R.S. Closure of the claim, and hence any issues addressed by an FAL, does not occur for purposes of § 8-43-203(2)(d) until such time as the parties exhaust, or fail to exhaust, review of the DIME physician's determinations in accordance with procedures established by the Act. *See Feeley v. Industrial Claim Appeals Office,* 195 P.3d 1154 (Colo. App. 2008); *Koch Industries, Inc. v. Pena,* 910 P.2d 77 (Colo. App. 1995).

It follows that where the claimant contests an FAL by requesting a DIME, the legal effect of the FAL is best analogized to a GAL when deciding whether the respondents may withdrawal the FAL on the threshold issue of compensability. This is true because a contested FAL does not "close the claim" within the meaning of § 8-43-203(2)(d), and further litigation on a range of issues is possible, if not probable. In these circumstances, the ALJ concludes the "act should not be interpreted to preclude fair consideration of an employer's right to just and equitable treatment" by precluding withdrawal of an allegedly improvident FAL. *Cf. HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). The ICAO has reached the same conclusion in a series of cases. *Eg. Whiteman v. Life Care Solutions,* W.C. No. 4-523-153 (ICAO October 24, 2004); *Shoaf v. Manor Care, Inc.,* W.C. No. 4-300-993 (ICAO December 20, 1999); *Fausnacht v. Inflated Dough, Inc.,* W.C. No. 4-160-133 (ICAO July 20, 1999), *aff'd., Fausnacht v. Industrial Claim Appeals Office,* (Colo. App. No. 99CA1499, May 4, 2000) (not selected for publication) (agreeing with ICAO that once claimant objected to FAL insurer could seek prospective relief if final admission was improvidently filed).

The ALJ concludes that the respondents may be permitted to withdraw their FAL admitting that the claimant sustained an injury arising out of and in the course of his employment as a bus driver. As found, the claimant contested the FAL and sought a DIME. In these circumstances the FAL did not close the claim or any issues, and the respondents retained the right to withdraw the admission.

Moreover, the claimant bears the initial burden of proof to establish by a preponderance of the evidence that he sustained an injury or occupational disease arising out of and in the course of the employment. *Pacesetter Corp. v. Industrial Claim Appeals Office, supra.* Because the question of whether the claimant proved a compensable injury is a "threshold issue" to be determined by the ALJ under the preponderance of the evidence standard, the opinion of the DIME physician is not entitled to any presumptive weight on this issue. *See Leprino Foods Co. v. Industrial Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Fuller v. Marilyn Hickey Ministries, Inc.,* W.C. No. 4-588-675 (ICAO September 1, 2006).

PROOF OF A COMPENSABLE OCCUPATIONAL DISEASE

The claimant contends he proved that he sustained a compensable occupational diseases caused by the hazards of his employment as a bus driver. Specifically, the claimant asserts that he proved it is more probably true than not that the repeated

activity of turning his neck caused him to develop neck and left upper extremity problems, or that the neck movement aggravated a pre-existing condition so as to cause a compensable occupational disease. The ALJ disagrees with this argument.

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). An "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.

This section imposes additional proof requirements beyond 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 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

The claimant was required to prove by a preponderance of the evidence that the alleged occupational disease was directly and proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The mere fact that a claimant experiences symptoms while performing duties of employment 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. This is true because the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claims Office.*

As determined in Findings of Fact 47 through 50, the ALJ concludes the claimant failed to prove it is more probably true than not that he sustained a compensable

occupational disease caused by exposure to the hazards of driving a bus, or that the hazards of driving a bus aggravated or accelerated any pre-existing disease process. Instead ALJ credits the opinion of Dr. Wunder that it is more likely than not the claimant's symptoms represent the natural progression of his pre-existing RA, not a disease process related to the hazards of employment. The ALJ finds that Dr. Wunder's opinion is corroborated by the credible opinions of Dr. Gellrick and Dr. Scherr, and that contrary opinions are not persuasive. Although the ALJ recognizes that some evidence in the case, lay and expert, might support contrary findings and conclusions, the ALJ does not find that evidence credible or persuasive.

ORDER

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

1. The respondents are permitted to withdraw their admissions of liability on a prospective basis. The claim is denied and dismissed from the date of this order and ongoing.

2. The claim for ongoing medical benefits after maximum medical improvement is denied and dismissed.

DATED: June 5, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-723-692

ISSUE

The issue for determination is compensability – Was Claimant an employee or an independent contractor under the Act when the injury occurred?

FINDINGS OF FACT

1.Claimant has been employed by U.P. for fourteen years as a machinist welder. Claimant was not customarily engaged in an independent trade, occupation, profession, or business related to machinist or welding work.

2.Claimant met Evans, the owner of Employer, while at work for U.P. Evans delivered an engine to U.P. Claimant noted the engine stand, and stated to Evans that he could do better. Evans and Claimant agreed to meet between 9:00 a.m. and 9:30 a.m. on Saturday morning, March 3, 2007, at Employer's shop.

3.Claimant considered the meeting a "try out" for a "side job." There was no guarantee that Employer would offer Claimant a job, even if Claimant was able to make a better engine stand for Employer. Pay was not discussed.

4.Claimant appeared at the appointed time and met Evans. Evans took him across town to look at tanks.

5.Claimant was welding or grinding when a tank exploded. Claimant sustained significant injuries. He was hospitalized in a drug-induced coma for 30 days.

6.Evans paid Claimant $100.00 cash for the work Claimant performed for Employer. Evans based the amount on his thinking that the job should take about three hours and that he would pay about $30.00 per hour. The pay was based on a fixed contract amount, not a salary or hourly rate. Claimant does not recall receiving any pay from Employer.

7.Employer considered Claimant to be an independent contractor. Claimant did not consider himself an employee until a lawsuit against Employer and the owner of the premises was settled and he entered into an agreement with his health insurance provider to seek benefits under the Act.

CONCLUSIONS OF LAW

Sections 8-40-202(b)(2)(a)and (b)(II) provide:

> Notwithstanding any other provision of this section, any individual who performs services for pay for another shall be deemed to be an employee, irrespective of whether the common-law relationship of master and servant exists, unless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. For purposes of this section, the degree of control exercised by the person for whom the service is performed over the performance of the service or over the individual performing the service shall not be considered if such control is exercised pursuant to the requirements of any state or federal statute or regulation.

To prove that an individual is engaged in an independent trade, occupation, profession, or business and is free from control and direction in the performance of the service, the individual and the person for whom services are performed

> may show by a preponderance of the evidence that the conditions set forth in paragraph (a) of this subsection (2) have been satisfied.

Claimant has established by a preponderance of the evidence that at the time of the injury he was performing a service for pay. Claimant is an employee unless Respondents show that at the time of the injury Claimant was free from control and direction in the performance of the service, both under the contract for performance of service and in fact, and that Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the service performed.

Employer did not require Claimant to work exclusively for him. This is an indication of an independent contractor relationship. Section 8-40-202(2)(b)(II)(A), C.R.S.

Employer did not establish a quality standard for Claimant. This is an indication of an independent contractor relationship. Section 8-40-202(2)(b)(II)(B), C.R.S.

Employer paid Claimant at a fixed or contract rate. This is an indication of an independent contractor relationship. Section 8-40-202(2)(b)(II)(C), C.R.S.

Employer could terminate the work of Claimant at any time without showing that Claimant violated a contract or failed to meet the specifications of the contract. This is an indication of an employment relationship. Section 8-40-202(2)(b)(II)(D), C.R.S.

Employer did not provide any training to Claimant. This is an indication of an independent contractor relationship. Section 8-40-202(2)(b)(II)(E), C.R.S.

Employer did not provide tools or benefits to Claimant. This is an indication of an independent contractor relationship. Section 8-40-202(2)(b)(II)(F), C.R.S.

Employer did not dictate the time of performance. The parties did mutually agree on when they were to meet to start the work. This is an indication an independent contractor relationship. Section 8-40-202(2)(b)(II)(G), C.R.S.

Employer paid Claimant cash rather than by check in a trade name or business name of Claimant. This is an indication of an employment relationship. Section 8-40-202(2)(b)(II)(H), C.R.S.

Employer did not combine its business operations in any way with the business operation of Claimant. This is an indication of an independent contractor relationship. Section 8-40-202(2)(b)(II)(I), C.R.S.

The ALJ gives great weight to that fact that Employer could terminate the services of Claimant at any time without liability. The power to terminate a business relationship without further liability implies the power to control. *See Calvin v. Calvin Builders & Stucco, Inc.,* W.C. No. 4-554-987 (ICAO, August 23, 2004).

The ALJ also gives great weight to the fact that Claimant had worked in an employment relationship and had not worked. as an independent contractor at the time he met Evans. Claimant had not been customarily engaged in an independent business or trade at the time of his hire by Employer. *See Valdez v. Wetherbee Drywall,* W.C. No. 4-732-329 (ICAO, April 28, 2009).

The ALJ gives little weight to the fact that Employer considered Claimant to be an independent contractor and that Claimant did not consider himself to be an employee. The Employer and Claimant did not analyze the factors in Section 8-40-202(2)(b), C.R.S.

The ALJ, having considered Section 8-40-202(2)(a), C.R.S., and the nine factors listed in Section 8-40-202(2)(b), C.R.S., concludes that Claimant was not free from control and direction in the performance of the service, both under the contract for performance of service and in fact. The ALJ also concludes that Claimant was not customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Claimant was an employee at the time of the accident. The claim is compensable. Insurer is liable for compensation and benefits under the Act.

ORDER

It is therefore ordered that Insurer is liable for compensation and benefits under the Act. All matters not determined herein are reserved for future determination.

DATED: *June 12, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-727-623 & WC 4-752-214

ISSUES

This was a hearing on the two claims, which were consolidated for purposes of hearing by Order of June 30, 2008. At hearing the parties stipulated that the issues for the June 13, 2007 claim captioned as W.C. No. 4-727-623 are permanent total disability, permanent partial disability, the date of maximum medical improvement, medical benefits, temporary total disability and the average weekly wage. As it relates to the March 5, 2003 claim, W.C. No. 4-752-214, the parties stipulated that the issues are permanent total disability, permanent partial disability, apportionment as it relates to permanent partial disability, and the two penalty issues. Respondent alleges a statute of limitations along with laches and estoppel as it relates to the filing of the Worker's Claim for Compensation in the 2003 claim. The parties further stipulated that the medical care of Drs. Richman, Mann, Cohen, and Sung are authorized, reasonable and necessary. Medical benefits sought are from June 13, 2007 and ongoing. The parties further stipulated that the Claimant was terminated by the City of Colorado Springs due

to medical reasons and as it related to the 2003 filing of the Worker's Claim for Compensation, that a supervisor, Janice Manuel, was not a person that misled the Claimant as it pertains to the filing of the Workers' Compensation claim. At the commencement of the hearing a Sequestration Order was entered. Respondent requested that they have an expert serve as an advisory witness. The witness was identified as their vocational expert, Margot Burns. Claimant also designated her vocational expert, Bruce Magnusson, as her advisory witness. All other witnesses were excluded pursuant to the Sequestration Order. The issues determined were as follows:

- Whether the Claimant has met her burden of proof that she sustained a compensable work-related injury on March 5, 2003.

- Whether the Claimant has sustained her burden of proof that she is entitled to permanent partial disability as a result of the industrial injury of March 5, 2003.

- Whether the Claimant has sustained her burden of proof that the medical care with the authorized treating doctors is related to her industrial injury of June 13, 2007 and/or in combination with an industrial injury of March 5, 2003.

- Whether respondent has met its burden to overcome the Division Independent Medical Examiner's opinion of maximum medical improvement.

- Whether the Claimant has met her burden of proof that she is entitled to temporary disability benefits up to and until the date of maximum medical improvement.

- Whether the Claimant has met her burden of proof as to the average weekly wage.

- Whether respondent has met its burden of proof to overcome the Division Independent Medical Examiner's opinion that the Claimant sustained a 6% working unit impairment and whether Claimant has overcome the Division Independent Medical Examiner's opinion that she sustained only a 6% impairment as a result of her industrial injury of June 13, 2007.

- Whether the Claimant has sustained her burden of proof that she is permanently and totally disabled as a result of the industrial injury of June 13, 2007, Claim No. 4-727-623 and/or as a combination of the two industrial injuries of June 13, 2007 and March 5, 2003, Claim No. 4-752-214.

FINDINGS OF FACT

1. The Claimant was hired by The Respondent-Employer-Insurer to work as an accounting technician in 1999 to work in the Utilities Department. Her regular duties included resolving problem invoices, verifying account numbers and entering the accounting numbers into the system, resolving discrepancies or missing information, and special projects. Her time was split roughly 50/50 between her regular activities and the special projects. Special projects included payment on large contracts, designing a website, and accounts receivable.

2. The Claimant reported two pertinent injuries. The first injury occurred on March 5, 2003 and the second injury occurred on June 13, 2007.

3. The Claimant was sent home from work by Dr. Kyle Akers on November 14, 2007 and has not returned to employment.

4. On July 10, 2008 the Respondent-Employer-Insurer terminated her employment for medical reasons; she was not capable of performing their work due to her low back injury and depression.

5. The March 5, 2003 claim resulted when the Claimant slipped on ice leaving the building where she worked. A Worker's Claim for Compensation was filed dated February 10, 2008. An Employer's First Report was filed March 4, 2008 and a Notice of Contest was filed on March 5, 2008. This claim was a full contest.

6. With regard to the June 13, 2007 claim, the Claimant was injured when she fell down a set of stairs. A Worker's Claim for Compensation was filed on December 3, 2007, the Employer's First Report was filed earlier on June 18, 2007, and a Final Admission of Liability was filed on November 28, 2007. Pursuant to the Final Admission of Liability the Claimant was found at maximum medical improvement by Dr. Akers on November 19, 2007 with zero permanent impairment. Maintenance care was denied. The Final Admission of Liability documents that temporary disability benefits were paid from June 18, 2007 through June 23, 2007, temporary total disability from June 24, 2007 through July 29, 2007, and temporary partial from July 30, 2007 through November 18, 2007.

7. The Claimant objected to the Final Admission of Liability on November 30, 2007 and requested a Division Independent Medical Examination. The Division Independent Medical Exam was performed by Dr. Katharine Leppard on May 27, 2008. Dr. Leppard opined in her report that the Claimant did not reach maximum medical improvement until May 27, 2008. In her evidentiary deposition, Dr. Leppard changed her date of maximum medical improvement to April 17, 2008. The basis for her opinion was the approximate date that it was determined the Claimant would not undergo surgery that had previously been proposed by Dr. Roger Sung. Dr. Leppard felt that the Claimant had a 16% whole person

impairment. Dr. Leppard apportioned 10% as pre-existing the June 13, 2007 injury, leaving 6% working unit for the June 13, 2007 claim.

8. Respondent-Employer-Insurer filed its Application for Hearing to challenge Dr. Leppard's opinion.

Injury and Compensability for March 5, 2003 Claim

9. On March 5, 2003 the Claimant was leaving the building where she worked for Respondent-Employer-Insurer when she slipped on ice and fell, sustaining injury to her back. The following day the Claimant reported this injury to her employer and completed the Respondent-Employer-Insurer's Incident Report.

10. The Claimant has had back problems since this original injury. She did not immediately seek medical care. She testified credibly that she originally was having buttock pain but did not understand this to be of a serious nature involving a bulging disc. She did begin treatment with Dr. Sparr on August 15, 2003. When she began treatment with Dr. Sparr, the Claimant also saw him for other conditions including myofascial pain involving her neck and parascapular muscles, bilateral epicondylitis and symptoms that Dr. Sparr initially assessed as a myogenic thoracic outlet syndrome. These same conditions were reported to her family doctor previously that year, Dr. Bird. She saw Dr. Sparr a second time a few weeks later before deciding to transfer her treatment to Dr. David Richman.

11. Dr. Richman first saw the Claimant on September 24, 2003 and has continued to treat her through the present. On that date she reported to Dr. Richman that she had been having problems with low back pain worsening over the last eight months.

12. Dr. Richman was provided the prior medical records from Dr. Sparr and asked for his opinion as to whether the original complaints in 2003 were secondary to the fall on the ice in March of 2003. In his report of December 5, 2008, Dr. Richman concluded that her original low back complaints and resulting pain-related depression were a direct result of the March 2003 fall at work. The testimony from Dr. Richman regarding compensability is credible and persuasive.

13. The Claimant testified credibly that in weekly meetings held between 2003 and 2007, employees met with their supervisors to discuss, among other things, scheduling conflicts such as medical appointments. The Claimant estimated that on approximately a dozen occasions in 2003 alone, she notified her supervisors that she was seeking medical care for her back injury. She asked her supervisors to modify her schedule accordingly.

14. When the Claimant's condition did not resolve she notified one of her supervisors, Janice Manuel, that she intended to seek authorization for the

medical treatment as a work-related claim through the Human Relations Department. The Claimant testified persuasively that she contacted Lori Stillmunks in late 2004 or 2005. She was told by Lori Stillmunks that she could not pursue a claim because too much time had gone by. The Claimant's recount of what occurred in 2003 through 2005 was supported by the two supervisors that she had during that time, Janice Manuel and Dawn Skeen. Lori Stillmunks, now known as Lori Stewart, testified that she did not have any knowledge that the Claimant had even filed an Incident Report for the 2003 claim. This was not credible in that the Incident Report was a document in the possession of respondent-employer.

15. Dawn Skeen testified that she is still employed at the Respondent-Employer-Insurer in the same department as the Claimant. She was no longer a supervisor of the Claimant at the time that the Claimant last worked for Respondent-Employer-Insurer. Dawn Skeen was "reclassified" in October of 2006 and her job duties changed from supervisor in February of 2007. Dawn Skeen testified that she was co-supervisor of the Claimant with Janice Manuel between 1999 and 2006. Dawn Skeen testified that she witnessed the fall at work in 2007 and helped bring the Claimant back to her feet. She described it as a "very hard fall."

16. Dawn Skeen testified that she was aware of the Claimant's 2003 injury at work. She testified that she was aware that the Claimant was arranging her schedule to make medical appointments for treatment for her back as a result of that fall. Dawn Skeen testified that it was part of her job as the Claimant's supervisor to receive reports from the Claimant when she was having appointments for her back injury. She shared this responsibility with Janice Manuel. Dawn Skeen testified that she could not provide the number of times this occurred, but testified that, "absolutely" she missed more than three days of work for medical appointments for her back between March 2003 and June of 2007.

17. Dawn Skeen testified consistently with the Claimant about the weekly meetings to discuss coverage issues and that she recalled in these group meetings the Claimant informing the group, including her and Janice, that she was missing time from work due to her back injury. Dawn Skeen also recalls a specific meeting that she had as a member of the Plaza Homeowners Association wherein the topic of the Claimant falling on March 5, 2003 was raised. She recalls this occurring on multiple occasions during these meetings because of the concern about ice build-up around the building. She recalls that in these meetings Patricia Martinez's work-related injury was specifically discussed. She also recalls that there were personnel from Respondent-Employer-Insurer at the manager and general manager level present.

18. Janice Manuel testified that she is now retired from Respondent-Employer-Insurer. She retired on April 27, 2007. Prior to that time she was a

supervisor of the Claimant. She recalls being aware that the Claimant hurt her back due to a work-related injury in 2003 when she fell leaving the building. She was aware as the Claimant's supervisor that she was missing time from work or arranging her flex time to accommodate medical appointments because of her back injury. She was the one that the Claimant provided the notice to and had the Claimant complete the Incident Report dated March 6, 2003. it is found that the testimony of the Claimant, Dawn Skeen, and Janice Manuel, her two supervisors, was credible and persuasive that the Claimant sustained a work-related injury on March 5, 2003 and that the Respondent-Employer-Insurer had notice of the injury and the fact that the Claimant had missed more than three days of work as early as 2003. The Claimant has provided evidence that it is more likely than not that she did sustain a work-related injury on March 5, 2003.

Medical Benefits

19. The parties stipulated at hearing that the medical care that the Claimant has received from Drs. Richman, Mann, Cohen, and Sung are authorized, reasonable and necessary. The issue left for determination is whether the treatment is related to either industrial injury, and whether Claimant is further entitled to maintenance care after maximum medical improvement.

20. The medical records from Drs. Richman, Mann, Cohen, and Sung all fully support the Claimant's need for medical care to cure and relieve the Claimant from the effects of the injury. With the exception of Dr. Akers' statement that the Claimant was released from care, all other treating physicians have documented the need for ongoing medical care. Dr. Richman testified persuasively at hearing as to the nature of her conditions and the need for the care that has been provided to her by Dr. Mann and himself. The most persuasive evidence is that the medical treatment incurred as of June 13, 2007 and continuing has been directly related to the industrial injury of June 13, 2007.

21. Dr. Richman opined as to the need for maintenance care. Dr. Richman testified credibly that along with the ongoing medications and office visits and the treatment from Dr. Mann, he would recommend medial branch blocks and possibly a spinal cord stimulator in the future. Dr. Richman noted that the medial branch blocks, in the past, did provide some improvement and should be considered once more. In addition, Dr. Mann set forth in his medical records repeated requests for more comprehensive psychological treatment and a more formal pain clinic as needed care and treatment. The most persuasive evidence has been provided by the Claimant that her medical care as of June 13, 2007 is directly related to the June 13, 2007 industrial injury. The Claimant has met her burden of proving that she requires ongoing medical care from these same providers to maintain her at maximum medical improvement.

Maximum Medical Improvement

22. The Claimant underwent a Division Independent Medical Examination by Dr. Katharine Leppard on May 27, 2008. In Dr. Leppard's report she concluded that Dr. Akers was incorrect in his assessment of maximum medical improvement and impairment. Dr. Leppard opined that the Claimant did not reach maximum medical improvement until seen by her on May 27, 2008. In her report, Dr. Leppard did indicate that she was not provided with the most recent medical records and therefore felt the date of the exam was the best date for assessing maximum medical improvement.

23. Prior to her deposition, Respondent-Employer-Insurer provided to Dr. Leppard the most recent medical records for review. These medical records included Dr. Sung's report of April 17, 2008. Dr. Sung, the orthopaedic surgeon, reported on April 17, 2008 that the Claimant was in for follow-up for her back and leg pain. Dr. Sung notes that he had a discussion with the patient and her husband and at that point recommended against the lumbar fusion. Dr. Sung recommended consideration be given for the spinal cord stimulator trial. Dr. Leppard, in her deposition, felt that this was the most appropriate date for a determination of maximum medical improvement in that up until that point there had still been some discussions of the Claimant undergoing the lumbar fusion. The most persuasive evidence submitted at hearing is that Dr. Leppard's opinion has not been overcome by Respondent-Employer-Insurer by clear and convincing evidence. The most persuasive evidence is that Dr. Leppard's opinion of maximum medical improvement on April 17, 2008 is appropriate.

Temporary Total Disability

24. The Claimant seeks temporary total disability benefits from November 19, 2007 until April 17, 2008.

25. On November 19, 2007 one of the two primary authorized treating physicians, Dr. Akers, opined on November 14, 2008 that the Claimant was, "Off duty on her work-comp claim until further notice." Five days later, on November 19, 2007, Dr. Akers opined that she had reached maximum medical improvement. In his office note of November 19, 2007 Dr. Akers stated, "Received on November 14, 2007 report from DIME examination by Dr. Elizabeth Bisgard, M.D. dated November 1, 2007. Based upon her findings with regard to [Claimant's] low back problem the aggravation of her pre-existing non-work-related low back problem returned to pre-injury baseline. Her shoulder has been doing fine for some time. This case is now closed with no impairment and no ongoing treatment. She should continue to seek treatment for the old low back problem from her private physician. She is released to full-time duty with no restrictions from this claim, have spoken with [Claimant] by phone this morning and relayed the information to her. Advised her to contact Claims to discuss benefits and time-reporting." It is the reasonable inference that Dr. Akers based his determination that the Claimant was at maximum medical improvement and without restrictions upon his mistaken belief that Dr. Elizabeth Bisgard had

provided a Division Independent Medical Examination report and that any residuals the Claimant was experiencing on November 19, 2007 was non-work-related.

26. The second authorized treating physician at the time was Dr. David Richman who had not released the Claimant to return to work. The most persuasive evidence is that on November 19, 2007 and continuing through the date of maximum medical improvement established by the Division Independent Medical Examiner, Dr. Katharine Leppard, the Claimant was temporarily and totally disabled from her work with respondent-employer. Restrictions were placed upon her by Dr. Richman. Dr. Akers had released the Claimant from all work only five days before declaring her at maximum medical improvement. The Claimant has met her burden of proof that she was entitled to temporary total disability benefits from November 19, 2007 until April 17, 2008.

Average Weekly Wage

27. During the 22-week period in 2007 leading up to her injury, the Claimant grossed $23,538.34 (January 5, 2007 to June 8, 2008). These were the first 22 completed weeks in 2007 before her date of injury. The gross divided by 22 weeks equals $1,069.92. The Claimant's wages vary from paycheck to paycheck depending upon the number of hours she performed and periodic performance bonuses. The 22 weeks is a fair approximation of the Claimant's average weekly wage and represents a fair reflection of her wage loss due to the industrial injury.

Permanent Partial Disability

28. As set forth in Findings of Fact below and Conclusions of Law and Order to follow, it is determined that the Claimant has met her burden of proving that she is permanently and totally disabled as a result of the June 13, 2007 industrial injury. Permanent partial disability benefits are therefore not assigned to that claim.

29. Dr. Richman opined that as a result of the 2003 industrial injury the Claimant sustained a 9% whole person impairment for her physical injuries involving her low back and a 5% psychological disability. Dr. Richman's testimony and his report of August 27, 2008 was convincing and persuasive as to the Claimant's permanent impairment secondary to the 2003 industrial injury.

30. The Division Independent Medical Examiner was not asked to provide permanent impairment for the 2003 claim. Supportive of Dr. Richman's opinion, however, she found that the Claimant currently had a 16% whole person impairment for the physical injuries of which she apportioned 10% of the working unit to the condition that existed prior to June 13, 2007. It is found that the "pre-existing condition" was a direct result of the 2003 industrial injury. In addition, in her evidentiary testimony Dr. Leppard felt that the psychological impairment

would be best assigned to the "pre-existing condition." The Claimant has met her burden of proof that it is more likely than not that as a result of her 2003 industrial injury she has sustained a 9% working unit impairment for injuries involving her back and a 5% for psychological impairment.

Permanent Total Disability

31. The Claimant's husband of 21 years, David, was the first to testify at hearing. He is also employed by the Respondent-Employer-Insurer in the Utilities Department. David testified credibly that when he awakens in the morning his wife is usually already up; having failed to sleep much during the night due to low back pain. When he awakens he rubs her back for 20-30 minutes and helps her with her initial medication. The medication makes the Claimant drowsy and she usually stays in bed and falls asleep. At approximately 1:00 p.m. the Claimant takes her pain medications again and goes back to bed. She sleeps for one to two hours. The Claimant will go downstairs and maybe read the paper or make a phone call or two until about 4:00 p.m. when she takes her medication again. She will then usually fall asleep until dinner time. David does the cooking. After dinner she returns to her room and lies down. He estimates that she is lying down approximately three-quarters of the day. She does not perform household chores. When he is at work he calls her constantly during the day to check on her well-being. He estimates that they go out approximately one time per week. The Claimant lasts no more than an hour. He noted that she was up numerous times throughout the night. When she is up at night she paces, she rolls on a styrofoam tube or on a physical therapy ball, and tries to do some stretching exercises. Because of her injuries they have hired a housekeeper. His wife rarely drives due to her pain and side effects from the medication. David described the disparity in her day-to-day activities from before the June 13, 2007 industrial injury and after June 13, 2007. He noted that prior to June 13, 2007 they took trips together, they attended their son's baseball games, she kept house, and she worked every day. She even went to Europe on her own. He noted that she used to volunteer for various organizations and that she was able to sleep through the night. He described the fact that she cries often. It is found that the testimony from David was credible and persuasive.

32. Dr. Richman has been treating the Claimant since shortly after her initial fall in 2003 through the present. He is in a unique position to provide evidence as to the nature of the injuries sustained in the 2003 fall, the injuries she sustained in the second fall in 2007, and the change in her condition since her industrial injury sustained in 2007. Dr. Richman opined that she sustained injuries that resulted in chronic low back pain, buttock and hip pain, some leg pain and some depression as a result of the March 2003 fall at work. However, he further opined that prior to June 13, 2007 he did not feel it was necessary to place physical restrictions on her ability to work due to these conditions. Dr. Richman testified credibly that since her fall at work on June 13, 2007 there has been a substantial change in her conditions. Specifically, her pain has gone up

and her emotional status has deteriorated. She also has significantly more leg pain. Dr. Richman opined that her deterioration and her depression is directly related to the increase in pain in her low back and leg secondary to the June 13, 2007 fall down the stairs at work.

33. Dr. Richman testified that within a few months of the June 13, 2007 fall that the Claimant's depression became so severe that he became concerned of her possibly hurting herself. He determined that it was necessary to bring in Dr. Dale Mann, a psychologist, on an emergency basis. Prior to her fall at work in June of 2007 he did not feel that it was necessary for her to have emergency psychiatric care for her depression. He also pointed out that her dosages for pain medication have needed to be increased substantially since June 13, 2007. He noted that the dosages started escalating fairly rapidly after her June 13, 2007 fall to the point today where she is taking more than twice as much opiates to control her pain.

34. Dr. Richman testified, "Immediately after her fall [June 13, 2007], she really decompensated significantly despite escalating the dosages and she got to the point where she no longer was remaining functional during her day. And even though she was on fairly modest doses of opiates before even with more than twice as much now, she's much less functional than before the fall in 2007."

35. Dr. Richman acknowledged that she was reporting high pain levels before the 2007 fall and after the 2007 fall. He noted that the subjective pain levels, measured on a 1 to 10 scale, must be seen in light of the individual patient's experience up to that point in time that she provides a subjective pain level. He also noted that to keep her at roughly the same subjective level, it has been necessary to double the dosage of narcotic pain medication. He noted that the pain medications she is currently taking sedate her.

36. In Dr. Richman's report of July 2, 2008 he states:

"I have known [Claimant] for many years now, and there is clearly a difference in [Claimant] since her fall from last year. Not only her pain complaints and reports, but more importantly her psychological status is much worse since her fall. It is my opinion that she has never reached her pre-fall baseline of pain and depression.

I spoke with [Claimant] at length about her physical capabilities and her potential return to work options. The biggest concern that I have for [Claimant] is that she can only tolerate 10-12 minutes of one particular position. This is demonstrated on most of the visits when she comes to see me. She shifts positions when sitting in a chair for more than 10-12 minutes, sometimes stands and tries to move around and then changes positions often. Additionally, after only a couple of hours of being up out of

bed or lying down she needs to get back into a supine or side-lying position. . . .

Regarding another issue of her return to work, [Claimant] decompensated psychologically quite a bit when put into any type of stressful situations after her fall in 2007. It is my opinion that although her pain levels have increased since her fall in 2007, her psychological status is actually the biggest deterrent for her returning to any regular work. Because of her high levels of anxiety and depression at times, any kind of stressful situation escalates her pain levels and her psychological situation decompensates fairly rapidly at times. Although overall she is doing much better since she has not been working, I am quite concerned given her current situation that if she were to return to work with any type of stress, that her psychological status would decline.

Because of all of the above, I think it would be necessary for [Claimant] to be in a situation with any type of attempted trial at return to work that she be allowed to change positions every 10-12 minutes from sitting to standing to walking, etc., and change this every 10-12 minutes per hour, but for no longer than a two-hour maximum, at which point she would need to lie down for 45-60 minutes before resuming a position in either sitting, standing or walking. These physical restrictions in and of themselves will make it extremely difficult for her to find any employment. In addition, she needs to limit her lifting, pushing, pulling, etc. to the sedentary or less than sedentary level of work, lifting no more than 5 pounds on a regular basis, 10 pounds on a rare occasion. Additionally, she needs to avoid bending at the waist, no stair climbing, no crawling, kneeling, squatting. Additionally, her work environment needs to be a very low stress situation and her job should not be a position which would potentially worsen her depression and anxiety."

37. In her evidentiary deposition, the Respondent-Employer-Insurer's vocational expert, Margot Burns, opined that if Dr. Richman's assessment of limitations as set forth in his July 2, 2008 report is accepted as accurate, that she agrees with the Claimant's vocational expert, Bruce Magnuson, that the Claimant is permanently and totally disabled.

38. Dr. Richman noted that prior to June 13, 2007 he did not think it was necessary for the Claimant to be referred to a surgeon for a surgical consult, for a discogram, and as noted above, for comprehensive and emergent psychological intervention. Dr. Richman noted that all of this became necessary due to her fall at work on June 13, 2007. In commenting on the reports from Drs. Bisgard and Akers that essentially opine that the Claimant had no change in her condition as a result of the June 13, 2007 fall at work, and that all of her ongoing symptomotology as reviewed by them in November of 2007 was pre-existing June 13, 2007, Dr. Richman opined that there was simply no basis for that

opinion. He stated that her condition was dramatically different after June 13, 2007 than what it was during the several years that he treated her following her first fall at work in 2003. He noted that she has not been able to tolerate getting back to any kind of routine activity in work like she was doing before. He noted that functionally, the change caused by the 2007 injury was dramatic. He noted that their apparent reliance upon before and after MRI's is insufficient. He noted that in the absence of clinical findings supporting the film study, the film study had little significance. It is found that the opinions and testimony provided by Dr. Richman is persuasive and credible. The contrary opinions provided by Dr. Akers and Dr. Bisgard that the Claimant returned to baseline by November of 2007 to her pre-existing condition and that residuals are not related to the 2007 industrial injury, are not credible or persuasive.

39. Dr. Dale Mann has been the Claimant's primary treating psychologist since brought into the case by Dr. Richman in November of 2007. Of note in his initial report of November 16, 2007 under his heading of CONCLUSION/ RECOMMENDATIONS, he found that [Claimant] was experiencing significant and overwhelming psychological and physical distress at the present time and would benefit from psychological care and psychological testing. Respondent-Employer-Insurer has refused to pay for any of his treatment. In his most recent note of January 8, 2009 he continues to opine that she is a strong candidate for an intense rehabilitation program. Absent that, he continues to believe that the patient is not psychologically ready to return to work.

40. The Respondent-Employer-Insurer makes the argument that the Claimant's fall at work is not a significant factor in her current disability. The Respondent-Employer-Insurer relies upon the independent medical examination reports and testimony from Drs. Bisgard and Kleinman as well as their in-house facility doctor, Dr. Akers. To support the medical opinions, the Respondent-Employer-Insurer argues that the Claimant was performing at a low level performance level prior to her June 13, 2007 industrial injury.

41. A current employee of the Respondent-Employer-Insurer and a prior supervisor of the Claimant, Dawn Skeen, testified at hearing. Ms. Skeen testified that the Claimant was an outstanding employee and noted that the performance reviews done in 2005, 2006, and 2007 rated the Claimant at either the highest performing level of role model or at the next highest level of solid performer. Dawn Skeen confirmed that was exactly how the Claimant performed her duties.

42. Janice Manuel, a now retired employee for the Respondent-Employer-Insurer and a past supervisor for the Claimant, testified to the same effect. Janice Manuel was the supervisor that produced the annual performance review for the year 2006. She not only rated the Claimant's performance as very high but she noted that the Claimant received a "star award" on November 20, 2006 from the manager for contributions and all of the accounts payable accomplishments in 2006. Janice Manuel noted that a star award is an unusual

award given for exceptional performance. Janice Manuel also prepared the 2005 performance review. She noted that the Claimant also received a star award for her leadership role in 2005.

43. The 2007 performance review was prepared by the Claimant's most recent supervisor, Gretchen Peters. The performance review by Gretchen Peters was also positive. It should be noted that the first time a supervisor raises concern about performance is only after the Claimant is severely injured on June 13, 2007. It is also noted that Gretchen Peters, in her attempt to discredit the Claimant's performance levels, uses only the time that the Claimant put in on her regular activities and not her special projects to skew the numbers against other employees who did not have special projects taking up approximately 50% of her time.

44. Bruce Magnuson testified on behalf of the Claimant as the Claimant's vocational expert. Bruce Magnuson reviewed her employment records going back several years. Bruce Magnuson testified that based upon his review of the personnel records from 2003 to 2007 there was every indication that the Claimant was performing at a high level, not missing an excessive amount of work, working 40 hours per week, receiving bonuses, getting awards, etc. Mr. Magnuson testified that the June 13, 2007 industrial injury was "the terminating factor in her loss of access to the labor market." In fact, Bruce Magnuson testified that she is currently, in his expert opinion, incapable of earning any wages, part-time or full-time, due to the injuries she sustained on June 13, 2007. He pointed out that the most qualified position available to the Claimant was the job she was doing at the time of her industrial injury. He noted that it was the lightest level of physical demand level as per the Dictionary of Occupational Titles and typical labor force demands. However, he further noted that the Respondent-Employer-Insurer terminated her because she was incapable of performing that same job.

45. Mr. Magnuson noted that the Claimant lies down most of the day, she is significantly medicated, it is difficult for her to stay focused, the type of work that she has previously done required fairly intense focus since she was dealing with money, calculations, mathematical computations, and computer entries. He agreed with the Respondent-Employer-Insurer in that she was no longer able to perform that type of activity. Further basis for his opinion was the medical reports and testimony from Dr. Richman and the medical reports from Dr. Mann. As opined by the respondent's expert, Margot Burn, in her evidentiary deposition testimony, if the restrictions provided by Dr. Richman are accepted as accurate, the Claimant simply is not employable at the present time. Mr. Magnuson noted that the Claimant had been fully and gainfully employed since February of 1999 by the Respondent-Employer-Insurer, and before that, had worked her entire adult life. In his report of August 3, 2008 he concludes by stating, "I would conclude that [Claimant] is not capable of earning a wage in a part or full time basis. She is also not a candidate for formal retraining. The probabilities of

being able to sustain employment if able to work for a partial day or a full day are highly improbable. The above conclusions are made within a high degree of vocational probability." The testimony of Bruce Magnuson is found to be persuasive.

46. The Respondent-Employer-Insurer relies to a large extent upon the independent medical examinations from Drs. Bisgard and Kleinman. In spending approximately an hour with the Claimant and a review of medical records, these two doctors have concluded that the June 13, 2007 injury really had no role in the Claimant's current disability. Neither of them found any impairment as a result of her fall on June 13, 2007. In fact, Dr. Kleinman felt that from any cause, the Claimant had no psychological impairment. Their opinions to these issues is not persuasive.

47. Prior to her June 13, 2007 fall at work, the Claimant was, like all of her co-employees, encouraged to tele-work from home two or three days per week. They also allowed her to use flextime so as to ensure that she worked her 40 hours per week even if it required her to work on weekends. After her injury, this was all taken away from the Claimant for what amounts to unexplained reasons other than her new supervisor, Gretchen Peters', request to "more closely keep an eye on her." Prior to her fall at work, the Claimant was always rated as a role model or solid performer; the two highest performance ratings. The Claimant was chosen for special projects. She trained new employees. She received awards for her leadership.

48. The Claimant testified credibly that her condition has significantly worsened since her industrial injury of 2007. Respondent, by its determination that she was physically incapable of performing her job, which resulted in her termination for medical reasons, supports her position. The Claimant is now in constant pain, sleeps poorly, is incapable of performing day-to-day activities of daily living, is opiate dependant, and severely depressed. The pain and depression along with the sedative effects of the narcotics require the Claimant to lay down most of the day. She rarely leaves the house. She does not drive. She is dependent upon her husband to take care of her. She is not capable of earning any wages. As stated by Bruce Magnuson at hearing, it is persuasive evidence in support of her claim that she is permanently and totally disabled that in the job that she was most likely able to do, the Respondent-Employer-Insurer found that she physically and emotionally could not do it.

49. It is found that the Claimant has demonstrated that it is more likely than not that she is permanently and totally disabled as a result of the industrial injury of June 13, 2007. It is further found that she has demonstrated that the June 13, 2007 industrial injury was a significant causative factor in her current disability. As a result of her March 2003 industrial injury, the Claimant was not permanently and totally disabled. She continued to function at work and at home. Her

successful activities at work demonstrated that she was fully capable of earning a wage until the June 13, 2007 industrial injury.

CONCLUSIONS OF LAW

Injury and Compensability for March 5, 2003 Claim

1. Claimant has the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment with the 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. An 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. As found, Claimant showed it more probably true than not she sustained an injury arising out of and in the course of her employment with Respondent-Employer-Insurer . Thus, Claimant proved by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment with Respondent-Employer-Insurer.

4. Respondent-Employer-Insurer asserts that the claim should be barred due to the statute of limitations. Section 8-43-103(2), C.R.S. states that a claim is barred unless a notice claiming compensation is filed within two years (three years in the case of excusable neglect) of the injury. Section 8-43-103(2) further states as follows:

> [I]n all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the Division as required by the provisions of said articles [of the Workers' Compensation Act], this statute of limitations shall not begin to run against the claim of the injured employee . . . until the required report has been filed with the Division.

This language was in effect at the time of the Claimant's injury. The employer's duty to "report said injury" to the Division refers to the employer's statutory duties under Section 8-43-101, C.R.S. *Grant v. Industrial Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987). Section 8-43-101(1), provided that

> "[w]ithin 10 days after … the occurrence of a permanently physically impairing injury, or lost time injury to an employee in excess of three shifts

> or calendar days," the employer must report the injury to the Division. An employer is deemed to have "notice" of an injury when the employer has "some knowledge of 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."

Jones v. Adolph Coors Co., 689 P.2d 681, 684 (Colo. App. 1984). It is the Claimant's burden to prove when the employer had sufficient knowledge to trigger the duties required by Section 8-43-101(1). See *City and County of Denver v. Industrial Claim Appeals Office*, 58 P.2d 1162 (Colo. App. 2002). This is true because the tolling provisions create an exception to the Claimant's duty to file a claim within two years of the injury. *Procopio v. Army Navy Surplus*, W.C. No. 4-465-076 (June 10, 2005).

5. The persuasive evidence is that the Claimant fell at work, reported the injury the next day, completed the paperwork, and began missing shifts greater than three days all to the direct knowledge of at least her two supervisors, if not upper management. The compelling evidence is that the Claimant sought to formalize the claim and was dissuaded by human relations. Regardless, the Claimant has met her burden of proving that the statute of limitations was tolled until such time as the employer completed their duty to file the Employer's First Report. The Employer's First Report was not filed by respondent-employer until March 3, 2008; less than a month after the Claimant had filed her Worker's Claim for Compensation on February 10, 2008.

6. Notice of the work-related claim does not have to be perfect from the Claimant. The notice must be sufficient to demonstrate that the employer has "some knowledge of 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." *Jones*, supra. In the very similar case of *Carter v. ENT Federal Credit Union*, W.C. No. 4-744-530 (January 28, 2009), using the reasonably conscientious manager standard, the Administrative Law Judge and Industrial Claim Appeals Panel found that the statute of limitations was tolled. Respondents argued that the respondent-employer was not given sufficient notice without the Claimant providing detail as to the specific work-related activity she was on when injured away from work. In rejecting this argument, the Administrative Law Judge and the Panel stated, "We are not persuaded that the ALJ erred in determining that the statute of limitations was tolled. This is so even if the HR representative lacked knowledge that there had been an interview with a prospective employee at the lunch. In our opinion, there is substantial evidence to support the ALJ's decision that the employer was on notice that a Workers' Compensation was likely regardless of what knowledge the HR representative had." In the instant case, we have clear repeated knowledge on the part of supervisors and the HR department of a fall at work necessitating medical care and missed time from work. Utilizing the reasonably conscientious manager standard, the statute of limitations should be tolled.

7. Respondent-Employer-Insurer has not provided persuasive evidence that the claim should be barred by the statute of limitations, laches or estoppel. Therefore, Claimant's claim shall be compensable.

Medical Benefits

8. Respondent is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P. 2d 777 (Colo. App. 1990).

9. The Claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of her employment. The Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998).

10. The parties stipulated that the medical care of Drs. Richman, Mann, Cohen, and Sung are authorized, reasonable and necessary. Claimant sought medical benefits from June 13, 2007 and ongoing from these same providers and their referrals. As found, Claimant has established that the medical treatment in this claim, including the treatment provided by Drs. Richman, Mann, Cohen, and Sung as of June 13, 2007 and ongoing is related to the June 13, 2007 industrial injury. Accordingly, respondent is liable for this medical treatment to cure and relieve the effects of her injuries.

11. As found, Claimant proved by a preponderance of the evidence that the medical treatment that she received for her injuries was authorized medical treatment reasonably necessary to cure and relieve her from the effects of the injury. As further found, as a result of Claimant's injuries, she needs and will need in the future medical care. Therefore, respondent shall be required to pay for the medical treatment the Claimant received and continues to receive from these authorized treating doctors and their referrals to maintain her at maximum medical improvement.

Maximum Medical Improvement

12. Section 8-42-107(8)(b)(III), C.R.S., provides that the determination of the DIME with regard to MMI shall only be overcome by clear and convincing evidence. A fact or proposition that has been proved by "clear and convincing evidence" if, considering all of 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). In this case the DIME, Dr. Leppard, determined that Claimant was at maximum medical improvement on April 17, 2008. Consequently, Respondent-Employer-Insurer must prove by clear and convincing evidence that this determination is incorrect. As found,

Respondent-Employer-Insurer has failed to prove by clear and convincing evidence that the MMI determined by Dr. Leppard is incorrect.

Temporary Total Disability

13. The Claimant seeks temporary total disability benefits from November 19, 2007 until the date of maximum medical improvement established by the DIME on April 17, 2008. To prove entitlement to TTD 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)(a), C.R.S. requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, supra. 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, which impair the Claimant's ability effectively, and properly to perform Claimant's regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Continuation of temporary total disability benefits may be appropriate if the Claimant has multiple authorized treating physicians who give conflicting opinions concerning the Claimant's ability to return to work. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999). Resolution of this dispute is made by the Administrative Law Judge. Likewise, conflicting inferences as to whether a treating physician has released the Claimant to regular employment can be resolved by the Administrative Law Judge. *Imperial Headwear, Inc. v. Industrial Claim Appeals Office*, 15 P.3d 295 (Colo. App. 2000).

14. As found, as a result of the June 13, 2007 industrial injury, Claimant suffered injuries and work restrictions which have prevented Claimant from doing Claimant's regular job with employer from November 14, 2007 through the date of maximum medical improvement as established by the Division Independent Medical Examiner.

15. As found, Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 19, 2007 through April 17, 2008.

16. Insurer shall be ordered to pay Claimant temporary total disability benefits from November 19, 2007, the original date of maximum medical improvement provided by Dr. Akers, to April 17, 2008.

Average Weekly Wage

17. The objective of wage calculation for the average weekly wage is to reach a fair approximation of the Claimant's actual wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The Administrative Law Judge under normal circumstances has broad discretion in calculating the employee's average weekly wage according to the facts of the case to fairly determine the Claimant's weekly wage. *Williams Bros. v. Grimm*, 88 Colo. 416, 297 P. 1003 (1931). As found, the Claimant's average weekly wage is $1,069.92.

18. Respondent shall pay temporary disability benefits commencing on June 13, 2007 through April 17, 2008 based upon the average weekly wage of $1,069.92 which provides a temporary total disability rate of $713.28.

Permanent Partial Disability for Date of Injury March 5, 2003

19. Permanent disability is determined when the Claimant's condition is deemed to be stable and when further medical care is not likely to improve the condition. Section 8-40-201(11.5). Permanent partial disability benefits are calculated either under the schedule system or whole person system of Section 8-42-107, C.R.S.

20. As found, the primary treating physician, Dr. David Richman, found the Claimant at maximum medical improvement and that she sustained a 9% whole person impairment for her physical injuries and a 5% psychological disability. Claimant proved by a preponderance of the evidence that she is entitled to permanent partial disability benefits for the March 5, 2003 industrial injury.

<u>Permanent Total Disability</u>

21. Permanent total disability is defined by Section 8-40-201(16.5)(a) as the Claimant's inability "to earn any wages in the same or other employment." The burden of proof to establish the Claimant suffers from a permanent total disability lies with the Claimant and is a question of fact for the Administrative Law Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). In arriving at a factual determination as to whether the Claimant has sustained her burden of proof, the Administrative Law Judge may consider several "human factors" in making the decision. *Christie v. Coors Transportation Co.*, 933 P.2d 1330 (Colo. 1997); *Best-Way_Concrete Co. v. Baumgartner*, 908 P. 2d 1194 (Colo. App. 1995). These factors include, but are not limited to, the Claimant's physical condition, mental ability, age, employment history, education and the "availability of work" the Claimant can perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). It is the overall objective of this "human factor" standard to determine whether, when taking into account all of the relevant factors, employment is "reasonably available to the Claimant under his or her particular circumstances." *Weld County School District RE-12 v. Bymer*, *supra*. Non-industrial medical conditions that impair the Claimant's ability

to earn wages can be considered when performing a "human factor" analysis. *Pinkard v. Jefferson County School*, W.C. No. 4-174-632 (ICAO March 18, 1998).

22. An industrial injury does not need to be the sole cause of the Claimant's permanent and total disability. Because of the "full responsibility rule" an employer takes an injured worker as it finds him, and permanent total disability can be a combination of personal factors, such as a pre-existing mental or physical condition and a work-related injury or disease. *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Colorado Fuel & Iron Corp. v. Industrial Commission*, 379 P.2d 153 (Colo. 1962); *Casa Bonita Restaurant v. Industrial Commission*, 624 P.2d 1340 (Colo. App. 1981). The Claimant must demonstrate that the industrial injury is a significant causative factor in the Claimant's disability to establish permanent and total disability. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986); *Riley v. Mile High Honda*, W.C. No. 4-486-242 (ICAO August 12, 2003); *Garcia v. CF&I Steel, L.P.*, W.C. No. 4-454-548 (ICAO May 14, 2004). As found, Claimant has provided the most persuasive evidence that she is permanently and totally disabled and that the industrial injury of June 13, 2007 is a significant factor in her permanent and total disability. The Claimant has met her burden of proof that she is more likely than not permanently and totally disabled as a result of the June 13, 2007 industrial injury.

23. Respondent-Employer-Insurer shall be ordered to pay permanent total disability benefits commencing on the date of maximum medical improvement of April 17, 2008 as a result of the June 13, 2007 industrial injury.

ORDER

It is therefore ordered that:

1. Respondent-Employer-Insurer shall pay Claimant for permanent total disability benefits in Claim No. 4-727-623 commencing April 17, 2008.

2. Respondent-Employer-Insurer shall pay Claimant permanent partial disability benefits based upon a 9% working unit and 5% psychological impairment in Claim No. 4-752-214.

3. Respondent-Employer-Insurer t shall pay Claimant for temporary disability benefits from June 13, 2007 through April 17, 2008 at the rate of $713.28 per week. Permanent partial disability benefits will also be paid based upon the temporary total disability rate of $713.28.

4. Respondent-Employer-Insurer shall pay for Claimant's medical care from June 13, 2007 and continuing for treatment received from Dr. Richman, Dr. Mann, Dr. Cohen, Dr. Sung and their referrals. Claimant has met her burden of

proving that she requires ongoing medical care from these same providers to maintain her at maximum medical improvement. Respondent shall be responsible for maintenance treatment.

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

6. Any and all issues not determined herein are reserved for future determination.

DATE: June 10, 2009

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-729-564

ISSUES

The issues determined herein are petition to reopen against the First Employer and American Casualty and compensability of an occupational disease against the Second Employer and Pinnacol. The parties stipulated to medical benefits and temporary total disability ("TTD") benefits.

FINDINGS OF FACT

1. Since December 2001, claimant has worked intermittently for the Second Employer, cleaning horse stall and sometimes feeding horses.

2. In August 2006, claimant was employed by the First Employer, a temporary employment agency.

3. On August 22, 2006, while working at Western Forge, a manufacturer of crescent wrenches, claimant injured her left shoulder while attempting to pull a large crescent wrench loose from the machine.

4. Claimant was treated by Dr. Ogrodnick on August 24, 2006, and complained of pain over the biceps tendon and acromioclavicular ("AC") joint; however, she was

pain-free at rest. Dr. Ogrodnick diagnosed left shoulder strain and released claimant to work with restrictions, including no lifting or reaching with her left arm.

5. Claimant then returned to work for the First Employer in a lighter job assignment.

6. On September 5, 2006, claimant returned to Dr. Ogrodnick, complaining of pain, every once in a while and with lifting more than 5 pounds. Work restrictions at that time included no lifting more than 5 pounds with the left arm, no pushing/ pulling over 5 pounds, and no overhead work.

7. On September 19, 2006, claimant had continued pain over her anterior and lateral shoulder. By this date, claimant had improved with six sessions of physical therapy, but additional physical therapy was denied. Dr. Ogrodnick's nurse practitioner administered a steroid injection, causing claimant to return to Dr. Ogrodnick's office on September 21, 2006, with worsening of her condition.

8. By October 2, 2006, claimant continued to have pain in the lateral deltoid of 8 on a scale of 1-10. She was having problems sleeping on her left side and was working light duty for Western Forge. On examination, she had a positive Hawkins impingement maneuver and was still tender over her biceps tendon and AC joint. Dr. Ogrodnick prescribed six additional visits of physical therapy, which were never authorized by American Casualty.

9. On October 23, 2006, claimant's pain was reduced to 5 on a scale of 1-10 in the lateral deltoid area and she was pain-free at times. She was still tender over the biceps tendon. On this date, she was returned to work with no restrictions. Claimant soon thereafter stopped working for the First Employer.

10. On November 13, 2006, Dr. Ogrodnick determined that claimant was at maximum medical improvement ("MMI"). On that date, claimant indicated that she had not been working and had only 85% overall improvement of her left shoulder condition. While she was pain-free at that visit, she was not 100%. Claimant was released with no impairment and no work restrictions.

11. Claimant never underwent a magnetic resonance image ("MRI") of her left shoulder to definitively rule out a rotator cuff tear prior to being placed at MMI on November 13, 2006.

12. In January 2007, claimant returned to work part-time for the Second Employer. Her duties consisted solely of scooping horse manure and emptying it into a bucket or wheelbarrow. She used a plastic "muck fork" about two feet wide with 12-inch tines, 2 inches apart, a five-foot long wooden handle, and weighs approximately 2 pounds. She was able to push the wheelbarrow from stall to stall without placing any strain or stress on her left shoulder joint. Occasionally, she would also grain the horses by taking another wheelbarrow from stall to stall and scooping grain into a bucket. None of claimant's duties involved lifting more

than five to seven pounds and she was able to transfer the wheelbarrow from stall to stall without placing any strain or stress on her left shoulder joint. Claimant is right-hand dominant and performed her duties using mostly her right arm and was careful not to re-injure or aggravate her left shoulder. Her schedule varied. She did not work every day and she only worked approximately two hours to perform her limited duties. To increase the monetary amount of her paychecks, her husband would often accompany her to the stables and perform additional duties that claimant was unable to perform. These duties were reported to the Second Employer, who issued a single check in claimant's name only. Claimant was also compensated for watching the stables, checking on the horses to ensure they were not injured, and letting dogs out while the owner was out of town. Claimant used her arms carefully, holding them down in front of her body, and avoided placing any strain or stress on her left shoulder joint.

13. Claimant continued to suffer pain in her left shoulder after MMI. She noticed increasing pain in her left shoulder in January 2007. By April 2007, she noticed constant pain in the left shoulder.

14. On June 29, 2007, claimant called Dr. Ogrodnick's office to report her continuing and increased left shoulder symptoms. She was informed that she would need to obtain authorization from American Casualty to be reexamined.

15. On September 17, 2007, Dr. Ogrodnick reexamined claimant, who reported that her left shoulder pain never resolved, but increased in January and February 2007. She reported pain while lifting a bag of groceries or even a pot of water. She further indicated to Dr. Ogrodnick that her pain was so severe that she would not be able to lift a bag of dog food or reach for a gallon of milk. Claimant reported to Dr. Ogrodnick that she was working intermittently part-time for the Second Employer. However, her job duties did not cause pain. She was continuously complaining of tenderness over the biceps tendon and AC joint, the same complaints she had prior to MMI. Dr. Ogrodnick again diagnosed shoulder strain and referred claimant for additional physical therapy. He also imposed restrictions and determined that claimant was no longer at MMI for the injury.

16. Also on September 17, 2007, American Casualty filed a final admission of liability, in accordance with the November 2006 report by Dr. Ogrodnick. The insurer admitted for post-MMI medical benefits, specifically the September 2007 appointment with Dr. Ogrodnick.

17. On November 16, 2007, Dr. Richman examined claimant, who reported that her shoulder hurt while lying on it and she experienced increased pain with and without activity. She reported to Dr. Richman that she was working part-time at the Second Employer. She further reported that she was following restrictions in her job duties because of her injury not getting any better. She complained of pain of 5-8 on a scale of 1-10, throbbing anteriorly and laterally. Claimant's complaints of pain were consistent with her pre-MMI status, as her condition

never returned to 100%. Dr. Richman's diagnosis was chronic left shoulder pain, traumatically induced, with popping. He placed her on restrictions of no overhead lifting beyond 10-20 pounds and no reaching away from her body. He further recommended an MRI, but American Casualty denied authorization for the MRI.

18. The February 29, 2008, MRI revealed a full thickness tear of the supraspinatus tendon.

19. Dr. Richman referred claimant to Dr. Sanchez, an orthopedic surgeon, for left shoulder impingement and rotator cuff tear, but American Casualty denied this authorization.

20. By letter dated March 12, 2008, Dr. Ogrodnick concluded that claimant suffered a worsening of condition resulting from the initial injury in 2006.

21. On April 18, 2008, claimant filed a Petition to Reopen based upon a change in medical condition of the August 22, 2006, left shoulder injury.

22. On May 8, 2008, claimant ceased work for the Second Employer, which went out of business.

23. On July 14, 2008, Dr. Davis, an orthopedic surgeon, performed an independent medical examination for American Casualty. Dr. Davis noted continuing pain after MMI, which was minimized by limiting the use of her arm. Claimant complained of pain while lying on her left side and performing overhead reaching or lifting. Claimant's condition had steadily worsened following MMI. After the initial injury, claimant attempted to avoid overhead or forceful activities with her left shoulder. Claimant denied any re-injury to her left shoulder. Claimant reported to Dr. Davis that she was allowed to work for the Second Employer within tolerance of her shoulder pain and she eventually quit due to her inability to complete the jobs that needed to be done. Dr. Davis diagnosed claimant with a full-thickness rotator cuff tear, based upon her history and medical records. Dr. Davis concluded that the rotator cuff tear was caused by steady deterioration of the injury of August 22, 2006. He based his opinion on the fact that the claimant might have strained or partially torn her rotator cuff initially in August of 2006, and the use of her arm over time had caused a gradual deterioration, resulting in a rotator cuff tear. Dr. Davis further explained that a rotator cuff tear is an attritional process. It can begin with a minor injury, which alters the dynamics of the shoulder. Over time, with normal use, a strain or partial tear may steadily deteriorate into a full-thickness tear if the shoulder continues to be symptomatic, as in claimant's case. Due to claimant's continued pain at MMI, Dr. Davis believed that it was reasonable that her symptoms would deteriorate in time, requiring a reopening of her case for further treatment.

24. In October 2008, the Second Employer and Pinnacol were added as parties to this claim, although claimant never actually filed a claim against those parties.

25. Dr. Davis testified by depositions in October 2008 and February 2009. He did not believe that claimant's job duties for the Second Employer would cause a re-injury or aggravation, if she was using her left arm carefully and not in a way to cause further pain, strain or stress on her joint. Dr. Davis testified that, if claimant was using her arms carefully, held down, close to her body, in a "hanging-down position, but a little bit in front of her", so as not to place any strain or stress on the joint, she would not likely have injured or aggravated her left shoulder. In fact, she could lift a large amount of weight or perform repetitive activities without ever injuring or aggravating her left shoulder. It was Dr. Davis' opinion based on claimant's history and the medical records that she had a single, primary injury in 2006. Claimant had a steady chronic deterioration as a natural progression of that traumatic 2006 injury. Dr. Davis noted that rotator cuff tears do not heal well with time, although conservative treatment can relieve symptoms of a rotator cuff tear. Dr. Davis agreed that claimant's improvement after receiving physical therapy and resting her left shoulder does not rule out the possibility that she had a rotator cuff tear from that initial injury of August 22, 2006.

26. Moreover, Dr. Davis was not able to tell from Dr. Ogrodnick's MMI report how he tested the rotator cuff. Claimant had pain over her AC joint and biceps tendon, which is consistent with a rotator cuff tear or with bursitis or impingement. After MMI, claimant was released and still had pain. Her left shoulder continued to bother her. Dr. Davis noted that position of the left arm was more important than the weight moved or the length of time spent in an activity. Dr. Davis concluded that he still thought that claimant's current condition was a natural consequence of the 2006 injury.

27. On February 24, 2009, Ms. Bartman performed a job analysis of a stable hand based upon observation of the job at another large riding stable near the Denver metropolitan area. Ms. Bartman did not interview the owner of the Second Employer, which had gone out of business. She concluded that the job required lifting 50-pound bales of hay and 50-pound bags of feed intermittently throughout the day, as well as other activities. Ms. Bartman's job analysis did not take into account the smaller scale of the Second Employer's operation or the limited job duties performed by the claimant. In fact, Ms. Bartman admitted that she did not know what claimant actually did for the Second Employer.

28. The preponderance of the evidence demonstrates that claimant's condition changed as a natural and proximate consequence of the admitted August 22, 2006, industrial injury. Claimant needs additional medical treatment and TTD benefits. Her testimony is credible. The opinions of Dr. Davis are credible and persuasive. Claimant clearly had ongoing pain at MMI, but the pain worsened. She did not suffer a new occupational disease as a natural consequence of her work for the Second Employer. She never reported a reinjury as a result of

activities she was performing for the Second Employer. She probably had the cuff tear from the original injury, or suffered a cuff strain that naturally led to the tear and need for surgery.

CONCLUSIONS OF LAW

1. Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. *See Ward v. Ward*, 928 P.2d 739 (Colo. App. 1996) (noting that change in condition has been construed to mean a change in the physical condition of an injured worker). Reopening is appropriate when the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Dorman v. B & W Construction Co.*, 765 P.2d 1033 (Colo. App. 1988). Claimant has the burden of proving these requirements, *see Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). Claimant must prove that her change of condition is the natural and proximate consequence of the industrial injury, without any contribution from another separate causative factor. *Vega v. City of Colorado Springs,* W.C. No. 3-986-865 & 4-226-005 (ICAO, March 8, 2000). As found, claimant has proven by a preponderance of the evidence that her condition changed as a natural and proximate consequence of the admitted August 22, 2006, industrial injury. Claimant needs additional medical treatment and TTD benefits. Consequently, her petition to reopen is granted.

2. Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). 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).

3. The allegation is that claimant suffered an occupational disease due to her work for the Second Employer. 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). 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, the preponderance of the evidence fails to prove that claimant suffered an occupational disease to her left shoulder resulting directly from the employment or conditions under which work was performed and following as a natural incident of the work for the Second Employer.

ORDER

It is therefore ordered that:

1. The claim for benefits against the Second Employer and Pinnacol is denied and dismissed.

2. Claimant's petition to reopen the claim against the First Employer and American Casualty is granted.

3. American Casualty shall pay for all of claimant's reasonably necessary medical treatment by authorized providers.

4. American Casualty shall pay to claimant TTD benefits based upon the admitted average weekly wage for the period commencing September 17, 2007, and continuing thereafter until modified or terminated according to law.

5. American Casualty 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: June 8, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-733-793

ISSUES

The issues include average weekly wage and post-maximum medical improvement medical benefits.

FINDINGS OF FACT

1. Claimant was injured while working for the Better Business Bureau on August 29, 2007. Her injury resulted from a fall off a horse while Claimant was participating in the filming of a television ad for the Better Business Bureau. Among other things, Claimant suffered a significant fracture of her right clavicle that required fixation. She also suffered a closed-head injury in that accident. As a direct result of this compensable work injury, Claimant has suffered impairment associated with her traumatic brain injury, including aggravation of non-industrial related pre-existing stress, anxiety and depression. She has undergone extensive treatment for cognitive therapy. Her job at the Better Business Bureau includes work in public relations, production of TV and radio ads, as well as media consultation. The job requires Claimant to multi-task and the work activity is high stress and intellectually demanding. Her job also includes hosting a television show and participating in various radio shows on behalf of the Better Business Bureau.

2.Claimant's authorized treating physician, Dr. George Schwender, has prescribed medication for Claimant's closed-head injury symptoms, including Seroquel and Lamictal.

3.Dr. Gutterman, the Respondents' forensic witness in this matter, opined that the Claimant's need for these two medications arise from a pre-existing condition, for which she was previously prescribed these medications.

4.Dr. Schwender, Claimant's authorized treating physician who prescribed the Seroquel and Lamictal for Claimant, testified that Claimant will require these medications for the indefinite future, partially as a direct result of the permanent impairment that Claimant suffers as a consequence of her work-related injury. Dr. Schwender testified that Claimant will require these medications for the indefinite future, partially as a direct result of the permanent impairment that Claimant suffers as a consequence of her work-related injury. Dr. Schwender testified that Claimant's use of Seroquel and Lamictal should be apportioned 50 percent to the compensable work injury and 50 percent to Claimant's pre-existing, long-standing periodic bouts with depression. Dr. Schwender has considered reports and opinions of Claimant's psychiatric providers, who evaluated and treated Claimant prior to this work injury. Under the facts herein, Dr. Schwender's analysis as to the apportionment of Claimant's need and therefore entitlement to the provision of Seroquel and Lamictal is found to be thorough, logical and preferred over the opinion of Dr. Gutterman.

5.Respondents are responsible for interest pursuant to statute on all amounts due and not paid when due, in the event Claimant had to absorb payment out-of-pocket for Seroquel and Lamictal during the course of this contest.

6. Respondents failed to prove entitlement to a change in the average weekly wage and therefore Respondents' request for a determination of temporary/total disability benefit rating in an amount other than that admitted for is denied. Blair Reeves was called as a witness on behalf of Respondents on the issue of average weekly wage. She was unable to offer information that would be of assistance in making a determination that the average weekly wage admitted for in the admissions filed herein should be any different than the number contained in those admissions.

CONCLUSIONS OF LAW

1. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988) holds that a claimant may be entitled to medical benefits after MMI if there is substantial evidence in the record to support a determination that future medical treatment will be reasonable and necessary to "relieve" the effects of the industrial injury, "prevent a deterioration" of the claimant's condition, or to maintain a claimant at MMI. Cf. *In re Mockmore*, W.C. No. 4-343-875 (ICAO, 4/8/2005)

2.Respondents challenged the causal relationship and Claimant's need for Seroquel and Lamictal as a result of Claimant's injury based on the fact that Claimant was prescribed those medications by a previous medical provider for a problem similar to the depression that Claimant suffers as a direct result of this worker's compensation closed-head injury. It is Respondents' assertion that while Claimant may have benefited and required those medications while she was treating for the work injury, she no longer requires those medications as a consequence of her work injury, but rather likely

requires the benefit of those medications for her pre-existing, psychiatric condition that continues to be symptomatic.

3.In weighing the testimony of Dr. Gutterman, the Respondents' forensic witness in this matter, as well as the testimony of Dr. Schwender, Claimant's authorized treating physician who prescribed the Seroquel and Lamictal for Claimant, the ALJ is convinced that the weight of the evidence makes it more likely than not that Claimant has an ongoing need for the medications.

4.Dr. Schwender testified that Claimant's use of Seroquel and Lamictal should be apportioned 50 percent to the compensable work injury and 50 percent to Claimant's pre-existing, long-standing periodic bouts with depression. Dr. Schwender has considered reports and opinions of Claimant's psychiatric providers, who evaluated and treated Claimant prior to this work injury. Dr. Schwender's analysis as to the apportionment of Claimant's need and therefore entitlement to the provision of Seroquel and Lamictal is found to be thorough, logical and preferred over the opinion of Dr. Gutterman.

5.Therefore, the Administrative Law Judge finds that the cost of Claimant's Seroquel and Lamictal medication should be apportioned 50 percent to Respondents in this claim.

6.The ALJ concludes that the facts as elicited fail to support as a matter of law, any change in the average weekly wage.

ORDER

It is therefore ordered that:

1.Respondents' request to change the average weekly wage is DENIED.

2. Consistent with Dr. Schwender's testimony and persuasive opinion, Respondents are ORDERED to pay 50 percent of the cost of Claimant's Seroquel and Lamictal for active treatment and by way of maintenance benefit after MMI.

3. Respondents are further ORDERED to pay eight percent interest per annum on all benefits not paid when due, including any expenses that Claimant has incurred for payment of Seroquel and Lamictal (out-of-pocket) during the time that this issue has been in contest.

4. All other matters are reserved if necessary for additional hearing and future determination.

DATE: June 18, 2009

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-734-781

ISSUE

Whether Claimant has established by a preponderance of the evidence that the artificial disk replacement surgery options recommended by Michael E. Janssen, M.D. are reasonable and necessary to cure and relieve the effects of his industrial injury.

FINDINGS OF FACT

1. On July 14, 2007 Claimant suffered an admitted industrial injury to his cervical spine during the course and scope of his employment with Employer.

2. During the course of Claimant's medical treatment for his industrial injury Authorized Treating Physician (ATP) Jeffrey Wunder, M.D. referred him to surgeons Hans C. Coester, M.D. and Michael E. Janssen, M.D. Both Dr. Coester and Dr. Janssen have opined that Claimant requires surgical intervention in the form of a diskectomy on his cervical spine at the C5-6 and C6-7 levels to alleviate pressure on his nerves and spinal cord. They have also determined that the surgery is reasonable, necessary and related to Claimant's industrial injury. Furthermore, independent medical examination physician Hugh D. McPherson, M.D. has agreed that a diskectomy is reasonable, necessary and related to Claimant's industrial injury.

3. Doctors Coester, Janssen and McPherson have opined that a secondary surgery is required to fill the spaces that remain after the C5-6 and C6-7 disks are removed from Claimant's cervical spine. There are three potential options for the secondary surgery: (1) a two-level cervical fusion of the C5-6 and C6-7 levels; (2) a two-level disk replacement using the ProDisc artificial disk; and (3) fusing one level of Claimant's cervical spine and implanting a ProDisc artificial disk at the remaining level (hybrid option).

4. The parties agree that a two-level fusion is reasonable and necessary to cure and relieve the effects of Claimant's industrial injury. However, Respondents have not authorized either a two-level artificial disk replacement or the hybrid option. Moreover, neither of the preceding surgeries is explicitly authorized within the Division of Workers' Compensation Medical Treatment Guidelines for cervical disorders (Medical Treatment Guidelines).

5. Orthopedic surgeon Dr. McPherson testified by telephone at the hearing in this matter. He explained that the Food and Drug Administration (FDA) has not approved the two-level artificial disk replacement or the hybrid option. Dr. McPherson also commented that neither the two-level artificial disk replacement nor the hybrid option were appropriate for Claimant because Claimant suffers from lower leg pain. He stated that lower leg pain reflects nerve impingement and that artificial disk replacement is not reasonable when an individual suffers from nerve impingement. Moreover, Dr. McPherson remarked that Claimant does not meet the FDA clinical trial requirement for an artificial disk replacement because his spinal canal diameter does not measure at least 10 millimeters. Dr. McPherson acknowledged that he had not examined Claimant for several months prior to testifying at the hearing in this matter.

6. On April 23, 2009 the parties conducted the evidentiary deposition of Dr. Janssen. Dr. Janssen explained that he is a spine surgeon who has been actively involved in artificial disk replacement surgery for several years. He has been the lead investigator for the FDA in evaluating disk replacement surgery. Dr. Janssen has participated in the research, development and implementation of ProDisc artificial disks. He also provides disk replacement training for spine surgeons. Dr. Janssen noted that the FDA has only approved the ProDisc artificial disk for single level disk replacement surgery. Nevertheless, he explained that he has performed multi-level ProDisc implants and the hybrid option. In fact, both doctors McPherson and Janssen have performed two-level arthroplasties and hybrids on their patients that included the “off-label” or non-FDA approved implantation of the ProDisc.

7. Dr. Janssen explained that a two-level fusion is beneficial because it is permanent. However, the procedure reduces a patient’s cervical range of motion. He commented that patients who undergo cervical fusions are at risk for sustaining non-congenital degeneration of the disks above and below the fused levels because of increased stress. Dr. Janssen remarked that up to one-third of patients sustain pathology at adjacent disk levels within five years of fusion surgery.

8. Dr. Janssen explained that motion preservation devices including the ProDisc are beneficial because they permit the patient to enjoy continued cervical range of motion. He noted that artificial disks are theoretically not permanent but should last approximately 25 years. Moreover, the levels adjacent to the artificial disks would not likely suffer non-congenital degeneration because of the absence of increased stress.

9. Dr. Janssen also addressed the viability of the hybrid surgical option. He commented that the fused level would enjoy the same risks and benefits associated with fusion surgery. Furthermore, the artificial disk implant level would enjoy the same risks and benefits associated with motion preservation devices.

10. Dr. Janssen disagreed with Dr. McPherson’s opinion that the motion preservation options would continue to expose Claimant to spinal cord impingement. He explained that Claimant’s diskectomy would remove pressure from the spinal cord. The two-level artificial disk replacement and the hybrid option would not cause additional impingement to the spinal cord. Dr. Janssen testified that the motion enjoyed with the

motion preservation options is not the patient's enemy. Instead, the pressure on the spinal cord caused by the disk herniation is Claimant's primary concern.

11. Dr. Janssen also disagreed with Dr. McPherson's conclusion that Claimant does not meet the FDA clinical trial requirement of a spinal canal diameter measuring at least 10 millimeters. He explained that the 10-millimeter spinal canal requirement imposed in the FDA clinical trials applied to congenital stenosis. However, Claimant's spinal stenosis is not congenital but was caused by the cervical disks that will be removed by the diskectomy.

12. Claimant testified at the hearing in this matter. He commented that he has been unable to control his back pain because pain medications upset his stomach. After consulting with numerous physicians he comprehends the risks and benefits associated with the various surgical options that are available. Claimant explained that he desires to proceed with the surgical options in the following order: (1) the hybrid option; (2) the two-level artificial disk replacement; and (3) a two-level fusion.

13. The parties agree that a two-level fusion is reasonable and necessary to cure and relieve the effects of Claimant's industrial injury. Moreover, Claimant's credible testimony and the persuasive testimony of Dr. Janssen demonstrate that Claimant has established that it is more probably true than not that two-level disk replacement surgery or the hybrid option using the ProDisc are reasonable and necessary to cure and relieve the effects of his industrial injury. A deviation from the Medical Treatment Guidelines is warranted under the specific facts and circumstances of this matter. Although Dr. McPherson has opined that a two-level disk replacement and the hybrid option are inappropriate for Claimant, Dr. Janssen provided a persuasive description of the advantages of disk replacement surgery for Claimant. He explained that a two-level fusion might accelerate Claimant's disk degeneration because of extra pressure on adjacent disks. In contrast, a two-level artificial disk replacement or the hybrid option would not cause increased stress on adjacent disks. Moreover, Dr. Janssen disagreed with Dr. McPherson's opinion that the motion preservation options would continue to expose Claimant to spinal cord impingement because the diskectomy would remove pressure from the spinal cord. The two-level artificial disk replacement and the hybrid option would then not cause additional impingement to the spinal cord. Dr. Janssen also explained that the 10-millimeter spinal canal requirement imposed in the FDA clinical trials applied to congenital stenosis, but Claimant's condition is not congenital and would be alleviated by the removal of cervical disks during the diskectomy. Two-level artificial disk replacement surgery or the hybrid option would improve Claimant's quality of life by maintaining his spinal mobility, preserve his activity level, and assist in pain relief. Finally, based on surgical consultations, Claimant has knowledge of the risks associated with surgical intervention and prefers to undertake two-level disk replacement surgery or the hybrid option to improve his condition.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured

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

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

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

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In Re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. The Medical Treatment Guidelines specifically provide that their primary purpose is "advisory and educational." Moreover, the Medical Treatment Guidelines state that "[t]he Division recognizes that acceptable medical practice may include deviations from these guidelines, as individual cases dictate. Therefore, these guidelines are not relevant as evidence of a provider's legal standard of professional care." The Medical Treatment Guidelines thus may be considered as an "acceptable professional standard" of care, but "certain cases may require treatment modalities that differ from those generally prescribed in the guidelines." *See Hall v. Industrial Claim Appeals Office,* 74 P.3d 459, 461 (Colo. App. 2003).

6. As found, the parties agree that a two-level fusion is reasonable and necessary to cure and relieve the effects of Claimant's industrial injury. Moreover, Claimant's credible testimony and the persuasive testimony of Dr. Janssen demonstrate that Claimant has established by a preponderance of the evidence that two-level disk replacement surgery or the hybrid option using the ProDisc are reasonable and

necessary to cure and relieve the effects of his industrial injury. A deviation from the Medical Treatment Guidelines is warranted under the specific facts and circumstances of this matter. Although Dr. McPherson has opined that a two-level disk replacement and the hybrid option are inappropriate for Claimant, Dr. Janssen provided a persuasive description of the advantages of disk replacement surgery for Claimant. He explained that a two-level fusion might accelerate Claimant's disk degeneration because of extra pressure on adjacent disks. In contrast, a two-level artificial disk replacement or the hybrid option would not cause increased stress on adjacent disks. Moreover, Dr. Janssen disagreed with Dr. McPherson's opinion that the motion preservation options would continue to expose Claimant to spinal cord impingement because the diskectomy would remove pressure from the spinal cord. The two-level artificial disk replacement and the hybrid option would then not cause additional impingement to the spinal cord. Dr. Janssen also explained that the 10-millimeter spinal canal requirement imposed in the FDA clinical trials applied to congenital stenosis, but Claimant's condition is not congenital and would be alleviated by the removal of cervical disks during the diskectomy. Two-level artificial disk replacement surgery or the hybrid option would improve Claimant's quality of life by maintaining his spinal mobility, preserve his activity level, and assist in pain relief. Finally, based on surgical consultations, Claimant has knowledge of the risks associated with surgical intervention and prefers to undertake two-level disk replacement surgery or the hybrid option to improve his condition.

ORDER

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

1. Respondents are financially responsible for Claimant's C5-6 and C6-7 cervical diskectomy and Claimant's choice of the following: (1) a two-level cervical fusion of the C5-6 and C6-7 levels; (2) a two-level disk replacement using the ProDisc artificial disk; and (3) the hybrid option of fusing one level of Claimant's cervical spine and implanting a ProDisc artificial disk at the remaining level.

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

DATED: June 11, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-735-693

ISSUES

- Did claimant prove by a preponderance of the evidence that she sustained an injury arising out of the course and scope of her employment?
- Did claimant prove by a preponderance of the evidence that she is entitled to temporary disability benefits?
- Did respondents prove 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?

FINDINGS OF FACT

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

Employer operates a nonprofit preschool and childcare center. Lindsay Sherman is executive director. Claimant's date of birth is December 23, 1981; her age at the time of hearing was 27 years. Claimant worked for employer from January through July of 2007, first as a teacher's aid and then a preschool teacher of some 12 to 14 children aged 4 to 5 years. Ms. Sherman was claimant's direct supervisor. Claimant contends she injured her lower back lifting a small table on Friday, June 15, 2007. Ms. Sherman terminated claimant for abandoning her classroom of children on July 10, 2007.

Claimant testified to the following: On Friday, June 15th, claimant felt a small strain in her lower back after lifting the children's table, but she did not report the incident to Ms. Sherman. Claimant visited her father in Silverton the following weekend. Claimant stated that she awoke in pain on Sunday morning, June 17th and had to think to recall what she might have done to cause her lower back pain. Claimant eventually recalled the table-lifting incident on June 15th and attributed her pain to that incident. Throughout Sunday, claimant was unable to straighten her back and experienced pain over her lumbar spine.

Claimant returned to work at employer on Monday, where she states she worked in pain. Claimant stated that she did not report her lower back pain on Monday because Ms. Sherman was away from the school. Ms. Sherman however has given her home telephone and cell phone numbers to staff at the school, and even to parents of children at the school should they need or want to contact her. Ms. Sherman's telephone numbers are also posted in various locations around the school so that staff can contact her when needed. Although claimant attempted to blame her failure to report her injury on the fact that Ms. Sherman was away from the school, this self-serving explanation

fails when weighed against the fact that Ms. Sherman was always available to employees by cell phone. Indeed, claimant eventually reported an injury to Ms. Sherman over the phone. Claimant's testimony explaining her failure to report an injury for several days is unreliable and lacks credibility.

Claimant was unable to credibly establish when she reported the table-lifting incident to Ms. Sherman. The Judge credits the testimony of Ms. Sherman in finding: Around 8:00 a.m. on Wednesday, June 20, 2007, claimant telephoned Ms. Sherman at home and advised her that she had injured herself on June 15th. Claimant told Ms. Sherman that she had hurt her back the previous Friday when she setting up for the Father's Day luncheon. Claimant asked Ms. Sherman to recommend a chiropractor or provider for treatment. Ms. Sherman told claimant that she could go to the emergency room (ER), depending on her level of pain. Ms. Sherman also provided claimant with the name of the chiropractic group. Claimant neither went to the ER nor to the chiropractic group Ms. Sherman suggested. Claimant instead chose to go to Advantage Physical Therapy.

Claimant's answers to many questions established that she could not recall the facts. Claimant's testimony also was replete with inconsistencies, such as her testimony attempting to explain the facts surrounding the table-lifting incident. On June 20, 2007, claimant reported to her physical therapist at Advantage Physical Therapy that she and one other teacher were completely responsible for setting up for the for the Father's Day luncheon. This report was inconsistent with claimant's testimony at hearing when she said that she had to set up the furniture for the luncheon by herself. When asked on cross-examination the name of the other teacher she mentioned to the physical therapist, she answered that she did not know. Claimant's testimony was largely unreliable and lacking credibility.

At the time she hired claimant, Ms. Sherman provided her with a copy of the school's handbook: *Employee Guidelines and Expectations*. Claimant acknowledged through her testimony that Ms. Sherman had provided her with a copy of the handbook. The handbook outlines the responsibilities of teachers and staff working with the various age groups of children, including infants, toddlers, and preschoolers. The applicable handbook section for preschool teachers contains a lengthy list of responsibilities directing them to: Provide a fun, educational, and safe environment for each and every preschooler; know at all times where each preschooler is or will be, never leaving a preschooler unattended; and release preschoolers only to authorized parents or guardians.

The handbook contains a general section discussing time off from work, it provides:

> If you would like to take time off, it is your responsibility to find another staff member to sub for you, if another staff member is not available, notify [Ms. Sherman] and she will arrange a sub.

The handbook encourages open communication among staff and a team environment where staff should feel comfortable asking each other for help and offering supportive suggestions.

Ms. Sherman conducted regular staff meetings and provided employees periodic training on various topics, including review of the school's guidelines and procedures. Ms. Sherman issued claimant a "Certificate of Completion" after she successfully completed 1.5 hours of training to prepare for a "Qualistar" review of the school and claimant's class. Ms. Sherman provided claimant additional training in preschool operations.

Agencies of the State of Colorado regulate the preschool's operations, including class size, the ratio of teacher to child, and other aspects of the preschool. Crediting Ms. Sherman's testimony, the appropriate ratio of child to teacher is posted in each classroom. Claimant was aware of such regulations.

After her initial physical therapy appointment on June 20, 2007, claimant advised Ms. Sherman that she had scheduled physical therapy appointments for the two following days at 11:00 a.m. Ms. Sherman explained to claimant that the 11:00 a.m. timing of the appointments was problematic: By scheduling her appointments right in the middle of the day, claimant would be disrupting the children's schedule. And it would be difficult for Ms. Sherman to find someone to cover claimant's preschool classroom. In addition, claimant had known for months that the end of June was the time that a Qualistar assessment was being performed at the school. Scheduling of the Qualistar assessment had been further complicated by vacation claimant had previously scheduled to take during the last week of June.

On June 21st, Ms. Sherman prepared a typed letter containing a corrective action plan, which she provided to claimant that day. The letter provides:

> I let [claimant] know that leaving after 2:30 p.m. would be acceptable, or making an appointment for before her scheduled arrival time (8:30), would be acceptable options, but leaving at 11:00 a.m. was not acceptable. The Qualistar assessment is taking place in her classroom on one of those 2 days, and as result of her demanded leave next week, there are already 5 blackout days for Qualistar assessment in her classroom. [Claimant] came into work Thurs a.m., and informed me she would be leaving for the 11:00 a.m. appointment, and that she had changed the Friday appt to 3:45. [Claimant] left on Thursday from 11:00 a.m. – 12:00 p.m. The Qualistar assessor was on her way to assess [claimant's] classroom earlier that morning, and was agreeable to changing her schedule so that she could assess a different classroom Thursday and [claimant's] room on Friday. The intention of this inclusion to [claimant's] file is to clearly identify issues related to emergency time off, ***and to reiterate Employee Handbook Policy, stating that staff is responsible for finding coverage for their time off.*** Only 3 of [claimant's] 6 days off next week are covered. Again, this is the time within the Qualistar window of

> assessment, for which staff had extensive notice that time off was not available…. Prior emergency leaves: One day for a sick dog appt; Consistent sick days (at least 1 per month since hiring). **In the future it is expected that time off will be covered in advance, and that, especially in light of the excessive amount of emergency and requested time leave, [claimant] will honor the center directors request to schedule personal appointments at appropriate times.** Those necessary leave times will also be covered in advance by an appropriate and available staff person.

(Emphasis added). Ms. Sherman invited claimant to respond in writing or schedule a meeting with her or other board members to discuss the corrective action plan.

Claimant responded to Ms. Sherman's letter with a two-page written statement, dated June 21st. Claimant wrote at the top:

> Please read and add to my file. Thank you!

According to her statement, claimant first notified Ms. Sherman of her injury on Wednesday, June 20th. Claimant stated that she contacted her employer by phone that day and was able to receive some medical care. Claimant specifically referenced the additional therapy appointments that Ms. Sherman mentioned in the disciplinary write-up. In her handwritten statement, claimant wrote:

> The care I received from the physical therapist helped a lot and I was able to complete my week of working … almost pain free.

While claimant acknowledged in her testimony that she had prepared the handwritten statement, she was unable to recall the details of the statement or the date upon which she actually submitted the statement to Ms. Sherman.

Claimant was off work on vacation during the entire week of June 25th through 29th, 2007. Claimant had arranged this time off to help move her grandmother in Ohio. Claimant traveled by airline to/from Ohio for that trip. While claimant suggested in testimony that she had not personally moved any of her grandmother's belongings, she reported to the physical therapist that her back held up fairly well during the trip to Ohio to move her grandmother. The Judge finds claimant's testimony self-serving and inconsistent with what she reported to the physical therapist.

Following the trip to Ohio, claimant returned to work at the school on Monday, July 2nd. Claimant continued performing her regular teaching duties up until her termination on July 10, 2007. Claimant never suggested to Ms. Sherman or anyone else at employer that she was physically unable to perform her regular job duties. Claimant's testimony suggests that she feared Ms. Sherman would fire her if she reported that she was unable to perform her job because of pain. This testimony was unreliable and inconsistent with what claimant wrote in her June 21st statement, indicating she was nearly pain-free during the prior week when she was performing her

regular work. Claimant's testimony also was inconsistent with what she reported to her physical therapist on July 10, 2007.

The typical operating schedule for the center is 8:00 to 5:30, Monday through Friday. The center is closed on weekends. During the summer months, employer attempts to give teaching staff an extra half-day off per week, providing there is no scheduling conflict and adequate coverage for each classroom. Claimant had requested time off on Tuesday afternoons, when Amanda Watts was available to cover claimant's classroom. Crediting Ms. Sherman's testimony, teachers understood that afternoons off were flexible and subject to change, depending upon staffing needs of the school.

On Friday, July 6, 2007, Julie Pawelk informed claimant that she should reschedule her afternoon off on the following Tuesday, July 10th, explaining that Ms. Watts would be unavailable to cover her classroom. On Monday, July 9th, Ms. Watts informed claimant that she could not cover for her on July 10th. Later on July 9th, Ms. Sherman reiterated to claimant that she could not take off July 10th because there was no coverage for her classroom. Ms. Sherman however told claimant she would be available to cover claimant's classroom on Wednesday afternoon so that claimant could take off that afternoon.

Claimant was unable to remember either her conversation with Julie Pawelk on July 6th or her conversation with Amanda Watts on Monday, July 9th. Claimant was able to recall the conversation where Ms. Sherman advised her that she could not take off on July 10th because of inadequate coverage. Claimant stated that she told Ms. Sherman that she had two previously scheduled doctors' appointments on Tuesday afternoon that she would try to reschedule for Wednesday. Claimant stated that she called and tried to reschedule the appointments but was unable to move them. Claimant stated that she did not cancel either of the appointments. Claimant was unable to recall the two medical providers. Claimant testified that, after finding she could not reschedule the appointments, she informed Ms. Sherman the appointments could not be rescheduled.

In contrast to claimant, Ms. Sherman testified that claimant never told her on July 9th that she was unable to reschedule two medical appointments. Ms. Sherman testified that claimant only told her that she had a "well check" appointment required for employees by employer. Ms. Sherman gave claimant permission to postpone the wellness examination until the next day. Claimant never mentioned to Ms. Sherman that she also had a physical therapy appointment. The Judge credits Ms. Sherman's testimony over that of claimant.

Ms. Sherman had understood from her conversation with claimant on Monday that claimant had agreed to switch her afternoon off from Tuesday to Wednesday when Ms. Sherman was available to cover her class. Ms. Sherman was shocked when claimant told her at 11:30 on July 10th that she was leaving; she testified:

> On July 10, 2007, I was working in the infant room with … an aide and eight infants. And at 11:30, [claimant] had her preschool class outside,

> and she came to the infant room window, which is adjacent to the outside playground, and said, "It's 11:30, and I'm leaving."
>
> And I said, "There's no one to cover your classroom. You can't leave. If you leave, I'll have to call all of the children's parents and let them know that they've been left alone."
>
> And she said, "I understand," and walked away from the window.
>
> ****
>
> I was shocked.
>
> ****
>
> [I]n all my years working with children, I have never seen someone just leave a group of children.

Because she was with a group of 8 babies, Ms. Sherman was unable to follow claimant to reason with her. Claimant walked away from her 11 preschool children, leaving them unattended.

Claimant felt that she was entitled to take off the afternoon of July 10th, irrespective of scheduling problems. Claimant felt any scheduling problems ultimately were Ms. Sherman's responsibility. Claimant stated that she left the children sitting in the classroom, reading books and that she opened some doors between her classroom and another classroom where the children have lunch. Claimant stated that there were two teachers in that other room having lunch with another class. Claimant stated that she made eye contact with both teachers and interpreted their nodding to indicate that they would watch the children. Claimant could not recall the names of the two teachers, nor did she verbally tell them that she was leaving. Claimant stated that she instead left the preschool building.

Ms. Sherman had no one to cover claimant's classroom of children because of state regulations controlling the ratio of teachers to children. Because claimant left her children unattended, the preschool was in violation of state law. State regulations constrained Ms. Sherman to self-report the violation to 2 separate state agencies, including the Department of Human Services. Ms. Sherman also had to call the parents of the 11 children to have them come to the school to pick them up. Ms. Sherman terminated claimant based upon the incidents leading up to the June 21st letter and the July 10th incident.

Respondents showed it more probably true than not that claimant was responsible for her termination. When claimant applied for her teaching position in January of 2007, she represented herself as an experienced preschool teacher with knowledge of developmental and age appropriate learning skills. Claimant understood that, as a preschool teacher, she was solely responsible for her class and could not

leave the children unattended or unsupervised for any amount of time. Claimant understood employer's policy that she was responsible for assuring that another teacher or substitute was available to cover her class should she need to be gone from work. Claimant contends she could not reasonably have understood that abandoning her class of children would result in her termination because the employee handbook allows employees to notify Ms. Sherman and leave it to her to arrange for a substitute if another staff member is unavailable. Claimant's reading of the handbook is self-serving and ignores Ms. Sherman's express directive to reschedule her afternoon off from Tuesday to Wednesday. Ms. Sherman, Ms. Pawelk, and Ms. Watts provided claimant adequate notice that staff were unavailable to cover for claimant on Tuesday, July 10th. There was no persuasive evidence otherwise showing that claimant had medical appointments she could not reschedule. The medical records instead reflect that claimant attended a physical therapy appointment at Advantage Physical Therapy on July 10, 2007. The physical therapy record fails to suggest any sort of urgency in that appointment. Instead, the report reflects claimant's back was feeling better. There are no medical records to suggest that claimant saw any medical provider other than the physical therapist the afternoon of July 10th. The Judge credits the testimony of Ms. Sherman and fellow teacher Renee Rodriguez in finding claimant, as a reasonable preschool teacher at employer, knew or should have known that abandoning her classroom of children on July 10th would result in her termination. Claimant's conduct was volitional, especially after Ms. Sherman directed her to work the afternoon of July 10th.

Insurer referred claimant to Stephen Johnson, M.D., who first evaluated her on July 11, 2007. At respondents' request, John Raschbacher, M.D., performed an independent medical examination (IME) of claimant on December 5, 2008. Both Dr. Johnson and Dr. Raschbacher testified as experts in the area of Occupational Medicine.

The Judge notes that insurer coordinated with claimant's prior attorney to arrange transportation, including round-trip flight arrangements from Durango to Denver, to attend a prior IME with Dr. Raschbacher one year earlier on December 10, 2007. Claimant no-showed, and insurer incurred the costs of the missed appointment. Claimant appeared for the December 5, 2008, IME only after respondents filed a motion to compel claimant's attendance. The Judge finds claimant failed to offer any credible or persuasive explanation for her failure to attend the earlier IME with Dr. Raschbacher. Claimant thus delayed resolution of her claim by at least one year. Claimant's conduct leading to such delay is inconsistent with her implied desire to obtain medical treatment to resolve her symptoms.

Prior to Dr. Johnson's examination on July 11th, claimant completed a two-page medical history form. On the form, claimant denied any past history of a similar lower back problem. When asked by Dr. Johnson about prior injury or problems with her back, claimant likewise denied any prior problems. Claimant misrepresented her past history of back treatment to Dr. Johnson.

On Dr. Johnson's medical history form, claimant denied any past history of treatment or counseling for mental health problems. Claimant misrepresented this history to Dr. Johnson and to respondents in discovery. Contrary to what claimant reported to Dr. Johnson, where she denied prior psychological treatment, claimant reported to Dr. Raschbacher that she had been in and out of psychological counseling her entire life. Claimant explained that she construed this question as limited to professional counseling. Claimant testified that she has gone to a counselor from time to time, but stated she could not recall the counselor's name. Claimant suggested that she started seeing a counselor in Durango a few weeks after her injury on June 15, 2007. Claimant could not recall who referred her to this counselor. Claimant attempted to justify her failure to disclose this information to respondents during discovery by claiming that the counselor was not a medical provider. Claimant's explanation for denying a past mental health history was disingenuous, self-serving and lacking credibility.

In his July 11th narrative report, Dr. Johnson noted claimant was bending over to pick up a small low children's table at work and felt a strain in her left low back region. Claimant reported to Dr. Johnson that she had experienced persistent discomfort with some discomfort intermittently going down into her left buttock and left lateral mid thigh. Claimant reported that, although the pain increased with bending or any heavy lifting, it had not prevented her from performing her normal work. Claimant reported having a second job delivering newspapers. Claimant reported that employer had terminated her because she took the prior afternoon off to see a doctor for a scheduled visit for routine health maintenance and for attending an appointment with her physical therapist. Dr. Johnson opined that, based upon the history and physical findings, claimant had injured her left sacroiliac joint at work while bending forward and lifting in an awkward position. Dr. Johnson diagnosed left sacroiliac joint dysfunction – a muscular/ligamentous strain. Dr. Johnson explained to claimant that her condition should improve over time with conservative treatment. Dr. Johnson recommended that claimant continue with physical therapy twice weekly and that she should start chiropractic treatment 2-3 times weekly for the next 2-3 weeks. Dr. Johnson referred claimant for chiropractic treatment at Bodo Chiropractic.

Although Dr. Johnson imposed a temporary lifting restriction of 10 pounds on July 11, 2007, claimant reported to Dr. Johnson that her lower back pain had not prevented her from performing her work at employer. The Judge credits the testimony of Ms. Sherman in finding that employer could accommodate this restriction such that claimant could continue to perform her regular work teaching preschool children.

On July 25, 2007, claimant reported to Dr. Johnson that chiropractic treatment had taken her back pain away. Claimant however reported new pain around her left hip area, which she attributed to chiropractic treatment. Dr. Johnson felt the new area of pain might involve the buttock muscles, the piriformis muscle, or posterior trochanteric bursa. Dr. Johnson examined claimant and determined that her left sacroiliac joint dysfunction had dramatically improved. Claimant told Dr. Johnson she was attempting some babysitting and house-cleaning work. Dr. Johnson recommended one more

chiropractic treatment, so long as claimant felt comfortable with that treatment. Dr. Johnson also recommended claimant continue with physical therapy treatment. Dr. Johnson scheduled claimant for a follow-up evaluation on August 6th, but claimant no-showed for the appointment.

Dr. Johnson examined claimant on August 16, 2007, when claimant reported that the area of initial low back pain from her injury at employer had resolved. Claimant however reported pain at a level 5/10 deep in her left hip area. Claimant agreed to additional chiropractic treatment and massage therapy instead of physical therapy. Claimant missed her next appointment with Dr. Johnson scheduled for September 4, 2007.

Dr. Johnson evaluated claimant on September 12, 2007, when she reported spending time in Silverton, arranging transfer of her father to a nursing facility. Because of this, claimant had not undergone therapy. Dr. Johnson evaluated claimant and noted:

> [Claimant] no longer has typical findings for sacroiliac dysfunction as she has previously, and I am concerned that she may have some undiagnosed lumbar disk problem.

Dr. Johnson referred claimant for a magnetic resonance imaging (MRI) scan of her lumbar spine on September 14, 2007.

Dr. Johnson discussed the MRI findings with claimant by telephone on September 19th. The MRI showed a central disc herniation at the L5-S1 level of claimant's lumbar spine, producing minor deformity of the ventral aspect of the thecal sac, but without evident compromise of the S1 or L5 nerve roots. Dr. Johnson reported that, although she had MRI findings of a disc herniation, claimant's symptoms were inconsistent with a disc problem.

Dr. Johnson opined it very unlikely that claimant's mechanism of injury caused the central disc herniation; he explained:

> [Y]ou can get a disk herniation with pretty minor trauma, but it's pretty rare that you would have a lumbar disk herniation without quite a lot of more heavy, repetitive lifting.
>
> ****
>
> Or sudden force on the disk, such as a fall. And reaching over to pick up a small table should not be enough force, especially in a young woman, to cause a disk herniation ….

Dr. Johnson's medical opinion was persuasive and amply supported by Dr. Rachbacher's medical opinion. The Judge credits Dr. Johnson's medical opinion in finding the MRI findings, including the finding of claimant's central disc herniation, were

preexisting and were neither aggravated, intensified, nor worsened by the alleged table-lifting incident at employer on June 15, 2007.

Dr. Johnson referred claimant to Physiatrist Mara Isser-Sax, M.D., for evaluation and treatment recommendations on October 9, 2007. Crediting what claimant reported to Dr. Isser-Sax, the Judge finds that table she lifted at employer on June 15th weighed 15 pounds. Claimant reported suffering post-traumatic stress disorder as a result of pain from her injury at employer. Dr. Isser-Sax diagnosed lumbar disc degeneration and left hip pain. Dr. Isser-Sax recommended a MRI scan of claimant's left hip for diagnostic purposes.

During cross-examination, claimant dissembled when answering questions concerning her history of work since employer terminated her on July 10, 2007. When questioned whether she had been hired to work at a clothing store called Durango Traditions shortly after July 10, 2007. Claimant initially agreed she worked there before stating she was never hired. Claimant stated that, while she worked for a couple of days, she was as never hired and never received a paycheck. Claimant was also asked if she had worked at Forget Me Not Floral in Durango. Claimant admitted that she had done part-time holiday work for Forget Me Not Floral. Claimant however stated that she was not paid by Forget Me Not Floral, but instead traded her help arranging flowers for a few items from the boutique. While claimant was unable to recall what those boutique items were, she nonetheless recalled that the total value of those items failed to add up to a hundred dollars. Claimant rationalized her failure to disclose her employment at Durango Traditions and Forget Me Not Floral in her discovery responses by arguing that she was not paid in money for either of those positions.

The following are further examples of claimant dissembling when answering questions about subsequent employment on cross-examination. When asked about her work cleaning houses, claimant was unable to recall whose houses she cleaned or whether she was self-employed or worked for a company. While she stated that she believed she had worked with another gal cleaning houses, claimant said she was unable to recall her name. When asked about her report to Dr. Johnson report that she had been cleaning 5 houses at some point, claimant denied ever cleaning that many houses. When asked whether she experienced back pain when cleaning the houses, claimant responded that she continuously experiences back pain on a day-to-day basis, depending upon her activity. Claimant stated she was unable to recall when she stopped cleaning houses, but offered that she stopped at some point because of back pain. When asked about Dr. Johnson's August 16, 2007, report indicating that she had been baby-sitting an 18-month-old child, claimant said she was unable to remember who she had been babysitting. Claimant however recalled that babysitting required little lifting that the toddler's mother had paid her about 20 bucks.

Dr. Raschbacher's testimony was persuasive and amply supported by the testimony of Dr. Johnson. The Judge credits Dr. Raschbacher's testimony in finding: All symptoms of the muscular/ligamentous strain Dr. Johnson diagnosed on July 11, 2007, reasonably should have manifest within 2 to 3 days of June 15, 2007. Claimant's

symptoms should have improved after June 18, 2007. Claimant instead reported markedly increased symptoms after Ms. Sherman terminated her. Claimant's subjective symptoms are unsupported by objective findings on physical examination and are unsupported by diagnostic testing. Crediting Dr. Raschbacher's suggestion, claimant's report of increased symptoms after her termination more likely reflects her motivation to punish employer because of her anger about her termination than actual symptoms from the alleged table-lifting incident.

Based upon the above examples and the totality of the evidence, the Judge finds claimant an unreliable historian. Claimant's testimony concerning her subjective symptoms, the cause of those symptoms, and the results of treatment modalities was unreliable and lacking credibility. Claimant's testimony attributing her symptoms to a table-lifting incident on June 15, 2007, lacks credibility.

Claimant failed to show it more probably true than not that she sustained an injury arising out of the course and scope of her employment on June 15, 2007. As found, claimant contends she felt a slight strain lifting a 15-pound table on Friday, June 15, 2007. According to claimant, her symptoms began when she awoke the following Sunday morning. The Judge however found that claimant's testimony attributing her symptoms to the table-lifting incident lacks credibility. Claimant thus failed to support her claim with credible testimony.

CONCLUSIONS OF LAW

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

A. Compensability:

Claimant argues she has proven by a preponderance of the evidence that she sustained an injury arising out of the course and scope of her employment on June 15, 2007. The Judge disagrees.

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

The 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 she sustained an injury arising out of the course and scope of her employment on June 15, 2007. Claimant thus failed to prove by a preponderance of the evidence that she sustained a compensable injury.

As found, claimant failed to support her claim with credible testimony.

The Judge concludes that claimant's claim for workers' compensation benefits under the Act should be denied and dismissed.

ORDER

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

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

DATED: June 19, 2009

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-735-985

ISSUES

The presented for determination was the calculation of the increase in Claimant's average weekly wage due to the loss of health insurance benefits under Section 8-40-201 (19), C.R.S. and the effective date of such increase.

FINDINGS OF FACT

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

1. Claimant was employed by Employer with a date of hire of May 10, 2004.

2. At the time of hire, Claimant enrolled in Employer's health insurance plan. Claimant enrolled herself and also her husband and 3 sons as dependents. Claimant enrolled in Employer's health, dental and vision insurance plans.

3. Claimant sustained a compensable injury on August 27, 2007. Claimant has not returned to work with Employer since September 1, 2007.

4. On October 30, 2008 Claimant completed a 2009 Benefit Enrollment/ Change form for Employer's medical, dental and vision programs. Claimant removed her husband and two of her sons as dependents covered under Employer's health insurance program. Claimant removed one of her sons because he had turned 19 years of age and was no longer covered under the Employer's health insurance plan. Claimant removed her husband and other son because she could not longer afford to pay her portion of the health insurance premium because she had not been able to work on account of her work-related injury.

5. Beginning January 1, 2009 Claimant and 1 dependent, her 12 year old son, were covered under Employer's health insurance plan. The pre-tax payroll deduction per pay period for this coverage was $55.45.

6. Claimant's employment with Employer terminated March 13, 2009 because Claimant had been on leave of absence for 18 months or more. Employer continued its contribution to the cost of Claimant's medical, dental and

vision insurance under Employer's plan until the time of Claimant's termination from employment effective March 13, 2009.

7. At the time of Claimant's termination from employment with Employer, Claimant's cost for continuing Employer's health insurance plan for medical, dental and vision coverage for herself and one dependent was $791.45 per month. This is a weekly cost of $182.64.

CONCLUSIONS OF LAW

8. 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*.

9. 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 or not credible. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

10. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). Here, Claimant argues that her average weekly wage should be increased by the cost of continuation of the Employer's health insurance plan for herself and two or more dependents. Claimant bears the burden of proof in this assertion.

11. Under the provisions of Section 8-40-201 (19)(b), C.R.S. the term "wages" includes "the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan…If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including 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."

12. Claimant initially argues that her average weekly wage should be increased by $85.10 per week effective January 1, 2009 to compensate her for the loss of health insurance coverage for her husband under Employer's plan. The amount

claimed represented the difference between the cost of continuing the Employer's plan for Claimant and one dependent and the cost for Claimant and 2 or more dependents. Claimant calculates this amount as: ($1,160,23 - $791.45 = $368.78 per month, or $85.10 per week). Claimant reasons that this amount represents "wages" lost by Claimant as a result of her work injury because Claimant removed her husband from coverage under the Employer's plan due to the cost and her off work-status. The ALJ disagrees.

13. The provisions of Section 8-40-201 (19)(b) operate to include the cost of health insurance only when a claimant had "continued" the employer's coverage at her own cost pursuant to COBRA (Consolidated Omnibus Budget Reconciliation Act of 1985). So long as the Employer continues its payment or share of the premium for the health insurance the amount a claimant pays as her share of the premium for the insurance is not includable in the average weekly wage under the definition of "wages" in Section 8-40-201 (19)(b), C.R.S. *Midboe v. Indus. Claim Appeals Office,* 88 P.3d 643 (Colo. App. 2003, rev'd on other grounds), *Indus. Claim Appeals Office v. Ray,* 145 P.3d 661, 667 (Colo. 2006). It therefore follows that here, when Claimant reduced the number of dependents covered under her employer's health insurance at a time when Employer continued to make payment for its portion of the premium, Claimant is not entitled to have any portion of the cost of such insurance included in her average weekly wage. Because Employer continued payment for its portion of the cost of the health insurance any value of decreased coverage under the plan does not constitute "wages" as defined under Section 8-40-201 (19)(b), C.R.S. Thus, Claimant is not entitled to have any cost or value associated with Employer's health insurance plan included in her average weekly wage until after March 13, 2009 when the employment with Employer terminated and Employer's contributions ended.

14. Respondents argue that the replacement cost for Claimant's health insurance to be included in the average weekly wage should be limited to the cost of continuation of Claimant's coverage only, not the cost for Claimant and one dependant. Respondents' argue that since Employer contributed only toward the cost of Claimant's coverage, the additional replacement cost attributable to coverage for a dependent should not be included. Although Respondents assert that Employer only contributed towards Claimant's coverage, not coverage for her dependents, that evidence is not in the record before this ALJ. Even were such evidence in the record, the ALJ would disagree with Respondents' position.

15. Under Section 8-40-201 (19)(b), C.R.S. is it the cost to claimant of converting to a similar or lesser plan, not the employer's cost of health insurance at the time of injury, that is to be included in the average weekly wage. *Schelly v. Indus. Claim Appeals Office,* 961 P.2d 547, 549 (Colo. App. 1997). At the time of her termination from employment and loss of health insurance under Employer's plan on March 13, 2009 Claimant's plan included coverage for her and one dependent, her 12 year old son. As found, the cost of converting to a similar plan was $791.45 per month or $182. 45 per week. It is this amount that is includable in and added to Claimant's average weekly wage effective March 13, 2009. The purpose of Section 8-40-201 (19)(b),

C.R.S. is to ensure that Claimant has sufficient funds available to purchase health insurance after Claimant's employment with Employer was terminated, regardless of whether the cost was more or less than Employer's cost of providing similar insurance. *Humane Society of Pikes Peak v. Indus. Claim Appeals Office,* 26 P.3d 546 (Colo. App. 2001). The ALJ rejects Claimant's argument that her average weekly wage should be increased by the cost to continue coverage for Claimant and 2 dependents, reflecting coverage for her husband and one of her sons who remained eligible for coverage under Employer's plan. Claimant voluntarily ended this coverage prior to the termination of her employment and loss of coverage. Claimant's voluntary reduction on coverage prior to her termination of employment, even though motivated by economic concerns related to her injury, does not entitle Claimant to a higher conversion cost to be included in her average weekly wage under Section 8-40-201 (19)(b), C.R.S. That cost is measured by the cost of converting to a similar or lesser plan as that in effect upon termination of Employer's contribution to the plan. Section 8-40-201 (19)(b), C.R.S. ("wages" shall include the amount…upon termination of the continuation, the employee's cost of conversion to a similar or lesser plan"). See, *Gonzales v. City of Fort Collins and Occupational Healthcare Management Services,* W.C. No. 4-365-220 (November 20, 2003).

16. Claimant additionally raises an argument that she should not be barred by application of the doctrines of issue preclusion or claim preclusion from litigating an error in the determination of her average weekly wage prior to inclusion of the cost of health insurance. The ALJ has previously addressed this issue in an Order Granting Partial Summary Judgment dated March 30, 2009. The ALJ is not persuaded to depart from his prior determination.

ORDER

It is therefore ordered that:

1. Claimant's claim for an increase in her average weekly wage of $85.10 effective January 1, 2009 through March 12, 2009 is denied and dismissed.

2. Claimant's average weekly wage is increased $182.64 per week beginning March 13, 2009 to reflect the Claimant's cost of continuing Employer's health insurance or converting to a similar or lesser plan.

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

All matters not determined herein are reserved for future determination.

DATED: June 11, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-736-285

ISSUES

The following issues were raised for consideration at hearing.

1. Permanent partial disability benefits (PPD);

2. Medical benefits; and

3. Penalties.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant filed an application for hearing on February 28, 2009 listing the issues of penalties, medical benefits and PPD. On March 18, 2009, Respondents filed a response to application for hearing indicating that PPD was not ripe for determination in light of the Division independent medical examiner's (DIME) determination that Claimant is not at maximum medical improvement (MMI). Respondents further raised the issue of "overcome DIME."

2. Claimant's claim with regard to medical benefits pertains to the DIME physician's recommendation that Claimant undergo a uni-compartmental knee replacement. Claimant argued that he was entitled to proceed to hearing on the February 28, 2009 application to prove reasonable, necessary, and related medical benefits with regard to the uni-compartmental knee replacement. Respondents further contended that the medical benefits issue was also not ripe for determination since it emanated from the DIME determination.

3. Respondents contended that the Administrative Law Judge (ALJ) lacked jurisdiction to consider the issues of PPD and medical benefits. Claimant asserted that even if the ALJ determined that the DIME determination and medical benefits was not properly before the ALJ on the basis of Claimant application for hearing, the issues were properly before the ALJ on the basis of the Respondents' response application in which Respondents raised the issue of "overcome DIME."

4. Following consideration of the parties' arguments presented at hearing, it was determine that the issue of PPD and medical benefits was not ripe for determination in this matter. It is undisputed by the parties that Respondents filed a new application for hearing on March 13, 2009 raising the issue of PPD regarding overcoming the DIME determination. The ALJ adopted the Respondents' argument that it timely filed an application for hearing following notice of completion of the DIME received from the Division of Workers' Compensation, Department of Labor and Employment (DOWC) pursuant to the provision of Section 8-43-203(2)(b)(II), C.R.S. The ALJ agreed with the Respondents that the issues of PPD and medical benefits were not ripe for determination until receipt from DOWC of the notice of completion of the DIME report. Claimant's contention that Respondents raised the issue of overcoming the DIME in this matter by way of the March 18, 2009 response to application for hearing in which Respondents state "overcome DIME" is rejected. It is argued by Respondents, and found by the ALJ that, at the time, Respondents filed the response to application for hearing in this case, the issue was not ripe for determination.

5. The only issue properly before the ALJ is the issue of penalties under Section 8-43-304. Claimant contends that he is entitled to a penalty under the provision of Section 8-43-304 because Respondents improperly terminated temporary total disability benefits (TTD) from July 3, 2008 to August 7, 2008. Claimant argues that he is entitled to a penalty from July 18, 2008 to August 7, 2008. Respondents contend that no penalty is warranted because the insurance adjuster cured the violation on August 7, 2008 before the application for hearing was filed and because the Claimant did not prove by clear and convincing evidence that the insurer/adjuster knew or should reasonably have known that the violation occurred. Respondents contend that the insurer cured the error as soon as it was made aware

6. Based on the insurance adjuster's credible testimony, he reasonably should have known that the violation occurred. The adjuster testified credibly that the error occurred when he took over Claimant's account from another adjuster. The adjuster testified that the former adjuster had Claimant's TTD payments issued automatically. The adjuster testified that when the account was transferred to him the "diary expired" and Claimant's TTD payments stopped. The adjuster testified that between July 3 and August 7, 2008 he did not watch the diary and had he done so he would have caught the problem. The adjuster also testified that since the problem with Claimant's TTD being improperly terminated, the adjuster has altered the procedures that he follows in order to prevent the mistake from occurring again. The adjuster credibly testified that he now checks all the claims within his authority to be sure the problem can't recur and to be sure they are not programmed for automatic termination. The adjuster finally testified that he is responsible for 140 claims and since the problem with Claimant's TTD he uses greater diligence in making sure each claim is handled properly.

7. It is found and concluded that Claimant is entitled to a 21-day penalty from July 18, 2008 to August 7, 2008 for improper termination of TTD. Claimant sustained his burden of proof to establish by clear and convincing evidence that the violator, the adjuster, should have known through the exercise of reasonable diligence that he was in

violation. However, Claimant offered no credible or persuasive evidence that he was harmed by the 21-day period his TTD benefits were improperly terminated.

8. The ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital*, 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 "degree of reprehensibility" of the violator's conduct, the disparity between the actual and potential harm suffered by a party and the award of penalties, and the difference between the penalties awarded and the penalties assessed in comparable cases. *Associated Business Products v. I.C.A.O.*, 126 P.3d 323 (Colo. App. 2005).

9. The adjuster's conduct, which caused the violation, was not reprehensible but an error, which the adjuster admitted and corrected. Claimant did not present credible or persuasive evidence that he was injured by the adjuster's mistake. It is found and concluded that Claimant is entitled to a 21-day penalty at the rate of $1.00 per day (or $21.00) for the insurer's improper termination of TTD.

CONCLUSIONS OF LAW

Having made the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. 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 leaves the trier-of-fact, after considering all 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. A Workers' Compensation case is decided on its merits. Section 8-43-201, supra. The facts in a Workers' Compensation case must be interpreted neutrally, neither in favor or the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, supra. The judge's factual findings concern only the evidence and inferences that are found to be dispositive of the issues involved that; that the judge has not addressed every piece of evidence and every inference that might lead to conflicting conclusions and has rejected evidence and inferences contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v Industrial Claims Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. On June 13, 2001, the Director of the Division of Workers' Compensation (Director) issued an "Interpretive Bulletin" concerning administration of the DIME procedure under Section 8-43-203(2)(b)(II), C.R.S. The Director's Interpretative Bulletin states that the legislative purpose of the March 2001 amendment to the statute is to prevent the filing of multiple hearing applications by holding the adjudication process in abeyance pending completion of the DIME "on disputed issues of MMI and/or whole person impairment." According to the Director, the DOWC is required to review DIME reports for completeness to ensure the DIME report is consistent with the requirements

of the AMA Guides, and rules including Rule XIX on apportionment. Then the DOWC issues a statement to the parties that the report has been accepted and may be considered final. The Interpretative Bulletin also states that the issuance of the DOWC's "notice of completion" triggers a party's responsibility to request a hearing in order to dispute a DIME physician's findings of MMI and medical impairment under Section 8-43-203(2)(b)(II), C.R.S. Thus, in the Director's opinion, "the time frame for responding to the IME results does not begin to run until the Division notifies the parties the IME report is complete and final."

4. It is found that the Director's informal interepretation of the statute is consistent with the legislative intent and is therefore persuasive. *See Banner Advertising v. People*, 868 P.2d 1077 (Colo. 1994).

5. The Director's Interpretive Bulletin is also consistent with Rule of Procedure XIV (L) (4) (d), 7 Code Colo. Reg. 1101-3 at 59 which states that the DIME report is final "when it includes the requested determination regarding MMI and/or final impairment rating worksheets." The rule further states that services of the DIME physician conclude upon "acceptance by the DOWC" of the final DIME report. Accordingly, in *Carlson v. Informatics Corporation*, W.C. No. 4-380-302 (November 1, 2002), it was concluded that the DOWC's notice of completion is dispositive of whether the issues of MMI and medical impairment are ripe for adjudication. This ALJ rules in this case consistent with the I.C.A P. in *Carlson, supra.*

6. Based on the credible and persuasive evidence presented at hearing, it was established that Claimant's claims related to PPD and medical benefits were not ripe for hearing based on the February 8, 2008 application for hearing in this case. The evidence further established that based on Respondents' reference to "overcome DIME" contained on the March 18, 2009 response to application for hearing, the issue still was not ripe for hearing. Thus, the claims related to the DIME decision are found not to be ripe and are dismissed.

7. Section 8-43-304(1), C.R.S. provides for penalties of up to $500 per day if respondent violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director. First, the claimant must prove that the disputed conduct constituted a violation of the statute, rule, or order. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995); *Villa v. Wayne Gomez Demolition & Excavating, Inc.*, W.C. No. 4-236-951 (ICAO, January 7, 1997). Failure to comply with the Rules of Procedure is a failure to perform a "duty lawfully enjoined" within the meaning of Section 8-43-304(1). *See Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App., 1997); *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App., 1996).

8. If the respondent committed a violation, penalties may be imposed only if the respondent's actions were not reasonable under an objective standard. Reasonableness depends upon whether respondent had a rational argument based in law or fact. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App.

1997); *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). The standard is "an objective standard measured by the reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office, 907 P.2d 676, (Colo. App., 1995).

9. The ALJ may consider a “wide variety of factors” in determining an appropriate penalty. Adakai v. St. Mary Corwin Hospital, 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 ”degree of reprehensibility” of the violator’s conduct, the disparity between the actual and potential harm suffered by a party and the award of penalties, and the difference between the penalties awarded and the penalties assessed in comparable cases. Associated Business Products v. I.C.A.O., 126 P.3d 323 (Colo. App. 2005).

10. Under Section 8-42-105(3), C.R.S., TTD may only be terminate upon the occurrence of the specified events defined in this section. These events do not include the reason provided by the adjuster in this case. The adjuster in this case testified that the termination of Claimant’s TTD was a mistake resulting from the changeover of adjusters assigned to work on Claimant’s claim. Furthermore, based on the adjuster’s testimony in this case, it is found that the insurer’s actions in this case resulting in the termination of Claimant’s TTD benefits from July 18 to August 7, 2008 was not objectively reasonable. It was through the adjuster’s admitted lack of diligence to keep track of the claims assigned to him that the TTD benefits were terminated.

11. The adjuster’s conduct, which caused the violation, was not reprehensible but an error, which the adjuster admitted and corrected. Claimant did not present credible or persuasive evidence that he was injured by the adjuster’s mistake. Accordingly, it is found and concluded that Claimant is entitled to a penalty in the amount of $1.00 per day for 21 days, for a total of $21.00

ORDER

It is therefore ordered that:

1. Claimant’s claim to proceed to hearing on the issues of PPD an medical benefits is denied and dismissed as the issues are not ripe for determination.

2. Claimant is entitled to a penalty pursuant to Section 8-43-304, C.R.S. for improper termination of TTD benefits in the amount of $21.00

3. The penalty payment shall be paid 75% payable to Claimant and 25% payable to the subsequent injury fund created in Section 8-46-101, C.R.S.

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

All matters not determined herein are reserved for future determination.

DATED: June 23, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-740-341

ISSUES

Issues endorsed for hearing include Compensability, Medical Benefits (Authorized Provider and Reasonably Necessary), and Average Weekly Wage. Claimant also endorsed the issues of Penalties pursuant to (a) Section 8-43-304 C.R.S. for failure to file an Employer's First Report of Injury as required by Section 8-43-101 C.R.S.; (b) Section 8-43-203(2)(a), C.R.S., for failure to timely admit or deny as required by Section 8-43-203(1)(a), C.R.S., and (c) Section 8-43-408 (1), C.R.S., for failure to carry workers' compensation insurance as required by Section 8-43-409, C.R.S.

FINDINGS OF FACT

1.Employer received on February 27, 2009, actual notice of the hearing. The Office of Administrative Courts' Notice of Hearing was served at Employer's corporate offices in Fort Myers, Florida, by the Lee County Florida Sheriff's Department.

2.Claimant is a 37-year-old former employee of Employer. Claimant was employed as a "roughneck" upon the oil drilling rigs that Employer operated in Colorado. Claimant's average weekly wage is $1,196.00.

3.Employer did not have a workers' compensation insurance policy in effect at the time of Claimant's injury.

4.On April 2, 2007, Claimant injured his right lower leg while in the course and scope of his employment with Employer in rural Weld County, Colorado. Claimant was helping load one of Employer's trucks with steel tubing utilized in the drilling operations

when the load shifted and fell. Steel tubing struck Claimant on his right lower leg causing open fractures of his right tibia and fibula.

5.Claimant was transported to the North Colorado Medical Center in Greeley, Colorado. Dr. Mark Grossnickle performed a surgical open reduction of the fibular fracture and internal fixation of the tibial fracture on April 2, 2007.

6.Claimant was followed at the Greeley Medical Clinic by Dr. Grossnickle and received physical therapy at the Platte Valley Medical Center in Brighton, Colorado.

7.Dr. Grossnickle performed a second surgery at the North Colorado Surgery Center on September 13, 2007, to remove the surgical screws used in the April 2, 2007, surgery. Claimant was discharged from his physical therapy at the Platte Valley Medical Center on November 5, 2007.

8.X-rays were performed by Dr. Thomas R. Dunphy at the Imaging Center at Centerra in Loveland, Colorado on October 15, 2007. The alignment of the bony fragments appeared appropriate.

9.All of the Claimant's medical treatment was reasonably necessary to cure and relieve Claimant of the effects of his injury.

10. The costs related to the medical treatment received by Claimant are as follows:

Provider	Service Date(s)	Amount
Greeley Medical Clinic	4/2/07 - 10/15/07	$5543.00
Platte Valley Medical Center	8/31/2007	$1482.00
Platte Valley Medical Center	7/31/2007	$1062.00
Platte Valley Medical Center	6/30/2007	$1570.00
Platte Valley Medical Center	5/31/2007	$1302.00
Platte Valley Medical Center	4/30/2007	$779.00
Harmony Imaging Center	10/15/2007	$86.00
North Colorado Medical Center	4/3/2007	$28435.72
Banner Home Medical Equipment	4/4/2007	$44.53
Orthopedic Rehabilitation Products	9/13/2007	$1000.00
North Colorado Surgery Center	9/13/2007	$2755.20
North Colorado Anesthesia Associates	9/13/2007	$472.50
	Total	**$44531.95**

11. Claimant received his regular pay of $1,196.00 per week during his period

of temporary disability and made no claim for temporary disability benefits.

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 8-42-101, 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.

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

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

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

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

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

5. Claimant's testimony at hearing established that he injured his right lower leg on April 2, 2007, while performing services arising out of and in the course and scope of his employment with Respondent. The clam is compensable.

6. Respondent is liable for the medical expenses reasonably needed to cure and relieve Claimant from the effects of the compensable injury. Section 8-42-101(1), C.R.S. Claimant incurred medical expenses of $44,531.95. The medical expenses were reasonably needed to cure and relieve him from the effects of the compensable injury. No medical provider may seek to recover fees from Claimant. Section 8-42-101 (4), C.R.S.

7. Employer's payroll records establish that Claimant's average weekly wage is $1,196.00. Section 8-42-102, C.R.S. Claimant's temporary total disability rate is

$719.74, the maximum compensation rate for an injury after July 1, 2006, and before June 30, 2007. [1]

8. Section 8-43-101, C.R.S., requires an employer, within 10 days, to report to the Colorado Division of Workers' Compensation any injury which results in lost time in excess of three shifts or calendar days. Respondent was required to file a report with the Division of Workers' Compensation no later than April 16, 2007, thirteen days after Claimant was injured. Respondent violated this provision of the Act. From April 16, 2007, to May 14, 2009, the date of the hearing, is 579 days. The penalty may be assessed at a rate of up to $500.00 per day for a violation of the Act. Sections 8-43-304 and 305, C.R.S. An appropriate penalty for this violation is $25.00 per day. The penalty due for this violation is $18,975.00. Seventy-five percent ($14,231.25) is due to Claimant and twenty-five percent ($4,743.75) is due to the Subsequent Injury Fund.

9. Section 8-43-203, C.R.S., requires an employer to notify in writing the Division of Workers' Compensation and the injured employee, whether liability is admitted or contested, within twenty days after a report is, or should have been filed, with the Division pursuant to Section 8-43-101, C.R.S. Respondent did not contest or admit liability before May 7, 2007. The penalty for violation of this section is up to one day's compensation for each day's failure to notify. From May 7, 2007, to May 14, 2009, the date of the hearing, is 738 days. However, the penalty is limited to 365 days. An appropriate penalty for this violation is $25.00 per day. This penalty totals $9,125.00. Fifty percent ($4,562.50) is payable to Claimant, and fifty percent ($4,562.50) is payable to the Subsequent Injury Fund (SIF).

12. Total penalties are as follows:

CRS Section:	**CLAIMANT**	**SIF**	**TOTAL**
8-43-203	$14231.25	$4743.75	$18975.00
8-43-101	$4562.50	$4562.50	$9125.00
TOTAL	**$18793.75**	**$9306.25**	**$28100.00**

13. Employer is not insured. Employer is required to pay all amounts due under this order, or to pay a deposit or file a bond as required by Section 8-43-408, C.R.S. Should Employer not do so, Employer may be required to pay an additional $1,000.00 penalty plus attorney fees.

ORDER

It is therefore ordered that:

[1] http://www.coworkforce.com/DWC/FormsDeskAids/DESKAIDS/PDFDeskaids/Desk_Aid_4_Max_Rates.pdf

1. Employer shall pay for the medical care Claimant receives that is reasonably needed to cure and relieve Claimant from the effects of the compensable injury.

2. Employer shall pay a penalty of $18,793.75 to Claimant.

3. Employer shall pay a penalty of $9,306.25 to the Subsequent Injury Fund of the Division of Workers' Compensation.

4. In lieu of payment of the above compensation and benefits to the claimant, the Employer shall:

a. Deposit the amount of $73,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; or

b. File a bond in the amount of $73,000.00 with the Division of Workers' Compensation within ten (10) days of the date of this order:
   (1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or
   (2) Issued by a surety company authorized to do business in Colorado.

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

IT IS FURTHER ORDERED: That Employer shall notify the Division of Workers' Compensation of payments made pursuant to this order.

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

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

DATED: *June 3, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-742-385

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 9, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 6/9/09, Courtroom 3, beginning at 8:30 AM, and ending at 11:42 AM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel, to be submitted electronically, giving non-insured Respondent 3 working days within which to file objections. The proposed decision was filed on June 16, 2009. On June 19, 2009, counsel for Respondent indicated no objection to the form of the proposed decision. The ALJ has modified the proposal and, as modified, hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns whether or not the Claimant was an Employee of the non-insured Employer or an independent contractor. The parties agreed to reserve all other issues.

As a threshold matter, § 8-40-202 (2) (b) (I), C.R.S. (2008, provides that the person for whom services are performed "may show by a preponderance of the evidence" that the "independent contractor" conditions have been satisfied.

FINDINGS OF FACT

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

1. Representatives of the non-insured Employer hired the Claimant at a job fair on October 30, 2007.

2. The Employer assigned the Claimant to work at the Doubletree Hotel as a dishwasher.

3. The Employer paid the Claimant for his services by the hour.

4. The Employer had the right to terminate the Claimant without consequences as long as the termination was not for discriminatory reasons..

5. The Employer required that the Claimant comply with its drug policy.

6. The Claimant was given set work hours and break times.

7. The non-insured Employer paid the Claimant by check made out to Claimant, personally.

8. Although a so-called "independent contractor agreement" was admitted into evidence as Claimant's Exhibit 5, page 10, the Claimant never signed it. Indeed, the Claimant credibly testified that he had never seen the agreement before the date of the hearing and did not put his name at the top of the agreement, as Chris Valera (an employee and recruiter for the Employer) testified the Claimant had done. For the reasons specified below, the ALJ finds Valera's testimony unworthy of belief.

9. The name at the top of the independent contractor agreement is misspelled, in that the Claimant's last name is spelled with two "t's" and lacks the designation of "Sr." Deliberately misspelling his own name would not only be contrary to the Claimant's pecuniary interests but it would defy reason and common sense. The ALJ infers and finds Valera's testimony in this regard to be a prevarication, which casts doubt on Valera's entire testimony concerning the "independent contractor agreement."

10. The ALJ finds that Claimant did not place his name at the top of the independent contractor agreement. The ALJ finds that the Claimant's testimony on this issue is persuasive, credible and overrides the testimony of Chris Valera. Claimant's name is misspelled. Claimant was adamant that his name is spelled with one "t", and that he uses Sr., because there is a junior around. The ALJ finds the Claimant's testimony inherently reasonable, credible, and consistent with reason and common sense.

11. Valera, saw lots of people at the job fair. Even if he was sincere, he was seriously mistaken regarding his explanation about an independent contractor agreement with the Claimant. The Claimant did not sign the agreement, which is one of the criteria required by the statute.

12. Exhibit D pages 7 & 8 purport to be "New Hire Report." Both are the same form. Valera testified that he filled out page 7 at the job fair. It designates hourly pay at $7.50. It leaves the alternative spaces "employee," or "contract labor" blank. It also leaves the job designation blank. According to Valera, page 8 was filled out by his assistant and submitted on November 9, 2007, after Claimant's October 31, 2007 injury. Page 8 lists the job as "dishwasher," the rate of pay as $7.00 an hour, and the space "contract labor" is checked off. These inconsistencies make no sense. Indeed, they significantly undermine Respondent's position that it deployed Claimant as an "independent contractor." Valera waffled as to why the discrepancy exists. Claimant credibly testified that he was actually paid $6.50 an hour. The ALJ takes administrative notice of the fact that this wage borders on minimum wage.

13. Although the Employer deployed the Claimant to the Doubletree as a dishwasher, the Employer paid the Claimant. Claimant was **not** required to furnish any tools, including his own dishrag. The Doubletree furnished the dishrags and the dishwashing machine. Additionally, there is no persuasive evidence that the Employer, or the Doubletree as its agent (or, as an alternative, the Claimant's "statutory employer"), established a quality standard for the washed dishes. There is no persuasive evidence that the Doubletree, as agent of the Employer, provided more than minimal training for the washing of the dishes. The Employer and/or the Doubletree, as its agent, dictated the precise hours of performance of the dishwashing operations down to the time and length of lunch and break times.

14. Wally Acevedo, the President and Owner of the Employer's company, testified that he is in charge of a national business concern that provides staff for hotels through the use of "independent contractors." He was adamant in his testimony that all of these individuals were "independent contractors." In the present case, Acevedo indicated that Doubletree would pay the Employer and the Employer would handle the payroll for the so called "independent contractors." Acevedo waffled on the distinction between his operation and manpower operations that functioned as an employer contracting out employees to business that needed "manpower." Acevedo further indicated that the Employer required the Claimant to follow its drug policy. The ALJ finds that Acevedo had no persuasive, substantive explanation as to why a near minimum wage employee, terminable at will, who furnished no tools, and whose hours were tightly controlled by the Doubletree Hotel, was an "independent contractor," as opposed to an "employee" of the Employer herein.

15. The Respondent's position, and evidence, that Claimant was an "independent contractor" places a strain on credulity, *i.e.,* to say that Claimant, a minimum wage and near minimum wage worker who reports out to regular jobs is an "independent contractors."

16. Respondent has failed to prove, by a preponderance of the evidence that Claimant was an "independent contractor," as defined by § 8-40-202 (2) (b) (II) (A) – (I), C.R.S. (2008).

CONCLUSIONS OF LAW

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

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The 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; 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, Valera's testimony defied reason and common sense. As further found, Acevedo's testimony offered no persuasive or credible explanation as to why the Claimant was an "independent contractor," as opposed to an "employee" as defined by § 8-40-202 (1), C.R.S. (2008). Claimant's testimony was consistent, reasonable, persuasive and credible, and it supports his status as an "employee" of the Employer herein.

b. The burden of proof is placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Respondent asserted that Claimant was an "independent contractor." § 8-40-202 (2) (b) (I), C.R.S. (2008), also places the burden of proof, by preponderant evidence, on the Respondent. As found, Respondent failed to satisfy this burden. Whether the Respondent sustained its burden of proof is a question of fact for resolution by the ALJ. *Nelson v. Industrial Claim Appeals Office*, 981 P2d 210, (Colo. App. 1998); *Klara Rapouchova, v. Frankie's Installation*, W.C. No. 4-630-152 [Industrial Claim Appeals Office (ICAO), August 17, 2005].

c. In the case of *Dana's Housekeeping v. Indus. Claim Appeals Office*, 807 P2d 1218 (1990), the employer secured cleaning engagements for minimum-wage maids, who were required to go where Dana's told them to go and were required to work fixed hours. Dana's argued that it was just an employment agency referring out independent contractors. In analyzing the conditions for an independent contractorship, the Court of Appeals was not persuaded to reverse ICAO's opinion affirming the ALJ

d. "No one factor is determinative as to whether a person is an employer as opposed to being an independent contractor…The most important factor, however, in determining whether a person is an independent contractor or employee is the right to control, not the fact of control." *See Dana's Housekeeping v. Butterfield*, *supra*. As found, Respondent failed to satisfy most of the criteria for "independent contractor" status, as provided in § 8-40-202 (2) (b) (II) (A) – (I), C.R.S. (2008).

e. "In this regard, one of the main issues to be decided is whether the purported employer has the right to terminate the relationship without liability. *Industrial Commission v. Valley Chip & Supply Co.* 133 Colo. 258, 293 P.2d 972 (1956). The right to discharge someone without liability inherently involves the right to control and is inconsistent with the concept of independent contractor, where a breach of contract

action may lie for a precipitous discharge from employment. *See Faith Realty & Development Co. V. Industrial Commission*, 170 Colo. 215, 460 P.2d 228 (1969)." *Also See Dana's Housekeeping v. Butterfield*, *supra*. As found, the Employer had the right to terminate the Claimant at will.

f. The way parties refer to themselves is not determinative of whether a claimant is an "independent contractor" or an "employee." *Faith Realty & Development Co. v. Industrial Commission, supra*; *RCS Lumber Co. v. Sanchez*, 136 Colo. 351, 316 P2d 1045 (1957)." *See Dana's Housekeeping v. Butterfield*, *supra*. Even an individual doing business for in a company name, under the auspices of a principal, may be an "employee," if the substantive indicia for being an "independent contractor" are not met. *See Stampados v. Indus. Claim Appeals Office,* 833 P.2d 815 (Colo. App. 1992). Indeed, the Employer's "independent contractor agreement," under the circumstances of the present case, may well not be worth the paper that it is written on.

g. The fact, however, that Claimant was compensated…on an hourly basis is significant in determining that he had employee status. *Neely-Towner Motor Co. v. Industrial Commission*, 123 Colo. 472, 230 P.2d 993 (1951)." See *Dana's Housekeeping v. Butterfield*, *supra*. As found, the Claimant was compensated at an hourly rate approximating minimum wage. As further found, the Employer had the right to terminate the Claimant without penalty. It had the right to assign the Claimant to work assignments. It paid the Claimant by the hour. It required the Claimant to follow its drug policy. The Claimant had set times for performing his work activities and taking breaks. In the present case, the ALJ concludes that if the Claimant walks, talks and squawks like an "employee," the Claimant is reasonably and probably an "employee."

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant was an employee of the Non-Insured Respondent at the time of his alleged injury on October 31, 2007.

B. Any and all issues not determined herein, including, but not limited to, compensability, entitlement to temporary disability benefits, entitlement to medical benefits and entitlement to permanent disability benefits, are hereby reserved for future decision.

DATED this_____day of June 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

ISSUES

The issues determined herein are compensability and temporary total disability ("TTD") benefits. The parties stipulated medical benefits and an average weekly wage of $644.47.

FINDINGS OF FACT

1.Claimant has worked as a bus driver for the employer for 23-24 years.

2.On April 16, 1992, claimant suffered a previous injury to her low back. A July 29, 1992, electromyography ("EMG") showed subtle L5 nerve root encroachment. An October 2, 1992, magnetic resonance image ("MRI") was normal.

3.On April 7, 1995, claimant suffered another previous injury to her low back. A May 17, 1995, MRI showed a disc bulge at L4-5. Dr. Finn performed an EMG on August 3, 1995, which was normal. Dr. Struck repeated the EMG in October 1995, and the results again were normal.

4.Claimant continued to have low back pain and left leg pain and numbness. Dr. Struck continued to treat claimant through September 1999. On June 28, 1999, Dr. Kurica noted L4-5 instability and recommended repeat MRI. On August 19, 1999, Dr. Kurica recommended aggressive physical therapy to stabilize the spine. He noted that claimant did not have symptoms at that time to require surgery. Claimant stopped obtaining treatment in October 1999 when her mother died and she became depressed.

5.Claimant did not obtain medical treatment for her low back and left leg symptoms from September 1999 to August 2007. She continued to work her regular job duties as a bus driver, including performing vehicle inspections.

6.On approximately August 7, 2007, claimant returned to work for the employer for the new school year.

7.On August 17, 2007, claimant lifted the 75-pound hood of her bus to check fluid levels. She felt a sharp pain in her low back. She reported to her employer that she experienced low back pain from the incident. The employer attempted to contact the insurer on the 1995 injury claim and did not immediately refer claimant for medical care. Claimant persisted in requesting medical treatment.

8.On September 24, 2007, claimant prepared a written statement to the employer that she had suffered low back pain from repetitive motion of the bus. The employer referred claimant to Dr. Malis.

9.On September 24, 2007, Dr. Malis examined claimant, who reported a history of repetitive lifting of the bus hood causing low back pain and left leg pain. Dr. Malis imposed restrictions against lifting over 10 pounds or bending more than 10 times per hour.

10.On September 27, 2007, Dr. Malis reexamined claimant. Dr. Malis concluded that claimant had symptoms only from her preexisting condition, did not suffer an acute work injury, and had only worked for two weeks for the employer. Dr. Malis discharged claimant and also released her to return to full duty work.

11.Dr. Malis did not release claimant to return to regular duty work in spite of the effects of her August 17, 2007 work injury. Dr. Malis issued the release because she did not think that claimant had suffered a work injury.

12.Claimant then chose to be treated by her personal physician, Dr. Malabre. On October 15, 2007, Dr. Malabre examined claimant, who reported a history of chronic low back pain that was worsened by lifting the bus hood on August 17, 2007. Dr. Malabre diagnosed low back pain and radiculitis and he prescribed medications. Dr. Malabre subsequently referred claimant to Dr. Jenks.

13.On February 21, 2008, Dr. Jenks examined claimant, who reported a history of low back and left leg pain for “quite some time” that was worse since August 2007.

14.A February 27, 2008, MRI showed a disc protrusion at L4-5 that significantly affected the left L5 nerve root, a possible impingement of the right L5 nerve root, and a subtle disc bulge at L5-S1.

15.Dr. Jenks administered a series of epidural steroid injections. On July 21, 2008, Dr. Jenks administered another epidural steroid injection at L4-5, resulting in 30% improvement. Claimant reported that she worked only one day during the summer of 2008 and suffered a significant flare of low back pain. On August 5, 2008, Dr. Jenks discharged claimant on an as-needed basis.

16.On August 13, 2008, the employer terminated claimant’s employment because she had missed too many days due to her work injury. Claimant was no longer able to perform her regular job duties as a bus driver for the employer.

17.On April 8, 2009, Dr. McCranie performed an independent medical examination for the respondents. Claimant reported a history of chronic low back pain and increased symptoms from repetitive lifting of the bus hood.

18.Dr. McCranie testified at hearing that she did not think that claimant suffered an acute trauma on August 17, 2007. She noted that claimant had preexisting conditions of low back pain and left leg pain and parasthesia with a disc bulge, instability, and L5 radiculopathy. Dr. McCranie thought that claimant’s current symptoms were no different than the preexisting symptoms. Dr. McCranie misread the MRI report from February 2008 and thought that claimant only had a possible left L5 nerve root

impingement. Dr. McCranie agreed that the August 17 lifting incident could cause a flare of symptoms, but it would not change the underlying condition.

19.Claimant has proven by a preponderance of the evidence that she suffered an accidental injury on August 17, 2007, arising out of and in the course of her employment. Clearly, claimant had preexisting conditions of low back pain and left leg pain and parasthesia. Nevertheless, she had been able to work regular duty and had not needed medical treatment for several years. Claimant is credible that the August 17 incident caused a sharp increase in symptoms. She promptly reported the injury, but the employer thought that the condition was due to the 1995 injury. The employer suggested that claimant make a report of repetitive lifting of the bus hood. Claimant reported the acute incident to Dr. Malabre. As Dr. McCranie admitted, the lifting could aggravate symptoms. That aggravation required medical treatment and is compensable.

20.Claimant was temporarily and totally disabled from her regular occupation commencing August 13, 2008. She was unable to perform the regular duties as a bus driver. The employer terminated her employment due to missed time from work.

CONCLUSIONS OF LAW

1. Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). As found, claimant has proven by a preponderance of the evidence that she suffered an accidental injury to her low back arising out of and in the course of her employment on August 17, 2007.

2. As found, effective August 13, 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).

3. Respondents have failed to prove that TTD benefits terminated on September 27, 2007, pursuant to section 8-42-105(3)(C), C.R.S. As found, Dr. Malis determined that claimant did not suffer a work injury. Dr. Malis did not release claimant to perform regular duty work in spite of the effects of a work injury. Eventually, claimant's employment was terminated because of her absences caused by the work injury. Respondents have failed to demonstrate that a ground exists to terminate TTD benefits.

ORDER

It is therefore ordered that:

1. The insurer shall pay for all of claimant's reasonably necessary medical treatment by authorized providers, including Dr. Malabre, Dr. Jenks, and Dr. Richman.

2. The insurer shall pay to claimant TTD benefits at the rate of $429.65 per week commencing August 13, 2008, and continuing thereafter until modified or terminated according to law.

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: June 11, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-743-367

ISSUES

1.Whether Claimant is entitled to an award of disfigurement benefits as a result of his July 24, 2007, work-related injury and, if he is entitled to disfigurement benefits, how much should be awarded.

2.Whether Claimant's average weekly wage, at the time the injury became disabling, was equal to $941.83.

3.Whether Claimant's scheduled impairment rating should be converted to a whole person impairment rating because Claimant has suffered a functional impairment that is not listed on the schedule of disabilities.

4.Whether Claimant is entitled to a change of authorized treating provider.

FINDINGS OF FACT

1.Claimant injured his left ankle in an admitted work-related injury on July 24, 2007.

2.Claimant sought medical care through his authorized treating provider. Claimant was returned to full duty and continued to work and receive full wages until November 1, 2009.

3.On November 1, 2009, Claimant underwent surgery to correct his compensable left ankle condition.

4.During the period of May 13, 2007 through October 27, 2007, Claimant earned $21,662.14. This period of time encompasses 23 workweeks. As such, Claimant's average weekly wage is $941.83. Claimant has established by a preponderance of evidence that his average weekly wage (AWW) should be $941.83. Respondents shall pay any indemnity benefits based upon the AWW of $941.83.

5.Claimant's testimony and the medical records establish that Claimant has suffered functional impairment to his knees, left hip and lower back. As such, Claimant has suffered functional impairment that is not listed on the schedule of disabilities. Claimant has established by a preponderance of evidence that his functional impairment is not listed on the schedule of benefits. Claimant is entitled to receive permanent partial disability benefits based upon a whole person calculation of 5% as found by Dr. Nanes. Respondents shall pay permanent partial disability benefits based upon 5% whole person rating.

6.Claimant suffered permanent disfigurement to his left ankle due to significant scarring.

7.The totality of the credible evidence establishes that Claimant has failed to prove by a preponderance of evidence that he is entitled to a change of physician at this time.

CONCLUSIONS OF LAW

1. Where the foregoing methods of computing the average weekly wage of the employee, by reason of the nature of the employment or the fact that the injured employee has not worked a sufficient length of time to enable earnings to be fairly computed thereunder or has been ill or has been self-employed or for any other reason, will not fairly compute the average weekly wage, the division, in each particular case, may compute the average weekly wage of said employee in such other manner and by such other method as will, in the opinion of the director based upon the facts presented, fairly determine such employee's average weekly wage. C.R.S. § 8-42-102(3) (2007).

2. Claimant has established by a preponderance of the evidence that his average weekly wage cannot be fairly computed under C.R.S. § 8-42-102(2).

3. Claimant has established by a preponderance of evidence that his average weekly wage (AWW) should be $941.83. Respondents shall pay any indemnity benefits based upon the AWW of $941.83.

4. Where the claimant suffers functional impairment that is not listed on the schedule, the claimant is entitled to medical impairment benefits for whole person impairment calculated in accordance with § 8-42-107(8)(c).

5. The court of appeals has specifically stated that the determination whether a claimant sustained a scheduled or nonscheduled injury is a question of fact for the ALJ, not the rating physician. *City Market, Inc. v. Industrial Claim Appeals Office* 68 P.3d 601 (Colo. App. 2003); *See Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984). *See also, Maestas v. American Furniture Warehouse*, W.C. No. 4-662-369 (June 5, 2007).

6. Claimant has established by a preponderance of evidence that his functional impairment is not listed on the schedule of benefits. Claimant is entitled to receive permanent partial disability benefits based upon a whole person calculation of 5% as found by Dr. Nanes. Respondents shall pay permanent partial disability benefits based upon 5% whole person rating.

7. The totality of credible evidence establishes that Claimant has failed to prove by a preponderance of evidence that he is entitled to a change of physician at this time.

ORDER

It is therefore ordered that:

1. Claimant suffered a permanent disfigurement entitling him to an award of $1,000.00.

2. Respondents shall pay any indemnity benefits based upon the AWW of $941.83.

3. Respondents shall pay permanent partial disability benefits based upon 5% whole person rating.

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

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

DATE: June 2, 2009

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-745-560

ISSUES

The follow issues were raised for consideration at hearing:

1. Claimant contends that he is entitled to worker's compensation benefits arising out of a brain cancer condition, which was diagnosed on December 12, 2007. He claims an entitlement to workers' compensation benefits pursuant to §8-41-209 (2)(b), C.R.S.; and

2. Claimant seeks temporary total disability benefits between December 12, 2007 and March 8, 2008, inclusive.

FINDINGS OF FACT

Having considered the evidence presented at hearing and the parties' post hearing position statements, the following Findings of Fact are made.

1. Claimant began his employment with the City of Littleton in 1987. For the last ten and one-half years, he has held the position of Battalion Chief for Littleton Fire & Rescue. He attends fires and performs the duties of the hazard officer at the fires.

2. As Battalion Chief, Claimant spends twenty percent of his time directly involved with calls and eighty percent of his time with day-to-day operations.

3. When Claimant was hired in 1987 by the City of Littleton, he underwent a physical, including chest X-rays and blood work. As part of HAZMAT physicals, Claimant has undergone blood testing. He has had other checkups through the City of Littleton's Fit for Life Program. This is a voluntary program. In 1987, and thereafter until 2007 during Claimant's physicals, no brain cancer was detected. However, no tests were administered during routine physicals that would have detected brain cancer.

4. Claimant never underwent a MRI scan as part of any physical examination done in conjunction with his employment.

5. After undergoing an MRI scan and a biopsy, Claimant was diagnosed with glioblastoma multiforme on December 12, 2007. There is no marker for brain cancer that appears in a blood test. To diagnose brain cancer, a brain scan or a tissue biopsy is required. After undergoing treatment, including chemotherapy, Claimant returned to work on March 8, 2008.

6. Dr. Denise M. Damek, M.D. was called as a witness by Respondents at hearing. She also prepared a report, which was admitted into evidence at hearing. The doctor is board certified in neurology and neuro-oncology. She is an associate professor at the University of Colorado Medical Center in the departments of neurology and neuro surgery. She also has a clinical practice. Eighty percent of her time is spent treating patients while twenty percent of her time is spent teaching. About eighty percent of Dr. Damek's clinical practice is devoted to treating patients suffering from primary brain tumors.

7. Dr. Damek's testimony at hearing and her medical report was found to be credible and persuasive on the issue whether Claimant's brain tumor was caused by his employment as a firefighter for the Employer. Dr. Damek opined and it is found that the cause of Claimant's brain cancer is not known.

8. Dr. Damek further credibly opined that it was once thought that changes within the DNA of a cell had to come from exposures outside of the body. Now, it is well recognized that the normal processes of cellular function produce damage in DNA, which may result in cancer, regardless of any exposure to substances outside the body.

9. Dr. Damek credibly testified that the term "carcinogen" refers to a substance that can cause a change in a cell that then causes it to grow uncontrollably. To have this impact on a particular organ, the carcinogen must have access to that organ and then the substance has to have an effect on the organ and the body's genetic structure has to be unable to repair that damage.

10. The International Agency for Research on Cancer (IARC) is an international group based in France that analyzes available data on carcinogens in both animal studies and human studies. The IARC has developed a list of chemicals designated as "Group I." These are, by definition, probable carcinogens in humans. Dr.

Damek credibly testified that this does not mean that any of these substances cause brain cancers in humans.

11. Dr. Damek opined and it is found that an increased brain tumor risk does not equate to a causal relationship. The doctor's credible opinion is that, to date, there is no evidence that any occupational or other exposure to known carcinogens predisposes one to the development of brain tumors. It is found that no known or putative carcinogen has been definitely associated with brain tumor development in either humans or animals.

12. Dr. Damek reviewed the Claimant's medical records, his family history and personal history, as well as pathology reports concerning his diagnosis. Dr. Damek researched medical literature regarding risk factors for brain tumors, specifically with respect to firefighters.

13. Dr. Damek credibly testified that there is no scientific evidence that firefighters are exposed to carcinogens, which actually cause brain cancer. It is undisputed that firefighters are exposed to an unknown amount and extent of carcinogens over the course of their careers but it remains unknown if the brain is a target organ for these carcinogens. The doctor credibly testified that even if the brain was clearly identified as a target organ for the specific carcinogenic exposures common to firefighting, it is unknown if inhalation of or dermal exposure to these carcinogens could reasonably impact the brain. And, with regard to Claimant, the doctor credibly opined that there is no scientific data that would allow one to conclude that Claimant's occupational exposures caused his brain cancer.

14. Respondents also retained Dr. Patricia Buffler to opine with regard to the relationship between firefighters and the possible risk of brain cancer. Dr. Buffler prepared a report and outlined her credentials as a Professor of Epidemiology at the School of Public Health, University of California, Berkeley and Dean of this School from 1991 to 1998. She has a concurrent appointment as an Adjunct Professor in the Department of Epidemiology and Biostatistics at the University of California San Francisco, School of Medicine and member of the University of California San Francisco Cancer Center. Her area of research is focused on understanding the contributions of environmental exposures to disease in human populations. She has been the principal investigator for numerous epidemiologic studies, many involving exposure assessment and the assessment of environmental hazards. She teaches other scientists how to conduct and evaluate epidemiologic studies.

15. Dr. Buffler prepared a report setting forth her opinions and conclusions with regard to the association between occupational exposures experienced by firefighters and the risk of brain cancer. She was made aware of Claimant's employment history, his diagnosis, and the statute, Section 8-41-209, C.R.S., creating a rebuttable presumption that a person who works as a firefighter for five years or more and contracts brain cancer is presumed to have suffered an occupational disease.

16. With regard to this case, Dr. Buffler evaluated the available epidemiologic studies pertaining to occupational exposures associated with firefighting and the possible association of these exposures with brain cancer. She credibly opined that these studies do not support a conclusion that any form of brain cancer is caused by occupational exposures to chemicals associated with firefighting.

17. Dr. Buffler credibly opined based on the available research that exposures to chemicals, such as acrylonitrile, formaldehyde, vinyl chloride and the other chemicals associated with firefighting have not been shown to be causally associated with the risk of brain tumors in humans. Dr. Buffler rejected a well known study, which looks at cancer risk among firefighters, referred to as the "LeMasters meta-analysis." The doctor interpreted the LeMasters meta-analysis to find that the likelihood of brain cancer risk among firefighters was only possible, not probable. She opined that this was due to the inconsistency among the Standardized Mortality Ratio studies included in the meta-analysis. Dr. Buffler credibly found that the LeMasters meta-analysis does not support a conclusion that employment as a firefighter is causally associated with the risk of any form of brain cancer.

18. Respondents further relied on the opinions and conclusions of Dr. Javier Waksman, a board certified, level II accredited toxicologist. He is an associate professor of medicine at the University of Colorado-Denver. He testified credibly at the hearing and prepared a report. The report's conclusions are relied upon in these findings.

19. At Respondents' request, Dr. Waksman addressed the causal relationship between the Claimant's work as a firefighter and the development of his glioblastoma**.** In order to assess this issue, he reviewed medical records and did a literature search. He reviewed the depositions of Claimant's expert witnesses, Dr. Virginia Weaver, M.D. and Dr. Edward Arenson. Dr. Arenson was also Claimant's authorized treating physician.

20. As a toxicologist, Dr. Waksman credibly testified that he analyzes questions of causation on a daily basis. As a level II accredited toxicologist, the doctor has completed courses that require application of a causation analysis, using specific criteria. Based on the level II accredited standards for determining causation, the doctor explained that one who is determining the cause of an occupational injury must establish and identify source, exposure, dose, and health effect.

21. In Claimant's case, it is Dr. Waksman's contention that the "source" of carcinogens in Claimant's work place would be the chemicals present in a fire. These are the "group I chemicals" referenced in Claimant's expert's, Dr. Weaver's, report. Dr. Weaver opines that it is chemicals such as arsenic, asbestos, benzene, benzo[a] pyrene, formaldehyde and the contents of soot, including polycyclic aromatic hydrocarbons, which Claimant has come in contact with at fires, which are carcinogens, and caused his brain cancer condition.

22. Dr. Waksman opined and it is concluded that the medical literature does not support an association between the Group I chemicals identified by Dr. Weaver and brain cancer. In the absence of evidence that the "source" is associated with brain cancer, it is impossible to reach the next step of the causal analysis. There is no single credible or persuasive study, which shows an association between brain cancer and the duties of a firefighter.

23. The Level II accreditation teachings require the application of a causation analysis. Applying that analysis to the facts of this case, Dr. Waksman testified credibly and persuasively that there is no basis to conclude that any causal connection exists between the Claimant's brain cancer and his exposures as a firefighter.

24. Claimant called as witnesses at hearing two experts, Dr. Weaver and Dr. Arenson. Both of Claimant's expert witnesses relied to varying degrees on the LeMasters meta analysis. The LeMasters meta-analysis is a study in which the authors gathered studies and consolidated the information contained in those studies. Dr. Damek thought the study represented the best compiled data, with regard to summarizing brain tumor risk among firefighters. Dr. Weaver called the study the "strongest and most comprehensive study."

25. The authors of the meta-analysis explained that they intended to update previous findings and studies by reviewing the methodologic characteristics of them and determining the probability of cancer by assessing the weight of evidence. The second purpose was to "describe a methodology for use in a meta-analysis when diverse investigations are being evaluated and summarized."

26. The authors of the LeMasters meta analysis assess risk in their study, however, there is no mention of the word "cause" and no discussion of an actual causal connection between the exposures of a firefighter and the development of cancer. The authors of the meta-analysis concluded that there was only a "possible association" between the exposures of a firefighter and the development of brain cancer. .

27. The IARC has issued a policy statement concerning a specific review of the LeMasters meta-analysis. The conclusion was that this study showed only a possible increase in risk for all cancers in firefighters. The IARC interpretation of this study agrees with the way that Dr. LeMasters interpreted the meta-analysis. Dr. Buffler and Dr. Damek agree with this interpretation of the study.

28. When Dr. Weaver testified about the LeMasters study before the Colorado legislature, she stated that the authors concluded that firefighters had a probable cancer risk for four cancers and only a possible risk for brain cancer.

29. According to Dr. Waksman and Dr. Damek, the LeMasters meta-analysis does not address causation. The conclusions of the study do not allow the completion of the universal causality criteria analysis required by the Level II courses. Dr. Arenson

recognized that the meta-analysis does not use "the language" of cause and effect relationship.

30. Claimant's expert witness, Dr. Weaver, is an associate professor and assistant professor at Johns Hopkins University in Baltimore, Maryland. She is a physician, specializing in occupational and environmental medicine. She is the director of the Occupational & Environmental Medicine Residency for Johns Hopkins.

31. The International Association of Firefighters (IAFF) sponsors a residency program at Johns Hopkins University. The money spent by the IAFF to sponsor the residency pays, in part, for Dr. Weaver's salary. It is found that Dr. Weaver's relationship with the IAFF provides a potential source of bias.

32. Dr. Weaver advocates for the legislative presumption contained in Section 8-41-209(2)(b), C.R.S. The IAFF asked Dr. Weaver to testify before the Colorado legislature in support of the presumption. She did so on April 11, 2007. The Union paid her expenses but did not pay her for her time. Her written testimony prepared for the state legislature is printed on paper under the logo of the IAFF. The IAFF paid Dr. Weaver's expenses incurred in testifying on behalf of Claimant in this matter.

33. At the request of the IAFF, Dr. Weaver prepared a report on behalf of Claimant. This is dated October 21, 2008 and contains the following conclusion: ". . .It is my medical opinion that [Claimant's] brain cancer is, more likely than not, work-related as the result of the toxic exposures he had experienced during his occupational activities as a professional firefighter."

34. Dr. Weaver testified that she did not do her own research with regard to the association between exposures to particular chemicals and the development of brain cancer before preparing her report of October 21, 2008. In her opinion, this was not needed. She reviewed two documents: 1) the LeMasters meta-analysis; and 2) the Bates Study.

35. Dr. Weaver testified that the LeMasters meta-analysis study amply supports her conclusions in this case. The doctor gave different testimony to the Colorado legislature, reporting to the legislature that the same study supported only a possible increased risk for brain cancer in firefighters.

36. Although Dr. Weaver lists carcinogens contained in smoke in her October, 2008 report, at the time she prepared the report, she had no literature, which showed that any of these chemicals target the brain.

37. Dr. Weaver's testimony and report were not credited nor were they found to be persuasive. Dr. Weaver's connection with the IAFF, her testimony on behalf of the IAFF before the Colorado legislature, and her lack of scholarly or medical inquiry into the particulars of this case made the information, opinions, and conclusions she provided less credible and persuasive than the testimony and reports of Dr. Buffler, Dr.

Waksman, and Dr. Damek. Dr. Weaver demonstrated bias and well-intentioned emotional support of firefighters. Though well intended, the desire on the part of Dr. Weaver to offer emotional support in general supplanted any scientific basis for her opinions

38. Dr. Edward Arenson, M.D. is a neuro-oncologist and Director of the Center for Brain and Spinal Tumors at the Colorado Neurological Institute. He is not board certified in neuro-oncology. Dr. Arenson has a clinical practice. He has treated Claimant for his condition of glioblastoma multiforme since December of 2007.

39. During testimony at hearing Dr. Arenson offered conflicting opinions about the cause of Claimant's brain cancer. The doctor conceded that the LeMasters study concludes that there is only a possible link between the exposures of a firefighter and the development of brain cancer. Yet, Dr. Arenson relied upon the meta-analysis for the proposition that there is a causal connection between the Claimant's glioblastoma and his occupational exposures, based upon a reasonable degree of scientific certainty. In spite of his disagreement with the conclusions of the LeMasters study, Dr. Arenson claimed that it provided him with a scientific basis for his opinions.

40. Dr. Arenson did not do his own literature search yet he testified that the LeMasters meta-analysis provided him with sufficient material to support his opinions. Dr. Arenson further testified that he did not believe that the scientific criteria for causation, as established by Dr. Waksman's testimony, should be applied to this particular causation question in Claimant's case. He testified that he did not believe the causation analysis was necessary here.

41. In Dr. Arenson's report, he provides two vastly different numbers with regard to the increased risk for developing brain cancer in firefighters: the doctor opined that the risk was 35% and 400% higher. The doctor could not identify the source of the number, "400% increased risk." He testified, when asked about the 400% risk factor, that he could not find the higher number in the LeMasters study and he may have been mistaken about that number.

42. Dr. Arenson's testimony was not credited as persuasive for purposes of supporting Claimant's position that his brain cancer was caused by his occupational exposure. Dr. Arenson's testimony was less credible and persuasive than the testimony and reports of Dr. Buffler, Dr. Waksman, and Dr. Damek. Like Dr. Weaver, Dr. Arenson's testimony demonstrated bias and well-intentioned emotional support of firefighters, and specifically for Claimant. Dr. Arenson's support of Claimant, in general, supplanted any scientific basis for his opinions

43. Accordingly, it is concluded that Respondents established by a preponderance of the evidence that Claimant's brain cancer was not caused by his occupational exposures. Respondents have rebutted the presumption created by Section 8-41-209, C.R.S.

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" 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. 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. Section 8-41-209, C.R.S. provides for the application of a presumption when certain criteria are met by the Claimant. The Claimant must establish that he has completed five or more years of employment as a firefighter. He must further establish that he has suffered disability or impairment of health caused by cancer of the brain. Finally, at the time he became a firefighter or thereafter, the Claimant must establish that he underwent a physical examination that failed to reveal substantial evidence of brain cancer that pre-existed his employment as a firefighter.

4. The Claimant has established that he was employed as a Battalion Chief for the past ten and one-half years. He also established that he underwent a physical examination before beginning his employment as a firefighter and that the examination did not reveal brain cancer. The ALJ thus finds and concludes that the statutory presumptions contained in Section 8-41-209, C.R.S. apply to the facts of this case. Accordingly, Claimant has met his burden and the rebuttable presumption is deemed established that Claimant's brain cancer condition is related to his duties as a firefighter.

5. The burden then switches to Respondents to prove by a preponderance of the evidence that Claimant's brain cancer is not caused by Claimant is occupational exposures. 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. 206, 592 P.2d 792 (1979).

6. To determine whether the Respondents have met their burden of proof, it is necessary to consider the credibility of all expert witnesses. 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 Ins. Co. v. Cline,* 57 P.2d 1205 (Colo. 19326); CJI Civil 3:16 (2005).

7. The Judge finds and concludes that the testimony and opinions of Dr. Damek, Dr. Buffler and Dr. Waksman are clear, reliable and well-founded by scientific evidence. As seen above, Dr. Damek is a board certified neuro-oncologist who treats patients and teaches students about the causes and diagnoses of brain cancer. Dr. Buffler is a epidemiologist who teaches other doctors how to perform epidemiologic studies. Dr. Waksman is a board certified toxicologist who is Level II accredited in the State of Colorado. Each expert has performed his or her own independent literature search. The completeness of each expert's literature search has never been challenged or controverted by the Claimant or his experts. Through each expert's particular perspective, it has been established that:

1. the substances to which the Claimant was exposed did not target his brain; and

2. The substances to which the Claimant was exposed do not cause brain cancer.

8. The Judge finds Dr. Waksman's opinions persuasive with regard to the application of the Level II curriculum here. He has demonstrated through his testimony that the essential components of a causality analysis have not been satisfied by the LeMasters meta-analysis or by the opinions of Dr. Weaver and Dr. Arenson. The Judge finds and concludes that it is appropriate to apply a causality analysis to the facts of this case, as explained by Dr. Waksman.

9. The Judge finds that the opinions of Dr. Buffler, Dr. Damek and Dr. Waksman support the conclusion that the Claimant's glioblastoma multiforme condition did not arise out of his employment as a firefighter.

10. The Judge has also considered and reviewed the opinions of Dr. Arenson and Dr. Weaver. She finds and concludes that Dr. Weaver and Dr. Arenson have relied heavily upon the LeMasters meta-analysis as support for their opinions, even though the conclusions of Dr. LeMasters and her colleagues support only a statement that there is a possible increased risk of brain cancer for firefighters. Relying upon the testimony of Dr. Damek, Dr. Waksman and Dr. Buffler, the Judge concludes that the LeMasters meta-analysis does not support the opinions of Dr. Arenson and Dr. Weaver with regard to the causal connection question.

11. The Judge also finds and concludes that both Dr. Arenson and Dr. Weaver demonstrated bias and that their well-intentioned emotional support of firefighters in general supplanted any scientific basis for their opinions. Accordingly, the Judge finds that the opinions of Dr. Weaver and Dr. Arenson are not reliable and do not form credible support for any rebuttal of the Respondents' evidence.

12. Based upon the opinions of Dr. Buffler, Dr. Damek and Dr. Waksman, the Judge concludes that the Respondents have met their burden of proof to establish, by a preponderance of the evidence, that the Claimant's brain cancer is not related to his employment.

ORDER

It is therefore ordered that:

The Claimant's claim for worker's compensation benefits arising out of his glioblastoma multiforme condition are hereby denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED: June 9, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-746-724

ISSUE

The issue presented for consideration at hearing is whether the ALJ has jurisdiction to consider a claim against the "Estate of Lorene I. Wherry."

FINDINGS OF FACT

Having reviewed and considered the undisputed facts, the documents, which are part of the court's file, and the parties' arguments, it is found, as follows:

1. The record reflects that hearing was scheduled on July 31, 2008 before Judge Laura Broniak in accordance with Claimant's April 9, 2008 Application for Hearing. On August 5, 2008, Judge Broniak struck Claimant's Application for Hearing without prejudice for failure to comply with an order granting Respondent's Motion to Compel discovery responses. Claimant was prohibited from filing a new application for hearing until such time as she provided executed authorizations for the release of information and answers to interrogatories.

2. It is undisputed that Lorene Wherry died on December 8, 2008. On December 17, 2008, Formal Notice of that death was filed with the Court and served on Claimant in the form of a pleading captioned "Notice of Death of Party" with an attached Certificate of Death for Lorene I. Wherry issued on December 15, 2008. The record is devoid of service of a notice on a personal representative or successor of Lorene I. Wherry by Claimant. The record contains no motion for the substitution of a personal representative of Lorene I. Wherry to act in her stead in this litigation. Respondent made part of the record in support of his motion to dismiss a notarized affidavit from the Registrar of the Denver Probate Court, reflecting that as of April 10, 2009, more than 90 days after the Notice of the Death of Lorene I. Wherry had been formally filed and served on Claimant, no Personal Representative had been identified or appointed with respect to Lorene I. Wherry.

3. Claimant filed a new Application for Hearing on January 27, 2009 naming the "Estate of Lorene I. Wherry" as Respondent in this claim. On February 26, 2009, a Response to that Application was timely filed, asserting among other issues, "party identified as respondent not the proper party in interest, motion to dismiss."

4. Based on the record and arguments of the parties presented at a May 5, 2009 hearing, a hearing which was held on the January 27, 2009 Application for Hearing, Claimant did not comply with the earlier entered order compelling Claimant's responses to Respondent's discovery requests. Claimant contended that the discovery requests were overbroad and irrelevant and Respondent asserted that Claimant was barred from making a new Application for Hearing before complying with the August 5, 2008 Order, which struck the 2008 Application for Hearing.

5. On May 5, 2009, Respondent argued that it reserved its defense that the claim should be dismissed until Claimant complies with Respondent's discovery requests. Respondent asserted that the claim should be dismissed on the grounds that Claimant named the wrong party in interest in her claim and Application for Hearing. Respondent argued that naming the "Estate of Lorene I. Wherry" as Respondent in this matter was improper and did not preserve Claimant's rights to recover workers' compensation benefits in this matter.

6. Respondent contends that Claimant cannot proceed and that the case should be dismissed with prejudice. Respondent argues that an order cannot be entered in this matter that is enforceable against a party in interest since the "Estate of" a deceased Respondent is not capable of being a party to a workers' compensation claim. Claimant contends that she was advised by an employee of the Department of Labor and Employment, Division of Workers' Compensation to name the "Estate of Lorene I. Wherry" in the Application for Hearing in this matter. Claimant argues that since she relied on the advice of someone working for the state department that administers the workers' compensation statute she should not be penalized by dismissal of her claim.

7. A notarized affidavit from the Registrar of the Denver Probate Court, reflects that as of April 10, 2009, more than 90 days after the Notice of the Death of Lorene I. Wherry was formally filed and served on Claimant, no Personal Representative was identified or appointed with respect to Lorene I. Wherry. It is found under the applicable Rules of Civil Procedure and case law that Claimant has named the wrong party in interest in this matter and the claim for workers' compensation benefits is dismissed with prejudice.

CONCLUSIONS OF LAW

1. 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 leaves the trier-of-fact, after considering all 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. A Workers' Compensation case is decided on its merits. Section 8-43-201, supra. 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 respondent. Section 8-43-201, supra. The judge's factual findings concern only the evidence and inferences that are found to be dispositive of the issues involved. The judge has not addressed every piece of evidence and every inference that might lead to conflicting conclusions and has rejected evidence and inferences contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v Industrial Claims Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. This case however turns on the procedural question whether Claimant can proceed with her claim where she has not identified the correct party in interest as Respondent in this matter. In the absence of a properly identified and named Respondent, it is contended that Claimant cannot proceed at a hearing in which the recovery of workers' compensation benefits is sought and that the case should be dismissed with prejudice. Claimant contends that she was advised by an employee of the Department of Labor and Employment, Division of Workers' Compensation to name the "Estate of Lorene I. Wherry" in the Application for Hearing in this matter. Claimant argues that since she relied on the advice of someone working for the state department that administers the workers' compensation statute she should not be penalized by dismissal of her claim.

4. It is concluded that there is no specific statutory provision in the Workers' Compensation Act, Workers' Compensation Rules of Procedure, or Office of Administrative Courts' Rules of Procedure, which governs how to proceed in a case in which the respondent is deceased at the time of the filing of Claimant's claim for workers' compensation benefits. Therefore, it is proper to look to the Colorado Rules of Civil Procedure (C.R.C.P.) for direction. *Nova v. Industrial Claim Appeals Office of State of Colo*. 754 P.2d 800 (Colo.App.1988)(the Colorado rules of civil procedure apply

insofar as they are not inconsistent with the procedural or statutory provisions of the Act).

5. Rule 25, C.R.C.P., applies here. That Rule, provides:

> (a)Death.
>
> (1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of process, and may be served in any county. **Suggestion of death upon the record is made by service of a statement of the fact of death as provided herein for the service of the motion and by filing of proof thereof. If the motion for substitution is not made within ninety days after such service, the action shall be dismissed as to the deceased party.** [emphasis added]

6. Claimant was served with notice of the death of Lorene I. Wherry on December 17, 2008. The record is devoid of service of a notice on a personal representative or successor of Lorene I. Wherry by Claimant. The record contains no motion for the substitution of any personal representative of Lorene I. Wherry to act in her stead in this litigation.

7. Claims or lawsuits can only be brought by legal entities, and against legal entities. There must be some identifiable person or entity against whom a claim might be enforced. *Ivanhoe Lodge v. Grand Lodge*, 126 Colo.515, 251 P.2d 1085 (Colo. 1952). An "estate", as is named by Claimant as the Respondent in this matter, is the property that is owned by a person at death. "…It is not a legal entity, though in common speech it seems such, and no judgment can be rendered for or against it…", *Heuschel v. Wagner*, 73 Colo. 327, 215 P. 476 (Colo. 1923).

8. The only "person" who can be made a party, after the death of an individual litigant, is the Personal Representative of the decedent. Section 13-20-101, C.R.S. A notarized affidavit from the Registrar of the Denver Probate Court reflects that as of April 10, 2009, more than 90 days after the Notice of the Death of Lorene I. Wherry was formally filed and served on Claimant, no Personal Representative was identified or appointed with respect to Lorene I. Wherry.

9. In argument on May 5, 2009 Claimant concedes that she did not substitute a party for the deceased Respondent and instead followed advice to name the respondent as "the Estate of Lorene I. Wherry." There has been no substitution of a

person or party for Lorene I. Wherry, as required by Rule 25(a), C.R.C.P., and no Motion for such a substitution within the requisite 90-day period after December 17, 2008. In the absence of a timely substituted party, the claim is dismissed. *Film Enterprises, Inc. v. Selected Pictures, Inc.,* 134 Colo.451, 306 P.2d 252 (Colo. 1957) (a previous rule of procedure requiring substitution within 2 years of the death of a party defendant was found to be a valid requirement, and an attempt to substitute after the expiration of the period was ineffective, requiring a dismissal of the action.)

10. There is no "person" or "entity" with capacity to act as a Respondent in this claim present in the action. The "Estate of Lorene Wherry" is not a person or entity with capacity to sue or be sued in Colorado Courts, including the Office of Administrative Courts.

11. Since there is no person or party respondent present in this claim over which the Office of Administrative Courts or the Division of Workers' Compensation has jurisdiction or authority to act, this claim does not survive the death of Lorene I. Wherry and is dismissed. Section 13-20-101, C.R.S.

ORDER

It is therefore ordered that:

The Claimant's claim for workers' compensation benefits is denied and dismissed with prejudice.

All matters not determined herein are reserved for future determination.

DATED: June 5, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-747-473

ISSUES

Hearing was held on the following issues:

1. Conversion to whole person impairment;
2. Permanent partial disability;

3. Maximum medical improvement and Reopening based on a change of condition;
4. Disfigurement;
5. Average weekly wage stipulation of $601.65.

FINDINGS OF FACT

1.Claimant sustained an admitted work-related accident on January 10, 2008, when he slipped and fell in the company lot while spreading ice melt. He fell onto his left shoulder sustaining a dislocation and severe four part fracture to the left humeral head and glenoid. Claimant underwent surgery the same day including an open reduction with internal fixation of the glenoid requiring two screws; hemiarthroplasty of the humeral head fracture; and biceps tenodesis performed by orthopedic surgeon, Paul Rahill, M.D.

2.At the time of the injury, Claimant was employed as the detail manager and lot technician for Freedomroads Holding, a RV business. Claimant's primary job duties included driving a forklift to move motor homes and travel trailers; driving and parking motor homes; removing snow when needed; keeping the lot neat and clean; supervising the detail crew; and on occasion, assisting with detailing of units.

3.Following his surgery, Claimant treated with Concentra physicians, Drs. Kohake and Peterson, who oversaw his physical therapy, which continued through July 18, 2008. Throughout his treatment, physical therapy reports document continuing mobility and range of motion impairments.

4.Claimant returned to work in February 2008, while still in a sling. He performed his job to the best of his ability gradually increasing his tasks as he was able.

5.On July 18, 2008, Dr. Rahill placed Claimant at MMI and assigned an impairment rating of 36% of the right upper extremity, which converted to 22% whole person. Range of motion measurements demonstrated limitation in all planes. Dr. Rahill assigned permanent work restrictions including: maximum lifting of 20 pounds; repetitive lifting of 10 pounds; carrying15 pounds; and pushing/pulling 20 pounds. Additional limitations were placed on reaching overhead and away from the body.

6.On July 28, 2008, Dr. Quick issued a nearly identical impairment rating of 37% scheduled, converted to 22% whole person. Dr. Quick noted Claimant was working full duty and recommended medical treatment after MMI as Claimant remains at risk for hardware-related pain in the glenoid and development of traumatic arthritis. At the time, Claimant remained on medication including over the counter ibuprofen and Percocet in the evening.

7.Both rating by Drs. Rahill and Quick included a 30% extremity rating for the hemiarthroplasty and range of motion loss per *AMA Guide to Permanent Impairment, 3rd Ed., Revised* (hereinafter *AMA Guides*) Table 19, page 50.

8.Following his placement at MMI, Claimant continued to perform his full job duties in a modified fashion. Due to his impairments, particularly limitations related to his ability to reach overhead and turn his neck to the right, he is unable to perform all of his tasks in the same manner he performed them prior to the injury. For example, when assisting with detailing, he uses a power washer and his right arm to do overhead tasks. Instead of careening his neck to operate the forklift in reverse, Claimant repositions his whole body. Additionally, Claimant uses a snow blower to remove snow rather than a shovel.

9.On August 8, 2008, Respondent's filed a Final Admission of Liability admitting for a 37% extremity rating. Claimant timely objected and filed a Notice and Proposal and Application for Hearing. Claimant later abandoned the Division IME, opting to proceed to hearing.

10.Approximately three to four months following his placement at MMI, Claimant began to experience a worsening of his symptoms in the top of his shoulder, neck and upper back as well as the development of new symptoms in his left upper extremity. Specifically, he began to experience intermittent symptoms in the fingers of his left hand including tingling and numbness. His symptoms in all other areas essentially became more frequent and of greater intensity. As a result, he increased his medication usage and engaged in self-help measures, ie. heat. He reported these new and worsened symptoms at his next scheduled medical appointment, an IME scheduled by Respondents on December 18, 2008.

11.According to Respondents' IME:

> He has a steady ache at the shoulder. It is never pain free. At times, he will get a sharp jabbing pain in the front and back of the shoulder. Sometimes he has a burning sensation going down the arm toward the hand. He has pain at the base of the left side of the neck but not in the axial portion of the cervical spine itself. He has pain that radiates to the left hand.
>
> About four times a week, he awakens with his whole hand and all digits numb. It goes away after about 10 minutes. He states, more specifically, that sometimes he awakens with these paresthesias in the left hand and other times they awaken him from sleep. He indicates the left upper chest, left posterior shoulder, and left anterior shoulder as being the areas of soreness in addition to the deltoid laterally. As noted above, he sometimes has pain that radiates to the left side of the base of the neck but not always….

12. The IME also documented Claimant's report of his impairment interfering with his activities of daily living including showering, washing his hair and body and getting dressed. Claimant's pain diagram shows pain in the left shoulder, into the neck and down the left arm as well as pain the area of the shoulder blade/upper back.

13. With respect to the impairment rating, Respondents' IME opined that Claimant's extremity rating should not be converted to a whole person rating because was the primary situs of the impairment was to the arm side of the glenohumeral joint rather than the torso side of the body. He further opined that Claimant was entitled only to 15% for the hemiarthroplasty rather than 30% for an arthroplasty noting that the Division has adopted similar reasoning in the case of partial knee replacements.

14. On February 10, 2009, Dr. Hughes performed an IME on behalf of Claimant and opined that Claimant's condition worsened based upon multiple documented objective signs and symptoms including: visible and palpable left trapezius hypertonicity which measurably and asymmetrically limits Claimant's head and neck motions to the right; restricted motion of the left shoulder with crepitus with external rotation; diminished sensation to light touch over the left radial forearm, thumb, index and middle digits compared to the right; and asymmetric deep tendon reflex over the left brachioradialis and biceps tendon compared to the right. Based upon these findings Dr. Hughes opined that Claimant is not at MMI and requires further medical diagnostics and treatment including a complete neurological consult and electrodiagnostic testing to address the emerging symptoms indicative of post traumatic brachial plexopathy.

15. Dr. Hughes further opined that Claimant manifests a functional impairment to his cervical spine resulting from hypertonicity of the trapezius caused by the trauma of the injury and surgery, bleeding and scarring at and near the surgical site.

16. On February 23, 2009, Dr. Quick reviewed Dr. Hughes report and agreed that Claimant was no longer at MMI based on his worsening symptoms and the emergence of new upper extremity symptoms. Dr. Quick also agreed with Dr. Hughes' opinion regarding Claimant's functional impairment to his cervical spine.

17. Claimant testified that he experiences relatively constant pain in his shoulder, neck, top of his shoulder and chest over the area of his scar. The pain is aching in nature and requires him to take over the counter medication on a more frequent basis and an occasional pain reliever. He reports symptoms in his left upper extremity consistent with those reported by Respondents' IME and Dr. Hughes.

18. Claimant has a large surgical scar on his left chest and arm.

CONCLUSIONS OF LAW

Conversion

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 of 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. *Warthe v. Industrial Claim Appeal Office*, 100 P.3d 581 (Colo.App. 2004); *Strauch v. PSL Swedish Healthcare System, supra.*

3. Claimant has established by a preponderance of the evidence that he sustained a functional impairment beyond the shoulder joint. Claimant is significantly limited in all ranges of motion, including his ability to reach overhead and away from his body. Claimant demonstrated his ability to raise his arm to approximately shoulder level but not beyond. Claimant described pain in his neck and upper back with overhead activity. He has modified the way in which he performs such tasks, using his right arm to a greater degree than before the injury. Overhead reaching requires the use of multiple muscles in the upper back, neck and shoulder including the trapezius, rhomboid, deltoid, etc.

4. According to Dr. Hughes, whose opinions are deemed persuasive and compelling, as a result of the compensable injury, Claimant has visible and palpable hypertonicity in his left trapezius muscle. This hypertonicity acts as a tether to asymmetrically limit Claimant's cervical range of motion. The changes to the trapezius are most probably the result of the traumatic injury, scarring and bleeding at the surgical site. Further, Claimant sustained functional limitations as the result of his injury including: loss of motion to the shoulder joint; loss of strength in the left upper extremity; loss of mobility of the cervical spine secondary to trapezius hypertonicity; and neurological loss in the C6 distribution. Specifically, loss of function to the cervical spine is a functional impairment which is not on the scheduled. As a result, conversion of the shoulder impairment rating to a whole person is appropriate.

5. Respondents' IME supports Claimant's complaints of neck pain and limitation as indicated on the pain drawing and in as outlined in the body of the report. Further, because Respondents' IME did not take measurements of Claimant's cervical spine, he is not in a position to determine whether a loss of function exists or the basis for such a loss. There is no evidence that Claimant suffers from a disc disease or any other condition likely to cause functional limitation of the cervical spine, particularly in an asymmetrical fashion.

Permanent partial impairment

6. Pursuant to § 8-42-107(8)(c) C.R.S. (2007), once an injured worker is placed at maximum medical improvement, the authorized treating physician shall determine a medical impairment rating based on the *AMA Guides to Permanent Impairment, 3rd Ed., Revised.*

7. It is undisputed that the *AMA Guides to Permanent Impairment, 3rd Edition Revised* assigns a 30% rating for a shoulder arthroplasty. The Division of Workers' Compensation has not issued any rule or advisory suggesting that the *AMA Guides'* rating should be reduced for a hemiarthroplasty of the shoulder. A reduction in the shoulder rating is not taught at the Division's accreditation classes for Level II certification. As a result, there is no evidence that either the *AMA Guides* or the Division of Workers' Compensation condones a reduction in the rating.

8. Respondents' reliance on a November 2008 advisory issued by the Division which recommends reducing the *AMA Guides'* rating by 50% for a partial knee replacement is misplaced. Respondents' position fails to take into consideration the significant differences between the two surgeries and joints. As explained by Dr. Hughes, a partial knee replacement is a "minimally invasive" procedure which by its nature is less of an insult to the existing structures of the body requiring less healing time and adjustment. A shoulder hemiarthroplasty, however, is an invasive procedure that significant insults the structures of the body surrounding and adjoining the surgical site. Additionally, a partial knee replacement leaves intact approximately one half of the natural structure of the knee. As a result, weight bearing on the natural knee is reduced by approximately one half. The humeral head, however, is bone through which the entire force of the arm travels. A replaced humeral head carries that force in its entirety. As a result, the full 30% impairment rating is appropriate for a shoulder hemiarthroplasty. Dr. Hughes' opinion is compelling and persuasive.

9. As a result, that portion of Claimant's impairment rating related by the hemiarthroplasty is not reduced from the 30% found in Table 19, page 50 of the *AMA Guides*. Claimant is entitled to a 22% whole person impairment as found by his treating physicians, Drs. Rahill and Quick.

Maximum medical Improvement/Reopening

10. Section 8-43-303 C.R.S. 2008 provides that an award may be reopened on the grounds of, among other things, error, mistake, or a change in condition. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 189 (Colo. App. 2002); *Heinicke v. Industrial Claim Appeals Office*,__P.3d __(Colo. App. No. 07CA1640, September 4, 2008). 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 compensable injury." *Chavez v. Indus. Comm'n,* 714 P.2d 1328, 1330 (Colo. App. 1985); *accord Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 330 (Colo. 2004). Medical testimony is not required to support a reopening based on a worsening of medical condition. *Indus. Comm'n v. Havens,* 314 P.2d 698 (1957); *see Colorado Fuel & Iron Corp. v. Indus. Comm'n,* 379 P.2d 153 (1962).

11. Claimant has proven by a preponderance of the evidence that his condition worsened in the months following maximum medical improvement (MMI). Claimant testified that his condition began to worsen several months after he was placed at MMI. He described his symptoms in the top of his shoulder, his neck, upper back and chest as increasing in both duration and intensity. He required additional medication to address his symptoms and was forced to modify his functioning. A preponderance of the evidence demonstrates the worsening is related to the traumatic injury.

12. New findings were present on physical examination of both IME physicians including trapezius tenderness; visible and palpable left trapezius hypertonicity which measurably and asymmetrically limits Claimant's head and neck motions to the right; restricted motion of the left shoulder with crepitus with external rotation; diminished sensation to light touch over the left radial forearm, thumb, index and middle digits compared to the right; and asymmetric deep tendon reflex over the left brachioradialis and biceps tendon compared to the right. New symptoms emerged relating to Claimant's left upper extremity as the result of a probable emerging post traumatic brachial plexopathy.

13. A preponderance of the evidence demonstrates the worsening is related to the traumatic injury. Claimant sustained a blow to his shoulder that was significant enough to shatter his humeral head. He underwent surgeries which reattached his biceps tendon, replaced his humeral head and required screws to hold the glenoid together. The problems he is experiencing are related both temporally and spatially to the injury. Claimant's injury and the subsequent surgeries likely caused significant scarring and bleeding both of which could and likely did cause an impingement in the brachial plexus requiring additional evaluation and treatment to cure and/or relieve the effects of the industrial injury. It is not unusual for persons with significant shoulder injuries to experience ongoing problems in the neck, upper back and chest area. In spite of Respondents' arguments to the contrary, there is no evidence that Claimant suffers from a cervical disc disease of other condition likely to cause the problems he now experiences.

14. MMI is defined as the point in time when the claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." Section 8-40-201 (11.5), C.R.S. 2003. Accordingly, the claimant is not at MMI if the claimant is willing to undergo additional treatment which has a reasonable prospect of improving his condition. *See Gonzales v. Industrial Claim Appeals Office,* 905 P.2d 16 (Colo. App. 1995); *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080 (Colo. App. 1990) [decided under the law prior to the enactment of § 8-40-201(11.5)].

15. Dr. Hughes recommended evaluation and treatment aimed at addressing Claimant's new and worsened symptoms. Once the evaluation is complete, Claimant's treating physicians will determine an appropriate course of treatment. Claimant testified that he is interested in additional diagnostics and/or treatment to address his new and worsened symptoms.

Disfigurement

16. 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 after July 1, 2007, Claimant is entitled to an award for disfigurement of up to $4000 if he or she has a serious impairment and permanent scar or other disfigurement to the head, face or parts of the body normally exposed to public view and up to $8000 in extreme cases. Claimant has sustained a compensable disfigurement and is entitled to an award for disfigurement of $1500.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant based upon a whole person impairment rating or 22%.

2. Claimant is not at MMI. The claim is reopened for further diagnostics and treatment to be determined by his treating physicians.

3. Claimant is entitled to an award for disfigurement in the amount of $1500 to be paid by the Respondents.

4. Claimant's average weekly wage is $601. 65.

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

DATE: June 10, 2009

/s/ original signed by:

Donald E. Walsh

Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-748-216

ISSUES

The issues to be determined by this decision concern: 1) Claimant's attempt to overcome the Division Independent Medical Evaluation (DIME); 2) Average weekly wage (AWW); 3) Medical benefits; and 4) Permanent total disability benefits.

FINDINGS OF FACT

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

1.On September 11, 1999, claimant suffered an admitted injury to her bilateral knees, low back, and elbows while employed by Big Lots, a previous employer. Claimant also suffered psychological issues related to those injuries as well.

2.Claimant sought treatment with the Orthopaedic Physicians of Colorado beginning on March 8, 2000, for continued right knee pain. She continued to seek treatment there through September of 2001.

3.Claimant underwent an MRI of her right knee on March 20, 2000, which showed patellar chondromalacia along the lateral facet.

4.On April 9, 2002, claimant told her authorized treating physician (ATP), Brian Beatty, D.O., that she had pain in her right knee, right lower leg and behind the knee.

5.On May 1, 2002, claimant reported to Dr. Beatty that her right knee was becoming painful.

6.Claimant reported to Dr. Beatty on August 7, 2002, that her right knee had been swelling a lot recently.

7.On August 21, 2002, clamant complained to Dr. Beatty, that she was experiencing right knee pain and requested x-rays of that knee.

8.Claimant was placed at MMI for her September 1999 work injury by Dr. Beatty on March 17, 2003. Dr. Beatty assigned claimant permanent work restrictions that included standing occasionally, up to 10-15 minutes per episode, and walking

occasionally, up to 10 minutes per episode. She was restricted from crawling, squatting, or kneeling. She could stoop occasionally and sit constantly. She could climb stairs and ladders occasionally. She could lift up to 10 pounds from floor to knuckle and 10 pounds from knuckle to shoulder. She was unable to perform a floor-to-shoulder lift or a shoulder-to-overhead left. She could carry 10 pounds occasionally for 20 feet.

9.Claimant continued to work for Big Lots under the work restrictions assigned by Dr. Beatty until she had her left knee surgery in October of 2004.

10.Claimant was seen for a Division IME by Edwin Healey, M.D., on July 17, 2003. At that time, claimant complained of chronic intermittent right knee pain over her right patella. She also complained of problems with depression and indicated that she was on multiple medications for the depression. Claimant also indicated that she had problems with concentration and thinking at that time. Dr. Healey assigned claimant a 38% left lower extremity impairment rating. In regards to her right knee, Dr. Healey assigned claimant a 9% right lower extremity impairment rating. He noted that claimant might require future surgery on her right knee. He indicated that claimant's right knee had evidence of definite pathology and was likely to develop increased pathology over the years. In regards to claimant's psychological issues, Dr. Healy noted that claimant had problems with activities of daily living, including bathing, eating and cooking. She also had difficulty with traveling and prolonged sitting. He also noted she had problems with sleep at that time as well. He indicated that claimant had problems with memory, concentration and attention primarily due to her medications, chronic pain, and depression. Overall, he assigned claimant a 4% whole person psychiatric rating.

11.Claimant was seen by Douglas Straehley, M.D., on February 17, 2004. Dr. Straehley noted that claimant had persistent problems with right knee pain since her injury in 1999. Dr. Straehley indicated that claimant's x-rays that day showed evidence of bone-on-bone osteoarthritis of the medial compartments of both knees with near bone-on-bone changes of the patellofemoral compartments and relative lateral compartment sparing.

12.Claimant underwent an MRI of her lumbar spine on April 19, 2004, due to complaints of low back pain and pain in her legs. The MRI showed that claimant had mild degenerative spondylosis with L4-5 and L5-S1 disc bulges.

13.On October 25, 2004, claimant underwent a left total knee arthroplasty.

14.On February 3, 2005, Dr. Beatty issued a letter at the request of claimant's counsel regarding claimant's work restrictions in relation to her left knee. He indicated that in relation to her left knee, he would assign her restrictions of no more than 35 pounds lifting, occasional use of stairs, no use of ladders, occasional squatting, and no kneeling or crawling.

15.On March 7, 2005, claimant was seen by Kimberlee Terry, M.D. Dr. Terry

noted that claimant complained of lower back pain since returning to work. She indicated that claimant had chronic lower back pain with mild degenerative joint disease of the lumbosacral spine.

16.Claimant was seen by Chris Kottenstette, PA-C, on April 4, 2005, at which time claimant complained of ongoing pain in her knees, right greater than left. PA Kottenstette noted on examination that she had significant pain along the joint line in the right knee with decreased range of motion and noted that she had previously diagnosed osteoarthritis in that knee. He referred her for x-rays of the right knee.

17.Claimant received psychological counseling from Howard Entin, M.D., following her 1999 injury. On April 13, 2005, Dr. Entin noted that among other medications, claimant was taking Prozac. He recommended at that time that claimant restart her use of Ambien for sleep problems. He also indicated that claimant suffered from Major Depressive Disorder in his medical assessment.

18.Claimant settled her 1999 claim in 2005 and voluntarily left her employment. Claimant testified that she did not work for a year after that because she was rehabilitating from her surgery and because she was not mentally ready to return to work.

19.On September 26, 2005, claimant's personal care physician at Kaiser Permanente, Katrine Moreale, M.D., noted that claimant had right knee pain with lateral joint space tenderness and a positive McMurray's sign. Claimant was occasionally unable to bend her knee.

20.Claimant had x-rays of her right knee performed on September 29, 2005. The x-rays showed degenerative change in the medial and patellofemoral joint compartments consistent with osteoarthritis.

21.On October 6, 2005, claimant underwent an MRI of her right knee. The MRI report indicated that claimant's medial compartment was narrowed with severe cartilage loss. There was a small horizontal tear of the medial meniscus. There were also prominent tricompartmental osteophytes noted. The report indicated that claimant had degenerative changes in her knee, most severely involving the medial compartment. Claimant was referred to an orthopedic surgeon by Dr. Moreale.

22.Claimant underwent a right knee arthroscopy and meniscectomy on January 10, 2006.

23.On April 3, 2006, claimant was seen by Richard Hathaway, M.D. He noted that claimant was status post right knee scope where it was found that she had grade 4 chondromalacia involving the whole medial femoral condyle and tibial plateau. He noted that claimant was having problems with her anterior compartment and lateral compartment of her leg. Claimant complained of tenderness with activities and difficulty sleeping due to pain.

24.Claimant began working for the employer in May of 2006 as a personal care provider.

25.Claimant was evaluated by Laura Moran, M.D., with Colorado Psychological Consultants on July 3, 2006. Claimant reported that she was having increased pain in her right knee. She had spurs removed from her right knee in January of 2006 as well as a meniscus repair. Claimant reported that her pain was very severe in her right knee and that she had been told that she needed a knee replacement. Claimant also reported that she was very frustrated due to her knee pain, felt depressed, had decreased motivation and concentration, and slept poorly. She indicated that she was on antidepressants. Claimant reported that she was very limited in the chores she could do around her house and had fallen about seven or eight times in the prior few months because her knee would give out. She indicated she had to use a cart at the grocery store to get around. She stated that her husband had to help her put her shoes and socks on as well as help her wash her legs and feet. Dr. Moran noted that x-rays taken that day showed severe tricompartmental changes in claimant's knee. Her impression was that claimant had severe osteoarthritis of both knees. She indicated, however, that there was no support based on her exam and review of the records for claimant's allegation that she could only sit for 10 minutes. Claimant sat for about 30-45 minutes during the examination and never changed positions or complained of pain. Dr. Moran felt that clamant could sit an entire day but would need to get up hourly to stretch. She noted that claimant was able to lift and carry only with one hand because she used a cane.

26.Claimant was seen by Dr. Moreale on July 6, 2006. Dr. Moreale noted that claimant had ongoing and worsening right knee pain. According to claimant's orthopedic physician she had chondromalacia. Dr. Moreale indicated that claimant wanted a total knee replacement. Claimant reported that the pain was so severe that she was having trouble exercising and doing her usual activities. She was also having trouble sleeping secondary to the pain. Dr. Moreale also noted that claimant had depression and that the paxil she was taking was not helping. Dr. Moreale indicated that claimant had major recurrent depression and recommended that claimant increase her use of paroxetine.

27.On August 21, 2006, claimant was seen by Vincent Ho, M.D., for complaints of all day chest tightness that had lasted for two days. Dr. Ho referred claimant for a simple GXT study but claimant said she would be unable to complete the study because of her inability to walk secondary to right knee discomfort.

28.Claimant was seen by Dr. Hathaway on September 8, 2006. Dr. Hathaway noted that claimant had known degenerative arthritis involving the right knee. He indicated that claimant had exposed bone involving the whole femur on the medial side as well as most of the tibia and at that point claimant could not stand it. Claimant indicated that she wanted to undergo a total knee arthroplasty. Dr. Hathaway indicated that he filled out the surgery request form and turned it in. He indicated that he would

perform the right total knee arthroplasty.

29.A note from Kaiser Permanente dated March 22, 2007, indicates that claimant was unable to schedule her total knee arthroplasty at that time due to her work schedule. It was recommended at that time that claimant stop using morphine due to tolerance problems and that she start using methadone instead. Another note from the same day indicates that claimant was seeking an alternative pain regimen that would better control her knee pain while sleeping.

30.Dr. Moreale noted on April 2, 2007, that claimant had been contacted regarding pain management relating to her right knee pain. The note indicated that claimant had been started on methadone. It also indicated that claimant had been unable to schedule her right total knee arthroplasty at that time due to her work schedule.

31.Claimant was seen by Dr. Moreale on July 12, 2007, at which time it was noted that claimant had severe right knee pain from bone on bone osteoarthritis. The record indicates that claimant was approved for a total knee arthroplasty but that she allegedly could not afford to miss work at that time. Claimant's knee was painful with walking and she was taking methadone for her pain. The pain was also affecting claimant's ability to sleep.

32.A Kaiser Permanente note from September 10, 2007, indicated that claimant was taking methadone for her knee pain and ativan or lorazepam to help her sleep.

33.On October 29, 2007, claimant sent a message to Dr. Moreale indicating that she was still having right knee pain.

34.Documentation from Dr. Moreale dated October 29, 2007, indicates that in an effort to obtain SSDI benefits claimant was requesting a letter for her attorney stating she needed surgery for a knee replacement.

35.Claimant's prescription for methadone was refilled on December 7, 2007, and was good until January 16, 2008.

36.On January 8, 2008, claimant emailed Dr. Moreale and stated, "I'm still having a lot of pain…please help I'm tired of being in pain. I also have the knee issue, the diabetes issue. I'm one big pain ball."

37.Claimant was seen by Dr. Moreale on January 9, 2008. Dr. Moreale noted that claimant was still with right-sided knee osteoarthritis pain. She noted that claimant was using methadone, but was having trouble sleeping at night because of the pain. Claimant was using lorazepam at night to help her sleep. Dr. Moreale briefly noted "as an aside, [patient] fell today at work."

38.Claimant was seen by Lawrence Cedillo, D.O., on January 10, 2008.

Claimant reported that on January 9, 2008, she tripped over a telephone cord at work and fell forward landing on her bilateral knees and hands and strained her left wrist and shoulder. She claimed she never injured those areas before in her lifetime. Dr. Cedillo noted that claimant's current medications included Vicodin, Paxil, and lorazepam all of which were prescribed by her personal care physician. He diagnosed claimant with contusion to the bilateral knees, contusion to the left shoulder, contusion to the bilateral hands, strain of the left wrist and strain of the right ankle and foot and right lower leg.

39.Claimant returned to see Dr. Cedillo on January 17, 2008. Claimant reported that she was working her normal job duties without any difficulty. She also reported that she was already anticipating having a total knee replacement in the right knee in the near future. Claimant reported that her left shoulder was fine at that time. Dr. Cedillo noted that claimant was nontender to palpation in regards to the left trapezial and scapular region. Claimant had full range of motion and strength in regards to the left upper extremity at the shoulder. There was no impingement sign and no instability in the left shoulder.

40.On January 23, 2008, claimant was again seen by Dr. Cedillo. Claimant reported that she was working doing her normal activities. He noted that claimant was referred to physical therapy initially and had three appointments altogether. Claimant complained of increasing pain in her low back because of wall squats. She claimed that she never had problems with her low back in her lifetime. She continued to complain of right greater than left knee pain. She indicated that her left shoulder was fine with no problems of any kind in that area. Dr. Cedillo noted that claimant's right knee osteoarthritis was not work-related. Dr. Cedillo indicated that it was unusual and unlikely that claimant had any type of serious injury in the low back area from the exercises she did in physical therapy. In regards to her right knee he believed that her main problem was her pre-existent osteoarthritis, with a minor aggravation from a contusion and abrasion on January 9, 2008. He did not anticipate any permanent impairment or permanent restrictions at that time.

41.Claimant returned to see Dr. Cedillo on January 30, 2008. Claimant reported that she still had bilateral knee pain. The left shoulder was fine at that time. She still complained of back pain. Claimant reported that she was doing her normal work activities that were sedentary. Dr. Cedillo indicated that claimant was to return to full duty as she was currently performing her full job duties without difficulty. He referred claimant to a physiatrist due to her ongoing pain complaints. Dr. Cedillo noted that he spoke with claimant's physical therapist who indicated that claimant only did less than 10 repetitions of wall squats in physical therapy and only did them on one occasion. Dr. Cedillo opined that he did not believe that claimant's right lumbosacral spine pain was secondary to an injury that occurred in therapy. He also opined that most of claimant's discomfort in her bilateral knees at that point was secondary to her pre-existing non-work-related osteoarthritis and that further diagnostics and therapeutics should be taken care of through her private health insurance. He noted that claimant's left shoulder had resolved and that her right lower leg, ankle and foot were at MMI. He released claimant to full duty.

42.Claimant was seen by Robert Kawasaki, M.D., on February 13, 2008. Claimant reported to Dr. Kawasaki that prior to her January 9, 2008, injury she was advised to have right total knee arthroplasty and that her right knee was already bad at the time of her fall. Claimant reported that all of her other symptoms had improved except for her right knee pain. Claimant also reported that she was in physical therapy and was asked to do some exercises that she felt caused her lower back pain. Dr. Kawasaki noted that claimant had end stage osteoarthritis of the right knee and that it was previously in need of a total knee arthroplasty. He indicated that claimant may have had a mild patellar contusion but that it appeared to be improving. He noted that claimant's need for total knee arthroplasty was pre-existent to her work injury. He also noted that claimant did not appear to have any significant trauma to her upper extremities and that her symptoms there were improving. In regards to her low back pain, Dr. Kawasaki indicated that it appeared unlikely that claimant would have significant injury to her low back from the physical therapy exercises she performed. He did recommend an MRI because claimant had some findings that suggested lumbar radiculopathy.

43.Claimant also saw Dr. Cedillo on February 13, 2008. Dr. Cedillo noted that claimant was working full duty at that time without restrictions. He noted that claimant's persistent discomfort in regards to the bilateral knees was more probably than not secondary to her pre-existing osteoarthritis. He indicated that claimant did suffer an aggravation of her pre-existing condition but not to the degree that any further active diagnostics or therapeutics should be given in relation to the January 9, 2008 injury. He felt that claimant's left shoulder, bilateral wrist and hands, right lower leg, ankle and foot were all at MMI. He indicated that claimant's low back pain was not caused by the physical therapy exercises or that she sustained any discogenic etiology, nerve root impingement or instability as a result of the exercises. Claimant was to continue at full duty.

44.Claimant underwent a lumbar MRI on February 14, 2008. The MRI showed mild L4-5 and L5-S1 disc degenerative changes and a small right paracentral L4-5 disc protrusion containing a small annular tear.

45.Claimant was again seen by Dr. Kawasaki on February 27, 2008. Dr. Kawasaki reviewed claimant's lumbar MRI and indicated that claimant did not have any need for interventional procedures or surgical interventions at that point. He believed that claimant would be reaching MMI fairly quickly with regards to her injuries. He indicated that her knee issues were pre-existing. He also noted that her lumbar complaints were questionable with regards to relatedness or actual injuries.

46.Claimant was seen by Dr. Cedillo on March 5, 2008. Dr. Cedillo noted that claimant was working doing her normal activities at that time. Dr. Cedillo referred claimant for an MRI of her right knee to rule out a medial mensical tear.

47.Claimant underwent an MRI of her right knee on March 6, 2008. The MRI

showed severe osteoarthritis as well as an osteochondral lesion involving the anterior medial femoral condyle.

48.Claimant was seen by Mark Failinger, M.D., on March 12, 2008. Dr. Failinger indicated that claimant's x-rays and MRI confirmed significant tricompartmental degenerative joint disease. He recommended a full knee replacement.

49.On March 24, 2008, Dr. Cedillo reiterated that claimant's current right knee condition was related to her pre-existing severe osteoarthritis and that further treatment should be dealt with through her private health insurance. He indicated that claimant's right knee was at MMI at that time. He also noted that claimant's complaints of back pain at that time did not correlate with the MRI findings and were inconsistent with her reported history of mini wall squats causing the pain. He indicated that claimant was still performing her normal work duties at that time.

50.On April 10, 2008, claimant was laid off from her position with the employer due to budget cuts. Contrary to claimant's contention at hearing, Jan Perko, the employer's Human Resources Manager, credibly testified that claimant was not terminated due to her work injury or the time she missed from work. Claimant was laid off due to budget cuts within her department.

51.Claimant testified that she was unable to work at all right after her injury in January of 2008. However, Ms. Perko testified that after claimant's injury on January 9, 2008, claimant was able to perform her full job duties without any assistance or modification and that claimant never requested any assistance or modification. Further, Dr. Cedillo's medical records clearly indicate that claimant had returned to work following her injury without any problems.

52.Although claimant had been released to full duty by Dr. Cedillo as of January 30, 2008, respondents admitted for TPD benefits through April 8, 2008.

53.Claimant's AWW at that time of her injury was $431.03.

54.At the time she was laid off, claimant was offered the opportunity to continue her health and dental insurance through COBRA. The cost to claimant for the continued coverage was $510.99 per month or $117.92 per week.

55.On April 16, 2008, claimant was seen by Dr. Healey on referral from her attorney. Claimant claimed that Dr. Hathaway never mentioned to her that she required a right knee replacement but that she knew would need one sometime in the future. She claimed her goal was to put it off as long as possible. Claimant also claimed that she was still having difficulty sleeping at night and that she had become more depressed since she lost her job. Dr. Healey noted that claimant had a history of depression prior to her injury. In his report, Dr. Healey opined that claimant suffered a permanent aggravation of her pre-existing tricompartmental degenerative arthritis on her right knee when she fell on January 9, 2008. In his opinion, claimant's need for the

right total knee replacement was accelerated by her fall on January 9, 2008. He also opined that claimant suffered an aggravation of her underlying degenerative disc disease in her back when she performed physical therapy exercises in January of 2008. He further opined that claimant's rotator cuff tear was caused by her fall in January of 2008. Dr. Healey felt that claimant was not at MMI for these injuries. He assigned her work restrictions that included alternating sitting and standing every 15 to 20 minutes, no repetitive bending or twisting at the waist and no lifting greater than 10 pounds. Dr. Healey admitted in his testimony that the restrictions he assigned claimant were essentially the same as the restrictions assigned by Dr. Beatty in 2003. Both sets of restrictions fall within the sedentary work category. In his permanent work restrictions worksheet, Dr. Healey indicated that claimant's ability to think and concentrate was not impaired by her pain. He also noted that her ability to function socially or adapt to stress was not impaired by her pain. He indicated that claimant was limited to sedentary work. Although he did not feel claimant was at MMI, he assigned her a 15% whole person rating for her lumbar spine, a 2% upper extremity rating for her left shoulder, and a 25% lower extremity impairment rating for her right knee. Dr. Healey opined that he did not note any depressive symptoms when he evaluated claimant on that date. He did not assign claimant a mental or psychological impairment rating.

56.Dr. Healey admitted in his testimony that claimant did have back problems prior to her injury in 2008 even though she denied having any prior back problems to Dr. Cedillo during the course of her treatment. Dr. Healey further admitted that in 2003 it was his opinion that claimant would require surgery in the future for her right knee problems. He also admitted that at the time he saw her for the DIME in 2003 claimant had evidence of pathology in her right knee that was likely to develop increased pathology over the years. Dr. Healey initially testified that claimant's need for the knee replacement was accelerated by her fall in January of 2008. However, after reviewing claimant's records, Dr. Healey conceded that claimant was planning on having a knee replacement as far back as September 6, 2006. He also admitted that he could no longer opine or state that claimant's injury on January 9, 2008, caused or accelerated her need for the total right knee replacement.

57.On April 18, 2008, claimant returned to see Dr. Cedillo and indicated that she had a redevelopment of left shoulder discomfort. She claimed it actually never went away and that it was related to her work injury. Dr. Cedillo noted that as of January 17, 2008, claimant reported to him that she was not having any problems with her shoulder. Dr. Cedillo opined that claimant's current left shoulder discomfort was not related to her January 9, 2008, injury.

58.On May 12, 2008, claimant stated that her right knee was not better and that she had persistent pain. She indicated that she did not understand Dr. Cedillo's opinion about her knee being resolved as a result of the injury even though she claimed she never had a problem with the right knee before the injury. Dr. Cedillo indicated that claimant could continue with full duty status at that time. He also referred her for an MRI of the left shoulder due to her continued pain complaints. However, he did not believe her current complaints were related to her injury on January 9, 2008.

59.Claimant underwent an MRI of her left shoulder on May 13, 2008. The MRI showed a near complete distal supraspinatus tendon tear.

60.Claimant was seen by Terry Wintory, D.O., on May 16, 2008, for evaluation of her shoulder condition. After reviewing claimant's records, Dr. Wintory indicated that he could not reasonably conclude with greater than 51% probability that claimant's rotator cuff tear was related to her January 9, 2008, injury. He indicated that it was statistically improbable that the patient would have a major tear in her shoulder and that she would present with only mild symptoms which would be completely resolved within two months and then be unbearable at four months post injury. He, therefore, concluded that claimant's left shoulder symptoms and rotator cuff tear were not related to her January 9, 2008, injury.

61.Claimant returned to see Dr. Kawaski on May 21, 2008. Dr. Kawasaki noted that claimant was now complaining of left shoulder pain. He noted that claimant did not have this complaint at her prior two appointments with him. In regards to claimant's low back pain, Dr. Kawasaki indicated that it was his impression that claimant's Swiss ball exercises were unlikely to have caused a significant lumbar injury as similar exercises are actually used while treating low back disc injuries. He indicated that she likely has underlying degenerative changes in the discs particularly at the L4-5 level.

62.On May 28, 2008, claimant was seen by Dr. Cedillo. Claimant continued to complain of left shoulder pain, low back pain, and right knee pain at that time. Dr. Cedillo again opined that claimant's current right knee symptoms were more probably than not related to her pre-existing severe tricompartmental osteoarthritis and were unlikely related to the contusion she suffered on January 9, 2008. In regards to her low back complaints, Dr. Cedillo indicated that the consensus among claimant's providers was that her current complaints were out of proportion to the objective findings that would be related to her date of injury. It was his opinion that claimant's current back complaints were unlikely related to the causality stated previously by claimant as being exercises in physical therapy. In regards to her left shoulder problems, Dr. Cedillo opined that those problems were more probable than not unrelated to her January 9, 2008, work injury. He indicated that all of claimant's injuries had resolved. He, therefore, released claimant from his care and placed her at MMI with no work restrictions in relation to her injuries and no permanent impairment.

63.Claimant was seen by Richard Peterson, M.D., on July 1, 2008. Dr. Peterson noted that claimant complained of severe daily right knee pain because of bone on bone osteoarthritis. She reported that she had chronically been on methadone for the pain. Dr. Peterson confirmed with Dr. Moreale that claimant was taking methadone for her knee pain. Claimant also reported having insomnia and that she often needed just a small dose of Valium to help her sleep at night. Dr. Peterson also confirmed claimant's long term use of this prescription with Dr. Moreale.

64.Joseph Fillmore, M.D., performed a 13 Division IME on September 8, 2008. At

that time, claimant complained of right knee pain, left shoulder pain and low back pain. After examining claimant and reviewing her records, Dr. Fillmore opined that he agreed with Dr. Wintory that it was unlikely that claimant would have a severe injury to her left shoulder and not have pain for several months. In his opinion, claimant's left shoulder condition was not related to her January 9, 2008, work injury. Dr. Fillmore also indicated that he agreed with Dr. Kawasaki and Dr. Cedillo that claimant's low back pain was not likely caused by her physical therapy exercises. He also did not believe it was a ratable injury or that it was caused by her work injury. In regards to claimant's right knee pain, he indicated that while she may have exacerbated her knee complaints, it appeared that her primary right knee problem was pre-existing osteoarthritis. He indicated that the majority of her right knee complaints and the need for the right total knee arthroplasty predated her January 9, 2008, injury. In his opinion, he did not believe it was likely that claimant's fall on January 9, 2008, exacerbated her pain complaints to the extent where it should be covered under workers' compensation. There was no mention in the record of any alleged psychological or mental problems in relation to the January 9, 2008 injury. Dr. Fillmore indicated that he agreed with Dr. Cedillo's MMI date of May 28, 2008. Dr. Fillmore did assign claimant a 12% right lower extremity impairment rating after apportioning out the impairment for her prior work injury. He did note, however, that he unfortunately did not have any interim loss of range of motion measurements between 2003 and the date of his exam. He noted that the loss of range of motion he found on exam could not clearly be associated with her most recent injury and most likely did progress over the years as her degenerative joint disease progressed as well.

65.Claimant was seen by David Zierk, Psy.D., on February 5, 2009, at her attorney's request for a vocational and psychological evaluation. Dr. Zierk indicated that claimant was capable of working only in a modified sedentary work classification. Overall, however, Dr. Zierk's opinion was that claimant was incapable of working in any capacity due to her psychological problems and her physical problems. But, psychological issues were never raised in this claim until claimant was evaluated by Dr. Zierk. Dr. Zierk admitted that none of claimant's treating physicians or claimant's own expert Dr. Healey assigned claimant any restrictions in regards to her alleged psychological issues. He also admitted that claimant's alleged psychological problems were not raised as part of her claim or mentioned in any of her 2008 medical records until he evaluated her in February of 2009.

66.Dr. Zierk's report indicated that claimant was taking lorazepam and methadone and that these medications affected her cognitive abilities. Dr. Zierk opined that lorazepam is used as an antidepressant, for anxiety and for sleep disorders as well. However, he admitted that neither of these medications had been prescribed by any physician in relation to claimant's January 9, 2008 injury and that she had been taking these medications prior to her 2008 injury. He also admitted that claimant was able to work prior to her January 2008 injury while taking these medications.

67.Dr. Zierk's report also indicates that he believes claimant has memory problems related to her 2008 injury. However, Dr. Healey's 2003 Division IME report indicated that claimant had mild problems with memory, concentration and attention

primarily due to her medications, chronic pain, and depression in relation to her 1999 injury. Further, Dr. Healey indicated in December of 2008, that claimant's pain from her 2008 injury did not affect her ability to think or concentrate.

68.Dr. Zierk's report states that claimant is functionally precluded from performing the duties associated with her usual and customary occupation as an administrative clerk and bookkeeper. However, Dr. Zierk admitted that if claimant was able to stand up when necessary at her position with the employer, then it would be consistent her work restrictions as outlined in his report. Both claimant and Ms. Perko testified that claimant was able to stand up whenever she needed in her position with the employer.

69.Dr. Zierk did not perform any labor market research or contact any potential employers as part of his assessment. The ALJ finds the testimony and opinions of Dr. Zierk not persuasive.

70.Cynthia Bartmann performed a vocational and employability evaluation on February 10, 2009. Claimant reported to Ms. Bartmann that following her injury she was able to work her full duty without any job modifications and did not have any difficulties completing her job duties. In conducting her labor market research, Ms. Bartmann utilized the sedentary work restrictions given by Dr. Healey as they were the most restrictive restrictions assigned to claimant in relation to her 2008 injury. Using these restrictions and claimant's prior work history and educational background, Ms. Bartmann located positions available in five different job categories in which she believed claimant was capable of performing. Claimant's treating physician, Dr. Cedillo, opined that claimant was capable of performing all of the job types identified by Ms. Bartmann. Claimant's position itself at the respondent employer, in Ms. Bartmann's opinion, fell within the restrictions outlined by Dr. Healey. Ms. Bartmann noted that claimant was capable of maintaining employment following her injury until she was laid off by the employer and that claimant should be able to maintain employment in the future. Overall, it was Ms. Bartmann's expert vocational opinion that claimant is capable of obtaining gainful employment and earning a wage. The ALJ finds Ms. Bartmann's opinion that claimant is employable and capable of earning a wage to be credible and persuasive.

71.Ms. Bartmann disagreed with Dr. Zierk's vocational assessment. She indicated that the positions she identified met Dr. Zierk's modified sedentary work restrictions and that claimant was capable of performing those positions even applying Dr. Zierk's restrictions. Ms. Bartmann noted that claimant's ability to advance in her prior positions with Big Lots and the employer showed she was capable of learning new skills and positions.

72.Claimant testified that prior to working for the employer she worked for Big Lots and worked her way up by getting promoted. She indicated that when she started at the employer in 2006, she started as a personal care provider and again worked her way up through promotions until she was promoted to her last position as program coordinator. She admitted that as a part of her promotions and job changes she was

required to learn new job duties and skills and that she did received training on the various computer programs utilized by the different departments.

73.Claimant testified that she did not have any sleeping problems until after her January 9, 2008, injury. However, the medical records pre-dating that injury are replete with evidence indicating that claimant had prior sleeping problems because of pain in her knee and that she was already taking medication for that problem. Claimant later admitted that she was actually taking medication for sleep problems prior to her January 2008 injury.

74.After the conclusion of the hearing, claimant's counsel submitted an affidavit from claimant regarding attempts she allegedly made to contact the employers identified in Ms. Bartmann's report. The ALJ sustains respondents objection to the submission of this affidavit as during the hearing the ALJ sustained respondents' objection to any testimony regarding this alleged contact based on claimants' failure to supplement her answers to interrogatories and provide this requested information prior to the hearing as required by the Rules.

CONCLUSIONS OF LAW

Overcoming the DIME

a.The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, 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. § 8-40-102(1), C.R.S. (2008). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. § 8-43-201.

b.When a party seeks to overcome a Division IME physician's opinions and conclusions regarding causation and permanent medical impairment, then the party's burden of proof is increased to "clear and convincing evidence." See *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. Indus. Claim Appeals Off.*, 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). The issue of causation is inherent in the Division IME process. *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590. Therefore, the Division IME physician's determination of causation is binding unless overcome by "clear and convincing evidence." *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998).

c."Clear and convincing evidence is evidence which demonstrates that it is 'highly probable' the DIME physician's opinion is incorrect. Put another way, in order to overcome the 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." See *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO October 4, 2001). This standard of proof is obviously higher than a mere preponderance of the evidence. See *Garcia v. Intermountain Electric*, W.C. No. 4-495-829 (ICAO January 27, 2004).

d.This enhanced burden of proof "reflects the underlying assumption that a physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. It also furthers the objective of reducing litigation regarding the extent of a claimant's impairment." *See Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590. The question of whether the DIME physician's opinion concerning impairment has been overcome is one of fact for determination by the ALJ. In making such determination, an ALJ is not required to give special weight to the opinions of any physicians other than the DIME physician. *Postelwait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995). A mere "difference of opinion" between expert witnesses and the DIME physician does not rise to the level of clear and convincing evidence.

e.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).

f.Although claimant has endorsed the issue of compensability, claimant is actually attempting to overcome the Division IME physician's opinion that her current low back condition, her current left shoulder condition, and her need for additional treatment for her right knee is not related to the injury that occurred on January 9, 2008. Claimant is attempting to overcome Dr. Fillmore's causation and relatedness opinions in an effort to obtain permanent total disability benefits.

g.Dr. Fillmore agreed with claimant's treating physicians, Dr. Cedillo and Dr. Wintory, that claimant's current left shoulder condition was not related to her fall on January 9, 2008. The only physician who opined that her left rotator cuff tear is related to her fall on January 9, 2008, was claimant's expert Dr. Healey. However, this difference in opinion between claimant's expert and the DIME physician and claimant's treating physicians does not rise to the level of clear and convincing evidence that Dr. Fillmore's opinion regarding relatedness and causation was incorrect. Dr. Fillmore, Dr. Cedillo, and Dr. Wintory all opined that given that claimant reported complete resolution of her left shoulder pain by January 17, 2008, and did not complain of any shoulder pain again until three months later on April 18, 2008, it was highly improbable that her rotator cuff tear was related to her accident on January 9, 2008. Claimant has failed to overcome Dr. Fillmore's opinion by clear and convincing evidence.

h.Dr. Fillmore also agreed with Dr. Cedillo and Dr. Kawasaki that claimant's low back condition was not related to her January 2008 work injury. Claimant's expert has opined that her back problems were caused by or related to her work injury. This difference in opinion does not rise to the level of clear and convincing evidence. Dr. Fillmore, Dr. Cedillo and Dr. Kawasaki all opined that it was highly unlikely that claimant's back complaints were related to either her work injury or any physical therapy exercises that she performed during her course of treatment. The physicians indicated that claimant's subjective complaints did not correlate with their objective findings on exam or diagnostic testing. Claimant has failed to provide any credible and persuasive evidence that this opinion is incorrect. Claimant has failed to overcome Dr. Fillmore's opinion by clear and convincing evidence.

i.In regards to claimant's right knee problems, Dr. Fillmore agreed with Dr. Cedillo, Dr. Kawasaki, and Dr. Failinger that claimant's right knee contusion had resolved and that her current problems were related to her underlying severe tricompartmental osteoarthritis. All four doctors opined that claimant's need for a right total knee replacement was not caused or accelerated by her injury on January 9, 2008. Rather, claimant's need for the total knee replacement predated her January 2008 injury. Claimant's own medical expert, Dr. Healey, admitted that he could no longer support his written opinion that claimant suffered a permanent aggravation of her underlying osteoarthritis that accelerated her need for a total knee replacement. Claimant contends that the mere fact that Dr. Fillmore assigned claimant an impairment rating for her right knee in relation to her 2008 injury shows that her need for the knee replacement is related to that work injury. However, Dr. Fillmore specifically noted that he did not have any interim range of motion measurement between 2003 and 2008 and that claimant's loss of range of motion most likely did progress during that time period along with her underlying degenerative condition. However, since he did not have any interim measurements, he was only able to utilize Dr. Healey's 9% impairment rating for apportionment purposes. Overall, Dr. Fillmore's opinion regarding claimant's current knee condition was that it was related to her pre-existing condition and not her January 2008 work injury. As such, claimant has failed to produce any credible and persuasive evidence that Dr. Fillmore's opinion is incorrect. Claimant has failed to overcome Dr. Fillmore's opinion by clear and convincing evidence.

j.Claimant is also attempting to relate her current psychological problems to her January 9, 2008, injury. Dr. Fillmore, however, did not opine that claimant had any psychological impairment as a result of her injury. Furthermore, there is no mention in claimant's medical records of any alleged mental or psychological issues related to her January 9, 2008, work injury until she was evaluated by David Zierk, Psy.D., for a vocational assessment in 2009. Since causation determinations are an inherent part of the Division IME evaluation process, the fact that Dr. Fillmore did not assign an impairment rating for psychological issues must still be overcome by clear and convincing evidence. Claimant has failed to carry that burden. As noted above, there is no mention in claimant's medical records following her January 2008 injury that she was suffering from any depression or psychological problems as a result of that injury. It is

clear, however, from claimant's prior medical records that she has pre-existing psychological problems relating back to her 1999 injury. Claimant's medical records show that she had major recurrent depressive disorder for which she had been prescribed antidepressants on a routine basis. Dr. Healey even assigned claimant a 4% mental impairment rating in 2003 in relation to her 1999 injury. Dr. Healey also admitted in his testimony that he did not observe any symptoms of depression at the time he evaluated her in 2008. In fact, he noted that her depression had improved since his Division IME in 2003. Only claimant's expert, Dr. Zierk, has opined that claimant has psychological issues as a result of her 2008 injury. This difference in opinion does not rise to the level of clear and convincing evidence.

k.Claimant has failed to carry her burden of proving by clear and convincing evidence that her current low back, left shoulder, right knee and psychological problems are related to her January 9, 2008, injury. Claimant has failed to provide evidence that is unmistakable and free from serious and substantial doubt and shows that it is highly probable that Dr. Fillmore's Division IME opinion is incorrect. Dr. Fillmore's opinion is supported by the numerous opinions of claimant's treating physicians. Only claimant's experts have provided a different opinion and those differing opinions do not rise to the level of clear and convincing evidence. As found, Dr. Fillmore's opinions are credible and persuasive. Claimant failed to overcome Dr. Fillmore's opinions by clear and convincing evidence.

Permanent Total Disability

l.Permanent total disability, as defined in § 8-40-201(16.5), C.R.S. (2008), 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).

m.The term "employment" is defined in the Workers' Compensation Act in § 840201(8). This section states that employment is "any trade, occupation, job, position, or process of manufacture or any method of carrying on any trade, occupation, job, position or process of manufacture in which any person may be engaged." § 840201 (19), defines "wages" as the money rate for which the employee is to be compensated for services. 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 Trans.*, 933 P.2d 1330 (Colo. 1997).

n.In determining whether a claimant is permanently totally disabled, the court may consider her 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 her particular circumstances. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

o.The respondents are not required to prove the existence of a job offer to refute a claim for permanent total disability benefits. *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (ICAO, December 1998) (claimant is not permanently totally disabled even though respondents' vocational expert was unable to identify a single job opening available to claimant); *Hennenberg v. Value-Rite Drugs, Inc.*, W.C. 4-148-050 (September 26, 1995); *Rencehausen v. City and County of Denver*, W.C. No. 4-110-764 (November 23, 1993); *Beavers v. Liberty Mutual Fire Ins. Co.,* (Colo. App. No. 96 CA0275, September 5, 1996) (not selected for publication); *Gomez v. Mei Regis*, W.C. No. 4-199-007 (September 21, 1998). Rather, 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).

p.There are many reasons a claimant may not be hired by a particular employer on a particular day, none of which have to do with her disability. As long as there are periodic jobs available to the claimant where she can earn wages, she is not totally disabled. *Black v. La Junta Housing Authority*, W.C. No. 4-210-925 (ICAO, December 22, 1998). In other words, as long as claimant can perform any job, even part time, she is not totally disabled. *Vigil v. Chet's Market*, W.C. No. 4-110-565 (ICAO, February 9, 1995).

q.Foremost in the determination of whether claimant has met her burden of proof is the necessity to find claimant credible when she gives an assessment of her abilities and condition. If claimant is not credible, she cannot be found to be permanently and totally disabled since the restrictions that would make her permanently and totally disabled are dependent on her accurately reporting her condition. 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).

r.In deciding whether 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).

s.Claimant has failed to carry her burden of proving by a preponderance of the credible evidence that she is incapable of earning any wages. The opinion of claimant's vocational expert is not persuasive. Claimant's vocational expert failed to complete any labor market research. Ms. Bartmann, however, opined that claimant is in fact employable and capable of earning a wage. As indicated, the ALJ found Ms. Bartmann's opinions credible and persuasive. Ms. Bartmann identified five job types in which she felt claimant was capable of obtaining employment and met her work restrictions and past work history. Claimant's treating physician, Dr. Cedillo, opined that claimant was capable of working in all five of those positions in relation to the restrictions from her actual work related injuries. Even though claimant's treating physician did not believe claimant had any work restrictions in relation to the injuries she suffered on January 9, 2008, Ms. Bartmann utilized the sedentary restrictions recommended by claimant's own expert in determining whether there were any job positions in which claimant was capable of performing. Even using these more stringent restrictions, Ms. Bartmann was able to locate several job types that claimant would be capable of performing. Claimant's position at the employer met the restrictions assigned by Dr. Healey and, following her injury, claimant was capable of performing those job duties for several months without any assistance or modification until her position was eliminated and she was laid off. Respondents have shown that claimant is capable of returning to the same or similar type of employment and that employment exists that is reasonably available to claimant under her particular circumstances. *See Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

t.Claimant's vocational expert Dr. Zierk opined that claimant's physical and mental problems prevented her from performing her prior job. He opined that claimant's left shoulder problems, low back problems, and right knee problems prevented her from performing her old job. However, the DIME physician, Dr. Fillmore, has opined that claimant's current conditions in relation to her left shoulder, low back and right knee are not related to the work injury that occurred in January of 2008. And, as claimant has failed to overcome that DIME opinion, it is inappropriate to utilize these conditions as a basis for determining that claimant is incapable of obtaining employment as a result of the injuries she suffered on January 9, 2008. Dr. Zierk also opined that claimant's psychological issues were causally related to her January 2008 injury and further prevent her from obtaining gainful employment. Again, the DIME physician did not relate any psychological or mental problems to claimant's January 2008 work injury and claimant has failed to overcome that causation opinion by clear and convincing evidence. Therefore, it is also inappropriate to utilize this unrelated condition in determining claimant's ability to obtain employment as it relates to her January 9, 2008, work injuries. As the majority of Dr. Zierk's vocational opinion hinges on injuries and conditions that are not related to claimant's work injury, his opinion is not persuasive.

u.Claimant is able to obtain and maintain employment within her labor market and earn wages in several different employment areas. Employment exists that is reasonably available to claimant given her particular circumstances, including her age, education and training, transferable skills, prior work experience, labor market and restrictions. Claimant failed to prove that she is unable to earn any wages in the same or other employment. The evidence presented at hearing overwhelmingly establishes that it is more probable than not that the claimant is capable of earning wages. Claimant is, therefore, not permanently and totally disabled.

Medical Benefits

v.Respondents are liable only 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. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the medical condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Off.*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant bears the burden of proof in showing that medical benefits are causally related to her work-related injury or condition. *See Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007). Therefore, claimant is not entitled to medical care that is not causally related to her work-related injury or condition.

w.In establishing causation, claimant "must show that the industrial injury bears a 'direct causal relationship between the precipitating event and the resulting disability.'" *See Garcia v. CF&I Steel,* W.C. No. 4-454-548 (ICAO May 14, 2004). An incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *F. R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Barba v. RE 1J School District*, W.C. No. 3-038-941 (ICAO June 28, 1991); *Hoffman v. Climax Molybdenum Company*, W.C. No. 3-850-024 (ICAO December 14, 1989). Rather, to receive medical benefits, the claimant must establish to a reasonable probability that the need for additional medical treatment is proximately caused by the aggravation, and is not simply a direct and natural consequence of the pre-existing condition. *Merriman v. Indus. Comm'n*, 120 Colo. 400, 210 P.2d 448 (1949); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

x.Specifically, the burden of proof rests on the claimant to establish a direct casual relationship between her employment and her need for medical care. *Brown v. Indus. Comm'n*, 167 Colo. 391, 477 P.2d 694 (1968). Moreover, causation is not established unless claimant proves the need for treatment for her symptoms is a "natural 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); *Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo.App. 1970); *Vega v. City of Colorado Springs*, W.C. No. 3-986-865; 4-226-005 (ICAO, March 8, 2000). To the extent evidence may conflict, the issue of causation is a matter of evidentiary fact to

be resolved by the ALJ. *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337 (Colo. App. 1997), *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

y.Claimant has failed to establish by a preponderance of the evidence that her need for medical treatment was caused by a work related injury on January 9, 2008. She has failed to show that her need for this treatment is not simply a direct and natural consequence of her pre-existing arthritic condition. None of claimant's treating physicians have recommended any maintenance treatment for the injuries or conditions that are related to her injury on January 9, 2008. The DIME physician, Dr. Fillmore, also indicated that there was no recommended maintenance care for the injuries or conditions that resulted from her January 9, 2008. Dr. Fillmore and claimant's treating physicians have all opined that claimant's need for a right total knee replacement predated her January 9, 2008, injury. Claimant's own medical expert recanted his opinion that claimant's need for the total knee replacement was caused by or accelerated by the knee contusion she suffered on January 9, 2008. As such, claimant has failed to present any credible and persuasive evidence that her need for a right total knee replacement is the natural and proximate consequence of her January 9, 2008 work injury. Instead, claimant's need for the knee replacement is solely related to her pre-existing severe osteoarthritis.

z.Claimant has also failed to establish by a preponderance of the evidence that her need for medical treatment for her low back was caused by or related to her January 9, 2008, injury. Dr. Fillmore and claimant's treating physicians have all opined that claimant's current back condition is not related to her work injury or the physical therapy exercises she performed during her course of treatment. Claimant has failed to present credible and persuasive evidence that her need for additional medical treatment for her back condition is related to her January 9, 2008, injury.

aa.Claimant has failed to establish that her need for medical treatment for her left shoulder was caused by or related to her January 9, 2008, injury. Dr. Fillmore, Dr. Cedillo, and Dr. Wintory have all opined that claimant's current shoulder condition is not related to her January 9, 2008, injury. Claimant has failed to present credible and persuasive evidence that her need for medical treatment for her left shoulder is related to her January 9, 2008 injury.

bb.Claimant has failed to establish that her need for any additional medical treatment at this time is causally related to her January 9, 2008, injury. Therefore, her claim for additional medical benefits is denied. The medical opinions of the DIME physician and claimant's treating physicians show that any medical treatment needed or sought by claimant at this time is either related to her pre-existing conditions or is simply not causally related to the injuries she suffered on January 9, 2008.

<u>Average Weekly Wage – Inclusion of COBRA Coverage</u>

cc.Claimant's AWW at the time of her injury was $431.03. Claimant was laid off on April 10, 2008 and was offered COBRA at that time. The cost to claimant for the

continued coverage was $510.99 per month or $117.92 per week. Therefore, claimant's AWW increased to $548.95.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant has failed to overcome the DIME physician's opinion that her current low back condition, left shoulder condition and need for additional treatment for her right knee are not causally related to the work-related fall on January 9, 2008. Claimant has failed to overcome Dr. Fillmore's credible and persuasive opinions by clear and convincing evidence.

B. Claimant has failed to prove that her current psychological problems are causally related to or were aggravated by the work-related fall on January 9, 2008. The DIME physician did not opine that claimant had any psychological impairment as a result of her fall. Therefore, claimant has failed to overcome Dr. Fillmore's opinion by clear and convincing evidence.

C. Claimant has failed to prove that she is permanently and totally disabled. Therefore, her claim for permanent total disability benefits is denied and dismissed.

D. Claimant has failed to prove that her need for any additional medical treatment at this time is causally related to her January 9, 2008 fall. Therefore, claimant's request for right knee surgery and treatment, left shoulder treatment, low back treatment, depression, and maintenance medical benefits is denied and dismissed.

E. Claimant's AWW is increased to $548.95 to include the cost of her COBRA benefits.

DATED: June 23, 2009

Barbara S. Henk
Administrative Law Judge

ISSUES

The issues to be determined include whether Claimant has proven by a preponderance of the evidence that he suffered an occupational disease while employed with employer; whether Respondents are liable for medical benefits incurred by Claimant to cure and relieve the effects of the occupational disease; and whether Claimant is entitled to ongoing medical care to treat the occupational disease.

The parties stipulated prior to the hearing that if medical benefits are awarded, Dr. Pirnat is the authorized treating physician selected by the Claimant. Respondents specifically reserved the issue of apportionment and issues involving the alleged late reporting of the injury.

FINDINGS OF FACT

1. Claimant is a 57 year old male who worked as a hard rock miner for employer for approximately 20 years. Claimant last worked for employer in 1991 when employer closed the mine. Claimant was subsequently employed at Columbia Chrome from 1991 through 1998 servicing hydraulic cylinders. While chrome plating was being performed 20-30 feet away from where Claimant worked, Claimant testified he worked in a well-ventilated area and has not made a claim for metal exposure. Claimant has worked for Sierra Chemicals since 2000. Claimant's job duties involve handling chemicals on a daily basis, however the chemicals are transferred through hoses. Claimant uses protective gear including a hard hat, gloves, steel-toed boots, full-face shield and eye protection, but is not required to use a respirator.

2. Claimant testified that he would attend annual screenings in Montrose, Colorado offered by National Jewish Hospital. According to the medical records, a chest x-ray taken at the annual screening in 2004 revealed abnormalities, including small nodules in the mid and upper lungs bilaterally likely secondary to pneumoconiosis such as silicosis. Claimant sought treatment with his personal physician, Dr. Pirnat, on June 8, 2004 requesting consultation for a possible work related lung disease. Dr. Pirnat recommended, among other testing, a full pulmonary function study including diffusion capacity and a high resolution thin slice CT scan.

3. Claimant returned to the annual screening in Montrose in March 2005 and underwent another chest x-ray that revealed significant interstitial lung disease with nodular pattern in the upper fields and a linear pattern in the lower lung fields. Claimant again returned to the annual screening on February 16, 2006 and underwent another chest x-ray that revealed thickening of the lining of his lungs, pleural thickening, and possible scarring. Claimant underwent a spirometry exams in 2004, 2005 and 2006, the results of which were normal. National Jewish Medical Center authored a report to Claimant on April 4, 2006, advising Claimant that his medical tests, including a physical exam, a spiromety, a chest x-ray with a B-read and pulse oximetry revealed that Claimant may have a work-related lung disease, despite the fact that the spirometry and pulse oximetry were normal. The report also advised Claimant that the most recent x-

ray finding revealed possible pleural thickening and bronchial wall thickening, that represented new findings.

4. Claimant returned to Dr. Pirnat on July 10, 2006 for follow up on his pulmonary status. Claimant reported no new symptoms, but continued to complain of dyspnea on exertion. Dr. Pirnat noted that a full pulmonary function study had been ordered in the past, but not completed, nor had Claimant undergone a CT scan that was previously recommended. The CT scan of the throrax was eventually completed on July 13, 2006 that revealed extensive nodular interstitial lung disease severely affecting the upper and midlung zones consistent with sarcoidosis.

5. Claimant was eventually referred for evaluation with National Jewish Hospital on April 7, 2007 by Dr. Pirnat. Claimant was evaluated at National Jewish Hospital by Dr. Stefanon and Dr. Gottschall. Dr. Gottschall reviewed Claimant's prior medical history, including the CT scans and spirometry and Claimant underwent an exercise stress test that revealed normal results. The physicians at National Jewish diagnosed Claimant with chronic simple silicosis, due to occupational exposure to silica dust as a miner from 1971 to 1991, currently without respiratory impairment. Dr. Gottschall recommended Claimant proceed with full pulmonary function testing to establish a baseline that can be followed over time with yearly follow up of spirometry, chest x-rays with B-read and a repeat chest CT scan.

6. Claimant returned to Dr. Pirnat on August 9, 2007 for re-evaluation. Dr. Pirnat reviewed the April 7, 2007 report from National Jewish Medical Center with Claimant and made arrangements with Claimant to obtain the pulmonary function studies and chest x-ray, along with an abdominal ultrasound, CT scan of the chest, a PPD test (to check for tuberculosis), saline nasal washes, and nasal steroid samples. Dr. Pirnat also considered adding a proton pump inhibitor after the initial functional studies were performed. Dr. Pirnat noted that Claimant's chronic cough appears to be multifactorial, related to seasonal allergies, past tobacco use and gastroesophageal disease (GERD). Claimant reported to Dr. Pirnat that there had been no significant change in his overall symptoms.

7. The thorax CT exam was performed on October 10, 2007 and revealed findings consistent with silicosis, that was noted to be unchanged from the prior study. When Claimant returned to Dr. Pirnat on December 10, 2007, Dr. Pirnat recommended a trial of Spiriva. Claimant returned to Dr. Pirnat on August 11, 2008 for treatment of chest pain that was caused by a toolbox falling on Claimant. This medical visit, including the chest x-ray performed at Mercy Medical Center was unrelated to Claimant's alleged occupational disease.

8. Claimant filed a Workers' Claim for Compensation with the Division of Workers' Compensation on February 11, 2008. According to the first report of injury completed by the insurance carrier, the insurance carrier received notice of the claim on February 22, 2008. Respondents, through their insurance carrier, filed a Notice of Contest on March 7, 2008. Claimant testified at hearing that the mine laid off all

employees and shut down in 1991. Claimant further testified that he did not know who to report his claim to as the employer no longer existed.

9. Respondents had Claimant examined by Dr. Repsher for an IME on February 4, 2009. Dr. Repsher obtained a medical history, performed a physical examination and obtained a chest x-ray. Dr. Repsher performed a B-reading of the chest x-ray and diagnosed Claimant as suffering from category 2 simple silicosis with normal pulmonary function. Dr. Repsher agreed that Claimant's category 2 simple silicosis was a result of his work as an underground hard rock miner. Dr. Repsher indicated Claimant's long term prognosis was good and that it would be extraordinarily unlikely for Claimant to ever develop clinically significant pneumoconiosis.

10. Dr. Repsher testified at hearing that Claimant's simple silicosis has a less than 1% chance of progressing. Dr. Repsher testified that claimant's obstructive sleep apnea was caused by inheritance and obesity and was not related to silicosis. Dr. Repsher opined that Claimant's rhinitous and GERD were related to Claimant's chronic cough, and not his silicosis. Dr. Repsher testified it would be his opinion that Claimant would not need annual follow up exams, but would only need to follow up once every five (5) years. Dr. Repsher noted that the Spiriva prescribed by Dr. Pirnat is used to treat chronic obstructive pulmonary disease (COPD) from smoking. However, Dr. Repsher noted that while Spiriva is not recommended for silicosis, doctors can use it to treat anything. On cross-examination, Dr. Repsher noted that Claimant could have progression of his silicosis, but it is rare. If the silicosis did develop, however, it could affect Claimant's heart. Dr. Repsher noted that there is a higher incidence of miners exposed to silica developing tuberculosis and acknowledged that the PPD evaluation was appropriate.

11. The ALJ finds that Claimant has proven by a preponderance of the evidence that he suffered an occupational disease arising out of and in the course of his employment with Respondent-employer. The ALJ finds the opinions of Drs. Pirnat and Gottschall more persuasive than the opinion of Dr. Repsher with regard to Claimant's future medical treatment. The ALJ finds that annual follow up exams are reasonable, necessary and related to Claimant's category 2 simple silicosis. The ALJ finds that the prescription for Spiriva is reasonable, necessary and related to Claimant's occupational disease.

12. The ALJ further finds that Claimant has not proven by a preponderance of the evidence that his treatment with Dr. Pirnat on August 11, 2008 was reasonable, necessary and related to the cure and relieve the effects of the occupational disease. The ALJ finds that Claimant first reported his industrial injury to employer on February 11, 2008. The ALJ finds that medical treatment obtained prior to February 11, 2008 was not authorized by Respondents based on the fact that Claimant did not report the injury to the employer. Claimant maintains that he did not report the injury to the employer due to the fact that the employer was no longer in business as of 1991.

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., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Claimant must show that the injury was sustained in the course and scope of his employment and that the injury arose out of her employment. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 579. A work-related injury is compensable if it "aggravates, accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* Whether there is a sufficient "nexus" or relationship between the Claimant's employment and his injury is one of fact for resolution by the ALJ based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988). The question of whether a claimant has proven that a particular disease, or aggravation of 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 Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

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

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

5. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

6. The ALJ notes that Respondents have reserved the issue of apportionment for further determination. Nonetheless, as found, the Claimant has proven by a preponderance of the evidence that he suffers from an occupational disease and that the occupational disease has caused Claimant's need for medical treatment. As found, the ALJ has determined that annual follow up exams and testing with the Claimant's authorized treating physician, Dr. Pirnat, and any referrals from Dr. Pirnat for the annual testing are reasonable, necessary and related to Claimant's occupational disease.

7. As found, the ALJ finds that treatment received by Claimant on August 11, 2008 was for a non-work related accident. As such, Respondents are not liable for the cost of treatment Claimant received on August 11, 2008 from Dr. Pirnat.

8. Section 8-43-404(5)(a), C.R.S. provides, as relevant here:

> In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor.

9. Treatment is compensable under the Colorado Workers' Compensation Act ("the Act") where it is provided by an "authorized treating physician." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 351 (Colo. App. 2006); *see also* Sections

8-42-101(1)(b), 3.6(b), 8-42-107(8)(b)(I), 8-43-404(7), 8-43-501(3)(e)(III), 8-43-502(2), C.R.S. (all referring to "authorized treating physician"). "Authorization" as that term is used in workers' compensation proceedings, refers to a physician's status as the health care provider legally authorized to treat an injured employee. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Section 8-43-404(5)(a) givers employers ***or insurers*** the right to choose the treating physicians in the first instance in order to protect their interest in being apprised of the course of treatment for which they could ultimately be held liable. *Bunch v. Industrial Claim Appeals Office, supra.* (emphasis added). That initial right of selection passes to the employee only if medical services are not timely tendered by the employer or insurer. *Id.*

10. An employer has the obligation to designate a treating physician forthwith upon notice of the injury, or else the right of selection passes to the employee. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). If the employee obtains unauthorized medical treatment, the employer or its insurer is not required to pay for it. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 2006). An employer is deemed notified of an injury when it has "some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonable conscientious manager that the case might involve a potential compensation claim. *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984) (quoting 3 A. Larson, *Workman's Compensation Law* § 78.31(a) at 15-105 (1983)).

11. As found, Claimant reported his injury to the carrier on February 11, 2008. The ALJ finds that the facts in this case are markedly similar to the facts in *Bunch v. Industrial Claim Appeals Office, supra.*, insofar as this case deals with an occupational disease, and Claimant was requesting an order requiring Respondents to pay for medical treatment that was reasonable, necessary and related to his occupational disease that was incurred prior to Claimant reporting his injury. As noted by the Court of Appeals in *Bunch*, the statute does not provide an exception to the employer's right to choose the treating physician, but courts have recognized an exception for emergency treatment. Nevertheless, once the emergency has ended, the employee must give notice to the employer of the need for continuing medical service and the employer then has the right to select a physician. *Bunch, supra. quoting Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The Claimant does not argue, nor does the ALJ find, that the treatment received by Claimant prior to February 11, 2008 qualified as "emergency treatment" that would fall under an exception to Claimant receiving authorization for the medical care.

12. The ALJ notes that Claimant cites to the revised version of Section 8-43-404(5)(a) in his position statement. However, due the fact that Claimant's exposure to silica dust and diagnosis of silicosis occurred prior to January 1, 2008, the ALJ finds that the previous version of Section 8-43-404(5)(a) applies in this case. The ALJ also notes that the analysis of authorization for medical treatment would not change based upon the amendments to Section 8-43-404(5)(a) effective January 1, 2008, since it was stipulated by Respondents that Dr. Pirnat became authorized after Claimant reported the injury and was not referred for medical treatment by the insurance carrier.

13. As found, the treatment Claimant received prior to February 11, 2008 was not authorized by Respondents by virtue of the fact that Claimant had not yet reported the injury. Therefore, Respondents are not liable for the medical care incurred by Claimant prior to February 11, 2008.

ORDER

It is therefore ordered that:

1. Respondents are liable for ongoing medical treatment after February 11, 2008 to cure and relieve the affects of the occupational disease from Dr. Pirnat and his referrals, including annual follow up exams, testing and future prescriptions for Spiriva.

2. Claimant has failed to show that it is more probably true than not that the treatment rendered by Dr. Pirnat on August 11, 2008 was reasonable, necessary and related to his occupational disease.

3. Respondents are not liable for treatment received by Claimant prior to February 11, 2008 since the treatment was not authorized by Respondents.

All matters not determined herein are reserved for future determination.

DATED:

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-751-951;WC 4-756-609; WC 4-762-541

ISSUES

The issues for hearing in the matter were compensability, medical benefits, temporary total and temporary partial disability benefits for the period January 29, 2008 through February 11, 2008; and May 29, 2008 and continuing. The Claimant and Respondent-Insurer Atlantic Mutual Insurance Company allege the Claimant suffers from an occupational disease. Respondent-Insurer OneBeacon Insurance Company alleges an injury with a date of injury of December 2003. The parties have stipulated that the Respondent-Employer's coverage for Workers' Compensation liability with Atlantic Mutual Insurance Company ended on May 21, 2004, and that Respondent-Insurer OneBeacon Insurance Company became on the risk from May 22, 2004 and forward.

FINDINGS OF FACT

1. The Claimant began employment with Respondent-Employer in February 1997.

2. The Claimant first experienced back pain on the job in December 2003 after lifting metal boxes, and painting. Claimant did not file a claim for compensation for this date of injury until June 2, 2008.

3. The Claimant described his daily routine as lifting parts from a pallet, twisting to his right side, and lifting the parts again to hang them from a rack. His next step was to push the parts into an oven, and then pull them out, whereupon he lifted the parts again from the rack and set them on a bench. The Claimant testified that he processed 15-20 boxes of parts a day. He worked an average of 9 to10 hours per day, five and one-half days per week.

4. The Claimant acknowledged that he believed he had a work-related injury in December 2003 when he first experienced back pain on the job. He did not inform the Respondent-Employer of his back pain because he was afraid of losing his job, and he believed his back pain would get better.

5. The Claimant continued working without lost time until the spring of 2005 when he first reported injuring his back from working on the job to Ken Plante, his supervisor.

6. The Claimant began playing soccer in 1993. At the time he began working for Respondent employer in 1997, he was playing soccer once a week. The soccer season began in May and continued through September. He was playing soccer in the years 2003, 2004 and 2005. In 2004, the Claimant injured his knee playing soccer. In March, 2006, the Claimant was seen by Dr. Navarez. The history contained in Dr. Navarez's note of March 14, 2006 notes the Claimant complained of back pain after lifting an object, but does not note that the lifting occurred at work.

7. Dennis Chambon, Jr., Director of Manufacturing at Vertec Tool, testified that the Claimant's employment file contains a record made by Ken Plante, the Claimant's supervisor, of a conversation concerning a soccer injury in October 2005.

8. Mr. Chambon testified concerning a lift that was installed at the Claimant's workstation. Beginning in November 2005 through May 2008, the Claimant was not required to lift more than 40 pounds. The installation of the lift occurred roughly two weeks after the Claimant told his supervisor that he was having back pain in October 2005. The lift is a hydraulic or pneumatic device which comes down into the Claimant's work station through the roof. A pallet of parts is wheeled into the booth on a pallet jack, which is positioned under the lift. Hooks from the lift bar are attached to the parts. The lift apparatus is activated, and it pulls the parts up off the pallets. The apparatus obviates the need for Mr. Amaya or another employee from actually lifting the parts up on the bench.

9. Dr. Roberto Masferrer examined the Claimant in May 2008. He authored a report dated May 6, 2008. In the doctor's opinion, the Claimant had an acute onset of low back pain initially in 2003.

10. Dr. Masferrer testified that certain activities could aggravate or exacerbate a herniated disc, which was his diagnosis. Those activities include playing soccer.

11. During his deposition, Dr. Masferrer was asked to review pages 43, 44 and 45 of the Transcript of the Hearing. Dr. Masferrer stated that Mr. Amaya's soccer playing could contribute to the worsening or increase of the herniation of a disc.

12. Dr. Masferrer was also asked to review page 108 of the Transcript of the Hearing which contains Dennis Chambon's description of the lift at the Claimant's work station. Dr. Masferrer testified that based upon a reasonable degree of medical probability, and assuming that Mr. Amaya didn't have to do anything else other than operating the lift machine, Mr. Amaya's job activities from November 2005 through May 2008 did not contribute to any increase in the actual disc herniation that he observed on the Claimant's MRI films. Dr. Masferrer maintained that based upon a reasonable degree of medical probability, the Claimant's disc herniation is one hundred percent related to his original Worker's Comp injury of 2003. Finally, Dr. Masferrer testified that based on the assumption that the Claimant made a claim for Workers' Compensation for an injury dated December 2003, the December 2003 acute onset date of back pain in his report of May 6, 2008 was corroborated and not a mistake on his part.

CONCLUSIONS OF LAW

1. The Claimant filed his Claim for Compensation on June 2, 2008, for a date of injury listed as December 4, 2003. This is four and a half years after the alleged injury. Pursuant to C.R.S. 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 resulting therefrom, 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, and the furnishing of medical, surgical, or hospital treatment by the employer shall not be considered payment of compensation or benefits within the meaning of this section; but, in all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division as

required by the provisions of said articles, this statute of limitations shall not begin to run against the claim of the injured employee or said employee's dependents in the event of death until the required report has been filed with the division.

2. The statute of limitation period in C.R.S. 8-43-103(2) "commences when the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury." *Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Taking the Claimant's assertion as true -- that he began having problems in 2003 but did not report the injury to his employer because he was afraid he would be fired -- along with the histories given to Dr. Masferrer and Dr. Hall by the Claimant, he was aware of the nature, seriousness, and potential compensable character of his injury in 2003 and did not file a claim until June 2, 2008. The Claimant also did not report the 2003 injury until the claim was filed, and therefore the Respondent-Employer was not obligated to file a First Report of Injury per C.R.S. 8-43-103. There is insufficient credible evidence to establish by a preponderance of the evidence that the Claimant reported this work-related injury to the Respondent-Employer; therefore, a failure of the Respondent-Employer to file a First Report of Injury does not toll the statute under the circumstances.

3. 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. § 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. § 8-43-201, C.R.S. A preponderance of 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. § 843-201, C.R.S.

4. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony

and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

5. For an injury to be compensable under the Workers' Compensation Act, it must arise out of and occur within the course and scope of employment. § 8-41-301(1), C.R.S.; *Price v. ICAO*, 919 P.2d 207, 210 (Colo. 1996). An activity arises out of and in the course of employment when it is sufficiently interrelated to the conditions under which the employee generally performs his job functions that the activity may reasonably be characterized as an incident of employment, even though the activity is not a strict employment requirement. *Price*, 919 P.2d at 210.

6. The ALJ concludes there is insufficient credible medical and other evidence to establish that it is more likely than not that the Claimant suffers from an occupational disease arising out of and in the course of his employment with the Respondent-Employer in claims W.C. Nos. 4-756-609 and W.C. 4-762-451, with dates of onset of January 18, 2007, and January 22, 2008, respectively.

ORDER

It is therefore ordered that:

1.Claimant's claim for benefits under the Workers' Compensation Act of Colorado under claim W.C. No. 4-751-951, with a date of injury of December 4, 2003, is denied and dismissed.

2.Claimant's claim for benefits under the Workers' Compensation Act of Colorado under claims W.C. Nos. 4-756-609 and W.C. 4-762-451, with dates of onset of January 18, 2007, and January 22, 2008, respectively, are denied and dismissed.

DATE: June 1, 2009

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-752-174

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a right shoulder injury during the course and scope of his employment with Employer on November 8, 2007.

2. Whether Claimant has demonstrated by a preponderance of the evidence that his 27% right upper extremity impairment rating should be converted to a 16% whole person impairment rating.

FINDINGS OF FACT

1. Claimant is a 70 year-old male. He worked for Employer as an automobile mechanic for approximately 15 years.

2. Claimant testified that on November 8, 2007 he assisted three other employees in moving an approximately 1000 pound tire-balancing machine onto a truck. He identified the three other employees as Roosevelt Jefferson, Darrel Hyberg and a "Mexican kid." Claimant also remarked that employee John Christman carried the cord of the tire-balancing machine. He commented that, while moving the machine, he experienced pain in his right shoulder area.

3. Claimant completed his shift, but his condition worsened over the next several days. He then reported the injury to his supervisor. Employer directed Claimant to Concentra Medical Centers for treatment.

4. On December 28, 2007 Claimant underwent an MRI of his right shoulder. The MRI revealed a complete supraspinatus tendon tear, infraspinatus tendon undersurface distal partial thickness tearing and mild osteoarthritis.

5. On February 26, 2008 Claimant underwent right shoulder surgery. The procedure included arthroscopic rotator cuff repair, subacromial decompression, distal clavicle coplaning and labral debridement.

6. On March 5, 2008 Insurer filed a General Admission of Liability (GAL) acknowledging Claimant's right shoulder injury. Pursuant to the GAL Respondents began paying Claimant disability benefits.

7. On July 14, 2008 John Hughes, M.D. placed Claimant at Maximum Medical Improvement (MMI) and assigned him a 27% extremity rating based on range of motion loss and an arthroplasty. The 27% extremity impairment converted to a 16% whole person rating. Dr. Hughes diagnosed right shoulder strain/sprain with complete

rotator cuff tear, right shoulder arthrosis post rotator cuff repair and persistent loss of mobility of the right shoulder. Claimant commented that he had been unable to grip or use his right hand since his surgery. Dr. Hughes imposed permanent work restrictions that included no shoulder-level lifting in excess of 10 pounds and opined that he did "not believe that [Claimant] retains any useful capacity for reaching or lifting above shoulder level."

8. On August 17, 2008 Insurer filed a Final Admission of Liability (FAL) consistent with Dr. Hughes' determination. Respondents acknowledged the 27% right upper extremity impairment rating and awarded Claimant disability benefits.

9. On November 19, 2008 Respondents conducted surveillance of Claimant. The surveillance video demonstrated Claimant carrying a bag in his right hand, working on an old car, using a brush with his right hand for several minutes, working at shoulder level for seven to eight minutes, reaching behind shoulder level, performing frequent overhead activity, elevating his shoulder above 90 degrees for 15-20 minutes, washing a vehicle with a pressure washing wand in his right hand and carrying small boards on his right shoulder with no obvious pain or difficulty. Claimant engaged in the preceding activities primarily with his right hand.

10. On November 25, 2008 Neil L. Pitzer, M.D. conducted an independent medical examination of Claimant. Claimant commented that he had not experienced significant improvement since his surgery, he had "severe difficulty working on old cars" and could not use his right arm for any vehicle maintenance. He also reported that he had sold his motorcycle because he could not ride it as a result of his right arm weakness. After reviewing the surveillance video Dr. Pitzer remarked that Claimant demonstrated a "significant amount" of symptom magnification, was "exaggerating his dysfunction" and his range of motion measurements were inaccurate.

11. Claimant's former co-employee Darrel Hyberg testified at the hearing in this matter. He recounted that, although Claimant was present during the moving of the tire-balancing machine on November 8, 2007, Claimant did not assist in the procedure. Mr. Hyberg stated that he, "Bulldog," Roosevelt Jefferson and Lorenzo or Luis assisted in moving the machine. He noted that John Christman carried the cord of the machine. Mr. Hyberg also testified that, sometime before November 8, 2007, Claimant appeared to be suffering from shoulder pain. Upon further inquiry, Claimant told Mr. Hyberg that he had hurt his shoulder while installing a car lift at home. Mr. Hyberg stated that the discussion occurred three to four weeks prior to November 8, 2007. He specified that Claimant did not help move the tire-balancing machine because of his shoulder injury.

12. Claimant's former co-employee John Christman testified at the hearing in this matter. He explained that he was present during the lifting of the tire-balancing machine on November 8, 2007 and that he carried the cord. He stated that the people carrying the tire balancer were Roosevelt Jefferson, Luis, Darrel Hyberg and "Bulldog." Mr. Christman commented that Claimant did not assist in lifting the balancer, and would not normally lift anything as heavy as the tire balancer, because of his age and the presence of others who were younger and stronger. He also testified that, at some time

around the lifting event, he had touched Claimant's shoulder. Claimant winced and stated that he had hurt his shoulder. Mr. Christman believed that his discussion with Claimant occurred before the November 8, 2007 lifting incident.

13. Eddie Gallegos testified at the hearing in this matter. He stated that he was present when the tire-balancing machine was moved on November 8, 2007. Although he did not assist in moving the machine, he witnessed Roosevelt Jefferson, "Bulldog," Luis and Darrel Hyberg move it. Mr. Gallegos remarked that Claimant did not assist in moving the tire-balancing machine and would not normally have assisted in a similar project because he was a mechanic. He commented that Claimant admitted to him that he was having shoulder problems. Mr. Gallegos was "confident" that Claimant's admission was "most definitely" before the November 8, 2007 lifting event.

14. Dr. Pitzer testified that he evaluated Claimant, reviewed Claimant's medical records and examined the surveillance video. He explained that Claimant told him that he had "severe difficulty" working on old cars and could not use his right arm for any vehicle maintenance. Dr. Pitzer stated that the surveillance video was not consistent with Claimant's claims of functional impairment. He remarked that Claimant's evaluation demonstrated give-away weakness, non-physiologic findings and inconsistency. Dr. Pitzer determined that he did not consider Claimant's presentation to be reliable and that Claimant was exaggerating his level of dysfunction.

15. Claimant presented two rebuttal witnesses at the hearing. Scott Gifford and John Urioste explained that they installed a floor lift in Claimant's garage. They remarked that Claimant only connected the electrical wiring and was not injured during the installation process.

16. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on November 8, 2007. Claimant testified that he injured his right shoulder while helping to move a tire-balancing machine on November 8, 2007. However, Mr. Hyberg, Mr. Christman and Mr. Gallegos all stated that Claimant did not assist in lifting the machine and thus was not injured. They identified the parties who actually performed the lifting as Roosevelt Jefferson, "Bulldog," Mr. Hyberg and either Luis or Lorenzo. All parties agreed that Mr. Christman carried the cord of the machine. Moreover, Mr. Hyberg testified that Claimant had suffered a shoulder injury while installing a car lift at home approximately three to four weeks prior to November 8, 2007. Mr. Christman commented that Claimant had disclosed a shoulder injury. He believed the discussion with Claimant occurred before the November 8, 2007 lifting incident. Finally, Mr. Gallegos commented that Claimant admitted to him that he was having shoulder problems. Mr. Gallegos was "confident" that Claimant's admission was "most definitely" before the November 8, 2007 lifting event. The record thus reveals that it is unlikely that Claimant injured his shoulder while moving a tire-balancing machine on November 8, 2007 but instead suffered a shoulder injury prior to November 8, 2007. Although two rebuttal witnesses testified that they installed a floor lift in Claimant's garage and Claimant was not injured during the procedure, they neither witnessed the

November 8, 2007 incident nor accounted for Claimant's shoulder problems prior to the incident.

CONCLUSIONS OF LAW

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

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

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

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (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. 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). After liability is admitted, payments must be made accordingly. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250, 252 (Colo. App. 1990). If respondents

improvidently admit liability, they may receive only prospective relief from the admission after the matter is litigated before an ALJ. *See Rocky Mountain Cardiology v. Industrial Claim Appeals Office,* 94 P.3d 1182, 1185 (Colo. App. 2004); *In re Fuller,* W.C. No. 4-588-675 (ICAP, Sept. 1, 2006). There is thus a degree of finality to admissions in cases where there is no legitimate controversy, but respondents still have an opportunity for a hearing and possible prospective relief. *HLJ Management Group Inc.,* 804 P.2d at 252-53.

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on November 8, 2007. Claimant testified that he injured his right shoulder while helping to move a tire-balancing machine on November 8, 2007. However, Mr. Hyberg, Mr. Christman and Mr. Gallegos all stated that Claimant did not assist in lifting the machine and thus was not injured. They identified the parties who actually performed the lifting as Roosevelt Jefferson, "Bulldog," Mr. Hyberg and either Luis or Lorenzo. All parties agreed that Mr. Christman carried the cord of the machine. Moreover, Mr. Hyberg testified that Claimant had suffered a shoulder injury while installing a car lift at home approximately three to four weeks prior to November 8, 2007. Mr. Christman commented that Claimant had disclosed a shoulder injury. He believed the discussion with Claimant occurred before the November 8, 2007 lifting incident. Finally, Mr. Gallegos commented that Claimant admitted to him that he was having shoulder problems. Mr. Gallegos was "confident" that Claimant's admission was "most definitely" before the November 8, 2007 lifting event. The record thus reveals that it is unlikely that Claimant injured his shoulder while moving a tire-balancing machine on November 8, 2007 but instead suffered a shoulder injury prior to November 8, 2007. Although two rebuttal witnesses testified that they installed a floor lift in Claimant's garage and Claimant was not injured during the procedure, they neither witnessed the November 8, 2007 incident nor accounted for Claimant's shoulder problems prior to the incident.

ORDER

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

1. Claimant's request for Workers' Compensation benefits is denied and dismissed. Respondents are entitled to prospective relief from the FAL filed in this matter.

2. Because Claimant has not suffered a compensable shoulder injury, it is unnecessary to address whether his 27% right upper extremity impairment rating should be converted to a 16% whole person rating.

DATED: June 24, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-727-623 & WC 4-752-214

ISSUES

This was a hearing on the two claims, which were consolidated for purposes of hearing by Order of June 30, 2008. At hearing the parties stipulated that the issues for the June 13, 2007 claim captioned as W.C. No. 4-727-623 are permanent total disability, permanent partial disability, the date of maximum medical improvement, medical benefits, temporary total disability and the average weekly wage. As it relates to the March 5, 2003 claim, W.C. No. 4-752-214, the parties stipulated that the issues are permanent total disability, permanent partial disability, apportionment as it relates to permanent partial disability, and the two penalty issues. Respondent alleges a statute of limitations along with laches and estoppel as it relates to the filing of the Worker's Claim for Compensation in the 2003 claim. The parties further stipulated that the medical care of Drs. Richman, Mann, Cohen, and Sung are authorized, reasonable and necessary. Medical benefits sought are from June 13, 2007 and ongoing. The parties further stipulated that the Claimant was terminated by the City of Colorado Springs due to medical reasons and as it related to the 2003 filing of the Worker's Claim for Compensation, that a supervisor, Janice Manuel, was not a person that misled the Claimant as it pertains to the filing of the Workers' Compensation claim. At the commencement of the hearing a Sequestration Order was entered. Respondent requested that they have an expert serve as an advisory witness. The witness was identified as their vocational expert, Margot Burns. Claimant also designated her vocational expert, Bruce Magnusson, as her advisory witness. All other witnesses were excluded pursuant to the Sequestration Order. The issues determined were as follows:

- Whether the Claimant has met her burden of proof that she sustained a compensable work-related injury on March 5, 2003.

- Whether the Claimant has sustained her burden of proof that she is entitled to permanent partial disability as a result of the industrial injury of March 5, 2003.

- Whether the Claimant has sustained her burden of proof that the medical care with the authorized treating doctors is related to her industrial injury of June 13, 2007 and/or in combination with an industrial injury of March 5, 2003.

- Whether respondent has met its burden to overcome the Division Independent Medical Examiner's opinion of maximum medical improvement.

- Whether the Claimant has met her burden of proof that she is entitled to temporary disability benefits up to and until the date of maximum medical improvement.

- Whether the Claimant has met her burden of proof as to the average weekly wage.

- Whether respondent has met its burden of proof to overcome the Division Independent Medical Examiner's opinion that the Claimant sustained a 6% working unit impairment and whether Claimant has overcome the Division Independent Medical Examiner's opinion that she sustained only a 6% impairment as a result of her industrial injury of June 13, 2007.

- Whether the Claimant has sustained her burden of proof that she is permanently and totally disabled as a result of the industrial injury of June 13, 2007, Claim No. 4-727-623 and/or as a combination of the two industrial injuries of June 13, 2007 and March 5, 2003, Claim No. 4-752-214.

FINDINGS OF FACT

The Claimant was hired by The Respondent-Employer-Insurer to work as an accounting technician in 1999 to work in the Utilities Department. Her regular duties included resolving problem invoices, verifying account numbers and entering the accounting numbers into the system, resolving discrepancies or missing information, and special projects. Her time was split roughly 50/50 between her regular activities and the special projects. Special projects included payment on large contracts, designing a website, and accounts receivable.

The Claimant reported two pertinent injuries. The first injury occurred on March 5, 2003 and the second injury occurred on June 13, 2007.

The Claimant was sent home from work by Dr. Kyle Akers on November 14, 2007 and has not returned to employment.

On July 10, 2008 the Respondent-Employer-Insurer terminated her employment for medical reasons; she was not capable of performing their work due to her low back injury and depression.

The March 5, 2003 claim resulted when the Claimant slipped on ice leaving the building where she worked. A Worker's Claim for Compensation was filed dated February 10, 2008. An Employer's First Report was filed March 4, 2008 and a Notice of Contest was filed on March 5, 2008. This claim was a full contest.

With regard to the June 13, 2007 claim, the Claimant was injured when she fell down a set of stairs. A Worker's Claim for Compensation was filed on December 3, 2007, the Employer's First Report was filed earlier on June 18, 2007, and a Final Admission of Liability was filed on November 28, 2007. Pursuant to the Final Admission of Liability the Claimant was found at maximum medical improvement by Dr. Akers on November 19, 2007 with zero permanent impairment. Maintenance care was denied. The Final Admission of Liability documents that temporary disability benefits were paid from June 18, 2007 through June 23, 2007, temporary total disability from June 24, 2007 through July 29, 2007, and temporary partial from July 30, 2007 through November 18, 2007.

The Claimant objected to the Final Admission of Liability on November 30, 2007 and requested a Division Independent Medical Examination. The Division Independent Medical Exam was performed by Dr. Katharine Leppard on May 27, 2008. Dr. Leppard opined in her report that the Claimant did not reach maximum medical improvement until May 27, 2008. In her evidentiary deposition, Dr. Leppard changed her date of maximum medical improvement to April 17, 2008. The basis for her opinion was the approximate date that it was determined the Claimant would not undergo surgery that had previously been proposed by Dr. Roger Sung. Dr. Leppard felt that the Claimant had a 16% whole person impairment. Dr. Leppard apportioned 10% as pre-existing the June 13, 2007 injury, leaving 6% working unit for the June 13, 2007 claim.

Respondent-Employer-Insurer filed its Application for Hearing to challenge Dr. Leppard's opinion.

Injury and Compensability for March 5, 2003 Claim

On March 5, 2003 the Claimant was leaving the building where she worked for Respondent-Employer-Insurer when she slipped on ice and fell, sustaining injury to her back. The following day the Claimant reported this injury to her employer and completed the Respondent-Employer-Insurer's Incident Report.

The Claimant has had back problems since this original injury. She did not immediately seek medical care. She testified credibly that she originally was having buttock pain but did not understand this to be of a serious nature involving a bulging disc. She did begin treatment with Dr. Sparr on August 15, 2003. When she began treatment with Dr. Sparr, the Claimant also saw him for other conditions including myofascial pain involving her neck and parascapular muscles, bilateral epicondylitis and symptoms that Dr. Sparr initially assessed as a myogenic thoracic outlet syndrome. These same conditions were reported to her family doctor previously that year, Dr. Bird.

She saw Dr. Sparr a second time a few weeks later before deciding to transfer her treatment to Dr. David Richman.

Dr. Richman first saw the Claimant on September 24, 2003 and has continued to treat her through the present. On that date she reported to Dr. Richman that she had been having problems with low back pain worsening over the last eight months.

Dr. Richman was provided the prior medical records from Dr. Sparr and asked for his opinion as to whether the original complaints in 2003 were secondary to the fall on the ice in March of 2003. In his report of December 5, 2008, Dr. Richman concluded that her original low back complaints and resulting pain-related depression were a direct result of the March 2003 fall at work. The testimony from Dr. Richman regarding compensability is credible and persuasive.

The Claimant testified credibly that in weekly meetings held between 2003 and 2007, employees met with their supervisors to discuss, among other things, scheduling conflicts such as medical appointments. The Claimant estimated that on approximately a dozen occasions in 2003 alone, she notified her supervisors that she was seeking medical care for her back injury. She asked her supervisors to modify her schedule accordingly.

When the Claimant's condition did not resolve she notified one of her supervisors, Janice Manuel, that she intended to seek authorization for the medical treatment as a work-related claim through the Human Relations Department. The Claimant testified persuasively that she contacted Lori Stillmunks in late 2004 or 2005. She was told by Lori Stillmunks that she could not pursue a claim because too much time had gone by. The Claimant's recount of what occurred in 2003 through 2005 was supported by the two supervisors that she had during that time, Janice Manuel and Dawn Skeen. Lori Stillmunks, now known as Lori Stewart, testified that she did not have any knowledge that the Claimant had even filed an Incident Report for the 2003 claim. This was not credible in that the Incident Report was a document in the possession of respondent-employer.

Dawn Skeen testified that she is still employed at the Respondent-Employer-Insurer in the same department as the Claimant. She was no longer a supervisor of the Claimant at the time that the Claimant last worked for Respondent-Employer-Insurer. Dawn Skeen was "reclassified" in October of 2006 and her job duties changed from supervisor in February of 2007. Dawn Skeen testified that she was co-supervisor of the Claimant with Janice Manuel between 1999 and 2006. Dawn Skeen testified that she witnessed the fall at work in 2007 and helped bring the Claimant back to her feet. She described it as a "very hard fall."

Dawn Skeen testified that she was aware of the Claimant's 2003 injury at work. She testified that she was aware that the Claimant was arranging her schedule to make medical appointments for treatment for her back as a result of that fall. Dawn Skeen testified that it was part of her job as the Claimant's supervisor to receive reports from

the Claimant when she was having appointments for her back injury. She shared this responsibility with Janice Manuel. Dawn Skeen testified that she could not provide the number of times this occurred, but testified that, "absolutely" she missed more than three days of work for medical appointments for her back between March 2003 and June of 2007.

Dawn Skeen testified consistently with the Claimant about the weekly meetings to discuss coverage issues and that she recalled in these group meetings the Claimant informing the group, including her and Janice, that she was missing time from work due to her back injury. Dawn Skeen also recalls a specific meeting that she had as a member of the Plaza Homeowners Association wherein the topic of the Claimant falling on March 5, 2003 was raised. She recalls this occurring on multiple occasions during these meetings because of the concern about ice build-up around the building. She recalls that in these meetings Patricia Martinez's work-related injury was specifically discussed. She also recalls that there were personnel from Respondent-Employer-Insurer at the manager and general manager level present.

Janice Manuel testified that she is now retired from Respondent-Employer-Insurer. She retired on April 27, 2007. Prior to that time she was a supervisor of the Claimant. She recalls being aware that the Claimant hurt her back due to a work-related injury in 2003 when she fell leaving the building. She was aware as the Claimant's supervisor that she was missing time from work or arranging her flex time to accommodate medical appointments because of her back injury. She was the one that the Claimant provided the notice to and had the Claimant complete the Incident Report dated March 6, 2003. it is found that the testimony of the Claimant, Dawn Skeen, and Janice Manuel, her two supervisors, was credible and persuasive that the Claimant sustained a work-related injury on March 5, 2003 and that the Respondent-Employer-Insurer had notice of the injury and the fact that the Claimant had missed more than three days of work as early as 2003. The Claimant has provided evidence that it is more likely than not that she did sustain a work-related injury on March 5, 2003.

Medical Benefits

The parties stipulated at hearing that the medical care that the Claimant has received from Drs. Richman, Mann, Cohen, and Sung are authorized, reasonable and necessary. The issue left for determination is whether the treatment is related to either industrial injury, and whether Claimant is further entitled to maintenance care after maximum medical improvement.

The medical records from Drs. Richman, Mann, Cohen, and Sung all fully support the Claimant's need for medical care to cure and relieve the Claimant from the effects of the injury. With the exception of Dr. Akers' statement that the Claimant was released from care, all other treating physicians have documented the need for ongoing medical care. Dr. Richman testified persuasively at hearing as to the nature of her conditions and the need for the care that has been provided to her by Dr. Mann and himself. The most persuasive evidence is that the medical treatment incurred as of

June 13, 2007 and continuing has been directly related to the industrial injury of June 13, 2007.

Dr. Richman opined as to the need for maintenance care. Dr. Richman testified credibly that along with the ongoing medications and office visits and the treatment from Dr. Mann, he would recommend medial branch blocks and possibly a spinal cord stimulator in the future. Dr. Richman noted that the medial branch blocks, in the past, did provide some improvement and should be considered once more. In addition, Dr. Mann set forth in his medical records repeated requests for more comprehensive psychological treatment and a more formal pain clinic as needed care and treatment. The most persuasive evidence has been provided by the Claimant that her medical care as of June 13, 2007 is directly related to the June 13, 2007 industrial injury. The Claimant has met her burden of proving that she requires ongoing medical care from these same providers to maintain her at maximum medical improvement.

Maximum Medical Improvement

The Claimant underwent a Division Independent Medical Examination by Dr. Katharine Leppard on May 27, 2008. In Dr. Leppard's report she concluded that Dr. Akers was incorrect in his assessment of maximum medical improvement and impairment. Dr. Leppard opined that the Claimant did not reach maximum medical improvement until seen by her on May 27, 2008. In her report, Dr. Leppard did indicate that she was not provided with the most recent medical records and therefore felt the date of the exam was the best date for assessing maximum medical improvement.

Prior to her deposition, Respondent-Employer-Insurer provided to Dr. Leppard the most recent medical records for review. These medical records included Dr. Sung's report of April 17, 2008. Dr. Sung, the orthopaedic surgeon, reported on April 17, 2008 that the Claimant was in for follow-up for her back and leg pain. Dr. Sung notes that he had a discussion with the patient and her husband and at that point recommended against the lumbar fusion. Dr. Sung recommended consideration be given for the spinal cord stimulator trial. Dr. Leppard, in her deposition, felt that this was the most appropriate date for a determination of maximum medical improvement in that up until that point there had still been some discussions of the Claimant undergoing the lumbar fusion. The most persuasive evidence submitted at hearing is that Dr. Leppard's opinion has not been overcome by Respondent-Employer-Insurer by clear and convincing evidence. The most persuasive evidence is that Dr. Leppard's opinion of maximum medical improvement on April 17, 2008 is appropriate.

Temporary Total Disability

The Claimant seeks temporary total disability benefits from November 19, 2007 until April 17, 2008.

On November 19, 2007 one of the two primary authorized treating physicians, Dr. Akers, opined on November 14, 2008 that the Claimant was, "Off duty on her work-

comp claim until further notice." Five days later, on November 19, 2007, Dr. Akers opined that she had reached maximum medical improvement. In his office note of November 19, 2007 Dr. Akers stated, "Received on November 14, 2007 report from DIME examination by Dr. Elizabeth Bisgard, M.D. dated November 1, 2007. Based upon her findings with regard to [Claimant's] low back problem the aggravation of her pre-existing non-work-related low back problem returned to pre-injury baseline. Her shoulder has been doing fine for some time. This case is now closed with no impairment and no ongoing treatment. She should continue to seek treatment for the old low back problem from her private physician. She is released to full-time duty with no restrictions from this claim, have spoken with [Claimant] by phone this morning and relayed the information to her. Advised her to contact Claims to discuss benefits and time-reporting." It is the reasonable inference that Dr. Akers based his determination that the Claimant was at maximum medical improvement and without restrictions upon his mistaken belief that Dr. Elizabeth Bisgard had provided a Division Independent Medical Examination report and that any residuals the Claimant was experiencing on November 19, 2007 was non-work-related.

The second authorized treating physician at the time was Dr. David Richman who had not released the Claimant to return to work. The most persuasive evidence is that on November 19, 2007 and continuing through the date of maximum medical improvement established by the Division Independent Medical Examiner, Dr. Katharine Leppard, the Claimant was temporarily and totally disabled from her work with respondent-employer. Restrictions were placed upon her by Dr. Richman. Dr. Akers had released the Claimant from all work only five days before declaring her at maximum medical improvement. The Claimant has met her burden of proof that she was entitled to temporary total disability benefits from November 19, 2007 until April 17, 2008.

Average Weekly Wage

During the 22-week period in 2007 leading up to her injury, the Claimant grossed $23,538.34 (January 5, 2007 to June 8, 2008). These were the first 22 completed weeks in 2007 before her date of injury. The gross divided by 22 weeks equals $1,069.92. The Claimant's wages vary from paycheck to paycheck depending upon the number of hours she performed and periodic performance bonuses. The 22 weeks is a fair approximation of the Claimant's average weekly wage and represents a fair reflection of her wage loss due to the industrial injury.

Permanent Partial Disability

As set forth in Findings of Fact below and Conclusions of Law and Order to follow, it is determined that the Claimant has met her burden of proving that she is permanently and totally disabled as a result of the June 13, 2007 industrial injury. Permanent partial disability benefits are therefore not assigned to that claim.

Dr. Richman opined that as a result of the 2003 industrial injury the Claimant sustained a 9% whole person impairment for her physical injuries involving her low back and a 5% psychological disability. Dr. Richman's testimony and his report of August 27, 2008 was convincing and persuasive as to the Claimant's permanent impairment secondary to the 2003 industrial injury.

The Division Independent Medical Examiner was not asked to provide permanent impairment for the 2003 claim. Supportive of Dr. Richman's opinion, however, she found that the Claimant currently had a 16% whole person impairment for the physical injuries of which she apportioned 10% of the working unit to the condition that existed prior to June 13, 2007. It is found that the "pre-existing condition" was a direct result of the 2003 industrial injury. In addition, in her evidentiary testimony Dr. Leppard felt that the psychological impairment would be best assigned to the "pre-existing condition." The Claimant has met her burden of proof that it is more likely than not that as a result of her 2003 industrial injury she has sustained a 9% working unit impairment for injuries involving her back and a 5% for psychological impairment.

Permanent Total Disability

The Claimant's husband of 21 years, David, was the first to testify at hearing. He is also employed by the Respondent-Employer-Insurer in the Utilities Department. David testified credibly that when he awakens in the morning his wife is usually already up; having failed to sleep much during the night due to low back pain. When he awakens he rubs her back for 20-30 minutes and helps her with her initial medication. The medication makes the Claimant drowsy and she usually stays in bed and falls asleep. At approximately 1:00 p.m. the Claimant takes her pain medications again and goes back to bed. She sleeps for one to two hours. The Claimant will go downstairs and maybe read the paper or make a phone call or two until about 4:00 p.m. when she takes her medication again. She will then usually fall asleep until dinner time. David does the cooking. After dinner she returns to her room and lies down. He estimates that she is lying down approximately three-quarters of the day. She does not perform household chores. When he is at work he calls her constantly during the day to check on her well-being. He estimates that they go out approximately one time per week. The Claimant lasts no more than an hour. He noted that she was up numerous times throughout the night. When she is up at night she paces, she rolls on a styrofoam tube or on a physical therapy ball, and tries to do some stretching exercises. Because of her injuries they have hired a housekeeper. His wife rarely drives due to her pain and side effects from the medication. David described the disparity in her day-to-day activities from before the June 13, 2007 industrial injury and after June 13, 2007. He noted that

prior to June 13, 2007 they took trips together, they attended their son's baseball games, she kept house, and she worked every day. She even went to Europe on her own. He noted that she used to volunteer for various organizations and that she was able to sleep through the night. He described the fact that she cries often. It is found that the testimony from David was credible and persuasive.

Dr. Richman has been treating the Claimant since shortly after her initial fall in 2003 through the present. He is in a unique position to provide evidence as to the nature of the injuries sustained in the 2003 fall, the injuries she sustained in the second fall in 2007, and the change in her condition since her industrial injury sustained in 2007. Dr. Richman opined that she sustained injuries that resulted in chronic low back pain, buttock and hip pain, some leg pain and some depression as a result of the March 2003 fall at work. However, he further opined that prior to June 13, 2007 he did not feel it was necessary to place physical restrictions on her ability to work due to these conditions. Dr. Richman testified credibly that since her fall at work on June 13, 2007 there has been a substantial change in her conditions. Specifically, her pain has gone up and her emotional status has deteriorated. She also has significantly more leg pain. Dr. Richman opined that her deterioration and her depression is directly related to the increase in pain in her low back and leg secondary to the June 13, 2007 fall down the stairs at work.

Dr. Richman testified that within a few months of the June 13, 2007 fall that the Claimant's depression became so severe that he became concerned of her possibly hurting herself. He determined that it was necessary to bring in Dr. Dale Mann, a psychologist, on an emergency basis. Prior to her fall at work in June of 2007 he did not feel that it was necessary for her to have emergency psychiatric care for her depression. He also pointed out that her dosages for pain medication have needed to be increased substantially since June 13, 2007. He noted that the dosages started escalating fairly rapidly after her June 13, 2007 fall to the point today where she is taking more than twice as much opiates to control her pain.

Dr. Richman testified, "Immediately after her fall [June 13, 2007], she really decompensated significantly despite escalating the dosages and she got to the point where she no longer was remaining functional during her day. And even though she was on fairly modest doses of opiates before even with more than twice as much now, she's much less functional than before the fall in 2007."

Dr. Richman acknowledged that she was reporting high pain levels before the 2007 fall and after the 2007 fall. He noted that the subjective pain levels, measured on a 1 to 10 scale, must be seen in light of the individual patient's experience up to that point in time that she provides a subjective pain level. He also noted that to keep her at roughly the same subjective level, it has been necessary to double the dosage of narcotic pain medication. He noted that the pain medications she is currently taking sedate her.

In Dr. Richman's report of July 2, 2008 he states:

“I have known [Claimant] for many years now, and there is clearly a difference in [Claimant] since her fall from last year. Not only her pain complaints and reports, but more importantly her psychological status is much worse since her fall. It is my opinion that she has never reached her pre-fall baseline of pain and depression.

I spoke with [Claimant] at length about her physical capabilities and her potential return to work options. The biggest concern that I have for [Claimant] is that she can only tolerate 10-12 minutes of one particular position. This is demonstrated on most of the visits when she comes to see me. She shifts positions when sitting in a chair for more than 10-12 minutes, sometimes stands and tries to move around and then changes positions often. Additionally, after only a couple of hours of being up out of bed or lying down she needs to get back into a supine or side-lying position. . . .

Regarding another issue of her return to work, [Claimant] decompensated psychologically quite a bit when put into any type of stressful situations after her fall in 2007. It is my opinion that although her pain levels have increased since her fall in 2007, her psychological status is actually the biggest deterrent for her returning to any regular work. Because of her high levels of anxiety and depression at times, any kind of stressful situation escalates her pain levels and her psychological situation decompensates fairly rapidly at times. Although overall she is doing much better since she has not been working, I am quite concerned given her current situation that if she were to return to work with any type of stress, that her psychological status would decline.

Because of all of the above, I think it would be necessary for [Claimant] to be in a situation with any type of attempted trial at return to work that she be allowed to change positions every 10-12 minutes from sitting to standing to walking, etc., and change this every 10-12 minutes per hour, but for no longer than a two-hour maximum, at which point she would need to lie down for 45-60 minutes before resuming a position in either sitting, standing or walking. These physical restrictions in and of themselves will make it extremely difficult for her to find any employment. In addition, she needs to limit her lifting, pushing, pulling, etc. to the sedentary or less than sedentary level of work, lifting no more than 5 pounds on a regular basis, 10 pounds on a rare occasion. Additionally, she needs to avoid bending at the waist, no stair climbing, no crawling, kneeling, squatting. Additionally, her work environment needs to be a very low stress situation and her job should not be a position which would potentially worsen her depression and anxiety.”

In her evidentiary deposition, the Respondent-Employer-Insurer's vocational expert, Margot Burns, opined that if Dr. Richman's assessment of limitations as set forth in his July 2, 2008 report is accepted as accurate, that she agrees with the Claimant's vocational expert, Bruce Magnuson, that the Claimant is permanently and totally disabled.

Dr. Richman noted that prior to June 13, 2007 he did not think it was necessary for the Claimant to be referred to a surgeon for a surgical consult, for a discogram, and as noted above, for comprehensive and emergent psychological intervention. Dr. Richman noted that all of this became necessary due to her fall at work on June 13, 2007. In commenting on the reports from Drs. Bisgard and Akers that essentially opine that the Claimant had no change in her condition as a result of the June 13, 2007 fall at work, and that all of her ongoing symptomotology as reviewed by them in November of 2007 was pre-existing June 13, 2007, Dr. Richman opined that there was simply no basis for that opinion. He stated that her condition was dramatically different after June 13, 2007 than what it was during the several years that he treated her following her first fall at work in 2003. He noted that she has not been able to tolerate getting back to any kind of routine activity in work like she was doing before. He noted that functionally, the change caused by the 2007 injury was dramatic. He noted that their apparent reliance upon before and after MRI's is insufficient. He noted that in the absence of clinical findings supporting the film study, the film study had little significance. It is found that the opinions and testimony provided by Dr. Richman is persuasive and credible. The contrary opinions provided by Dr. Akers and Dr. Bisgard that the Claimant returned to baseline by November of 2007 to her pre-existing condition and that residuals are not related to the 2007 industrial injury, are not credible or persuasive.

Dr. Dale Mann has been the Claimant's primary treating psychologist since brought into the case by Dr. Richman in November of 2007. Of note in his initial report of November 16, 2007 under his heading of CONCLUSION/ RECOMMENDATIONS, he found that [Claimant] was experiencing significant and overwhelming psychological and physical distress at the present time and would benefit from psychological care and psychological testing. Respondent-Employer-Insurer has refused to pay for any of his treatment. In his most recent note of January 8, 2009 he continues to opine that she is a strong candidate for an intense rehabilitation program. Absent that, he continues to believe that the patient is not psychologically ready to return to work.

The Respondent-Employer-Insurer makes the argument that the Claimant's fall at work is not a significant factor in her current disability. The Respondent-Employer-Insurer relies upon the independent medical examination reports and testimony from Drs. Bisgard and Kleinman as well as their in-house facility doctor, Dr. Akers. To support the medical opinions, the Respondent-Employer-Insurer argues that the Claimant was performing at a low level performance level prior to her June 13, 2007 industrial injury.

A current employee of the Respondent-Employer-Insurer and a prior supervisor of the Claimant, Dawn Skeen, testified at hearing. Ms. Skeen testified that the Claimant

was an outstanding employee and noted that the performance reviews done in 2005, 2006, and 2007 rated the Claimant at either the highest performing level of role model or at the next highest level of solid performer. Dawn Skeen confirmed that was exactly how the Claimant performed her duties.

Janice Manuel, a now retired employee for the Respondent-Employer-Insurer and a past supervisor for the Claimant, testified to the same effect. Janice Manuel was the supervisor that produced the annual performance review for the year 2006. She not only rated the Claimant's performance as very high but she noted that the Claimant received a "star award" on November 20, 2006 from the manager for contributions and all of the accounts payable accomplishments in 2006. Janice Manuel noted that a star award is an unusual award given for exceptional performance. Janice Manuel also prepared the 2005 performance review. She noted that the Claimant also received a star award for her leadership role in 2005.

The 2007 performance review was prepared by the Claimant's most recent supervisor, Gretchen Peters. The performance review by Gretchen Peters was also positive. It should be noted that the first time a supervisor raises concern about performance is only after the Claimant is severely injured on June 13, 2007. It is also noted that Gretchen Peters, in her attempt to discredit the Claimant's performance levels, uses only the time that the Claimant put in on her regular activities and not her special projects to skew the numbers against other employees who did not have special projects taking up approximately 50% of her time.

Bruce Magnuson testified on behalf of the Claimant as the Claimant's vocational expert. Bruce Magnuson reviewed her employment records going back several years. Bruce Magnuson testified that based upon his review of the personnel records from 2003 to 2007 there was every indication that the Claimant was performing at a high level, not missing an excessive amount of work, working 40 hours per week, receiving bonuses, getting awards, etc. Mr. Magnuson testified that the June 13, 2007 industrial injury was "the terminating factor in her loss of access to the labor market." In fact, Bruce Magnuson testified that she is currently, in his expert opinion, incapable of earning any wages, part-time or full-time, due to the injuries she sustained on June 13, 2007. He pointed out that the most qualified position available to the Claimant was the job she was doing at the time of her industrial injury. He noted that it was the lightest level of physical demand level as per the Dictionary of Occupational Titles and typical labor force demands. However, he further noted that the Respondent-Employer-Insurer terminated her because she was incapable of performing that same job.

Mr. Magnuson noted that the Claimant lies down most of the day, she is significantly medicated, it is difficult for her to stay focused, the type of work that she has previously done required fairly intense focus since she was dealing with money, calculations, mathematical computations, and computer entries. He agreed with the Respondent-Employer-Insurer in that she was no longer able to perform that type of activity. Further basis for his opinion was the medical reports and testimony from Dr. Richman and the medical reports from Dr. Mazen. As opined by the respondent's expert,

Margot Burn, in her evidentiary deposition testimony, if the restrictions provided by Dr. Richman are accepted as accurate, the Claimant simply is not employable at the present time. Mr. Magnuson noted that the Claimant had been fully and gainfully employed since February of 1999 by the Respondent-Employer-Insurer, and before that, had worked her entire adult life. In his report of August 3, 2008 he concludes by stating, "I would conclude that [Claimant] is not capable of earning a wage in a part or full time basis. She is also not a candidate for formal retraining. The probabilities of being able to sustain employment if able to work for a partial day or a full day are highly improbable. The above conclusions are made within a high degree of vocational probability." The testimony of Bruce Magnuson is found to be persuasive.

The Respondent-Employer-Insurer relies to a large extent upon the independent medical examinations from Drs. Bisgard and Kleinman. In spending approximately an hour with the Claimant and a review of medical records, these two doctors have concluded that the June 13, 2007 injury really had no role in the Claimant's current disability. Neither of them found any impairment as a result of her fall on June 13, 2007. In fact, Dr. Kleinman felt that from any cause, the Claimant had no psychological impairment. Their opinions to these issues is not persuasive.

Prior to her June 13, 2007 fall at work, the Claimant was, like all of her co-employees, encouraged to tele-work from home two or three days per week. They also allowed her to use flextime so as to ensure that she worked her 40 hours per week even if it required her to work on weekends. After her injury, this was all taken away from the Claimant for what amounts to unexplained reasons other than her new supervisor, Gretchen Peters', request to "more closely keep an eye on her." Prior to her fall at work, the Claimant was always rated as a role model or solid performer; the two highest performance ratings. The Claimant was chosen for special projects. She trained new employees. She received awards for her leadership.

The Claimant testified credibly that her condition has significantly worsened since her industrial injury of 2007. Respondent, by its determination that she was physically incapable of performing her job, which resulted in her termination for medical reasons, supports her position. The Claimant is now in constant pain, sleeps poorly, is incapable of performing day-to-day activities of daily living, is opiate dependant, and severely depressed. The pain and depression along with the sedative effects of the narcotics require the Claimant to lay down most of the day. She rarely leaves the house. She does not drive. She is dependent upon her husband to take care of her. She is not capable of earning any wages. As stated by Bruce Magnuson at hearing, it is persuasive evidence in support of her claim that she is permanently and totally disabled that in the job that she was most likely able to do, the Respondent-Employer-Insurer found that she physically and emotionally could not do it.

It is found that the Claimant has demonstrated that it is more likely than not that she is permanently and totally disabled as a result of the industrial injury of June 13, 2007. It is further found that she has demonstrated that the June 13, 2007 industrial injury was a significant causative factor in her current disability. As a result of her March

2003 industrial injury, the Claimant was not permanently and totally disabled. She continued to function at work and at home. Her successful activities at work demonstrated that she was fully capable of earning a wage until the June 13, 2007 industrial injury.

CONCLUSIONS OF LAW

Injury and Compensability for March 5, 2003 Claim

Claimant has the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment with the 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).

An 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).

As found, Claimant showed it more probably true than not she sustained an injury arising out of and in the course of her employment with Respondent-Employer-Insurer . Thus, Claimant proved by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment with Respondent-Employer-Insurer.

Respondent-Employer-Insurer asserts that the claim should be barred due to the statute of limitations. Section 8-43-103(2), C.R.S. states that a claim is barred unless a notice claiming compensation is filed within two years (three years in the case of excusable neglect) of the injury. Section 8-43-103(2) further states as follows:

> [I]n all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the Division as required by the provisions of said articles [of the Workers' Compensation Act], this statute of limitations shall not begin to run against the claim of the injured employee . . . until the required report has been filed with the Division.

This language was in effect at the time of the Claimant's injury. The employer's duty to "report said injury" to the Division refers to the employer's statutory duties under Section 8-43-101, C.R.S. *Grant v. Industrial Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987). Section 8-43-101(1), provided that

> "[w]ithin 10 days after … the occurrence of a permanently physically impairing injury, or lost time injury to an employee in excess of three shifts

> or calendar days," the employer must report the injury to the Division. An employer is deemed to have "notice" of an injury when the employer has "some knowledge of 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."

Jones v. Adolph Coors Co., 689 P.2d 681, 684 (Colo. App. 1984). It is the Claimant's burden to prove when the employer had sufficient knowledge to trigger the duties required by Section 8-43-101(1). See *City and County of Denver v. Industrial Claim Appeals Office*, 58 P.2d 1162 (Colo. App. 2002). This is true because the tolling provisions create an exception to the Claimant's duty to file a claim within two years of the injury. *Procopio v. Army Navy Surplus*, W.C. No. 4-465-076 (June 10, 2005).

The persuasive evidence is that the Claimant fell at work, reported the injury the next day, completed the paperwork, and began missing shifts greater than three days all to the direct knowledge of at least her two supervisors, if not upper management. The compelling evidence is that the Claimant sought to formalize the claim and was dissuaded by human relations. Regardless, the Claimant has met her burden of proving that the statute of limitations was tolled until such time as the employer completed their duty to file the Employer's First Report. The Employer's First Report was not filed by respondent-employer until March 3, 2008; less than a month after the Claimant had filed her Worker's Claim for Compensation on February 10, 2008.

Notice of the work-related claim does not have to be perfect from the Claimant. The notice must be sufficient to demonstrate that the employer has "some knowledge of 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." *Jones*, supra. In the very similar case of *Carter v. ENT Federal Credit Union*, W.C. No. 4-744-530 (January 28, 2009), using the reasonably conscientious manager standard, the Administrative Law Judge and Industrial Claim Appeals Panel found that the statute of limitations was tolled. Respondents argued that the respondent-employer was not given sufficient notice without the Claimant providing detail as to the specific work-related activity she was on when injured away from work. In rejecting this argument, the Administrative Law Judge and the Panel stated, "We are not persuaded that the ALJ erred in determining that the statute of limitations was tolled. This is so even if the HR representative lacked knowledge that there had been an interview with a prospective employee at the lunch. In our opinion, there is substantial evidence to support the ALJ's decision that the employer was on notice that a Workers' Compensation was likely regardless of what knowledge the HR representative had." In the instant case, we have clear repeated knowledge on the part of supervisors and the HR department of a fall at work necessitating medical care and missed time from work. Utilizing the reasonably conscientious manager standard, the statute of limitations should be tolled.

Respondent-Employer-Insurer has not provided persuasive evidence that the claim should be barred by the statute of limitations, laches or estoppel. Therefore, Claimant's claim shall be compensable.

Medical Benefits

Respondent is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

The Claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of her employment. The Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998).

The parties stipulated that the medical care of Drs. Richman, Mann, Cohen, and Sung are authorized, reasonable and necessary. Claimant sought medical benefits from June 13, 2007 and ongoing from these same providers and their referrals. As found, Claimant has established that the medical treatment in this claim, including the treatment provided by Drs. Richman, Mann, Cohen, and Sung as of June 13, 2007 and ongoing is related to the June 13, 2007 industrial injury. Accordingly, respondent is liable for this medical treatment to cure and relieve the effects of her injuries.

As found, Claimant proved by a preponderance of the evidence that the medical treatment that she received for her injuries was authorized medical treatment reasonably necessary to cure and relieve her from the effects of the injury. As further found, as a result of Claimant's injuries, she needs and will need in the future medical care. Therefore, respondent shall be required to pay for the medical treatment the Claimant received and continues to receive from these authorized treating doctors and their referrals to maintain her at maximum medical improvement.

Maximum Medical Improvement

Section 8-42-107(8)(b)(III), C.R.S., provides that the determination of the DIME with regard to MMI shall only be overcome by clear and convincing evidence. A fact or proposition that has been proved by "clear and convincing evidence" if, considering all of 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). In this case the DIME, Dr. Leppard, determined that Claimant was at maximum medical improvement on April 17, 2008. Consequently, Respondent-Employer-Insurer must prove by clear and convincing evidence that this determination is incorrect. As found, Respondent-Employer-Insurer has failed to prove by clear and convincing evidence that the MMI determined by Dr. Leppard is incorrect.

Temporary Total Disability

The Claimant seeks temporary total disability benefits from November 19, 2007 until the date of maximum medical improvement established by the DIME on April 17, 2008. To prove entitlement to TTD 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)(a), C.R.S. requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, supra. 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, which impair the Claimant's ability effectively, and properly to perform Claimant's regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Continuation of temporary total disability benefits may be appropriate if the Claimant has multiple authorized treating physicians who give conflicting opinions concerning the Claimant's ability to return to work. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999). Resolution of this dispute is made by the Administrative Law Judge. Likewise, conflicting inferences as to whether a treating physician has released the Claimant to regular employment can be resolved by the Administrative Law Judge. *Imperial Headwear, Inc. v. Industrial Claim Appeals Office*, 15 P.3d 295 (Colo. App. 2000).

As found, as a result of the June 13, 2007 industrial injury, Claimant suffered injuries and work restrictions which have prevented Claimant from doing Claimant's regular job with employer from November 14, 2007 through the date of maximum medical improvement as established by the Division Independent Medical Examiner.

As found, Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 19, 2007 through April 17, 2008.

Insurer shall be ordered to pay Claimant temporary total disability benefits from November 19, 2007, the original date of maximum medical improvement provided by Dr. Akers, to April 17, 2008.

Average Weekly Wage

The objective of wage calculation for the average weekly wage is to reach a fair approximation of the Claimant's actual wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The Administrative Law Judge under normal circumstances has broad discretion in calculating the employee's average weekly wage according to the facts of the case to fairly determine the Claimant's weekly

wage. *Williams Bros. v. Grimm*, 88 Colo. 416, 297 P. 1003 (1931). As found, the Claimant's average weekly wage is $1,069.92.

Respondent shall pay temporary disability benefits commencing on June 13, 2007 through April 17, 2008 based upon the average weekly wage of $1,069.92 which provides a temporary total disability rate of $713.28.

Permanent Partial Disability for Date of Injury March 5, 2003

Permanent disability is determined when the Claimant's condition is deemed to be stable and when further medical care is not likely to improve the condition. Section 8-40-201(11.5). Permanent partial disability benefits are calculated either under the schedule system or whole person system of Section 8-42-107, C.R.S.

As found, the primary treating physician, Dr. David Richman, found the Claimant at maximum medical improvement and that she sustained a 9% whole person impairment for her physical injuries and a 5% psychological disability. Claimant proved by a preponderance of the evidence that she is entitled to permanent partial disability benefits for the March 5, 2003 industrial injury.

<u>Permanent Total Disability</u>

Permanent total disability is defined by Section 8-40-201(16.5)(a) as the Claimant's inability "to earn any wages in the same or other employment." The burden of proof to establish the Claimant suffers from a permanent total disability lies with the Claimant and is a question of fact for the Administrative Law Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). In arriving at a factual determination as to whether the Claimant has sustained her burden of proof, the Administrative Law Judge may consider several "human factors" in making the decision. *Christie v. Coors Transportation Co.*, 933 P.2d 1330 (Colo. 1997); *Best-Way Concrete Co. v. Baumgartner*, 908 P.2d 1194 (Colo. App. 1995). These factors include, but are not limited to, the Claimant's physical condition, mental ability, age, employment history, education and the "availability of work" the Claimant can perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). It is the overall objective of this "human factor" standard to determine whether, when taking into account all of the relevant factors, employment is "reasonably available to the Claimant under his or her particular circumstances." *Weld County School District RE-12 v. Bymer*, *supra*. Non-industrial medical conditions that impair the Claimant's ability to earn wages can be considered when performing a "human factor" analysis. *Pinkard v. Jefferson County School*, W.C. No. 4-174-632 (ICAO March 18, 1998).

An industrial injury does not need to be the sole cause of the Claimant's permanent and total disability. Because of the "full responsibility rule" an employer takes an injured worker as it finds him, and permanent total disability can be a combination of personal factors, such as a pre-existing mental or physical condition and a work-related injury or disease. *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168

(Colo. 1991); *Colorado Fuel & Iron Corp. v. Industrial Commission*, 379 P.2d 153 (Colo. 1962); *Casa Bonita Restaurant v. Industrial Commission*, 624 P.2d 1340 (Colo. App. 1981). The Claimant must demonstrate that the industrial injury is a significant causative factor in the Claimant's disability to establish permanent and total disability. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986); *Riley v. Mile High Honda*, W.C. No. 4-486-242 (ICAO August 12, 2003); *Garcia v. CF&I Steel, L.P.*, W.C. No. 4-454-548 (ICAO May 14, 2004). As found, Claimant has provided the most persuasive evidence that she is permanently and totally disabled and that the industrial injury of June 13, 2007 is a significant factor in her permanent and total disability. The Claimant has met her burden of proof that she is more likely than not permanently and totally disabled as a result of the June 13, 2007 industrial injury.

Respondent-Employer-Insurer shall be ordered to pay permanent total disability benefits commencing on the date of maximum medical improvement of April 17, 2008 as a result of the June 13, 2007 industrial injury.

ORDER

It is therefore ordered that:

Respondent-Employer-Insurer shall pay Claimant for permanent total disability benefits in Claim No. 4-727-623 commencing April 17, 2008.

Respondent-Employer-Insurer shall pay Claimant permanent partial disability benefits based upon a 9% working unit and 5% psychological impairment in Claim No. 4-752-214.

Respondent-Employer-Insurer t shall pay Claimant for temporary disability benefits from June 13, 2007 through April 17, 2008 at the rate of $713.28 per week. Permanent partial disability benefits will also be paid based upon the temporary total disability rate of $713.28.

Respondent-Employer-Insurer shall pay for Claimant's medical care from June 13, 2007 and continuing for treatment received from Dr. Richman, Dr. Mann, Dr. Cohen, Dr. Sung and their referrals. Claimant has met her burden of proving that she requires ongoing medical care from these same providers to maintain her at maximum medical improvement. Respondent shall be responsible for maintenance treatment.

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

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

DATE: June 10, 2009

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-756-139

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he was an employee of Employer pursuant to a contract of hire under §8-40-202(1)(b), C.R.S.

2. Whether Respondents have established by a preponderance of the evidence that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he was injured during the course and scope of his employment with Employer on September 4, 2007.

FINDINGS OF FACT

1. During the summer of 2007 Claimant worked for a temporary labor service known as "CSEM."

2. Bart Pobar owns a party and event rental business. He used outside contract labor through CSEM to obtain assistance in promoting major party events. Because Claimant worked for CSEM, he often performed labor services for Mr. Pobar.

3. Mr. Pobar met Employer while attending auctions and participating in scrap metal recovery projects. Because Claimant was a good worker, Mr. Pobar introduced Employer to Claimant. In approximately June 2007 Employer expressed an interest in hiring Claimant for various projects.

4. By August 2007 Employer offered to hire Claimant directly as an employee. Claimant explained that he would work as a laborer for Employer on a sporadic basis to help with scrap metal recovery and assist with removing some buildings in south Denver. Employer would thus dictate the time of performance of the projects and establish quality standards for the work performed. Claimant stated that he resigned from CSEM effective September 4, 2007. Claimant expected that he would also begin work for Employer on September 4, 2007 and earn $10.00 per hour. Mr. Pobar corroborated Claimant's account of his employment conditions with Employer.

5. Claimant did not complete any paperwork detailing his employment with Employer. He also did not execute an independent contractor agreement.

6. At the time Claimant obtained employment with Employer he was living in Lakewood, Colorado. However, Employer's operations were located much further east in Byers, Colorado. Claimant therefore arranged with Employer to move into one of Employer's apartments that was adjacent to Employer's coin laundry business in Byers. Claimant moved into the apartment on September 1, 2007.

7. On Friday, August 31, 2007 Employer and Mr. Pobar attended an auction at an Albertson's grocery store in West Denver, Colorado. Because the Albertson's store had closed, the purpose of the auction was to sell any remaining items in the store. Employer purchased five heating units that were mounted on walls or ceilings in various locations throughout the store. None of the heating units were removed on the day of the auction.

8. Monday, September 3, 2007 was the Labor Day holiday. Therefore, removal of the remaining auctioned items from the Albertson's store was not scheduled until September 4, 2007.

9. On September 4, 2007 Claimant met Mr. Pobar and Employer at Mr. Pobar's house in Byers, Colorado. Mr. Pobar left his house to retrieve paperwork involving property in South Denver. He then planned on driving to the Albertson's store in order to retrieve some of the items he had purchased at the August 31, 2007 auction. Employer and Claimant drove in Employer's pickup truck directly to the Albertson's store in West Denver.

10. Upon arriving at the Albertson's store, Employer checked in with Matthew Lee. Mr. Lee testified that he was employed by the auction company that conducted the auction at the Albertson's store. His duties involved ensuring that the proper parties removed the items purchased at the Albertson's auction. Mr. Lee commented that Employer introduced Claimant as a helper who was working for him.

11. Employer and Claimant began to remove the heating units that Employer had purchased at the auction. Employer supplied all of the tools that Claimant required to complete the task. He also directed Claimant and provided him with instructions regarding the removal of the heating units. Mr. Lee observed Employer and Claimant remove some of the heating units and at one point became concerned about the removal process because they were standing on equipment that appeared to be unsteady.

12. Mr. Pobar arrived at the Albertson's store after he obtained his paperwork in South Denver. He began to collect the remainder of the items that he had purchased at the auction.

13. After Employer and Claimant had removed some of the heating units, Employer arranged to borrow a scissors lift to facilitate the removal of the units. Using

the scissors lift, Employer and Claimant began to remove a heating unit near the ceiling in a rear corner of the Albertson's store. However, the parties encountered difficulties in steadying and manipulating the large heating unit. When Mr. Pobar entered the area after removing the items he had purchased at the auction, he suggested that Employer should borrow a forklift to lower the heating unit to the floor.

14. Employer crawled down from the scissors lift in order to obtain a forklift. He then left the area. Claimant remained on the scissors lift and attempted to steady the heater on the railing of the scissors lift bucket. While trying to hold the heater, Claimant lost his footing and slipped between the rails of the scissors lift bucket. He fell approximately 20 feet. Claimant landed on his feet but shattered his heals. Mr. Pobar was on the opposite side of the scissors lift when Claimant fell. He did not directly witness the fall but immediately heard Claimant screaming in agony and offered assistance.

15. At the time of the incident, Mr. Lee was in another part of the store but heard the commotion. He immediately walked to the area where Claimant's fall had occurred. Mr. Lee saw the scissors lift in a raised position with the heater unit on the top of the lift. He saw Claimant on the floor with Mr. Pobar. Mr. Lee helped Mr. Pobar in assisting Claimant.

16. Mr. Pobar subsequently transported Claimant to the VA hospital in Denver and delivered him to the emergency room for medical treatment. Mr. Pobar then returned to the Albertson's store. Employer had remained at the Albertson's store in order to remove his last heating unit.

17. Upon entering the hospital, Claimant mentioned that he had been injured after falling from a roof or gutter. The medical records from the VA hospital confirmed Claimant's statements. Claimant commented that he was afraid that he would not receive treatment if he told them that he fell while working for Employer. He subsequently remained in the VA hospital and the VA nursing home for several months to receive treatment and care for his foot injuries.

18. Employer testified at the hearing in this matter. His explanation of his relationship with Claimant and the events surrounding Claimant's fall conflicted with the testimony of Claimant, Mr. Pobar and Mr. Lee. Employer asserted that Claimant arrived at the Albertson's store with Mr. Pobar in Mr. Pobar's vehicle. He remarked that Claimant was working for Mr. Pobar on the day of the fall. Nevertheless, Employer acknowledged that he had purchased the heating units and that Claimant was attempting to remove a heating unit when he fell from a scissors lift. He explained that at the time of the fall he was in another area of the Albertson's store attempting to remove a small heating unit. Employer denied that he had any employment relationship with Claimant. Instead, Employer claimed that Mr. Pobar and Claimant were working on removing the heating units because he had helped Mr. Pobar remove his purchased equipment from Albertson's on Friday, August 31, 2007.

19. Claimant has demonstrated that it is more probably true than not that he was an employee of Employer pursuant to a contract of hire when he was injured at the Albertson's store on September 4, 2007. Claimant explained that he was hired to work as a laborer for Employer on a sporadic basis to help with scrap metal recovery and assist with removing some buildings in South Denver. Claimant expected that he would begin work for Employer on September 4, 2007 and earn $10.00 per hour. Mr. Pobar corroborated Claimant's account of his employment conditions with Employer. Moreover, Claimant arranged to move into one of Employer's apartments that was adjacent to Employer's coin laundry business in Byers. Claimant moved into the apartment on September 1, 2007. When Claimant was injured he was performing services for Employer by removing the heating units that Employer had purchased at the August 31, 2007 auction.

20. Respondents have failed to demonstrate that it is more probably true than not that Claimant was an independent contractor. Respondents have not shown that Claimant was free from direction and control in the performance of his duties and was customarily engaged in an independent business related to labor services. Claimant agreed with Employer to work as a laborer on a sporadic basis to help with a variety of labor projects. Claimant was not hired to work independently. Because Claimant would be assisting Employer with projects, Employer dictated the time of performance of the projects and established quality standards for the work performed. In fact, on September 4, 2009 Employer drove Claimant to the Albertson's store and introduced Claimant to Mr. Lee as a helper who was working for him. Moreover, Claimant would be paid at a rate of $10.00 per hour instead of at a fixed or hourly rate. Respondents also have not produced any evidence that Claimant was to be paid under a trade or business name. Furthermore, Employer provided the tools and equipment that were necessary to remove the heating units from the Albertson's store. Finally, Respondents have failed to produce any documentation that Claimant was hired as an independent contractor. Balancing the factors enumerated in §8-40-202(2)(a), C.R.S. reflects that Respondents have failed to overcome the presumption, by a preponderance of the evidence, that Claimant was an employee under the Act.

21. Based on Claimant's credible testimony and the consistent accounts of Mr. Pobar and Mr. Lee, Claimant has demonstrated that it is more probably true than not that he was injured during the course and scope of his employment with Respondents on September 4, 2007. Claimant was removing Employer's heating unit from an Albertson's store at the direction of Employer. Claimant was on top of a scissors lift using tools to manipulate and remove the heating unit. While trying to hold the heater, Claimant lost his footing and slipped between the rails of the scissors lift bucket. He fell approximately 20 feet. Claimant landed on his feet but shattered his heals. Claimant subsequently remained in the VA hospital and the VA nursing home for several months to receive treatment and care for his foot injuries.

CONCLUSIONS OF LAW

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

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

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

Contract of Hire

4. The Act defines "employee" in §8-40-202(1)(b), C.R.S. as "[e]very person . . . under any contract of hire, express or implied." When a claim is filed under the Act, the burden of proof is upon the claimant to prove that he was an employee by showing the existence of a contract of hire. *In Re Underwood,* W.C. No. 4-745-218 (ICAP, May 15, 2009). Despite the general law governing contracts, a "technical application of the 'contract of hire' requirement is not appropriate." *Id.* Therefore, the "realities of the employment relationship [are] more important in this determination than the 'technicalities' of contract law." *Id.*

5. As found, Claimant has demonstrated by a preponderance of the evidence that he was an employee of Employer pursuant to a contract of hire when he was injured at the Albertson's store on September 4, 2007. Claimant explained that he was hired to work as a laborer for Employer on a sporadic basis to help with scrap metal recovery and assist with removing some buildings in South Denver. Claimant expected that he would begin work for Employer on September 4, 2007 and earn $10.00 per hour. Mr. Pobar corroborated Claimant's account of his employment conditions with Employer. Moreover, Claimant arranged to move into one of Employer's apartments that was adjacent to Employer's coin laundry business in Byers. Claimant moved into the apartment on September 1, 2007. When Claimant was injured he was performing

services for Employer by removing the heating units that Employer had purchased at the August 31, 2007 auction.

Independent Contractor

6. Respondents maintain that, even if Claimant performed services for Employer pursuant to a contract of hire, Claimant was an independent contractor. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." The "employer" may establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and whether the person is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(2)(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Id.*

7. As found, Respondents have failed to demonstrate by a preponderance of the evidence that Claimant was an independent contractor. Respondents have not shown that Claimant was free from direction and control in the performance of his duties and was customarily engaged in an independent business related to labor services. Claimant agreed with Employer to work as a laborer on a sporadic basis to help with a variety of labor projects. Claimant was not hired to work independently. Because Claimant would be assisting Employer with projects, Employer dictated the time of performance of the projects and established quality standards for the work performed. In fact, on September 4, 2009 Employer drove Claimant to the Albertson's store and introduced Claimant to Mr. Lee as a helper who was working for him. Moreover, Claimant would be paid at a rate of $10.00 per hour instead of at a fixed or hourly rate. Respondents also have not produced any evidence that Claimant was to be paid under a trade or business name. Furthermore, Employer provided the tools and equipment that were necessary to remove the heating units from the Albertson's store. Finally, Respondents have failed to produce any documentation that Claimant was hired as an independent contractor. Balancing the factors enumerated in §8-40-202(2)(a), C.R.S. reflects that Respondents have failed to overcome the presumption, by a preponderance of the evidence, that Claimant was an employee under the Act.

Compensability

8. 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.

9. As found, based on Claimant's credible testimony and the consistent accounts of Mr. Pobar and Mr. Lee, Claimant has demonstrated by a preponderance of the evidence that he was injured during the course and scope of his employment with Respondents on September 4, 2007. Claimant was removing Employer's heating unit from an Albertson's store at the direction of Employer. Claimant was on top of a scissors lift using tools to manipulate and remove the heating unit. While trying to hold the heater, Claimant lost his footing and slipped between the rails of the scissors lift bucket. He fell approximately 20 feet. Claimant landed on his feet but shattered his heals. Claimant subsequently remained in the VA hospital and the VA nursing home for several months to receive treatment and care for his foot injuries.

ORDER

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

1. Claimant was an employee of Employer pursuant to a contract of hire under §8-40-202(1)(b), C.R.S.

2. Respondents have failed to establish that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S.

3. Claimant suffered compensable Workers' Compensation injuries during the course and scope of his employment with Employer on September 4, 2007.

DATED: June 16, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-758-962

ISSUES

The issue determined herein is reasonable necessity of medical benefits, specifically lumbar spine bone scan, magnetic resonance image ("MRI") of the sacroiliac ("SI") joints, and neurosurgical evaluation.

FINDINGS OF FACT

1.Claimant suffered previous low back injuries in 2001 and 2003 while working as a commercial tire service person. In 2003, he received only about three weeks of conservative treatment at Concentra.

2.Claimant began permanent full-time work for the employer in January 2003. He had to do frequent heavy lifting.

3.On February 1, 2008, claimant suffered onset of an admitted occupational disease to his low back.

4.A February 1, 2008, MRI showed L3-4 degeneration and protrusion.

5.On February 7, 2008, Dr. Sung, an orthopedic surgeon, examined claimant and diagnosed degenerative disc disease at L3-4 and L4-5. He referred claimant for a discogram.

6.The February 28, 2008, discogram showed concordant pain at L3-4 and L4-5. Claimant also had a computed tomography scan with contrast.

7.On March 12, 2008, Dr. Sung recommended surgical fusion at L3-L5. Dr. Sung requested prior authorization of the surgery.

8.On April 29, 2008, Dr. Peterson at Concentra examined claimant. Dr. Peterson noted no significant changes in the MRI findings compared to a 2003 MRI. Dr. Peterson diagnosed degenerative disc disease, partly due to claimant's heavy work. Dr. Peterson referred claimant back to Dr. Sung for evaluation and probable surgery.

9.On May 13, 2008, the insurer filed a general admission of liability for medical benefits and temporary disability benefits.

10.On June 9, 2008, Dr. Stephen Lindenbaum performed a medical records review for respondents. He concluded that the requested two-level fusion surgery was not medically necessary because claimant had no documented conservative treatment.

11.In August 2008, claimant moved to Yakima, Washington. The parties had some difficulty finding a new authorized treating physician who would accept a Colorado workers' compensation patient.

12.On January 16, 2009, Dr. Thysell examined claimant. Dr. Thysell completed only a brief, handwritten one-page report form. He recommended that claimant be referred to a neurosurgeon, "along with bone scan and MRI of the sacroiliac joints." In the section for pending studies, Dr. Thysell wrote, "bone scan; MRI sacroiliac joint."

13.Dr. Antonelli performed a medical records review for respondents. On February 12, 2009, she called Dr. Thysell, who indicated that claimant had had enough studies and he really needed neurosurgical evaluation. In her February 13, 2009, report, Dr. Antonelli noted that a lumbar bone scan and lumbar MRI were not medically necessary and that Dr. Thysell had withdrawn those requests.

14.The preponderance of the record evidence does not demonstrate that lumbar bone scan or MRI of the SI joints is reasonably necessary to cure or relieve the effects of claimant's admitted occupational disease. Dr. Thysell did not provide any explanation of the need for those studies and has, apparently, withdrawn his recommendation for the additional tests. The record evidence does not suggest SI joint involvement. If such involvement is reasonably expected, the attending physician needs to explain it.

15.The preponderance of the record evidence demonstrates that claimant needs referral to a neurosurgeon near his residence. Dr. Sung, an orthopedic surgeon, had already recommended surgery, although Dr. Lindenbaum and respondents had disagreed with that recommendation. Dr. Thysell did not actually refer claimant to a neurosurgeon, although he indicated that was the next step. The absence of recent conservative treatment weighs against immediate surgery, but neurosurgical <u>evaluation</u> is reasonably necessary.

CONCLUSIONS OF LAW

1. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). As found, the preponderance of the record evidence does not demonstrate that lumbar bone scan or MRI of the SI joints is reasonably necessary to cure or relieve the effects of claimant's admitted occupational disease. As found, the preponderance of the record evidence demonstrates that claimant needs referral to a neurosurgeon near his residence.

ORDER

It is therefore ordered that:

1.Claimant's request for an order to provide a lumbar bone scan or MRI of the SI joints is denied and dismissed.

2.The insurer shall refer claimant to a neurosurgeon near claimant's residence and shall pay for the examination by that neurosurgeon.

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

DATED: June 11, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-761-186

ISSUES

The sole issue determined was whether or not the Claimant proved by a preponderance of the credible and persuasive evidence that she sustained a compensable injury arising out of and in the course of her employment on March 1, 2008.

FINDINGS OF FACT

1. Claimant was struck by a shopping cart on or about March 1, 2008, while she was engaged in her employment with Respondent-Employer. The shopping carts were being moved by a co-employee and the co-employee was purposefully trying to strike the Claimant.

2. Claimant testified that she had felt pain as a result of the shopping carts striking her, but did not have a disabling injury and did not seek medical attention.

3. On March 10, 2008, Claimant presented to the emergency room at Exempla St. Joseph's for treatment of an unrelated condition. Claimant did not complain of any low back pain to the emergency room physicians.

4. On May 27, 2008, Claimant subsequently sought medical care at Southern Colorado Clinic with Dr. Nicholas Kurz. Dr. Kurz opined that Claimant's mechanism of injury was inconsistent with her reports of pain. Claimant's pain symptoms were out of proportion to her physical findings. Dr. Kurz opined that Claimant's alleged symptoms and pain were not work-related.

4. On October 17, 2008, a telephonic deposition of Dr. Kurz was conducted. Dr. Kurz testified that Claimant's alleged injury was not work-related in nature. Specifically, Dr. Kurz testified that the type of mechanism of injury sustained by the Claimant would not produce the symptoms that Claimant had alleged.

5. Dr. Kurz is a Colorado licensed and level II accredited physician.

6. On October 27, 2008, Claimant underwent and independent medical evaluation (IME) with Dr. Timothy Hall. In his IME report, Dr. Hall examined the Claimant and opined that the incident on March 1, 2008 resulted in a compensable injury to Claimant's low back. Dr. Hall further indicated that additional medical treatment was needed to relieve Claimant of the effects of the injury.

7. On January 9, 2009 Claimant filed an Application for Hearing asserting issues, including compensability, medical benefits, authorized provider, reasonably necessary, average weekly wage, and temporary disability benefits from March 2, 2008 and ongoing.

8. On January 19, 2009 a deposition of Dr. Hall was conducted. Dr. Hall testified that Claimant was not disabled as a result of the incident on March 1, 2008. Dr. Hall further testified that symptoms of early bruising would appear within the first week to ten days of an injury.

9. On February 6, 2009 Respondents filed a Response to Application for Hearing asserting issues, including compensability, medical benefits, authorized provider, reasonably necessary, and 8-42-103(1).

10. The findings by the treating physician at Exempla St. Joseph's Hospital contradict the Claimant's reports of pain to Dr. Hall. The ALJ finds Dr. Hall's deposition testimony to be unpersuasive.

11. It is specifically found that the expert opinion of Dr. Kurz is more credible and more persuasive than the opinions of all other healthcare providers including, but not limited to, Dr. Hall.

12. It is specifically found that Claimant failed to meet her burden of proof that the alleged incident resulted in a compensable work-related injury.

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. *§8-43-201, C.R.S. (2008)* 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, 529 P.2d 792 (Colo. 1979); People v. M.A., 104 P.3d 273, 275 (Colo. App. 2004).* 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 employer's rights. *§8-43-201, C.R.S. (2008)* A Workers' Compensation case is decided on its merits. *§8-43-201, C.R.S. (2008)*

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

3. The test as to whether injury has arisen out of course of employment is whether there is a causal connection between duties of employment and injury suffered. *Deterts v. Times Pub. Co., 552 P.2d 1033, (Colo. App. 1976).* Specifically, in order for an injury to be compensable, there must be an accident and the injury complained of must have some causal connection with an industrial accident. *Industrial Com'n of Colo. v. Horner, 325 P.2d 698, (Colo. 1958).* All that is necessary to warrant finding of causal connection between accident and disability is proof of facts and circumstances which would indicate with reasonable probability that disabling condition resulted from, or was aggravated by, the accident. *Colorado Fuel & Iron Corp. v. Industrial Com'n of Colo., 269 P. 2d 1070, (Colo. 1954).*

4. Mere fact that one has suffered a physical injury, or has contracted a disease listed under Occupational Disease Disability Act, does not mandate award of workmen's compensation benefits; test for determining Claimant's compensable status turns on industrial disability or loss of earning capacity; inability, as result of work-connected injury or disease, to perform or obtain work suitable to Claimant's qualifications and training. *American Metals Climax, Inc. v. Cisneros, 571 P.2d 315, (Colo. App. 1977).*

5. Claimant argues that the incident on March 1, 2008 resulted in a compensable injury. The ALJ disagrees.

6. Although Claimant was struck by shopping carts and an incident occurred on March 1, 2008, Claimant failed to prove by a preponderance of the evidence that she sustained a compensable injury resulting from the incident.

7. The ALJ concludes that the medical and other credible evidence is insufficient to establish that it is more likely than not that the Claimant sustained a compensable work related injury as a result of the March 1, 2008 incident.

ORDER

It is therefore ordered that:

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

DATE: June 18, 2009

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-761-187

ISSUE

The following issue was raised for consideration at hearing:

1. Whether Claimant is responsible for her termination from employment and therefore not entitled to temporary total disability benefits (TTD).

STIPULATIONS OF FACT

Having considered the parties' stipulation of fact and post hearing position statements, the following Stipulations of Fact are entered.

1. Claimant began employment as an employee with Respondent Employer on August 27, 2007.

2. On June 2, 2008, Claimant left foot was injured during the course of her employment with Respondent when a box of papers weighing approximately 51 pounds fell off a cart onto her left foot. Claimant sought and received medical treatment to her injured left foot that same day, June 2, 2008. Claimant was treatment by Robert Klingelheber, D.O. of the Poudre Valley Health System.

3. After her injury and initial medical treatment on June 2, 2008, Claimant was later seen by Michael G. Holthouser, M.D. who became and remains Claimant's Primary Care Physician in this case.

4. Claimant received temporary total disability benefits beginning on August 4, 2008. following the commencement of the TTD benefit, Claimant underwent surgery by Dr. Michael Houghton of the Orthopedic Center of the Rockies. Dr. Houghton performed realignment and arthrodesis of the second metatarsal to the medial cuneiform bone of Claimant's injured left foot. See attached medical records from Dr. Holthouser, Houghton, Basow and Physical Therapy records of the Orthopedic Center of the Rockies attached hereto and incorporated herein and moved into evidence by the parties in this matter.

5. Claimant was released to work with restrictions for modified work by Dr. Holthouser on September 16, 2008. Please see attached reports and subsequent medical reports.

6. Respondents sent to the Claimant letters dated October 10, 2008, October 16, 2008 October 22, 2008, offering modified duty to Claimant and a letter dated October 30, 2008, terminating Claimant's employment. Claimant's attorney sent a letter to the adjuster handling Claimant's workers' compensation claim, with a copy being sent to the employer, dated October 24, 2008 and a subsequent letter to newly appointed counsel Matthew C. Hailey, Esq. dated November 25, 2008. All said letters are attached hereto and included by this specific reference and moved into evidence by all parties. The Claimant did not respond to the letters dated October 10, 16, and 22, 2008 from her employer other than through her attorney in the above two described letters. Claimant would testify that in late October 2008 Claimant left a voice mail message to Joanna Praninkoss (SP) in employee relations for MMC, the parent company of Respondent employer, Kroll Inc., stating that the Claimant was not resigning from her job and that she is receiving harassing letters from the employer again. Respondents would submit testimony from Joanna Dranakoff that she never received any such voicemail message.

7. The parties stipulate that the letters referenced above do not meet the requirements of Colorado Workers' Compensation Rule 6.

CONCLUSIONS OF LAW

Having considered the foregoing stipulated facts, the following Conclusions of Law are entered.

1. 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 leaves the trier-of-fact, after considering all 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. A Workers' Compensation case is decided on its merits. Section 8-43-201, supra. The facts in a Workers' Compensation case must be interpreted neutrally, neither in favor or the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, supra. The judge's factual findings concern only the

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

3. Respondents contend that Sections 8-42-103(1)(g) and 8-420105(4) C.R.S. controls this claim. Respondents assert that since Claimant caused his wage loss by not responding to the Employer's request that she return to work that she caused her termination from employment and is not entitled to temporary total disability benefits (TTD).

4. It is concluded consistent with Claimant's arguments, that Claimant's return to work is controlled by Workers' Compensation Rule of Procedure, Rule 6. Respondents contend that Rule 6 only applies to circumstances where the Respondents want to unilaterally terminate TTD benefits. However, it is concluded that when Claimant has an industrial injury, undergoes medical treatment, is returned to work with restrictions in a modified duty position, the only way for Claimant to return to work in pursuant to the provision of Rule 6-1.

5. Rule 6-1(A)(4) provides, as follows:

> In all claims based upon an injury or disease 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:
>
> (4) a letter to the claimant or copy of a written offer delivered to the claimant with a signed certificate indicating service, containing both an offer of modified employment, setting forth duties, wages and hours and a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions. A copy of the written inquiry to the treating physician shall be provided to the claimant by the insurer or the insured at the time the authorized treating physician is asked to provide a statement on the claimant's capacity to perform the offered modified duty. The claimant is allowed a period of 3 business days to return to work in response to an offer of modified duty. The 3 business days runs from the date of receipt of the job offer. Such admission of liability shall admit for temporary partial disability benefits, if any…

6. The evidence established that the letters of October 10, 16, and 22, 2008 did not comply with Rule 6-1(A)(4) and therefore the letters were ineffective to command Claimant's return to work. Furthermore, the letters did not provide the Respondents with justification to terminate Claimant's employment for failure to comply with his employer's orders to return to a modified duty position.

7. Rule 6-1 (A)(4) has no meaning if Respondents can circumvent the intent of the rule by ordering the injured worker's return to a modified duty position by correspondence that does not comply with Rule 6-1(A)(4). It would not be reasonable to allow Respondents to disobey Rule 6-1(A)(4) and benefit from their actions by terminating the injured worker and claiming the termination is the injured workers' fault. Rule 6-1(A)(4) insures that an injured worker returns to the workplace in a modified duty position assigned duties approved by his authorized treating physician.

8. It is concluded that Claimant was not responsible for his termination from employment and therefore TTD should not be terminated.

ORDER

It is therefore ordered that:

1. Respondents failed to sustain their burden of proof to establish by a preponderance of the evidence that Claimant is responsible for his termination from employment. Therefore, Respondents are liable to Claimant for continuing TTD benefits.

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

All matters not determined herein are reserved for future determination.

DATED: June 25, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-761-275

ISSUES

The following issues were raised for consideration at hearing.

1. Whether Claimant's heart attack was a compensable injury;
2. Whether Claimant is entitled to temporary total disability benefits; and
3. Average weekly wage.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the deposition testimony of Dr. Rubinstein, and the parties' post hearing position statements, the following Findings of Fact are entered.

1. Claimant is the sole employee of Employer where he has been employed for the last 10 years, working in all phases of farming.

2. Claimant is paid $2,000 per month plus a crop bonus, which is valued at $5,000 per year.

3. On March 23, 2008, Claimant had to travel to a seed dealer and pick up two pallets of feed seed. The distance from the farm to the seed dealer was about 30 miles. Claimant does this on a yearly basis.

4. Claimant drove a truck that did not have air conditioning. He attached a low trailer to the truck. .

5. Each pallet contained between 60 and 70 bags of seed. Each bag weighed about 50 pounds. The temperature that day was between 90 and 95 degreed.

6. The dealer loaded the first pallet onto the truck with a forklift. However, when the dealer tried to load the second pallet, the pallet broke and the bags of seed fell to the ground.

7. To remedy the situation, the dealer placed another empty pallet on the trailer. Then the dealer and Claimant reloaded the pallet. The pallets had been wrapped in plastic to keep the load stable. However, after the pallet broke, the reloaded pallet was no longer wrapped in plastic.

8. On the way back to the farm, the bags fell off the second pallet and Clamant had to stop and reload the pallet. This occurred three to four times while traveling back to the farm. Each time it occurred, Claimant had to stop and reload about thirty bags. This lengthened the travel time significantly.

9. While doing this, Claimant felt hot, sweaty and tired. He did not foresee the trip being strenuous or long and so he did not bring any extra water with him.

10. When the Claimant arrived at the farm, he backed the trailer into a barn, which was about 10 degrees hotter than it was outside. He then used a forklift to remove the pallets from the trailer.

11. Bags of milo, which were needed first, had originally been stacked on the top of the pallet. However, after the pallet was reloaded at the dealer, the milo ended up at the bottom of the pallet. This made it necessary for Claimant to unload the entire pallet to get to the bags of milo.

12. Claimant credibly testified that he had to lift bout 150 bags on his trip back to the farm and in the barn, for a total of about 7,500 pounds. He testified that this was the most he exerted himself during the 10 years he had worked for Employer. This testimony is unrebutted.

13. Claimant credibly testified that when he started to unload the seed in the barn he began to feel sick. However, he was able to finish unloading the seed. Claimant thought that he was simply too hot so he took a break and ate his lunch. After eating about one-half of his lunch he vomited. He then got into this own truck, which had functioning air-conditioning. This made him feel better and he decided to fill the fuel tanks for the sprinkler system. But every time Claimant got out of his truck he would again feel sick and would vomit.

14. Claimant was able to finish filling the tanks and then went home. He thought he might be having an asthma attack so he tried to use an inhaler but it was empty. He took a hot shower but continued to feel sick. His son went to the paramedic's station about one block from Claimant's home and they took him to the hospital in Springfield, Colorado. From there he was airlifted to Aurora Regional Medical Center. The Claimant was diagnosed as having suffered a heart attack.

15. As a result of the heart attack the Claimant was off work until October 15, 2008 when he returned to the farm and resumed his duties.

16. In his testimony, Claimant said he had never had a pallet break before. The most bags he ever had to lift were eight to sixteen and even then he had help from his boss.

17. One of the Claimant's treating cardiologists, Dr Jeffrey Greenberg, stated in his June 12, 2008 report, "At present the patient's medical condition and precipitation of his myocardial infarction occurred while performing heavy physical labor at work and is subsequently related to a work related injury." Dr. Greenberg's opinion is inferred to be that the Claimant's heart attack was brought on by Claimant's physical exertion at work.

18. Dr. Jeffrey Rubenstein, a board certified cardiologist, testified on behalf of the Claimant. He stated that the Claimant had no risk factors for heart attack. Specifically, he did not have high blood pressure, diabetes or high cholesterol, was not a smoker, was not obese and did not have a sedentary lifestyle. Also, the Claimant's family did not have a history of coronary heart disease. Also, he stated that the angiogram performed on the Claimant showed no plaque in the Claimant's arteries.

19. Dr. Rubenstein specifically testified in his deposition, and stated in his April 6th and April 8, 2009 reports that the Claimant's heart attack was caused by high levels of exertion and dehydration. His opinion was that the excessive work, the exposure to heat, and the lack of fluids caused the Claimant to have a heart attack. It was unclear from the testing as to whether the Claimant had a thrombosis or a spasm in the artery that caused diminished blood flow to the heart. However, his credible opinion was that

whatever the actual mechanism, the heart attack itself was brought on by the unusual exertion at Claimant's employment.

20. Respondent's expert witness, Dr. Mark Paz, also testified by deposition. He is an occupational physician and is board eligible in internal medicine. He stated in his September 23, 2008 report, that the Claimant had an arterial occlusion caused by a plaque rupture and that the rupture could not be caused by exertion.

21. Dr. Rubenstein disagreed with Dr. Paz and pointed out in his deposition as well as in his April 8, 2009 report that there was no evidence of coronary artery plaque in the angiogram and no evidence of a rupture of plaque. He also stated that even if there was a rupture, stress causes an increase in adrenalin, which can cause a plaque rupture. However the arterial wall showed no sign of a plaque rupture.

22. Dr. Paz also testified that exertion is not in and of itself a risk factor for a myocardial infarction. However, he conceded in his deposition that exercise could dislodge plaque from an artery. He also conceded that once plaque was partially occluding an artery, the increase need for blood flow brought on by exertion, could cause a heart attack

23. Dr. John Hughes examined the Claimant and concluded in his February 16, 2009 report that the Claimant probably suffered a heart attack from the unusual exertion and the probable resulting dehydration.

24. It is found that Claimant suffered a heart attack because of the unusual level of exertion, which the claimant was subjected to as a result of having to stack and restack the load.

25. It is found that Claimant has an average weekly wage of $557.69.

26. It found that the Claimant was unable to work from March 24, 2008 until October 15, 2008. Claimant testified that he was paid full wages for the first month by the employer.

CONCLUSIONS OF LAW

Having made the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. 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 leaves the trier-of-fact, after considering all 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. A Workers' Compensation case is decided on its merits. Section 8-43-201, supra. The facts in a Workers' Compensation case must be interpreted neutrally, neither in favor or the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, supra. The judge's factual findings concern only the evidence and inferences that are found to be dispositive of the issues involved that; that the judge has not addressed every piece of evidence and every inference that might lead to conflicting conclusions and has rejected evidence and inferences contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v Industrial Claims Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. The Colorado Workers Compensation Act provides at Section 8-41-302(2) that "Accident", "injury", and "occupational disease" shall not be construed to include disability or death caused by heart attack unless it is shown by competent evidence that such heart attack was proximately caused by an unusual exertion arising out of and within the course of the employment."

4. Claimant has clearly shown by a preponderance of the evidence that he suffered a heart attack as a result of exertion, which was unusual. Two cardiologists concluded this as did an occupational physician, Dr. John Hughes. The Claimant had no risk factors for having a heart attack. There was no evidence of plaque in the Claimant's arteries following the heart attack. Dr. Paz admitted in his deposition that even if there was an occlusion of the Claimant's artery from plaque or a clot, the increase need for blood as the result of exertion could cause a heart attack. Dr. Rubenstein stated that it was exertion and dehydration the caused a coronary spasm. Dr. Rubenstein said that even if there was plaque, it could have been dislodged as a result of the exertion.

5. It is found that Claimant has an average weekly wage of $557.69.

6. Claimant was unable to work for from March 24, 2008 until October 15, 2008 as a result of the heart attack. However, he was paid full wages for the first month and thus did not become entitled to temporary total disability benefits until April 24, 2008.

ORDER

WHEREFORE, IT IS ORDERED:

1. That the Respondents shall provide medical benefits to the Clamant to cure and relieve the affects of his injury.

2. That the Respondents shall pay temporary total disability benefits at the rate of $371.42 per week from March 24, 2008 until October 15, 2008. .

All matters not determined herein are reserved for future determination.

DATED: June 25, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-761-738

ISSUES

Whether the full and final settlement of Claimant's claim should be re-opened under the provisions of Section 8-43-204 (1), C.R.S. on the grounds of fraud or mutual mistake of material fact.

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury on June 5, 2008. Claimant was employed by Employer as a driver. On the date of injury, Claimant was pulling rocks out of the back of a truck when the rocks came loose from the tailgate of the truck and fell on Claimant.

2. Claimant presented to the emergency room at The Medical Center of Aurora South at 7:33 a.m. on June 10, 2008. Claimant stated he had an injury to his chest and back. Claimant stated his "past medical history" was "negative.

3. Claimant was seen by Dr. Eric Tentori on June 11, 2008. Claimant denied a history of significant back issues. Claimant advised he had a right thumb injury on the date of injury. Dr. Tentori stated claimant denied a history of similar issues regarding his right thumb.

4. Claimant filed a Workers' Claim for Compensation with the Division of Workers' Compensation on June 10, 2008. Claimant obtained the form from the Division of Workers' Compensation himself. Claimant alleged he was injured on June 5, 2008 and stated his injuries as being his back and chest. Claimant did not claim an injury to his right thumb in his Workers' Claim for Compensation.

5. Claimant had a workers' compensation claim involving his low back in 2000 for which he received treatment. Claimant was seen at Aurora Medical Center on December 13, 2000 for a complaint of back pain from lifting a heavy refrigerator.

Claimant had a history of a bulging disc from an injury 12 years prior with the same type of symptoms.

6. Claimant had a worker' compensation claim for an injury on April 21, 2004 which involved his low back. Claimant was treated by Dr. Laura Caton, M.D. for this injury. On June 4, 2004 Claimant requested Dr. Caton to release him from care and Dr. Caton discharged Claimant against medical advice on June 4, 2004. Claimant settled that workers' compensation claim prior to being placed at MMI and prior to receiving an impairment rating. Claimant appeared *pro se* and received a *pro se* advisement in connection with the settlement of that claim that was approved by Order dated August 21, 2007.

7. Claimant had a prior workers' compensation claim for a date of injury of July 12, 2007 involving his right thumb. This injury caused claimant's right thumb to sublux. Claimant settled the claim prior to MMI and prior to receipt of an impairment rating. Claimant participated in a *pro se* advisement prior to the approval of the settlement of this claim.

8. The insurer had claimant complete a form regarding prior injuries. On June 16, 2008 claimant acknowledged he had prior workers' compensation claims but denied prior treatment for the injured body parts involved in the claim. Claimant completed a health history form on June 19, 2008. On that form claimant also denied prior problems in the right thumb and his low back. Claimant's explanation of the discrepancy on these forms and the history of his prior injuries on the basis that he is not proficient in reading the English language is found not credible.

9. Claimant admitted that he approached the insurer about settlement at the start of his claim for the June 5, 2008 injury and submitted a demand of $20,000.00. Claimant stated to his treating physician, Dr. Barry Ogin, on July 1, 2008 that he had asked the Insurer to provide him with a financial settlement. Claimant's testimony that a Ms. Jenkins from Insurer approached him to settle and suggested the figure of $20,000 is not credible. The Insurer rejected Claimant's request to settle the claim at this time.

10. Carol Von Eschen was the claims representative for Claimant's June 5, 2008 injury. She took over the handling of Claimant's claim on July 24, 2008. Ms. Von Eschen reviewed the entire file noting Claimant had denied prior injuries to the claimed body parts. Ms. Von Eschen began an investigation of Claimant's claim after noting that Claimant's statements regarding prior injury to his low back and right thumb were inconsistent with the prior claims records.

11. Prior to September 26, 2008 Claimant was represented by counsel in connection with his claim for benefits for the June 5, 2008 injury. Claimant's counsel was permitted to withdraw from representation of Claimant by Order dated September 26, 2008. Claimant had requested that his attorney no longer represent him. Claimant did not enlist new counsel and proceeded *pro se*. Claimant filed a *pro se* Application for Hearing on September 12, 2008. Claimant completed this Application in English.

12. Claimant contacted Ms. Von Eschen to discuss his claim while he was still represented by counsel. Because claimant was represented, she refused to talk to Claimant. Ms. Von Eschen did not talk to claimant until she received an order granting the withdrawal of counsel.

13. Ms. Von Eschen last spoke with Claimant on October 2, 2008. Ms. Von Eschen advised Claimant that she was proceeding to obtain records regarding Claimant's prior injuries and intended to send those records to the current treating physicians. In the beginning of October 2008, Ms. Von Eschen was that claimant was recording conversations. At that time, Ms. Von Eschen refused to speak with claimant and required all conversations be done through Respondents' counsel. Ms. Von Eschen never had another conversation with claimant after that point in time.

14. Claimant admitted that he was provided with copies of medical records from Dr. Tentori consisting of WC 164 Physician's Report of Worker's Compensation injury that stated permanent impairment was anticipated. These medical records were obtained and provided to Claimant prior to the time he entered into settlement of the claim for the injury of June 5, 2008.

15. When Claimant spoke with Ms. Von Eschen on October 2, 2008 Claimant again raised the issue of settlement. Ms. Von Eschen credibly testified, and it is found, that she was not interested in settlement of Claimant's claim because she wanted to further investigate the claim and had scheduled an independent medical examination with Dr. Raschbacher. Claimant had contacted Ms. Von Eschen about settlement and the eve of the IME with Dr. Raschbacher.

16. Although Ms. Von Eschen did not want to settle Claimant's claim with him and wished to proceed with the evaluation by Dr. Raschbacher, Ms. Von Eschen's supervisor requested that she get the claim settled. Ms. Von Eschen never spoke to claimant regarding the settlement or its terms and made no representations or omissions regarding settlement. Ms. Von Eschen's testimony is credible.

17. Ms. Von Eschen did not tell Claimant he had no claim, that he would not be able to find a lawyer to represent him, that his injuries were not related to the claimed accident or that there was 'nothing wrong with him'. Claimant's testimony that Ms. Von Eschen made these statements to him is not credible.

18. Claimant signed and entered into a Settlement Agreement and Motion for Approval of his June 5, 2008 claim on November 18, 2008. In the written settlement agreement, Claimant was advised that he was settling claims for injuries to his low back, right thumb, and chest and was further advised that he had not reached MMI and had not received an impairment rating. At paragraph 14 of the Settlement Agreement, Claimant represented that he had "carefully reviewed the terms of this Settlement, and Claimant understands the rights which are being waived as a result of this Settlement."

Claimant further represented that he was agreeing to the settlement "of his own free will, without force, pressure, or coercion by anyone."

19. A pro se advisement hearing was held before Pre-Hearing Administrative Law Judge ("PALJ") Sharon Fitzgerald of the Division of Workers' Compensation on November 21, 2008. A transcript of that advisement hearing was admitted into evidence as Exhibit S. PALJ Fitzgerald confirmed claimant read the settlement carefully before he signed it. Claimant agreed he understood everything in the settlement agreement. Claimant advised PALJ Fitzgerald that he understood he was settling the case before MMI, before an impairment rating was issued, and was giving up the right to obtain additional benefits. PALJ Fitzgerald discussed what permanent impairment benefits were and Claimant agreed he was waiving his right to those benefits. Claimant agreed no one promised him anything not written in the document to encourage him to settle. Claimant affirmed that he was not pressured or made to feel threatened to go through with the agreement to settle his claim. Claimant stated he could make a knowing and voluntary decision to settle. Claimant was advised that he had the option to have the judge approve the settlement, to change his mind and decline to settle, or to reschedule the advisement and take additional time to consider the settlement. Claimant asked that the settlement be approved and PALJ Fitzgerald approved the settlement and issued an Order of November 21, 2008 approving the settlement.

20. Subsequent to approval of the settlement, Claimant returned to Dr. Barry Ogin and paid for Dr. Ogin to provide him with an impairment rating. Prior to the settlement, Claimant had not been provided with an impairment rating from his treating physicians.

21. Claimant's testimony that he felt defrauded into settlement is not credible. Claimant's testimony that he felt pressured into settlement or was advised that his claim lacked merit is likewise not credible. There was no impairment rating issued until after the settlement, which claimant procured himself. Claimant admitted he was provided forms from Dr. Tentori on numerous occasions prior to the settlement of the claim that indicated permanent impairment was anticipated.

22. Claimant has failed to prove by a preponderance of the evidence, the existence of fraud or a mutual mistake of material fact.

CONCLUSIONS OF LAW

23. 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*.

24. 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 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 or not credible. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

25. Under the provisions of Section 8-43-204 (1), C.R.S. an injured employee may settle all or part of any claim for compensation benefits, penalties or interest. If such settlement provides by its terms that the employee's claim or award shall not be reopened, such settlement shall not be subject to being reopened under any provisions of articles 40 to 47 to title 8 other than on the ground of fraud or mutual mistake of material fact.

26. The legal standard for adjudicating the existence of a mutual mistake of material fact is the standard for setting aside civil releases. *Franklin v. Portfolio Inns, Inc.*, W.C. No. 3-957-460, July 30, 1993, aff'd., *Portfolio Inns, Inc. v. Franklin*, Colo. App. No. 93CA1386, July 28, 1994 (not selected for publication). The standard for setting aside civil releases was established by our Supreme Court in *Gleason v. Guzman*, 623 P.2d 378 (Colo. 1981). In *Guzman*, the court indicated that a "mutual mistake of material fact" is one which relates to the "nature" of a known injury rather than a prediction about the future course and effects of the injury. *Gleason v. Guzman*, 623 P. 2d 385. (emphasis added). It is well established by case law that a full and final release may not be reopened on the basis of a mutual mistake of material fact, unless the material fact pertains to a past or present fact. *Maryland Casualty v. Buckeye Gas Products Co.*, 797 P.2d 11 (Colo. 1990); *Gleason v. Guzman*, 623 P.2d 378 (Colo. 1981).

27. A material fact is one which relates to a basic assumption on which the contract was made. It must have a material effect on the agreed upon exchange, and the mistake must not be one concerning which the party seeking relief bears the risk. See *Davis v. Critter's Meat Factory*, W.C. No. 3-063-709 (August 29, 1996), citing *Masias v. Colorado Compensation Insurance Authority*, (Colo. App. No. 94CA0989, July 20, 1995) (not selected for publication) (relying on Restatement of Contracts (Second) § 152). Finally, the mistake must be mutual. Section 8-43-204(1)

28. A mistake concerning the prognosis for an injured person's recovery does not establish grounds to reopen a claim. See *Davis v. Flatiron Materials Co*., 182 Colo. 65, 511 P.2d 28 (1973). A claimant's assertion that the settlement was too low is not basis for reopening of settlement. *Balachio v. Mu Zeta Housing Corp*., W.C. No. 4-221-033 & 4-221-429 (ICAO 1/10/05). A settlement which reflects a difference of opinion between the parties concerning the respondents' potential liability if the settlement were reopened and the case proceeded to hearing, is not a mutual misunderstanding of an existing fact essential to the agreement. Id.

29. Claimant did not meet his burden of proof to show there was a mutual mistake of material fact. There was no impairment rating issued by an authorized treating physicians at the time of the settlement. Medical records from Dr. Tentori indicated permanent impairment was anticipated. This information was known, or available to both parties, when the case was settled. After making an informed decision to enter into settlement, Claimant then went out and procured an impairment rating from Dr. Ogin. Claimant clearly could have procured this rating prior to his agreement to enter into settlement of his claim and prior to the advisement hearing before PALJ Fitzgerald. Claimant's election to proceed with a settlement prior to MMI and prior to receipt of an impairment rating is not a mutual mistake of material fact. The fact that Claimant has previously settled claims prior to being placed at MMI and assigned an impairment rating shows that Claimant is aware of his options to settle his claim prior to receiving an impairment rating.

30. Claimant cannot claim he was mistaken about the fact that there was not an impairment rating or that one could be assigned, as it was discussed in the settlement agreement and the *pro se* advisement. The settlement documents spelled out that there was a compromise of PPD prior to receipt of a rating and that a rating was a possibility in the claimant's claim. The advisement offered by Judge Fitzgerald explained claimant's rights in no uncertain terms and claimant agreed he understood those rights and wanted to proceed.

31. As found, Claimant did not sustain his burden to prove the settlement was based on fraud. Fraud exists when there has been a false representation of a material fact, or the representation of a material existing fact with reckless disregard of its falsity, or the concealment of a material fact which in equity and good conscience should have been disclosed). *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 (1937). Claimant did not offer credible evidence that Respondents made a false representation of material fact. Claimant has failed to sustain his burden to prove the existence of fraud in the settlement of his claim.

ORDER

It is therefore ordered that:

Claimant's Petition to Re-Open the settlement of his claim upon the grounds of fraud or mutual mistake of material fact is denied and dismissed.

DATED: June 9, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-766-652

ISSUES

The following issues were presented:

1. Whether the Claimant's claim is compensable.

2. Whether Dr. Dana Bennett, Dr. Jan Davis, Dr. Rawat, and Dr. Richard Nanes, and their referrals are authorized treating physicians. Whether care provided at Parkview Medical Center and Centura Health Center was authorized.

3. Temporary Total Disability from June 30, 3008 and ongoing.

4. Average weekly wage was stipulated at least the maximum rate, weekly disability rate is therefore $753.41.

5. Affirmative defense of statute of limitations.

6. Penalties against Claimant for failure to report claim in timely manner.

FINDINGS OF FACT

The Administrative Law Judge enters the following findings of fact:

1. Claimant was born on May 9, 1966. Claimant was an employee of the Respondent-Employer for over 10 years prior to June 2008. For many years prior to June 2008 Claimant was a crane operator. In June 2008 Claimant was operating the crane known as the middle crane as his employment for the Respondent-Employer.

2. On occasion, over the course of Claimant's employment with Respondent-Employer, while he was operating the middle crane, the middle crane would lose power to the controls. When this would happen, Claimant would lose the ability to control the

movement of the crane. On occasion when this would occur if the crane was close to and proceeding toward one of the walls, the crane would strike the wall. This happened on numerous occasions over the ten years of Claimant's employment with the Respondent-Employer.

3. On occasion the crane Claimant was operating would strike the wall so hard Claimant would be thrown against the inside of the cab. That happened on his shift on the 6th of June and the 19th of June 2008. Claimant had complained to management about the crane losing power to the controls on numerous occasions.

4. The bumpers for the middle crane were 'blown out' and not functioning during portions of 2008 including June 2008. The bumpers are designed to absorb shock should the crane make contact with the wall. The bumpers were changed out in August 2008. With the bumpers blown out it was "steel on steel" when a crane would strike the wall.

5. The ALJ has considered all the evidence from the witness regarding the crane losing power to the controls, the crane striking the wall as well as the amount of force with which the crane would strike the wall. The ALJ acknowledges that there is a conflict in this evidence. The ALJ finds the Claimant to be credible in this regard.

6. The credible evidence of record is that the crane Claimant was operating struck the wall with significant force on June 6, 2008 and June 19, 2008. On these occasions Claimant suffered a new and distinct injury to his neck and left shoulder. The ALJ specifically notes that these are two distinct incidents and finds that the incident that caused the distinct injuries to Claimant's neck and shoulder was the incident that occurred on his work shift of June 19, 2008.

7. There was insufficient evidence that Claimant deliberately hit the wall or was reckless and that this is why he hit the wall while operating his crane. The credible evidence is that Claimant, while operating his crane on June 19, 2008, struck the wall hard as a result of losing power. Sufficient evidence exists that this injury occurred in the course and scope of Claimant's employment. There is insufficient evidence that this injury occurred prior to June 2008. Claimant was not in violation of a safety rule. The ALJ finds insufficient evidence to support the Respondents' claim of statute of limitation and insufficient evidence to support the claim for penalties.

8. Claimant went to the Parkview Emergency Room on June 20, 2008 and reported neck and shoulder numbness after working and the crane he was operating struck the wall. On June 20, 2008 Claimant reported to Mr. Jack Hall PA-C or Dana Bennett, M.D that the crane he operates periodically loses power while rolling on trolley and he was thrown against the cab hard enough to break a bolt on the cab. On July 1, 2008, in an examination completed at CCOM by Dr. Richard Nanes under the heading "plan", the doctor says, "based on the mechanism of injury it is my opinion that this is a work related condition." This medical evidence supports a distinct injury occurring on his shift that started on June 19, 2008. Any conflicting evidence is considered and disregarded.

9. Claimant last worked on June 29, 2008. On June 30, 2008 Dr. Bennet, through Jack Hall, PA-C, opined that Claimant should not return to work until further evaluation. On July 1, 2008 Claimant was seen by Dr. Richard Nanes, the company designated physician. Dr. Nanes stated "I am going to keep him off of work as of 06/03/08 (sic) and today 07/01/08." At that time Dr. Nanes indicated that he would return him to work on July 2, 2008. In his report Dr. Nanes opined that Claimant's condition, based on the described mechanism of injury, was work related. He diagnosed a herniated disk with left sided radiculopathy also involving the thumb and C5 radiculopathy. The disability that started on June 30, 2008 was due to the injury Claimant suffered on June 19, 2008.

10. Dr. Nanes evaluated Claimant again on July 8, 2008. Again he indicated that Claimant should observe the restrictions of no climbing and no use of the left arm. These restrict Claimant from performing his regular job duties. The Respondent-Employer has not offered Claimant work within his physical restrictions and his restrictions have not been lifted. Claimant has not earned any wages since June 30, 2008 and has not been placed at maximum medical improvement. Claimant has been disabled due to the injuries he suffered on a continuing basis from June 30, 2008

11. At the time Claimant reported his industrial injury to the Respondent-Employer, a physician was not designated. As Respondent-Employer failed to designate a provider in the first instance upon notice of Claimant's injury, the right of selection passed to Claimant. Claimant exercised his right of selection and selected Dr. Dana Bennett. Dr. Bennett and his referrals, including the June 26 MRI, Dr. Davis and Dr. Rawat, are deemed authorized.

12. Claimant, as he needed care on an urgent basis, went to Parkview Hospital on June 20 and 21, 2008 as well as St. Mary Corwin Hospital on June 30, 2008. The ALJ finds that the need for treatment on these occasions was on an urgent or emergency basis and Claimant did not need to give notice to the employer nor await the employer's choice of physician before seeking such medical attention. It is further found that the treatment rendered on such dates by such providers was reasonable and necessary.

13. The Respondent-Employer referred Claimant to Dr. Richard Nanes. Dr. Nanes is an authorized provider.

14. All conflicting evidence has been considered and is disregarded.

CONCLUSIONS OF LAW

The Administrative Law Judge enters the following Conclusions of Law:

1. The Claimant has met his burden of proof that it is more probably true than not that he sustained an injury arising out of and in the course of his employment with the Respondent-Employer. Whether the Claimant met that burden of proof is a factual question for resolution by the ALJ, and the decision of an ALJ must be upheld if supported by substantial evidence in the record. *Dover Elevator Co. v. Industrial Claim*

Appeals Office, 961 P.2d 1141 (Colo. App. 1998). Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995). Substantial evidence exists to support the finding that the Claimant sustained an injury arising out of his employment with the Respondent-Employer on June 19, 2008.

2. The Claimant has established and the ALJ found the existence of a disability, as contemplated by C.R. S. 8-42-103(1), from June 30, 2008 and ongoing. Such finding is supported by substantial evidence. The ALJ concludes that the Claimant is entitled to temporary total disability from and including June 30, 2008 and ongoing.

3. "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor. …" C.R.S. 8-43-404 (5)(a). The ALJ has found that at the time the Respondent-Employer was made aware of the Claimant's injury, a physician was not designated. As such the right of selection passed to the Claimant. The Claimant selected Dr. Dana Bennett. As such the ALJ concludes that Dr. Bennett is the authorized treating physician. As a matter of law the referrals of Dr. Bennett are deemed authorized.

4. "…in an emergency situation, an employee need not give notice to the employer nor await the employer's choice of a physician before seeking medical attention. A medical emergency allows an injured party the right to obtain treatment without undergoing the delay inherent in notifying the employer and obtaining his referral or approval. …" *Sims v. Industrial Claims Appeals Panel,* 797 P.2d 777, (Col. App. 1990). The ALJ found that an emergency situation existed at the time the Claimant was treated at Parkview Hospital on June 20 and 21, 2008 and at St. Mary Corwin Hospital on June 30, 2008. The ALJ therefore concludes as a matter of law that such treatment is the responsibility of the Respondent and is considered authorized care.

5. The ALJ found that Respondent-Employer failed to provide sufficient evidence in support of penalties against the claim. The ALJ concludes that such claim for penalties must fail as unsupported.

6. The ALJ found insufficient evidence in support of Respondent-Employer's defense of statute of limitation. The ALJ concludes that such must fail.

ORDER

It is therefore ordered that:

1.Claimant's injury of June 19, 2008 is compensable under the Workers' Compensation Act of Colorado.

2.Respondent-Employer/Insurer shall pay all authorized, reasonable and necessary medical expenses to cure or relieve Claimant from the effects of his injury, including costs incurred subsequent to June 19, 2008.

3.Respondent-Employer/Insurer shall pay Claimant temporary total disability benefits in the amount of $753.41 from June 30, 2008 and ongoing until terminated by operation of law.

4.Dr. Bennett, Dr. Jan Davis, Dr. Rawat, and Dr. Nanes and their referrals are authorized treating physicians. Treatment at Parkview Medical Center was obtained on an emergency basis and is therefore authorized. Centura Health was seen on an emergency basis and is therefore authorized.

5.Claimant's average weekly wage is at least $1,130.12.

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

7.Respondent-Employer's defense of statute of limitation is denied and dismissed.

8.Respondent-Employer's claim for penalties is denied and dismissed.

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

DATE: June 4, 2009

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-766-824

ISSUES

The sole issue presented for determination by the parties was compensability in both W. C. No. 4-766-824 and 4-773-581. W.C. No. 4-766-824 concerns an injury date of July 28, 2008. W.C. No. 4-773-581 concerns an injury date of September 12, 2008.

FINDINGS OF FACT

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

1. Claimant was employed by Employer in the Production R Line. Claimant's date of hire was January 24, 2007.

2. On July 28, 2008 Claimant was carrying a bag of cement when he tripped on a pallet causing him to fall and strike his back and right arm on a scale.

3. On July 28, 2008 Claimant was working with Alberto Mercado and Fernando Zamora. Mr. Mercado and Mr. Zamora were present when Claimant sustained his injury and assisted Claimant after he was injured.

4. Claimant presented to the Emergency room at St. Anthony's Hospital North on July 28, 2008 with a stated complaint of low back pain. Claimant gave a history that he was lifting a 94 pound box and fell.

5. Claimant was examined in the Emergency room at St. Anthony's Hospital North on July 28, 2008 by Physicians Assistant Jason Schmidthuber. On physical examination, Claimant was found to have mild to moderate pain to palpation of the L5-S1 intervertebral disc space and moderate right-sided paravertebral muscle tenderness/ mild paravertebral muscle spasm. A positive right-sided straight leg raising at 30 degress of flexion was noted. Claimant was diagnosed with back strain, given medications and discharged to home to follow-up with the Workers' Comp clinic.

6. Albert Mercado completed a Witness Report of Injury dated July 29, 2008. Mr. Mercado stated that the incident had occurred on the R-line by the digital scale. Mr. Mercado further stated in this report that Claimant "was lifting a 94 pound bag of white cement and he tripped on an empty pallet and he hit his back on the corner of the scale." Mr. Mercado's statement in consistent with his credible testimony at hearing and is found as fact.

7. On September 12, 2008 Claimant was working for Employer stacking bags of paving material. On that date, Claimant lifted one of the bags of paving material to place it on a pallet and experienced a "pop" in his back.

8. Claimant presented to the Emergency room at St. Anthony's Hospital North on September 15, 2008 complaining of back pain. Claimant was examined on that date by Physicians Assistant Adam Yeagley. On physical examination Claimant was noted to have tenderness over the left paravertebral muscles. Claimant was diagnosed with lumbar strain and given medications.

9. Claimant was referred by Employer to Dr. Christian Updike, M. D. at Concentra Medical Center for evaluation and treatment. Dr. Updike initially evaluated and examined Claimant on September 16, 2008. Dr. Updike obtained a history that on July 28, 2008 Claimant was carrying a bag of cement and tripped on a pallet falling backwards and hitting his back on the corner of a scale. On September 16, 2008, Dr. Updike also obtained a history that on September 12, 2008 Claimant was lifting an

object that aggravated his back and heard a “pop”. Dr. Updike examined Claimant again on September 18, 2008 and obtained a similar history regarding the injury of September 12, 2008.

10. When Dr. Updike examined Claimant on September 18, 2008 he noted a positive right-sided straight leg raising test of 50 degrees. Dr. Updike testified, and it is found, that this positive straight leg raising test was consistent with a lifting type injury as Claimant described had occurred on September 12, 2008. Although Dr. Updike strongly suspected symptom magnification at his examination on September 18, 2009 he diagnosed Claimant with “low back with radiculopathy” and prescribed medications.

11. The ALJ finds Claimant’s testimony regarding the occurrence of injuries on July 28, 2008 and September 12, 2008 to be credible and persuasive. Claimant’s testimony is supported by the credible testimony of co-workers and is consistent with histories of the injuries contained in the medical records from St. Anthony’s Hospital North and the records of the Employer designated physician, Dr. Updike.

12. Claimant has proven by a preponderance of the evidence that he sustained injuries to his low back on July 28, 2008 and September 12, 2008 arising out of and in the course of employment with Employer.

CONCLUSIONS OF LAW

13. 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*.

14. 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).

15. 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.

16. The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease 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).

17. Section 8-41-301(1)(c), C.R.S., requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. See *Subsequent Injury Fund v. Industrial Claim Appeals Office,* __P.3d__ (Colo. App. No. 05CA0278, February 9, 2006); *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

18. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back and right arm on July 28, 2008 in W.C. No. 4-766-824. Claimant's testimony that on that date he was carrying a bag of cement and tripped on a pallet causing him to fall and strike his back on a scale is found to be credible. Claimant's testimony is supported by the credible testimony of co-workers Alberto Mercado and Fernando Zamora as well as the Employer's injury reports for the day in question. Claimant's fall caused the need for medical treatment and Claimant received treatment from the emergency room at St. Anthony's Hospital where he was diagnosed with a low back strain. This diagnosis is supported by the testimony of Dr. Updike who agreed that Claimant sustained a work-related low back injury on July 28, 2008.

19. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his back on September 12, 2008 in W. C. No. 4-773-851. On that date, Claimant was lifting a bag of paving material to put on a pallet when he felt a "pop" in his back. Claimant's testimony is credible and consistent with the history obtained by Dr. Updike at his evaluations of Claimant on September 16 and 18, 2008. Claimant's testimony is also consistent with the history obtained by Dr. Ramos when he evaluated Claimant on September 29, 2008. Dr. Updike testified, and it is found, that the positive right straight leg raising test he found at examination on September 18, 2008 was consistent with a lifting injury as alleged by Claimant. The inconsistencies found in the medical records regarding the history of the mechanism of injury of either the July 28 or September 12 injuries can be attributed to the lack of reliable translation services for Claimant, Claimant being a poor historian and the physicians potential misunderstanding of the history being relayed by Claimant. The ALJ concludes that these inconsistencies do not rise to the level of making the Claimant not credible regarding the occurrence of the injuries. Additionally, no persuasive evidence was presented of injury occurring outside of work or of pre-existing injury.

ORDER

It is therefore ordered that:

Claimant sustained compensable injuries to his low back on July 28, 2008 and September 12, 2008. No specific benefits were requested at hearing and none are awarded in the Order

All matters not determined herein are reserved for future determination.

DATED: June 10, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-766-874

ISSUES

- Whether Claimant sustained an injury to his low back arising out of and in the course and scope of his employment with Employer;
- Whether Claimant is entitled medical benefits associated with the injury; and

- Whether Claimant's spinal stenosis and/or thoracic myelopathy was caused, aggravated or accelerated by the May 2, 2008 industrial injury.

The parties entered into the following stipulations, which were approved and made an order of the court. If the claim is found compensable:

- Claimant's average weekly wage (AWW) is $150.00.
- Claimant is entitled to temporary partial disability (TPD) benefits from July 1 through July 24, 2008.
- Claimant is entitled to temporary total disability (TTD) benefits commencing July 25, 2008 until terminated pursuant to the Workers' Compensation Act.
- Claimant's medical treatment to date with Concentra, Cherry Creek Imaging and US Medical Group are reasonable, necessary and related.
- Claimant's medical treatment from Denver-Vail Orthopedics including, but not limited to Dr. Pamela Knight and Dr. Scott Stanley is unauthorized.

FINDINGS OF FACT

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

1. Claimant began working for Employer in March 2008 as a sorter. Claimant's job duties included sorting packages as they came down "the line" or on a conveyer. Claimant was required to lift boxes weighing 30 pounds to 160-170 pounds. Claimant worked 4 hours per day, 5 days per week. Claimant denied holding any other jobs at this time.

2. On May 2, 2008, Claimant was working at the Employer sorting job at 4:30 a.m., when boxes on an overhead conveyer belt jammed and a sixty to seventy pound box fell, striking Claimant in his mid-lower back, as he bent over to place a package on the low conveyer belt. Claimant heard a co-worker yell "watch out" when Claimant was struck from above by the box.

3. Claimant reported the injury and went to Employer's authorized treating physician, Dr. Alan E. Shackelford at Concentra Medical Centers. Dr. Shackelford noted midline tenderness to palpation at T-10 to T-12 and L1-L2 and slight discomfort in the thoracolumbar spine with right and left rotation. He assessed Claimant with a "back contusion." Claimant was returned to regular duty work and was next evaluated by Dr. Jeffrey Wunder.

4. Claimant saw Dr. Wunder on June 26, 2008. Dr. Wunder noted that the MRI completed on June 16, 2008 revealed diffuse disc dessication at L2-S1 and a minor bulge to the left of at L5-S1, which did not appear to be significant. Dr. Wunder further noted that most prominent findings on the MRI were a disc dessication, degenerative disease and spinal stenosis at T12-L1. Dr. Wunder noted a slight left leg limp. He recommended continued physical therapy and traction.

5. On July 1, 2008, Claimant returned to Dr. Shackelford at which time he issued physical restrictions of no lifting over 30 pounds, no bending greater than five times per hour, no pushing and/or pulling over 50 pounds of force, and no squatting and/ or kneeling.

6. On July 3, 2008, Dr. Wunder opined that the structure of the lumbar spine would be non occupational and that Claimant appeared to have congenital malformations of the lumbar vertebrae in that area and associated spinal stenosis. Dr. Wunder found that Claimant's injury seemed to have aggravated the underlying condition, to a degree. Dr. Wunder also noted that Claimant was concurrently feeling left knee pain and seeking treatment with his family physician. This is supported by the medical record dated May 27, 2008, which reflects that Claimant saw his family physician, Dr. Lisa Davidson, and complained of knee pain and months of stiffness in his joints, including his knees.

7. Claimant decided to obtain a second opinion from a doctor outside of the workers' compensation system. He saw Dr. Pamela A. Knight on July 8, 2008. Dr. Knight noted that Claimant lack of proprioception bilaterally at the great toe and poor coordination with heel or toe walking. Dr. Knight opined that Claimant's functional abilities were possibly affected by a combination of the stenosis, which was aggravated by the work injury, and the peripheral neuropathy. Dr. Knight referred Claimant to Dr. Scott Stanley.

8. Claimant saw Dr. Stanley, an orthopedic surgeon, on July 17, 2008, who gave the opinion that Claimant's injury at work exacerbated his underlying condition of congenital stenosis.

9. On July 17, 2008, Claimant returned to Dr. Wunder who recommended that Claimant be referred to Dr. Jay Ogsbury for a neurosurgical consultation. Dr. Wunder wanted Dr. Ogsbury's opinion on surgical implications as well as causation and correlation of symptoms with anatomic findings.

10. On July 22, 2008, Dr. Ogsbury evaluated Claimant. Claimant's complaints at the time included pain in his upper low back, plus discomfort in both hips, both buttocks, and both legs more left than right, whole (front, back, and both sides and, thighs and for legs, feet and all toes). Claimant reported numbness and tingling, primarily in left leg. Claimant noted his leg control, motor skills and balance were "not good." Dr. Ogsbury's clinical impression was T12-L1 congenital spinal stenosis-significant disc protrusion T12/L1 producing increased spinal stenosis and conus

medularis compression; and myelo-radiculopathy. Dr. Ogsbury indicated Claimant had a mixed radicular and myelopathic picture. Dr. Ogsbury indicated that Claimant had convincing evidence of a myelopathy with hyperreflexia, possibly one beat of clonus and decreased position sensation and perhaps even hyperesthesia to pin sensation in his leg.

11. Dr. Ogsbury agreed that surgery was a reasonable and necessary option. Dr. Ogsbury also opined that if Claimant has never had any of these symptoms prior to the work injury, and has had this progressive set of symptomatology since the injury, then the symptoms, and any treatment thereof would have to be considered causally related to the work injury of May 2, 2008.

12. Thereafter, Claimant saw Dr. Sanjay Jatana for a surgical consultation. Dr. Jatana's impression was lumbar spinal stenosis secondary to a disc protrusion and developmental stenosis. He noted "work-related injury" and recommended a bilateral decompressive laminectomy.

13. On August 4, 2008, Claimant underwent decompressive laminectomy, T12-L1, with medial facetectomy and foraminotomy of the T12 and L1 nerve roots, evaluation of disc protrusion T12-L1. Claimant's pre-operative and post-operative diagnosis was T12-L1 disc protrusion and severe spinal stenosis; bilateral lower extremity myelopathy and radiculopathy and degenerative disc lumbar spine.

14. Dr. Matt Miller referred Claimant to Dr. Eric Hammerberg for an evaluation which occurred on September 18 and 24, 2008. Dr. Hammerberg's impression was thoracic myelopathy secondary to severe central canal stenosis at T10-11, status post T12-L1 discetomy. Dr. Hammerberg opined that Claimant's myelopathic picture appeared to be, at least in part, due to the myelomalacia at T10-11 and that accounted for Claimant's continuing problems with balance and lower extremity dysfunction. Dr. Hammerberg indicated Claimant's cord compression pre-existed the injury that occurred on May 2, 2008. Dr. Hammerberg opined that the back injury did not aggravate Claimant's thoracic myelopathy.

15. Claimant continued under the care of the doctors at Concentra Medical Centers and U.S. Medical Group until he moved from Colorado to Florida on or about September 4, 2008. Claimant started treatment with Dr. Michael J. Webb in Florida. The most recent report from Dr. Webb reflects that Claimant is not at maximum medical improvement (MMI), restricted to lifting no more than 20 pounds and no bending at the waist. Dr. Weber has made a referral to a neurosurgeon.

16. Claimant's direct supervisor for his sorter position, Tafoya, testified that while Claimant was able to do the physical requirements of his job, Claimant had a noticeable heavy limp prior to May 2, 2008. Tafoya acknowledged that Claimant was never written up or disciplined for his job performance prior to May 2, 2008.

17. Claimant's direct supervisor in the small sort department, Mangus, that when Claimant first came to work in her department prior to May 2, 2008, she thought that claimant had been assigned modified duty in small sort due to an injury. Mangus testified that Claimant walked with a limp. Claimant's job duties in small sort were essentially the same physical requirement both before the injury and after the injury. Mangus testified that Claimant was able to perform the physical requirements of the small sort position, prior to and subsequent to the injury, and was never written up or disciplined for inability to do his job because of his physical condition.

18. Another Employer manager, Cook, testified that Claimant worked his first day with Employer working the sort line which included placing boxes in the package car. Cook testified that Claimant was unable to perform these job duties due to difficulty maneuvering on and off the package car with boxes. Claimant was then transferred to the sort line managed by Tafoya. Cook testified he observed Claimant with physical limitations including a significant limp and an inability to squat down and lift packages off the ground. Cook testified that claimant was never written up or disciplined due to his physical inability to perform his job duties with employer.

19. On January 29, 2009 Claimant underwent an Independent Medical Examination with Dr. Allison Fall at the request of Respondents. Claimant gave a history of working as a box sorter and unloading boxes when he was bent forward towards the right and a box fell and landed in the middle of his low back. Claimant underwent surgery which immediately resolved 85% of his pain. Claimant denied any prior "serious" back injuries and no prior trauma to his low back. Following the examination of the Claimant and review of the medical records, Dr. Fall felt that Claimant's work-related diagnosis was a lumbar contusion. Dr. Fall felt that the contusion was not causally related to the severe spinal stenosis at T11-T12, nor the myelomalacia. Dr. Fall indicated in her report that an initial evaluation following the work-related injury to rule out acute fracture and possibly one or two visits would have been appropriate. Dr. Fall opined that Claimant's industrial injury did not cause the need for thoracic surgery. Dr. Fall indicated that based upon the industrial incident, work restrictions were not necessary.

20. Dr. Fall testified consistent with her report. Dr. Fall placed emphasis upon the fact that Claimant's pathology pre-existed the work injury, however, conceded that Claimant did not have any of the pain complaints that the Claimant currently has, and has had, since the injury of May 2, 2008. Dr. Fall also opined that stenosis can cause myelomalacia, but disagreed that this occurred in Claimant's case. Dr. Fall explained that symptoms of myelomalacia include issues with balance and proprioception. Dr. Fall further emphasized Claimant's past reports of back pain reflected in the medical records from 2004 and described below.

21. On June 25, 2004, claimant was seen for a periodic health screening examination with family physician, Dr. Lisa Davidson. Claimant provided history of something falling on to his low back about four years ago. Claimant never had an x-ray and never had neurologic symptoms, but sometimes felt very painful in the lumbar area. Claimant wondered if he sustained a back fracture that didn't heal

correctly. Included in Claimant's assessment was low back pain. Dr. Davidson suggested that Claimant undergo an x-ray to look for signs of old fracture, arthritis, or spondylolysthesis.

22. Claimant saw Dr. Davidson on October 27, 2004 for primary complaints of right shoulder pain. Past medical history was remarkable for chronic pain affecting the low back.

23. Claimant had no work restrictions prior to May 2, 2008 and was able to perform his job duties. Restrictions were first imposed on July 1, 2008. As of August 4, 2008, the date of surgery, Claimant was unable to perform his job duties as a sorter with Employer.

24. Prior to May 2, 2008, Claimant had never specifically sought treatment for his back, nor had he experienced symptoms similar to those he experienced after May 2, 2008. In addition, no recommendation had been made by any medical provider that Claimant undergo back surgery.

25. Dr. Webb maintains that Claimant has not reached MMI and referred Claimant out for a second neurological evaluation.

26. Although Claimant remains on restrictions he has found employment in Florida which accommodates his restrictions, and he has been working since March of 2009.

27. Based on the foregoing, Claimant has established that on May 2, 2008, he sustained an injury to his low back while in the course and scope of employment. It is undisputed that a heavy box fell onto Claimant's back while he was working for Employer. The parties dispute the extent of the injuries that flowed from the incident. While it is true that Claimant had mentioned to his primary care physician that he sometimes felt low back pain due to a prior incident, Claimant was not in need of treatment before the incident on May 2, 2008. Claimant credibly testified that he was not suffering from ongoing low back pain or other symptoms similar to those he felt following the incident on May 2, 2008. Claimant's testimony is supported by his ability to perform his job duties, which included heavy lifting, without work restrictions. The testimony of Claimant's supervisors that Claimant had a heavy limp before May 2, 2008 is inconsistent with the notation by Dr. Wunder on June 26, 2006, that Claimant had a slight limp. In addition, Claimant agreed he had a slight limp, and the medical records reflect that Claimant was seeking treatment for left knee pain and stiffness. Finally, the Judge does not find persuasive Dr. Fall's opinion that a notation of chronic back pain four years prior to the work incident leads to the conclusion that Claimant was in need of treatment prior to the incident on May 2, 2008. Claimant has established by a preponderance of the evidence, that the May 2, 2008 industrial accident aggravated and accelerated the preexisting degenerative condition producing the need for treatment.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Judge 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 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).

4. 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).

5. As found, it is uncontested that Claimant was struck in the back by a box on May 2, 2008 while in the course and scope of his employment. The parties, however, dispute the extent of the injuries that flowed from the incident. While it is true that Claimant had mentioned to his primary care physician that he sometimes felt low back pain due to a prior incident, Claimant was not in need of treatment before the incident on May 2, 2008. Claimant credibly testified that he was not suffering from ongoing low back pain or other symptoms similar to those he felt following the incident on May 2, 2008. Claimant's testimony is supported by his ability to perform

his job duties, which included heavy lifting, without work restrictions. The testimony of Claimant's supervisors that Claimant had a heavy limp before May 2, 2008 is inconsistent with the notation by Dr. Wunder on June 26, 2006, that Claimant had a slight limp. In addition, Claimant agreed he had a slight limp, and the medical records reflect that Claimant was seeking treatment for left knee pain and stiffness.

6. The opinions of Drs. Wunder, Knight, Stanley, Ogsbury, are more persuasive than those of Dr. Fall. All four physicians acknowledge that Claimant had preexisting congenital spinal stenosis, yet determined that the stenosis was aggravated by the industrial injury. Dr. Fall's opinion relies heavily upon a notation of chronic back pain in a medical record from 2004 and on a 2004 report of occasional pain following a blow to the back approximately eight years before the work incident. There is no credible or persuasive evidence to suggest that Claimant was in need of treatment for his back prior to the incident on May 2, 2008, or that he had the severe symptoms he had following the incident.

7. Although Drs. Fall and Hammerberg opined that Claimant's myelopathic condition is not related to his work injury nor aggravated by his work injury, Claimant was not suffering from the symptoms of this condition prior the incident on May 2, 2008. As Dr. Fall testified, symptoms of myelomalacia include issues with balance and proprioception. There is no persuasive evidence that Claimant was having issues with either balance of proprioception prior to May 2, 2008. Furthermore, Dr. Ogsbury opined that if Claimant did not have these symptoms prior to May 2, 2008, that they would be causally related to the work incident.

8. Claimant has established by a preponderance of the evidence that the May 2, 2008 industrial accident resulted in the onset of back pain and radicular symptoms, which Claimant had not previously experienced. Such symptoms produced the need for treatment. Accordingly, Claimant has established that the industrial accident aggravated and accelerated the preexisting degenerative conditions of stenosis and myelomalacia which produced the need for treatment, including all treatment rendered through the date of the hearing.

9. Based on the finding of compensability, Claimant has also established that he is entitled to reasonable and necessary medical treatment to cure and relieve the effects of the work injury. Respondents are responsible for providing such reasonable, necessary and related medical benefits including those already provided.

10. Claimant has further established entitlement to temporary disability benefits as stipulated by the parties. Claimant's new employment that began in March 2009 may result in termination of TTD or payment of TPD. The details of Claimant's hours and wages were not developed by the record.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable industrial injury on May 2, 2008.

2. Claimant's medical treatment at Concentra Medical Centers, U.S. Medical Group, and their referrals for MRIs and surgery with Dr. Sanjay Jatana, as well as his current treatment with Dr. Michael J. Webb are all found reasonable, necessary, and related.

3. Pursuant to the stipulation of the parties Claimant's AWW is $150.00.

4. Pursuant to the stipulation of the parties, Claimant is entitled to TPD benefits for the period between July 1, 2008, through July 23, 2008.

5. Claimant is entitled to TTD benefits from July 25, 2008, ongoing until he started new employment in March 2009.

6. Claimant is entitled to TPD benefits to the extent he does not earn $150.00 a week at his employment that commenced in March of 2009.

7. The insurer shall pay interest to claimant 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: June 19, 2009

Laura A. Broniak
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-769-948

ISSUES

The issues raised for consideration at hearing were compensability, medical benefits, and temporary total disability benefits.

FINDINGS OF FACT

After consideration of the evidence, including the submissions of the parties and the testimony at hearing, the ALJ enters the following Findings of Fact:

1.Claimant alleged an injury on Friday, April 11, 2008 due to falling off a ladder onto his tool belt. The height of the alleged fall is noted between 3 and 6 feet in the medical records. Claimant testified that he felt immediate onset of pain after falling off the ladder and that he called his supervisor, Heath Herring, to report the incident the day it occurred.

2.Mr. Herring testified claimant never called him on April 11, 2008 to report the alleged incident. Mr. Herring acknowledged during testimony that a co-worker of the claimant, Phil, who had been working with the claimant on April 11, 2008 told Mr. Herring on Monday April 14, 2008 that claimant had "taken a tumble" on Friday. Mr. Herring testified he sought out the claimant after Phil made this comment and asked the claimant about the incident. Mr. Herring testified the claimant never came to him directly to report the April 11, 2008 incident. Mr. Herring testified claimant responded that he was fine and told Mr. Herring it was no problem. Mr. Herring testified he offered to file a report and refer the claimant for medical care but claimant told him that he did not need medical care and did not want to file any report of an incident. Mr. Herring testified after this conversation he presumed the claimant was fine and the incident of April 11, 2008 was not further addressed. This ALJ finds Mr. Herring's testimony with respect to the reporting of the alleged incident more credible and persuasive than claimant's account.

3.Mr. Herring testified that from April 14, 2008 until June 30, 2008 on multiple occasions he worked with the claimant or observed claimant at the shop and claimant always appeared fine. This ALJ accepts Mr. Herring's testimony that claimant was able to perform his full normal job duties in this time frame and did not request any modified duty or further bring up the April 11, 2008 incident with Mr. Herring. Mr. Herring's testimony was in direct conflict with the claimant's testimony that he asked Mr. Herring "at least 30 times" after the April 11, 2008 incident to file a claim and obtain medical care. Mr. Herring credibly and persuasively denied claimant's allegation that Mr. Herring threatened the claimant and intimidated him from obtaining medical care.

4.Mike Wetzbarger, the owner of the respondent-employer, testified that claimant did not report any injury to him on or around April 11, 2008. Mr. Wetzbarger testified he also had an opportunity to observe the claimant on multiple occasions between April 14, 2008 and June 30, 2008 and claimant appeared physically fine and never requested modified employment or asked him to file a workers' compensation claim. Mr. Wetzbarger testified claimant had access to him and could have come to him to discuss the alleged incident at any time if claimant felt Mr. Herring was not being responsive to his requests. Mr. Wetzbarger testified at no time between April 14, 2008 and June 30, 2008 did claimant come to him to discuss the April 11, 2008 incident.

5.Mr. Wetzbarger testified on June 30, 2008 he was on a job site with the claimant when claimant came to him and told him that he had a hernia he needed to have looked at. Because claimant seemed to indicate the hernia was work related, Mr. Wetzbarger directed claimant to the office to fill out an injury report. Mr. Wetzbarger testified that claimant did not mention anything about his back hurting or the April 11, 2008 incident when claimant discussed the hernia issue with him. Claimant filled out an

accident report slip on June 30, 2008 and was directed by the employer to Harmony Urgent Care Center for medical treatment on that date.

6.Mr. Wetzbarger also testified that claimant had prior work related incidents, specifically a cut hand and an incident with a 2x4, for which claimant had reported the injury and obtained medical care. Mr. Wetzbarger testified based on these past experiences he thought claimant understood the workers' compensation injury reporting process. Claimant had also signed several forms indicating the designated medical provider for the respondent-employer and directions for reporting injuries and obtaining care.

7.Mr. Wetzbarger and Mr. Herring testified the employer held bi-weekly safety meetings, many of which were concluded by asking if any employee had any issues to address. Mr. Wetzberger and Mr. Herring testified between April 14, 2008 and June 30, 2008 claimant attended many of these meetings and never raised the April 11, 2008 incident as an issue.

8.Despite the claimant's allegations that he was "broken" and physically incapacitated following the April 11, 2008 incident, it is undisputed that claimant did not seek medical care for his alleged low back and hernia injuries until June 30, 2008. This ALJ finds claimant's failure to seek medical care through an emergency facility, low cost medical clinic, or other source inconsistent with claimant's allegations regarding the extent of the symptoms he experienced after April 11, 2008.

9.Claimant was returned to modified duty at the respondent-employer following the June 30, 2008 report of the April 11, 2008 alleged injury. Claimant acknowledged he was accommodated in a modified duty capacity. Mr. Herring testified that in September 2008 claimant gradually stopped calling in for his modified duty. Mr. Herring testified that on or about September 12, 2008 claimant came into the shop and cleared out his tools. Mr. Herring testified the collection of tools in their industry signifies that an individual has quit his employment. Mr. Wetzbarger's testimony also indicated his understanding and belief that claimant quit his employment voluntarily on or about September 12, 2008.

10.Respondents filed a Notice of Contest with respect to the alleged April 11, 2008 incident but elected to provide claimant medical care. Dr. Jeffrey Wunder ultimately became the primary authorized treating provider after Dr. Fredrick Scherr transferred care to Dr. Wunder due to concerns regarding delayed recovery and lack of correlation between the claimant's reported symptoms and objective findings. Respondents submit it was undisputed at hearing that Dr. Wunder is the primary authorized treating physician.

11.Claimant had a prior injury to his low back on May 3, 2007, which affected the L4-5, and L5-S1 discs. Records indicate claimant was also treated for ankylosing spondylitis, a low back condition, as far back as 2004. This ALJ takes notice that claimant's reported mechanism of injury, a fall onto his tool belt, is essentially the same mechanism of injury as the May 3, 2007 injury.

12.Claimant settled his May 3, 2007 claim on June 26, 2007 prior to reaching maximum medical improvement. At the time claimant settled the prior injury, an orthopedic surgical evaluation was pending with Dr. Benz. Claimant's MRI on June 11, 2007 was reported as showing a bulge of the L4-5 intervertebral disc and a protrusion of L5-S1. Claimant denied to medical providers in relation to the April 11, 2008 claim that the May 3, 2007 injury was a lost time claim. However, review of the records in conjunction with the May 3, 2007 injury clearly indicates claimant was not working for a period of time following the May 3, 2007 injury. This ALJ finds that claimant was not forthcoming regarding the extent of the May 3, 2007 injury and resultant treatment which his medical providers providing care in relation to the April 11, 2008 alleged incident.

13.Claimant testified that he was symptom free from June 2007 until April 2008. He made similar statements to his medical providers who treated him in relation to the April 11, 2008 incident stating he had received only minor treatment for the May 3, 2007 injury and that his symptoms had completely resolved. On June 22, 2007 claimant told his medical providers he was getting worse and described his pain at 6/10. On September 26, 2007 claimant applied for a prescription for medical marijuana. In his application, claimant identified "chronic neck and low back pain" He identified pain on both his left and right side in the low back and indicated his pain was an 8 out of 10 in the past 24 hours. Claimant also indicated his low back pain "completely interferes" with his sleep and enjoyment of life. He also indicated his pain almost completely interferes with his general activities, mood, walking ability, and normal work duties. Claimant re-applied for his medical marijuana prescription in September 2008 and failed to mention the alleged April 11, 2008 incident in his application.

14.A second MRI was performed on August 28, 2008 which was reported as showing degenerative changes at L4-5 and L5-S1. Dr. Wunder, the primary treating physician stated in his report of September 30, 2008 the MRI conclusively ruled out the question of fractures which had been raised based on earlier x-rays. Dr. Wunder opined the August 28, 2008 MRI was essentially unchanged in comparison to the June 11, 2007 MRI.

15.Claimant was placed at maximum medical improvement by Dr. Wunder on September 30, 2008 and rated with 5% whole person impairment for specific disorders of the lumbar spine. Lumbar inclinometer measurements were noted to be invalid. Dr. Wunder did not address the claimant's hernia as a prior treating medical provider, Dr. Scherr, had opined on July 24, 2008 "based on the mechanism of injury et cetera I do not believe that the hernia is probably a work-related issue, as I do not see how the correlation, in my opinion, between the hernia and his injury. I do not see how that could have occurred."

16.Claimant returned to Dr. Wunder for repeat inclinometer measurements on October 14, 2008. At that time Dr. Wunder noted he had received medical reports with respect to the claimant's 2007 injury. Dr. Wunder noted the claimant's exaggerated pain

behaviors. Valid range of motion measurements were obtained and Dr. Wunder amended his impairment rating to 4% for range of motion deficits, fully apportioning the specific disorder rating to the May 3, 2007 injury. Dr. Wunder also noted the potential of secondary gain given claimant's request for narcotic analgesics and use of medical marijuana. When Dr. Wunder requested that a urine drug screen be performed claimant produced a medical marijuana license. Claimant had failed to disclose his use of medical marijuana to any of his treating medical providers prior to October 14, 2008.

17.On October 22, 2008 Dr. Wunder discussed the results of the drug screen noting the presence of cannaboids, which was expected given claimant's stated use of medical marijuana. However, Dr. Wunder also noted the positive results for hydromorphone and hydrocodone. Claimant was not prescribed these medications by any providers in the chain of referral. Dr. Wunder considered this a noncompliant response. On December 12, 2008, the claimant's next appointment with Dr. Wunder, Dr. Wunder discharged claimant from care and opined no further medical treatment of any kind was needed.

18.Claimant testified that he did not use any other medications besides ibuprofen and medical marijuana. His testimony is directly contradicted by the positive urine screen showing hydromorphone and hydrocodone on October 22, 2008. Claimant also testified that he has difficulty walking and drags his leg approximately 80% of each day. Respondents submitted a surveillance disk of the claimant taken in September 2008. Claimant is visible in the surveillance video walking with no apparent difficulty. Claimant's credibility is further placed in question by records concerning his scuba diving lessons obtained on March 10, 2009. In conjunction with these lessons, claimant filled out a medical history form where he denied any back pain or spine problems.

19.Based on the repeated inconsistencies in claimant's testimony, this ALJ finds the testimony of Mr. Herring and Mr. Wetzbarger more credible than the claimant. Specifically, this ALJ finds the testimony of Mr. Herring more credible with respect to the April 11, 2008 incident. While Mr. Herring acknowledged being told the claimant "took a tumble" this ALJ accepts Mr. Herring's testimony that the claimant told him that he was fine and did not require any medical care or desire to file a workers' compensation claim. This ALJ accepts Mr. Herring and Mr. Wetzbarger's testimony that from April 14, 2008 until June 30, 2008 claimant was able to work his full and normal duties with no difficulty and did not make any further mention of the April 11, 2008 incident, request medical care, or request to file workers' compensation claim.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following conclusions of law:

1. Claimant bears the burden of proving by a preponderance of the evidence he sustained a compensable injury which arose out of and in the course and scope of his employment. Section 8-41-301(1) C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier fact, after considering all of the evidence, that a fact is more probable than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

2. The claimant argues he has proven by a preponderance of the evidence he sustained a compensable injury to his back and also sustained a hernia on April 11, 2008. This ALJ disagrees.

3. Even where there is an acknowledged incident, this incident does not necessarily create a "compensable injury" within the meaning of the Act. *Graphman v. Amberwood Court Care Center*, W.C. No. 4-621-138 (ICAO June 29, 2005). The Workers' Compensation Act creates a distinction between the terms "accident" and "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. 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*, 426 P.2d 194 (Colo. 1967).

4. No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." Claimant bears the burden of proving a compensable injury. *See e.g., Smith v. Dept. of Labor*, 494 P.2d 598 (Colo. App. 1972). Inconsistencies in a claimant's account of an injury or his actions thereafter can provide sufficient basis to conclude the claimant has failed to carry his burden of proof. Under the Act, a compensable injury is one which "requires medical

treatment or causes a disability." Section 8-41-301(1)(c) C.R.S.; *See e.g., Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990).

5. This ALJ finds it is undisputed that claimant did not seek medical treatment for the alleged April 11, 2008 incident until June 30, 2008. This ALJ accepts the testimony of Heath Herring and Mike Wetzbarger as credible and persuasive and finds claimant did not sustain any lost time from work immediately following the April 11, 2008 incident.

6. Therefore, this ALJ finds that claimant has failed to sustain his burden of proof to establish that the April 11, 2008 incident constituted a compensable injury. After consideration of the evidence presented, this ALJ finds that the claimant failed to meet his burden of proof to show a causal connection between the April 11, 2008 incident and a need for medical treatment.

7. This ALJ finds the claimant failed to sustain his burden of proof to show the incident of April 11, 2008 caused disability. In *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999), the court defined "disability" as medical incapacity as evidenced by some loss of bodily function, and loss of wage-earning capacity evidenced by an employee's inability to resume his prior work. Here, the claimant completed his employment duties on the date of the alleged incident and returned to his normal employment the first business day after the incident in question and continued to work, without demonstrable difficulty or complaint for approximately two months. The ALJ finds claimant's ability to continue to work and failure to seek medical treatment more proximately to April 11, 2008 is inconsistent with claimant's assertion that he experienced a compensable injury on April 11, 2008.

8. Because this ALJ finds claimant failed to sustain his burden of proof to demonstrate a compensable injury, this ALJ does not reach the other questions presented regarding claimant's responsibility for termination from employment.

9. 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).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the ALJ enters the following Order:

Claimant's claim for workers' compensation benefits under the Workers' Compensation Act is hereby DENIED and DISMISSED.

All matters not determined herein are reserved for future determination.

DATED: June 25, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-770-776

ISSUES

1. The issues for determination include compensability, medical benefits, temporary total disability benefits, temporary parties disability benefits and penalties for failure to carry workers' compensation insurance pursuant to Section 8-43-408.

FINDINGS OF FACT

1. Claimant is a 27 year old male who was working at a tire shop on or about August 19, 2008 when he approached Mr. Pearson, owner of Respondent 1, and initiated a conversation about performing work as a sawyer on a project Respondent 1 was working on for Respondent 2. Mr. Pearson told Claimant he was looking for good help and Claimant advised Mr. Pearson that he was an experienced sawyer and would be available to work on the project falling trees. Claimant testified that he had seen a "Help Wanted" sign near a truck parked on the driveway being constructed by Respondent 1 and was aware of the area where the work was being performed.

2. Claimant testified that he discussed an hourly wage with Mr. Pearson and was offered a position as a sawyer at $45 an hour if he had his own insurance and $35 an hour if he didn't have his own insurance. Claimant testified he accepted the position at $35 per hour and made arrangements to begin working for Respondent 1. Claimant gave his notice to the tire shop on August 20, 2008 and showed up at the construction site on August 21, 2008 with his chain saw and safety chaps. Claimant did not have his hard hat on August 21, 2008 and was provided one at the job site.

3. Mr. Pearson had called Mr. Rose, owner of a subcontracting firm hired to help excavate the road on August 20, 2008 and advised Mr. Rose that a new person would be showing up for work on August 21, 2008. When Mr. Rose arrived at the site of the road being constructed on August 21, 2008, he met Claimant who was waiting for the gate to be unlocked. Mr. Rose unlocked the gate and Claimant and Mr. Rose drove to the designated area where the trees were to be felled.

4. Mr. Rose instructed Claimant on where to cut the trees, identifying the stakes that had been set out to mark the road construction. Claimant testified that he was only instructed to fall trees and was not involved in the road excavation. Claimant testified that it was his understanding that he was on land owned by Respondent 2 at the time he was falling trees.

5. Claimant worked until approximately 4:00 p.m. on August 21, 2008 and testified that when he left, he saw Mr. Pearson who told him he would see him tomorrow. Claimant showed up on August 22, 2008 at 7:15 a.m. and Mr. Rose again showed up and let Claimant inside the gate and onto the property. Claimant and Mr. Rose went up to the same spot and Claimant began felling trees at approximately 7:50 a.m. At approximately 2:00 p.m. while sawing a log that had been felled, the tree bowed and snapped hitting Claimant in the left calf, causing Claimant to fall and twisting his left leg.

6. After Claimant's injury, Claimant was helped to his truck by Mr. Harrington as no other worker was in the vicinity at the time of the injury. Claimant put his truck into first gear and idled down the hill to where Mr. Pearson was working with a group of temporary laborers bundling timber. Claimant reported to Mr. Pearson that he was injured and was going to Vail Valley Medical Center. Claimant proceeded to drive down the hill to his fiancé's employer and awaited for his fiancé to take him to the emergency room (ER). Claimant eventually arrived a the hospital at approximately 5:00 p.m. where he was evaluated and given a prescription for Vicodin.

7. Claimant contacted Mr. Pearson on Saturday, August 23, 2008 and was informed by Mr. Pearson that he would have a meeting with Claimant and Respondent 2 on Monday at 10:00 a.m. Claimant went to the job site on August 23, 2008 and was advised by Mr. Pearson that there was nothing Mr. Pearson could do for Claimant. Claimant sought treatment on his own with Dr. Sterettt and obtained an MRI of his left knee on August 26, 2008 that revealed a rupture of the anterior cruciate ligament ("ACL") and eventually underwent a total ACL reconstruction in September 2008. Claimant eventually returned to work on October 26, 2008 for a new employer.

8. Claimant testified that he worked a total of 15 ½ hours over two days on the job site and had a handshake agreement with Mr. Pearson that he would be paid $35 per hour for the work. The ALJ finds the testimony of Claimant credible.

9. Mr. Pearson testified that he is the owner of Respondent 1 and was hired by Respondent 2 to build a road for a private residence. The road to be constructed was just under 2 miles long. In constructing the road, Respondent 1 needed to remove trees before the road could be constructed. Respondent 1 testified that his business has no employees and only uses subcontractors. Therefore, Respondent 1 does not have workers' compensation insurance.

10. Mr. Pearson testified that he had a conversation with Claimant on August 19, 2008 when Claimant approached Respondent 1 about possible employment. Mr. Pearson testified he told Claimant that he only hired independent contractors and told

Claimant he would have to have his own employee identification number ("EIN"), own equipment and own insurance. It is undisputed that Respondent 1 does not have workers' compensation insurance. Mr. Pearson testified that on August 20, Claimant showed up with his chainsaw, cut proof pants and hardhat ready for work. Mr. Pearson testified that when he asked for Claimant's paperwork, Claimant first said he would go get his paperwork, before eventually admitting he did not have proper paperwork. Mr. Pearson testified that he then contacted Mr. Rose and Mr. Boles (the owner of a separate subcontracting firm working on the site) and told Mr. Rose and Mr. Boles that Claimant was willing to work as a sawyer, but Mr. Rose or Mr. Boles would need to treat Claimant as an employee of their company.

11. Mr. Pearson testified that he saw Claimant at the job site on August 21, 2008 and believed that Claimant was their demonstrating his ability as a sawyer for Mr. Rose or Mr. Boles before they would decide to hire Claimant on a full time basis. Mr. Pearson testified he told Mr. Rose to tell Claimant not to come back to work unless he was contacted by Mr. Rose and told to return. Mr. Pearson did not see the Claimant on August 22, 2008 until Claimant drove up to Mr. Pearson after the injury. When Claimant reported his injury to Mr. Pearson, Mr. Pearson inquired as to whom Claimant was working for at the time he was injured. Mr. Pearson testified Claimant told him Respondent 1 was his employer.

12. After Claimant's injury, Mr. Pearson testified he contacted Mr. Rose to determine if Claimant was an employee of Mr. Rose's company. Respondent 1 called Mr. Rose to testify in this matter. Mr. Rose testified that he was contact by Mr. Pearson in the afternoon or evening of August 20, 2008 and advised that there would be a new person showing up for work on August 21, 2008. Mr. Rose met Claimant at the gate on August 21, 2008 and was not surprised to see Claimant there based upon the telephone conversation with Mr. Pearson the previous evening. Mr. Rose took Claimant up to the area where the trees were being cut down and instructed Claimant on the cutting area, explaining to Claimant not to cut outside the stakes, and how to cut the trees into appropriate dimensions. Mr. Rose had received the information about the appropriate dimensions to cut the trees into from Mr. Boles. Mr. Rose testified Claimant asked Mr. Rose about how he was to get paid on August 21, 2008. Mr. Rose told Claimant to write down his hours and give the hours to Mr. Pearson. Mr. Rose testified that it was his belief when the Claimant arrived at work on August 21, 2008 that Claimant already had work. Mr. Rose testified that Claimant's work was not with his company.

13. Mr. Rose testified that on August 22, 2008 he and his employees left the job site about noon because it was his birthday, so his employees were given the afternoon off. Mr. Rose became aware of Claimant's injury the next day when he was contacted by Mr. Pearson. Mr. Rose was trap shooting with friends when Mr. Pearson called him and asked him to put Claimant on his workers' compensation insurance. Mr. Rose testified that he took a few minutes before calling Mr. Pearson back and providing Mr. Pearson with a made up number representing the cost of putting Claimant on his workers' compensation insurance. Mr. Rose testified he never explored putting the

Claimant on his insurance and simply came up with a large number to reject the request of Mr. Pearson. The ALJ finds the testimony of Mr. Rose credible.

14. Mr. Pearson testified that he would not hire Claimant because Claimant did not have appropriate paperwork to document he was an independent contractor. Mr. Pearson, however, contacted Mr. Rose on August 20, 2008 and advised Mr. Rose that the Claimant would be at the job site on August 21, 2008, evidencing that Mr. Pearson had made arrangements for Claimant to perform work at the job site. Mr. Pearson's testimony that Claimant was to demonstrate his ability as a sawyer for Mr. Rose and Mr. Boles was not supported by any other testimony, particularly that of Mr. Rose who testified at the hearing under subpoena. Moreover, Mr. Pearson's attempts to have Claimant covered under Mr. Rose's workers compensation policy after the accident occurred demonstrates compelling evidence that Mr. Pearson was aware that Claimant was an employee of Respondent 1, and took action to attempt to shift liability for Claimant's injuries to an existing workers' compensation policy. The ALJ finds the testimony of Mr. Pearson to be not credible.

15. Respondent 1 argues that Claimant was not an employee of Respondent 1 because a contract for hire did not exist between Claimant and Respondent 1. The ALJ is not persuaded. The undisputed testimony at the hearing showed that Claimant initiated a conversation with Mr. Pearson on or about August 19, 2008 regarding working as a sawyer on the road construction project. The undisputed testimony also showed that Mr. Pearson contacted Mr. Rose on August 20, 2008 to advise Mr. Rose that there would be a new person coming to the project to perform job duties as a sawyer on August 21, 2008. Mr. Pearson testified that he attempted to retain Claimant as an independent contractor on August 20, 2008, but Claimant did not have the proper paperwork. Mr. Pearson, however, did instruct Claimant to appear at the job site prepared to work on August 21, 2008 as evidenced by Mr. Pearson's August 20, 2008 phone call to Mr. Rose advising Mr. Rose that a new person would be coming to the job site the next morning. The testimony differs as to whether Claimant was instructed to return on August 22, 2008 to continue his employment on the project. Insofar as there is a conflict in the evidence as to whether Claimant was to return on August 22, 2008, the ALJ credits the testimony of the Claimant over the testimony of Mr. Pearson. Mr. Pearson's testimony that he overheard Mr. Rose instruct Claimant not to return unless instructed to do so by Mr. Rose is contradicted by Mr. Rose's testimony and the actions of Mr. Rose in letting Claimant back on the job site on the morning of August 22, 2008. Claimant's testimony that he was hired to work as a sawyer earning $35 per hour was substantiated by Mr. Rose who testified that Claimant was to be paid $35 per hour. As such, the ALJ finds that a contract of employment existed between Claimant and Respondent 1 as of August 22, 2008.

16. Respondent 1 also argues that because Respondent 1 was not in the business of cutting trees. Therefore, Respondent 1 argues that Claimant was the employee of Mr. Boles subcontracting company. The ALJ is not persuaded. Respondent correctly noted that Claimant completed a workers' claim for compensation form listing his "crew boss" as "Kip". "Kip" is purportedly an employee of Mr. Boles

subcontracting firm. Respondent 1 also correctly pointed out that Claimant was instructed to cut the timber into specific lengths by Mr. Rose upon arriving at the work site on August 21, 2008. The credible evidence at the hearing demonstrated that Claimant's conversations with regard to employment prior to August 21, 2008 were all with Mr. Pearson. There was no credible evidence that Mr. Pearson has the ability or authority to hire employees for Mr. Boles subcontracting business. Therefore, the credible evidence establishes that Claimant was an employee of Mr. Pearson.

17. Respondent 1 did not argue at hearing that Claimant was an independent subcontractor pursuant to Section 8-40-202(2)(b). However, the issue was raised by Respondent 2 and therefore, will be addressed by the ALJ. In this case, the evidence did not show that Claimant was not required to work exclusively for Respondent 1. No quality standards were set forth for Claimant, except that he was instructed to cut the trees into specific lengths. The ALJ interprets this evidence to show that Claimant was instructed as to how to perform his work. Claimant was paid at an hourly rate as opposed to a contract rate. Respondent 1 was capable of terminating the work of Claimant at any time, as evidenced by Mr. Pearson's testimony that the Claimant was instructed not to show back up on his second day (even though the evidence of Claimant being told not to show up on August 22 is found to be not credible, it demonstrates that Mr. Pearson believed he had the authority to terminate Claimant's work at the job site). The ALJ finds that Respondent 1 did not provide Claimant with training. Claimant brought his own chain saw and safety equipment with the exception of a hard hat on the first day. However, equipment was also offered to Claimant at the job site. Claimant was not required to use his own equipment and was provided with a hard hat on his first day on the job. Respondent 1 did not dictate Claimant's work schedule other that to instruct Claimant to show up in the morning. The ALJ notes that Claimant was allowed to leave early if he so desired. Claimant was to be paid personally instead of by check payable to the trade or business name. Even though Claimant was not paid due to his short tenure, there was no credible testimony presented at the hearing that the Claimant had any trade or business name that he was to be paid under. Lastly, the ALJ finds that the business operations were not combined, insofar as Claimant did not have a "business operation" with the exception of performing his own work. Insofar as the Claimant's "business operation" was performing sawyer work on his own, this "business operation" was combined with the business operation of Respondent 1, as Respondent 1's business operation included road construction. The ALJ finds that no document exists establishing the contract for hire. The ALJ further finds that the oral contract for hire establishes the criteria of subsections A, E, and G of Section 8-40-202(2)(b)(II), but fails to establish criteria for B, C, D, F, H and I.

18. Respondent 2 argues that he is immune from being held to be Claimant's statutory employer by virtue of the residential exemption. Respondent 2 is a physician who maintains his primary residence and professional practice in Tennessee. Respondent 2 owns the property that consists of approximately 90 acres in Eagle County. The property is completely surrounded by National Forest and does not have road access. Respondent 2 obtained an easement from the National Forest on July 18, 2007 to allow for construction of a private road through the National Forest to allow

access to the property. Respondent 2 contracted with Respondent 1 to construct the road up to and across his property. Respondent 2 testified that his property is zoned to allow for construction of up to two residences (one house on each 35 acres), as well as two ancillary buildings.

19. Respondent 2 contracted with an architect in Tennessee on November 17, 2007 for a project identified in the contract as Respondent 2's Home, "Eagle County, Colorado". The architecture plans establish a design of a house with the plan to begin construction in June, 2008. Respondent 2 obtained a residential well permit on November 2007 to provide water to the residence. The Permit Application indicates that the well is intended for "ordinary household use in 1 to 3 single family dwellings" and irrigation. Respondent 2 contracted with LKP Engineering for soil testing to be performed on the proposed house site on October 8, 2008. Respondent 2 made an application to Xcel Energy for electric service for a single residential home on the property on April 1, 2008. Respondent 2 testified that he initially hoped to begin construction in June, 2008 but has not been able to begin construction because the road access to the property is not completed. Respondent 2 now hopes to have construction completed by 2010. The ALJ finds the testimony of Respondent 2 credible.

20. The ALJ finds that the purpose of the construction of the road was as a driveway to access the property for a residential home for Respondent 2. While construction on the residential home had not yet begun, completion of the access to the property needed to be completed prior to construction of the home to begin, and the driveway is an extension of the home insofar as the home can not exist without the driveway. The driveway was being constructed pursuant to a legal easement Respondent 2 had obtained from the National Forest and therefore, the easement provides Respondent 2 with property interests in the easement. The ALJ finds Respondent 2 credible insofar as Respondent 2 testified that he intended to build a residential home that would be considered a qualified residence pursuant to IRC 163(h)(4)(A).

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. Likewise, Respondents have the burden of proving by a preponderance of the evidence any affirmative defenses properly raised in response to an application for hearing. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. Section 8-40-202(1)(b) defines "employee" as follows:

> Every person in the service of any person, association of persons, firm, or private corporation, including any public service corporation, personal representative, assignee, trustee, or receiver, under any contract of hire, express or implied, including aliens and also including minors, whether lawfully or unlawfully employed, who for the purpose of articles 40 to 47 of this title are considered the same and have the same power of contracting with respect to their employment as adult employees, but not including any persons who are expressly excluded from articles 40 to 47 of this title or whose employment is but casual and not in the usual course of the trade, business, profession, or occupation of the employer. The following persons shall also be deemed employees and entitled to benefits at the maximum rate provided by said articles, and, in the event of injury or death, their dependents shall likewise be entitled to such maximum benefits, if and when the association, team, group, or organization to which they belong has elected to become subject to articles 40 to 47 of this title and has insured its liability under said articles: All members of privately organized volunteer fire departments, volunteer rescue teams or groups, volunteer disaster teams, volunteer ambulance teams or groups, and volunteer search teams and organizations while performing their respective duties as members of such privately organized volunteer fire departments, volunteer rescue teams or groups, volunteer

> disaster teams, volunteer ambulance teams or groups, and volunteer search teams and organizations and while engaged in organized drills, practice, or training necessary or proper for the performance or their respective duties.

5. As found, Claimant was operating under a contract of hire with Respondent 1 at the time of his industrial injury on August 22, 2008. As found, Claimant's conversations regarding his work prior to beginning employment on August 21, 2008 were with Mr. Pearson, owner of Respondent 1. The ALJ finds no credible evidence that Claimant entered into a contract for hire with any other subcontractor on the job site after August 20, 2008.

6. Section 8-40-202(2)(a), *supra,* provides that an individual performing services for another is deemed to be an employee:

> [U]nless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.

7. Section 8-40-202(2)(b)(II), *supra*, then sets forth nine factors to balance in determining if claimant is an employee or an independent contractor. *See Carpet Exchange of Denver, Inc. v. Industrial Claim Appeals Office*, 859 P.2d 278 (Colo. App. 1993). A document may satisfy the requirement to prove independence, but a document is not required. Section 8-40-202(2)(b)(III), *supra,* provides that the existence of any one of those factors is not conclusive evidence that the individual is an employee. Consequently, the statute does not require satisfaction of all nine criteria in Section 8-40-202(2)(b)(II) in order to prove by a preponderance of the evidence that the individual is not a employee. *Nelson v. David Hachenberger*, W.C. No. 4-313-962 (Industrial Claim Appeals Office, March 9, 1998). As found, Respondents have only established 3 of the balancing factors in section 8-40-202(2)(b)(II). As found, Respondents have failed to establish that Claimant was free from direction and control at the time of his industrial injury on August 22, 2008. As found, Claimant is an employee of Respondent 1 and suffered an industrial injury arising out of his employment on August 22, 2008.

8. Section 8-41-402(1) provides in pertinent part:

> Every person, company, or corporation owning any real property or improvements thereon and contracting out any work done on and to said property to any contractor, subcontractor, or person who hires or uses employees in the doing of such work shall be deemed to be an employer under the terms of articles 40 to 47 of this title. Every such contractor, subcontractor, or person, as well as such contractor's, subcontractor's, and person's employees, shall be

> deemed to be an employee, and such employer shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said contractor, subcontractor, or person and said employees or employees' dependents and, before commencing said work, shall insure and keep insured all liability as provided in said articles. Such employer shall be entitled to recover the cost of such insurance from said contractor, subcontractor, or person and may withhold and deduct the same from the contract price or any royalties or other money due, owing, or to become due to said contractor, subcontractor, or person. Articles 40 to 47 of this title shall not apply to the owner or occupant, or both, of residential real property which meets the definition of a "qualified residence" under section 163 (h) (4) (A) of the federal "Internal Revenue Code of 1986", as amended, who contracts out any work done to the property, unless the person performing the work is otherwise an employee of the owner or occupant, or both, of the property.

9. Internal Revenue Code ("IRC") § 163(h)(4)(A) defines a "qualified residence" as follows:

> (I) the principal residence (within the meaning of section 121) of the taxpayer, and
> (II) 1 other residence of the taxpayer which is selected by the taxpayer for purposes of this subsection for the taxable year and which is used by the taxpayer as a residence (within the meaning of section 280A(d)(1)).

10. As an exception to the general rule prohibiting non-corporate taxpayers from deducting personal interest, I.R.C. § 163(h) allows the deduction of "qualified residence interest" that is paid on either an acquisition or home equity indebtedness for a "qualified residence." *See Organ v. Jorgensen*, 888 P.2d 336 (Colo. App. 1994). The enforcement regulations under the Internal Revenue Code allow a taxpayer to treat a home under construction as a qualified residence for a period of up to 24 months, but only if the residence becomes a qualified residence, without regard to that regulatory section, as of the time that the residence is ready for occupancy. *Id., citing* Treas. Reg. § 4.463-10 T(p)(5).

11. In *Organ v. Jorgensen, supra.*, the court of appeals rejected the contention that Section 8-41-402(1) would exclude property owners who had not taken occupancy by the date of injury or hearing. The court held that the General Assembly intended to provide the non-occupant residential real property owner of a house under construction with the same retroactive protection from liability as provided by the Code's regulations.

12. As found, Respondent 2 is the owner of real property who contracted out work to be done on said property. As found, the property meets the definition of a "qualified residence" insofar as Respondent 2 is in the process of building a home on

said property. The ALJ credits the testimony of Respondent 2 along with evidence of the steps taken by Respondent 2 in building the house. The ALJ notes that the vast majority of the steps taken by Respondent 2, including obtaining the well permit, and retaining an architect were performed prior to Claimant's injury. As such, the ALJ credits the testimony of Respondent 2 that the road construction across the easement from the National Forest to Respondent 2's property is part of Respondent 2's construction of the "qualified residence" on the property.

13. Claimant argues that Respondent 2 cannot claim the qualified residence exemption because no structure is on the property. The ALJ is not persuaded. The purpose of the construction of the road across the easement is for building the residence. Moreover, nothing in Section 8-41-402(1) requires that the work being performed be done to the "qualified residence." *See Brown v. Muto*, 943 P.2d 38 (Colo. App. 1996). Claimant also argues that Respondent 2 cannot claim the qualified residence exception because no evidence of a building permit was presented at the hearing, and therefore, no residence could be presently built. As mentioned above, the ALJ finds the testimony of Respondent 2 credible that the intentions of Respondent 2 is to build a residence on the property in question. Credible evidence was presented of these intentions at the hearing including significant measures taken by Respondent 2 to lay the ground work for the construction of a residence, including obtaining appropriate permits, obtaining an easement to allow for access to the property, retaining an architect to design the residence, soil and foundation testing for building of the residence and obtaining an application for electricity to be provided to the residence. The ALJ notes that some of these measures were taken prior to the Claimant's injury and additional measures were taken after Claimant's injury. The ALJ finds the testimony of Respondent 2 as to his intentions with regard to the property in question credible as it is supported by the documentation needed by Respondent 2 to build a qualified residence. As found, Claimant's claim that he was a statutory employee of Respondent 2 is denied and dismissed.

14. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-42-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once Respondents have exercised their right to select the treating physician, Claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). The right to select the treating physician, however, passes to Claimant where the employer fails to designate a physician willing to treat Claimant in the first instance. *See Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Section 8-43-404(5), C.R.S. now requires the employer to provide an injured employee with a list of at least two physicians or medical providers willing to treat Claimant.

15. As found, Claimant reported his injury to his employer on August 22, 2008. Respondent 1 did not refer Claimant for treatment at that time, or any other time.

Therefore, the right to select the physician to treat Claimant's injury passed to Claimant. Claimant selected Dr. Sterettt. The ALJ finds the injury of August 22, 2008 resulted in Claimant needing medical treatment from the emergency room and Dr. Sterettt. The ALJ finds that the medical treatment from the ER and Dr. Sterettt is reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury.

14. 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 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).

15. As found, Claimant suffered a compensable injury while employed with Respondent 1 arising out of and in the course of his employment with Respondent 1 on August 22, 2008. Claimant's injury resulted in Claimant being temporarily and totally disabled from employment from August 23, 2008 through October 25, 2008.

16. Section 8-43-408(1), C.R.S. states in pertinent part:

> In any case where the employer is subject to the provisions of articles 40 to 47 of this title and at the time of an injury has not complied with the insurance provisions of said articles, or has allowed the required insurance to terminate, or has not effected a renewal thereof, the employee, if injured, or, if killed, the employee's dependents may claim the compensation and benefits provided in said articles, and in any such case the amounts of compensation or benefits provided in said articles shall be increased fifty percent.

17. As found, Respondent 1 was Claimant's employer and was not insured for workers' compensation benefits at the time of Claimant's injury. As such, the penalty provisions of Section 8-43-408(1), C.R.S. are appropriate in this case. Claimant's compensation shall be increased by fifty percent (50%).

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury while employed with Respondent 1 on August 22, 2008.

2. Respondent 1 shall pay for Claimant's reasonable, necessary and related medical expenses from the ER and Dr. Sterettt.

3. Respondent 1 shall pay Claimant TTD benefits for the period of August 23, 2008 through October 25, 2008.

4. Claimant's disability benefits shall be increased by fifty percent (50%) pursuant to Section 8-43-408, C.R.S. for Respondent 1's failure to secure workers' compensation insurance.

5. Claimant's claim for benefits from Respondent 2 is denied and dismissed.

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

All matters not determined herein are reserved for future determination.

DATED:

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-771-717

ISSUES

- Did Claimant prove by a preponderance of the evidence that she suffered a compensable injury arising out of and in the course of her employment with employer?

- Did Claimant prove by a preponderance of the evidence that she is entitled to temporary disability benefits for the period of November 26 through November 30, 2007 and at what rate did Claimant prove for her average weekly wage?

- Did Claimant prove that Respondent-employer is subject to penalties for failing to maintain workers' compensation insurance pursuant to Sections 8-43-408(1) and 8-44-101, C.R.S. 2007?

FINDINGS OF FACT

1. Claimant testified that on November 26, 2007 she was employed as an assistant to Ms. Bermudez, the owner/operator of Nellie's Child Care. Claimant was paid $10 per hour and was guaranteed forty (40) hours per week. Claimant routinely would work between forty-four (44) and forty-six (46) hours per week. Claimant was not paid time and a half for overtime. Claimant normally worked from 7:15 a.m. until 3:15 p.m. each day but would work until 5:15 p.m. on two days per week.

2. On November 26, 2007, Claimant was at work when Ms. Bermudez asked Claimant to run errands for her, including taking Ms. Bermudez' wedding dress to the dry cleaners and picking up a soft drink for Ms. Bermudez'. Claimant testified that it was not unusual for her employer to ask her to run errands during business hours and that such work was a part of her employment functions as an assistant to Ms. Bermudez. After dropping off Ms. Bermudez' wedding dress, Claimant picked up a soft drink and returned to her employer's place of business. While walking up the walk to the building where employer's business was located, Claimant slipped on ice and fell to the ground injuring her left arm and wrist.

3. Claimant proceeded to her employer's place of business, provided her employer with the slip from the dry cleaner, her drink and her change, and told her employer that she had slipped and fallen on the employer's sidewalk. Claimant's employer directed Claimant to the emergency room ("ER") for treatment.

4. Claimant was evaluated at the ER and underwent x-rays of the left wrist that revealed a volar Barton's fracture. Claimant was placed in a sugar tong splint with a thumb spica extension and released. Claimant returned to her employer and inquired about workers' compensation insurance. Ms. Bermudez advised Claimant that she did not have workers' compensation insurance and would pay for her medical expenses personally. Ms. Bermudez did not refer Claimant to a particular physician for treatment.

5. Claimant was evaluated by her primary care physician, Dr. Schoo, on November 28, 2007. Dr. Schoo diagnosed Claimant with a fracture of her radius and ulna and recommended treatment with closed immobilization. Claimant continued to treat with Dr. Schoo's office on December 3, 2007, December 10, 2007, December 14, 2007, December 19, 2007, January 9, 2008 and February 6, 2008. The ALJ finds that all visits with Dr. Schoo's office are reasonable, necessary and related to Claimant's November 26, 2007 wrist injury. When Claimant was last evaluated by Dr. Schoo on February 6, 2008, Dr. Schoo noted that Claimant's arm appeared healed and Claimant reported doing well.

6. Claimant testified that she was off of work from November 26, 2007 until November 30, 2007. Claimant also testified that she missed approximately three days after November 30, 2007 to attend doctor appointments and was not paid for her time by employer for attending the doctor appointments. The ALJ finds Claimant's testimony regarding the accident and her lost time credible.

7. The ALJ finds Claimant was in the course and scope of her employment at the time of the industrial injury. The ALJ finds that Claimant timely reported her injury to her employer and was not referred for medical treatment. The employer's right to select the authorized treating physician was therefore waived. Claimant has selected Dr. Schoo to be the authorized treating physician. The ALJ finds that employer advised Claimant that workers' compensation insurance was not in effect for the employer's business on the date of injury. The ALJ finds the Claimant's testimony in this regard credible.

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., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

2. Claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), supra; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of " requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

3. In general, claimants injured while going to or coming from work fail to qualify for recovery because such travel is not considered performance of services arising out of and in the course of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 864 (Colo. 1999). Our courts recognize exceptions to this general rule where circumstances create a causal connection between the employment and an injury occurring under special circumstances while an employee is going to or coming from work, such as:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

Madden v. Mountain West Fabricators, *id.* Travel may be contemplated by the employment contract when the employee's travel is at the employer's express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work. *See Electric Mutual Liability Insurance Co. v. Industrial Commission,* 154 Colo. 491, 391 P.2d 677 (1964).

4. In this case, the ALJ finds that Claimant's travel was at the express request of Claimant's employer, and therefore, the travel in this case was contemplated by the employment contract. The ALJ also finds that Claimant's injury occurred during working hours and Claimant slipped an fell on the employer's premises. As found, Claimant has sustained her burden of proving an injury arising out of an in the course of her employment with employer.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-42-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once Respondents have exercised their right to select the treating physician, Claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). The right to select the treating physician, however, passes to Claimant where the employer fails to designate a physician willing to treat Claimant in the first instance. *See Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Section 8-43-404(5), C.R.S. now requires the employer to provide an injured employee with a list of at least two physicians or medical providers willing to treat Claimant.

6. As found, Claimant's treatment at the emergency room on November 26, 2007 is deemed compensable emergency treatment and employer is responsible for the cost of Claimant's treatment, subject to the medical fee schedule. As found, Claimant selected Dr. Schoo as her treating physician after Claimant was not timely referred for medical treatment by employer. The treatment from Dr. Schoo is found to be

reasonable, necessary and related to Claimant's November 26, 2007 workers' compensation injury.

7. 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), C.R.S., requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. 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).

8. As found, Claimant was off of work from November 26 until November 30, 2007. Claimant is entitled to four days of temporary total disability benefits. As found, Claimant worked at least 44 hours per week and was paid a rate of $10 per hour. The ALJ finds that Claimant's average weekly wage is $440 per week.

9. As found, Respondent-employer did not have workers' compensation insurance in effect at the time of the injury in violation of Section 8-44-101, C.R.S. 2007. Section 8-43-408(1), C.R.S. 2007 states in pertinent part:

> In any case where the employer is subject to the provisions of articles 40 to 47 of this title and at the time of an injury has not complied with the insurance provisions of said articles, or has allowed the required insurance to terminate, or has not effected a renewal thereof, the employee, if injured, or, if killed, the employee's dependents may claim the compensation and benefits provided in said articles, and in any such case the amounts of compensation or benefits provided in said articles shall be increased fifty percent.

10. As found, Respondent-employer's failure to maintain workers' compensation insurance at the time of the injury results in an increase of Claimant's compensation or benefits by fifty percent.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $440 per week.

2. Respondent-employer shall pay for the reasonable, necessary and related medical treatment for Claimant's November 26, 2007 injury.

3. Respondent-employer shall pay Claimant temporary total disability benefits for the period of November 26, 2007 through November 30, 2007, a period of 4/7 weeks.

4. In lieu of payment of the above compensation and benefits to the claimant, the Respondent-Employer shall:

a. Deposit the sum of $2,635.72 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; or

b. File a bond in the sum of $2.635.72 with the Division of Workers' Compensation within ten (10) days of the date of this order:
(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or
(2) Issued by a surety company authorized to do business in Colorado.
The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the Respondent-Employer shall notify the Division of Workers' Compensation of payments made pursuant to this order.

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

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

All matters not determined herein are reserved for future determination.

DATED: June 3, 2009

Keith E. Mottram
Administrative Law Judge

ISSUES

The following issues were presented for consideration at hearing:

1. Whether Claimant suffered a compensable injury; and
2. Whether Claimant was disabled from her usual employment and therefore entitled temporary total disability benefits.

The parties stipulated, prior to hearing, that Claimant's average weekly wage was $237.19.

FINDINGS OF FACT

Having considered the evidence presented at hearing and the parties' post hearing position statement, the following Findings of Fact are entered.

1. The Employer is a grocery store chain. Claimant worked for the Employer as a courtesy clerk on October 4, 2008. Claimant has been so employed since November 1999. Claimant earned a high school diploma, an associate's degree at college, and she attended Picken business school. Claimant earned an associate's degree over a five-year period. Claimant has difficulty learning. She requires extra time and assistance. Claimant has never had a driver's license. She lives with her mother and is driven places by her mother or takes public transportation.

2. On October 4, 2008, Claimant was performing her usual duties, sacking groceries, bringing in carts from the parking lot, and putting away merchandise on the store shelves. She worked during her shift with cashier, Denise Handy. Claimant finished her regular duties and took her regular break.

3. While in the break room, Claimant sat at a table and started eating candy from a bag on the table. As Claimant was eating the candy, the store director, Vince Geist (Geist), also came into the break room.

4. Geist confronted Claimant about eating food without a store receipt. Claimant protested that the bag was open on the table. It is a store policy that employees may not consume store merchandise without possessing a store receipt for the merchandise. Claimant was aware of this policy.

5. Geist demanded the bag of candy. Claimant testified that she turned over the bag of candy to Geist and did not remember anything further being said, except that she told Geist that the bag had been open on the break room table.

6. Geist credibly testified that Claimant, after being told to turn over the bag of candy, then unwrapped two more pieces of candy and placed the candy in her mouth. Geist further credibly testified that Claimant handed to him both the empty candy wrappers and the bag of candy. Geist suspended Claimant for her actions of eating food sold at the store without a receipt and for handing him the bag of candy and used candy wrappers only after eating more candy. Geist suspended Claimant, pending review by the Employer's Human Relations Department. Claimant immediately left the store.

7. Geist had previous opportunities to interact with Claimant. Geist had supervised Claimant for three years. He testified that in the past, Claimant was always very vocal about anything that concerned her. Geist testified that he had "written up" Claimant for performance issues in the past and that she was never shy about protesting those write ups. Claimant was written up on one occasion for calling Geist a "jack ass" in front of customers. Claimant denied that she made this remark in front of customers. Claimant testified that Geist frightened her and she was hesitant about speaking to him. Geist's testimony was found to be more credible and persuasive than Claimant's testimony.

8. Claimant testified that on October 4, 2008 she felt pain and a bulge in her abdomen. Claimant had a history of hernias, having had two prior hernia surgeries. Previously, Claimant had a right inguinal hernia repair surgery. On October 4, 2008, Claimant recognized the bulge as a hernia. Claimant did not report an injury to anyone at the store on the date of the alleged occurrence, October 4, 2008. Claimant testified that she thought October 4, 2008 was remarkable because she could no longer push in the bulge in her abdomen caused by the hernia.

9. The following day, October 5, was a Sunday. Claimant came into the store to speak to her union steward.

10. On October 5, 2008, Claimant also went to the emergency room. According to the emergency room records, Claimant gave a history, the day after the alleged incident, of abdominal pain for several weeks, which was still present. Claimant reported at the emergency room that the abdominal pain had a "gradual onset and has been intermittent." Claimant described sharp pain located in the left lower quadrant. The records contain a statement, attributed to the Claimant, that over the last "few weeks" when Claimant was pushing carts or lifting boxes, she had a "bulge" and that she had "similar symptoms previously."

11. Claimant testified at hearing that, on October 4, 2008, she was loading groceries into a sack, specifically, heavy SOBE bottles, when she felt a tear in her lower

quadrant. She claimed that it was a specific incident and she was aware of it immediately. This is contrary to Claimant's report at the emergency room.

12. Denise Handy (Handy) was the grocery checker Claimant was working with on October 4, 2008. Handy testified at hearing that she worked with Claimant for several years and was familiar with her work habits. She testified that she never observed Claimant exhibit pain behaviors while working with her. However, Handy could not specifically recall the date of the alleged injury. Handy further testified that Claimant was never hesitant to complain about anything during the performance of her job. Handy knew nothing about an alleged hernia or Claimant suffering any pain until she heard that a claim had been filed. Handy's testimony was credible and persuasive.

13. On October 5, 2008, at the Medical Center of Aurora emergency room, Claimant was placed on work restrictions to October 12, 2008 of no bending or stooping and no prolonged sitting or lifting in excess of 10 pounds. Claimant was released from the emergency department in stable condition and instructed to see her private physician if she felt sick again.

14. On October 5, 2008, Claimant also went to Piney Creek Medical where her primary care physician diagnosed a left side inguinal hernia. Claimant reported to this physician that she experienced pain while sacking groceries and placing groceries into various customers' cart. Claimant reported that her inguinal hernia was work related.

15. In November 2006, Claimant had already had two surgeries for inguinal hernias. Claimant was seen by Dr. Asif Husain, M.D. based on a referral by Dr. Robert Stewart, M.D. Claimant complained of four out of ten pain in the right lower quadrant of her abdomen. Claimant reported a gradual onset of abdominal pain, which was intermittent. The doctor's report reflected that the intermittent pattern had been occurring over a ten-year period. During testimony at hearing, Claimant reviewed this medical record and admitted that her prior hernia condition was unrelated to any employment activities.

16. On Monday, October 6, 2008, Claimant was contacted by Geist and directed to meet with him at the store to talk about the candy incident. Claimant came to Geist's office with her union steward. They discussed the fact that consuming products without a receipt was a serious offense and could result in termination. Geist resolved that Claimant could return to work.

17. At the meeting with Geist on October 6th, Claimant reported the workers' compensation claim. Claimant handed Geist the emergency room records from October 5th. Geist asked Claimant why it took two days to report the accident, when she was supposed to report all accidents immediately. Claimant told Geist that she did not report the hernia immediately because, initially, she was not sure what caused her abdomen pain. Geist reported the claim to the Employer's third-party administrator and referred Claimant to an authorized provider of medical care.

18. Claimant was on restrictions and did not return to work from October 16, 2008 to December 1, 2008. In early November 2008, Claimant had an unrelated health problem, pneumonia, according to her testimony. She was hospitalized. During the time period she was off work for the left inguinal hernia and subsequent surgery, she was also off work for pneumonia. Claimant applied for and received short-term disability benefits. Those continued until she returned to work.

19. Records reflect that Claimant was placed at maximum medical improvement (MMI) on March 10, 2009. Claimant was released to full duties, without restrictions or permanent impairment.

20. In this case, Claimant failed to sustain her burden of proof. Claimant had a duty to tip the scale in her favor in order to establish that it is more probably true than not that her inguinal hernia developed on October 4, 2008 as a result of her work duties. Claimant's testimony for the most part was credible and so was the testimony of Respondents' witnesses. However, Claimant failed to tip the scale in her favor. It is just as likely that Claimant's inguinal hernia on the left developed as the hernias on the right did, unrelated to an industrial cause. It is further likely that Claimant was angered by Geist's admonishment on October 4, 2008 because she was eating food in the break room without a receipt, as evidenced by her insubordinate behavior when she continued eating the candy after being told to give the bag of candy to Geist. Claimant may have decide to raise the issue of the alleged work injury, after Geist suspended her and called her into a meeting to advise her of his decision with regard to further discipline.

21. Claimant wants the fact finder to conclude that her varied reports to medical professionals are explained by her confusion about the cause of the hernia and perhaps by her mental status, which was described as slow. However, this perception of Claimant was as likely as the Respondents' perception, which cast Claimant as a verbally abrasive individual who had no hesitation to approach Geist and forcefully make her case.

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" 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. 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. Claimant shoulders the burden of proving by a preponderance of the evidence that his/her ... arose out of the course and scope of his employment with Respondent-Employer. Section 8-41-301(1), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Claimant must prove entitlement to benefits by a preponderance of the evidence. 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).

4. In this case, Claimant failed to sustain her burden of proof. Claimant had a duty to tip the scale in her favor in order to establish that it is more probably true than not that her inguinal hernia developed on October 4, 2008 as a result of her work duties. Claimant's testimony for the most part was credible and so was the testimony of Respondents' witnesses. However, Claimant failed to tip the scale in her favor. It is just as likely that Claimant's inguinal hernia on the left developed as the hernias on the right did, unrelated to an industrial cause. It is further likely that Claimant was angered by Geist's admonishment on October 4, 2008 because she was eating food in the break room without a receipt, as evidenced by her insubordinate behavior when she continued eating the candy after being told to give the bag of candy to Geist. Claimant may have decide to raise the issue of the alleged work injury, after Geist suspended her and called her into a meeting to advise her of his decision with regard to further discipline.

5. Claimant wants it to be believed that her varied reports to medical professionals is explained by her confusion about the cause of the hernia and perhaps by her mental status, which was described as slow. However, this perception of Claimant was as likely as the Respondents, which cast Claimant as a verbally abrasive individual who had no hesitation to approach Geist and forcefully make her case.

6. Under these circumstances, considering the totality of the evidence, it is concluded that Claimant failed to sustain her burden of proof and it is concluded that her claim for workers' compensation benefits is denied and dismissed.

ORDER

It is therefore ordered that:

Claimant's claim for workers' compensation benefits for an alleged injury on October 4, 2008 is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED: June 17, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-773-686

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 27, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 5/27/09, Courtroom 1, beginning at 8:32 AM, and ending at 11:56 AM).

At the conclusion of the hearing, the ALJ established a briefing schedule, briefs to be filed electronically: Claimant's opening brief to be filed within 5 working days; Respondents' answer brief to be filed within 5 working days of the opening brief; and, Claimant's reply brief to be filed within 3 working days of the answer brief. Claimant's opening brief was filed electronically with the Office of Administrative Courts (OAC) on June 3, 2009, allegedly mailed to Respondents' counsel on the same date with no signed certificate of mailing and received by Respondents' counsel on June 8, 2009. Respondents' answer brief was filed electronically on June 16, 2009. No timely reply brief was filed and the matter was deemed submitted for decision on June 22, 2009.

ISSUES

The issues to be determined by this decision concern compensability; medical benefits; average weekly wage (AWW); voluntary resignation; temporary total disability (TTD) benefits; whether the Employer is entitled to penalties for Claimant's late reporting of his alleged injury; whether the Claimant is entitled to penalties for Respondents' alleged late filing of the First Report of Injury ("First Report"); and, authorized treating physician (ATP).

FINDINGS OF FACT

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

1. The Employer hired the Claimant as a laborer by on July 16, 2008. The contract of hire provided that Claimant was to be paid $18.00 an hour. Claimant

testified he was to be paid $18.00 an hour as told to him by to his supervisor, Bob Butler. Claimant signed and acknowledged on the new hire form that he was being hired as a seasonal employee and that there was no guarantee the position would become permanent. Claimant acknowledged that he was aware that company policy provided that all on-the-job injuries were to be reported to the supervisor within 24-hours.

2. Claimant indicated on the emergency contact form at his time of hire that he had a previous herniated disc in the lumbar section of his lower back, but he did not indicate that he was on any work-restrictions.

3. Claimant alleges that he was moving a log on July 17, 2008 and he injured his back while working for the Employer. Claimant's medical records from Granby Medical Center note that Claimant stated he was lifting some logs. Claimant's medical records from Alpine Physical Therapy state that Claimant was pushing a log.

4. According to Claimant, upon arrival to the jobsite, he was told by his supervisor Bob Butler that they were short on laborers and that Claimant's job duties that day were to deconstruct a fence. Claimant was given a sledgehammer and a sawzall and told to drive to the fence that they were to deconstruct. At this time, Claimant reminded Butler of his injured back and Butler responded by saying that the fence logs were dried out and weighed less than 20 pounds and if Claimant wasn't going to do it he would find someone that would and it just needed to get done and then Claimant could operate machinery. Claimant drove himself to the fence and was joined by a fellow employee named Nate, who arrived at the fence operating a skidsteer. Butler also said when he arrived at the fence deconstruction job site, Nate and Claimant had not begun to deconstruct the fence. According to Claimant, he was lifting a log and felt a pop in his back. Claimant went to Butler and told him that he had injured his back and needed to seek medical treatment.

5. Jerry Steves was working with the Claimant on July 17, 2008. Steves has no interest in the outcome of this case, his testimony was consistent, straight-forward, reasonable and credible. Steves testified that he and the Claimant arrived to work around 6:45 AM. Steves stated that they had a meeting with their supervisor, Bob Butler, and then proceeded to the job-site. Steves testified that they arrived at the job-site around 7:15AM, and stood around waiting to begin work. Steves further testified that Claimant did not lift anything or do any sort of labor while they were standing around. Steves testified that the skid steer, which another employee was operating, does most of the physical work and that Claimant had not started doing anything. Steves also testified he did not see Claimant's girlfriend, Sarah Brinkman, on the job-site or any female on the job-site on the morning of July 17, 2008. Steves has not worked for the Employer since February 15, 2009., which enhances Steves' credibility.

6. At hearing, Employer's administrative assistant Susan Koeneke testified that Claimant came into her office on approximately July 21, 2008 and notified her that he had sustained a lower back injury while working for Employer on July 17, 2008 and that he was in need of additional medical care. At the time, Koeneke did not take any

actions in response to Claimant's reporting of his work related injury. She stated that she did not believe that Claimant was injured and therefore did not file an Employer's First Report of Injury or report Claimant's injury to the Employer's workers' compensation insurance company. In fact, an Employer's First Report of Injury was not filed until December 4, 2009.

7. Claimant voluntarily resigned from his position with the Employer on the morning of July 17, 2008. Claimant's time card for July 17, 2008 indicates he clocked out at 8:15 AM. The Employer's office assistant, Susan Koeneke, testified that Claimant did not mention anything to her that he had allegedly hurt his back at the time he quit. There is no persuasive evidenbce that Claimant was pressured into resigning.

8. Claimant indicated on his Workers' Claim Compensation that his alleged injury occurred at 8:45 AM. The medical records from Granby Medical Center indicate that Claimant stated that he was lifting some logs and that the alleged injury occurred around 9:00 AM. Although this is a minor discrepancy, when added to the other discrepancies in Claimant's version of the events of July 17, a significant question concerning Claimant's overall credibility is posited for resolution. The notes from Granby Medical Center also indicate that Claimant went home first and took Flexeril and three Tylenol before arriving at the medical center. Claimant stated in his signed statement, dated July 20, 2008, that the alleged injury occurred at 9:10 AM. Claimant also testified that he did not go home first, but drove himself directly to Granby Medical Center which he testified was fifteen minutes away from the job-site. The timing of Claimant's alleged activities on the morning of July 17 simply does not add up and this is one more factor that significantly detracts from the Claimant's credibility.

9. Claimant's time card for July 17, 2008 indicates that Claimant clocked in at 6:45 AM. Claimant testified that he arrived to work at 7:00 AM to meet Bob Butler and then went and clocked in at the office for work.

10. Claimant's girlfriend, Sarah Brinkman, testified that she did not see Claimant injure himself when she states she was at the job-site. Brinkman also testified that she mailed Claimant's Workers' Claim for Compensation on July 29, 2008 because that is when she stamped the paperwork and wanted it for her personal file.

11. Prior to July 17, 2008, the Claimant treated at Granby Medical Center on June 11, 2008 for a non work-related back injury. Claimant stated he was attempting to push a tree into a large hole at home when he had a sudden onset of pain in the lower lumbar spine. Claimant stated that he felt a pop in the area on June 11, with the onset of pain afterwards. Claimant testified he was receiving physical therapy, had seen a spine specialist, and was taking pain medications as a result of the back injury that occurred at home on June 11, 2008. He also testified he was scheduled to continue with physical therapy past July 17, 2008 as a result of the injury at home on June 11, 2008.

12. Claimant treated at Granby Medical Center again on June 16, 2008 for low back pain. He stated that over the weekend he did several things to re-injure his back, including helping deliver puppies.

13. An MRI (magnetic resonance imaging) taken of Claimant's back on June 17, 2008 indicated a small L5-S1 central disk protrusion with no central canal stenosis or significant neural foraminal narrowing. There was mild diffuse L4-L5 disk bulging with no canal stenosis of significant neural foraminal narrowing.

14. Claimant returned to Granby Medical Center on June 24, 2008, complaining of acute low back pain with radiculopathy. Claimant stated he was lying on the couch and simply went to stand up and heard another pop with recurrence of his back pain and right leg radiculopathy.

15. Claimant testified that he was receiving physical therapy and pain medications as a result of his prior back injury on June 11, 2008, and he admits he has prior back problems. Claimant was also taking the sleep aid medication, Ambien, prior to the June 11, 2008 injury, according to the medical record dated February 6, 2008 from Timberline Family Practice.

16. Claimant treated at Alpine Physical Therapy on August 29, 2008 and stated that he needed to be loosened up before he went hunting. Claimant treated at this same facility on November 26, 2008 and stated he had slipped in the shower and had extreme pain.

17. An MRI was taken of Claimant's back on November 21, 2008. The results of this MRI state there was no interval change from the MRI taken on June 17, 2008, which showed there was no evidence of a disk protrusion, and that Claimant had mild degenerative disk disease.

18. James S, Ogsbury III, M.D. , was of the opinion that all the treatment Claimant was receiving prior to July 17, 2008 was related to Claimant's back injury on June 11, 2008. Dr. Ogsbury also was of the opinion that Claimant had no anatomical change in comparison to the MRI that was taken on June 11, 2008 and the MRI taken on November 11, 2008.

19. Dr. Ogsbury stated that no structural change had occurred between the two MRI's reviewed and x-rays taken of Claimant's back. Dr. Ogsbury also was of the opinion that any changes on both MRI's were antecedent to the injury that occurred to Claimant at home on June 11, 2008 and were all degenerative changes.

Credibility

20. Claimant testified that he arrived to work on July 17, 2008 at 7:00 AM to meet with Bob Butler and then went to the office to clock-in. According to Claimant's timecard for that day, he clocked in at 6:45 AM. It is not reasonably probable that

Claimant could have arrived at 7:00 AM, met with his supervisor, and then go clock in at the office after his meeting, but yet his time card indicates he clocked in at 6:45 AM. Claimant's account of when he arrived to work is inconsistent and defies reasonable probablility.

21. Claimant stated on his Worker's Claim for Compensation that his injury occurred at 8:45 AM. The medical records from Granby Medical Center note that Claimant stated the injury occurred around 9:00 AM. According to Claimant's typed statement dated July 20, 2008, he indicated the injury occurred at 9:10 AM. Claimant testified that he made this statement while it was "fresh in his mind." It would not be probable that Claimant would have three different time periods for when he claims the injury occurred, especially since he testified that his statement dated July 20, 2008 was done while the details of July 17, 2008 were fresh in his mind. If the details of the alleged injury were fresh in his mind, Claimant would have a more accurate account of the alleged time of injury. Claimant later testified that his injury occurred between 8:00 AM – 9:00 AM, but according to his time card, he had punched out at 8:15 AM and was not even at the job-site AT 8:45 AM. If he had clocked out at 8:15 AM, it would not be possible or probable for him to have sustained an injury at the jobsite as Claimant stated, at 8:45, 9:00, or 9:10 AM, when he was not even at the job-site. Claimant's story is fraught with inconsistencies.

22. The medical record , dated July 17, 2008, from Granby Medical Center state that Claimant said he went home and then arrived at the emergency room. Claimant testified that he did not go home and went straight to Granby Medical Center after he left work. According to Claimant's hospital admission form, he signed in at 10:30 AM. Claimant testified that it took him fifteen minutes to get from the Employer's job-site to the emergency room at Granby Medical Center. If this were true, then according to Claimant's time card showing him clocking out at 8:15 AM, he would have arrived at Granby Medical Center around 8:30 AM. Based on Claimant's hospital admission form that he signed in at 10:30 AM, there would be a two-hour period before claimant was seen at Granby Medical Center. Claimant testified he was in the waiting room. While possible, it is not reasonably probable that Claimant was in the waiting room of the Granby Medical Center for two-hours waiting to be seen. Also, as found, Claimant could not possibly have been at Granby Medical at 8:30 AM, considering that he stated his alleged injury occurred at 8:45 AM, 9:00 AM, and then 9:10 AM.

23. Claimant and his girlfriend, Sarah Brinkman, are also not credible in their testimony of when the Workers' Claim for Compensation was filed. Brinkman testified that she placed a stamp on the Division of Workers' Compensation (DOWC) form indicating "Mailed on 7-29-08" and stated this was for her records so she knew when she mailed the form. According to the copy the DOWC received, this form was not received until October 10, 2008. While possible, it is not reasonably probable that it took two and a half months for this form to reach the DOWC. Indeed, in the days of the 19th Century Pony Express, a letter from New York could reach San Francisco in approximately two months. Also, when the Claimant's counsel asked him when the claim was filed, Claimant stated around October 10, 2008. Claimant rebuts the

testimony of his girlfriend in this respect by stating that the claim was filed and mailed on October 10, 2008. His girlfriend states that the claim form was mailed on July 29, 2008. Their testimony is inconsistent, each with the other, and this significantly impacts the credibility of both.

24. In Brinkman's statement for July 17, 2008, she states that Claimant called her because Claimant realized he forgot his lunch and wanted it brought to the job-site. In Claimant's opening brief, Claimant states that Brinkman called him because she noticed that he forgot his lunch and she was bringing it to the job-site. Again, although seemingly minor discrepancies, these conflicting statements by Brinkman and the Claimant impact the credibility of both.

25. Claimant is also inconsistent in describing the alleged mechanism of injury. On his Workers' Claim for Compensation, he states that he was moving a log. In the medical record from Alpine Physical, he claims that he was pushing a log. While "moving" and "pushing" may be one and the same, in the medical records from Granby Medical Center, Claimant states he was lifting a log. There is a significant commonsensical difference between "moving/pushing" and "lifting." This inconsistency goes to the heart of the facts closely related to the alleged injury itself. Claimant gave conflicting and inaccurate statements concerning the alleged mechanism of injury. Accuracy in describing then mechanism of injury is critical for a physician's causality determination. The ALJ infers that a reasonably prudent person would appreciate the need for accuracy in describing the mechanism of injury unless, of course, the alleged injury never occurred at work.

26. Jerry Steves is a credible witness. Steves no longer works for the Employer and has no stake in the outcome of this claim. He testified that at no time on the morning of July 17, 2008, did he see Claimant lift or do any labor. Claimant's only attempt to discredit Steves' testimony is that he walked over to his truck and picked up some tools. Steves was still close to the deconstruction site, and stated that the only work that had begun was being done by the skid steer driven by another employee. Steves was not at his truck very long and given the Claimant's inconsistent statements concerning the alleged injury, Steves' testimony that Claimant had done **no** labor or had not picked up anything stands out as an island of credibility. The ALJ resolves the conflict in the testimony in favor of Steves and against the Claimant and his girlfriend.

Medical

27. Dr. Ogsbury, a board certified neurosurgeon, was of the opinion that based on the MRI taken of Claimant's back on June 11, 2008, and the subsequent MRI taken on November 21, 2008, there was no anatomical change. Dr. Ogsbury stated there was no structural change from the first MRI to the second MRI. Dr. Ogsbury was of the opinion that the changes on both MRI's were antecedent to the back injury that

occurred to Claimant while at home on June 11, 2008 (non-work related) and were all degenerative changes.

28. Claimant misinterprets what Dr. Ogsbury stated in his testimony at the hearing. In paragaraph 9 of Claimant's opening brief, Claimant states that Dr. Ogsbury, after listening to all the witness testimony, was still of the opinion that it took the second incident for Claimant to become significantly symptomatic. This is not accurate. Dr. Ogsbury stated that he heard conflicting opinions whether there was even an injury. Dr. Ogsbury stated that his opinion would be the same if the history given by Claimant is the same. Dr. Ogsbury's opinion was based entirely on the history given by Claimant of the alleged incident on July 17, 2008. Dr. Ogsbury stated that **if there was no lifting of a** log as Claimant states or no injury as Claimant claims, then, the Claimant's antecedent problems would be the only explanation for Claimant's condition and need for any treatment. Based on the finding that Claimant's version of events is not credible, Dr. Ogsbury's present opinion that Claimant's back condition and need for treatment was causally related to antecedent events overrides his prior opinion of causal relatedness to the alleged work incident of July 17, 2008, and supports the proposition that Claimant did not sustain a compensable injury on July 17, 2008.

Voluntary Resignation/Credibility

29. Claimant testified that when the Employer hired him, he did not give the Employer any written notice from a physician that he was on any work-restrictions. Claimant did not offer any written work-restrictions given to him by a physician. Susan Koeneke testified that the first time she had any knowledge that Claimant was alleging any back problems or work-restrictions was after he quit on July 17, 2008. Claimant argues he was "forced" into moving a log, but Bob Butler and Jerry Steves contradict this. Both testified that no work had even begun on July 17, 2008, and that Claimant was standing around waiting for the skid steer operated by another co-worker, Nate Richards. Bob Butler testified that he was never notified or told by Claimant that Claimant was on work-restrictions of lifting no more than 20-pounds. Jerry Steves testified that the majority of any physical labor was done by the mechanical skid steer, and not by Claimant or Steves. Claimant testified that he operated the skid steer on the day in question before he quit so it is plausible that there were other jobs Claimant could do for the Employer if he was not to lift 20-pounds as he claims. Claimant's attempt to make a case for a constructive termination, which is solidly contradicted, further undermines Claimant's overall credibility.

30. Claimant voluntarily resigned his position with the Employer and never gave the Employer an opportunity to accommodate his restrictions, if any, because he quit before the Employer was aware of any restrictions. Claimant did not provide any persuasive evidence that the Employer would not accommodate his restrictions and had Claimant not resigned, the ALJ infers and finds that the Employer would more likely than not have accommodated Claimant's restrictions, given there were other jobs for Claimant to do. Claimant voluntarily resigned his employment with the Employer and therefore there was no resulting wage loss as a result of the alleged injury.

Ultimate Finding

31. Because of the numerous inconsistencies in Claimant's version of events and in his actions, he has failed to prove, by a preponderance of the evidence that he sustained a compensable injury to his back on July 17, 2008.

CONCLUSIONS OF LAW

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

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, the Claimant's version of events is riddled with inconsistencies and it is contradicted by Jerry Steves, a former co-employee who has no interest in the outcome of this case. Therefore, as found, the Claimant's testimony is not credible and this lack of credibility undermines his claim for compensability. As found, Dr. Ogsbury's testimony is essentially un-contradicted. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. Additionally, as further found, Dr. Ogsbury's ultimate opinion does not support a compensable injury.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 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 on compensability.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims for workers' compensation benefits are hereby denied and dismissed.

B. Determinations on other designated issues are moot.

DATED this_____day of June 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-774-450

ISSUES

The issues determined herein are compensability and authorized medical benefits by Dr. Vialpondo and Dr. Likes. The parties stipulated that the average weekly wage was $800 and that claimant was entitled to temporary total disability ("TTD") benefits for the period October 20 through December 23, 2008. The parties also stipulated to medical benefits by Dr. Olsen, Parkview Medical Center, Southern Colorado Clinic, and the ultrasound at St. Mary Corwin Hospital.

FINDINGS OF FACT

1. Claimant is a residential plumber for employer, which is owned by claimant's brother. Claimant began working for the employer in August of 2003. As a plumber, claimant has to kneel 10-20 times per day.

2. When he was 13 years old, claimant injured his right knee skateboarding.

3. On July 28, 2003, Dr. Vialpando examined claimant, who complained of swelling and discomfort in his right knee for about one week. Claimant reported injuring his knee years ago while playing sports in high school,

primarily wrestling. Since then he has had occasional locking and the knee feels as if it will give way. Claimant reported no history of recent injury.

4. On July 12, 2007, claimant sought treatment from Dr. DeGroote for left knee pain that he had suffered for several weeks without any specific trauma. On September 26, 2007, Dr. DeGroote performed surgery for a left medial meniscectomy and microfracture technique on the medial femoral condyle.

5. On October 10, 2008, claimant was working for the employer, installing plumbing fixtures in newly constructed lofts. Claimant arrived at the jobsite between 8:00 am and 8:30 am. He ate lunch on the job site and did not take a separate lunch break. Shortly after he ate lunch, claimant went to his work vehicle to get a P-trap. On his way to the van, claimant tripped in a pothole and twisted his right knee. Claimant suffered a right knee ache, but he continued to work his regular job duties for the rest of the workday. Claimant left the job site at about 3:30 p.m. and returned to the employer's shop. He did not report any work injury. He went home.

6. When claimant arrived home he took some Aleve, but he had trouble walking. At approximately 5:30 p.m., claimant left for a meeting of the Eagles Club at 6:00 p.m. Mr. Benavidez noticed that claimant was limping badly.

7. After about 8:30 p.m., claimant returned home and asked his son to get his crutches to assist with ambulating. Claimant admits that he did not know what was causing his knee pain by the time he attended the meeting on Friday night.

8. Over the weekend, claimant iced and rested his right knee, but did not seek medical care.

9. On Monday, October 13, 2008, claimant reported to work and informed the owner, who is also his brother, that he needed to go to the doctor for his knee. Claimant did not report the injury as work-related and elected to pursue care with his family physician, Dr. Vialpando.

10. On October 13, 2008, Dr. Vialpando examined claimant, who reported a history of right knee pain and swelling for three days. Claimant reported that his father had a history of thrombophlebitis, a condition related to abnormal blood clotting. Claimant admits that at the time of this first visit with Dr. Vialpando, he did not know what was causing his knee pain. At that time nothing was "jarring his memory" that would suggest the cause.

11. At the request of Dr. Vialpando, an ultrasound of claimant's left lower extremity was completed on October 13, 2008. This test showed no signs of deep vein thrombosis. Thereafter, Dr. Vialpando referred claimant to an

orthopedic surgeon, Dr. Likes. Claimant admits that he was not referred to Dr. Likes by the employer or the insurer.

12. Dr. Likes evaluated claimant on October 14, 2008. During this initial evaluation claimant filled out a medical history, which indicated that he did not believe his injury was a workers' compensation claim. During the evaluation, claimant specifically denied any specific injury to his knee.

13. Dr. Likes first suspected septic arthritis and drew 80 cc. of blood-tinged fluid from claimant's knee, but the tests showed no infection. Dr. Likes also ordered a magnetic resonance image ("MRI") of the right knee. The October 14 MRI showed a right anterior cruciate ligament ("ACL") tear, a right meniscal tear, a right partial patellar tendon tear, and joint effusion.

14. On October 17, 2008, Dr. Likes reexamined claimant and tried to prompt claimant to remember what he had done to the right knee. Claimant then recalled the October 10 incident when he stepped in the pothole. Dr. Likes' recorded that the pothole incident happened while claimant was "eating lunch." Dr. Likes prescribed physical therapy.

15. On October 17, 2008, claimant immediately called the employer to report the work injury of October 10, 2008.

16. On Monday, October 20, 2008, Ms. Norris, the insurance adjuster, called claimant and referred him to CCOM for medical treatment.

17. On October 22, 2008, Ms. Norris conducted a telephone interview of claimant, who reported that he had stepped in the hole while going to or from the truck to obtain a plumbing part for work. Claimant reiterated that the pothole was the only incident that he could think of to explain the onset of symptoms on October 10.

18. On October 27, 2008, Dr. Olsen, at CCOM, examined claimant. Dr. Olsen thought that the step caused a flareup of claimant's right knee pathology. He prescribed Celebrex, ice, and crutches. He thought that claimant might need surgery and referred claimant back to Dr. Likes.

19. On November 22, 2008, Dr. Roth performed an independent medical record review for respondents. Dr. Roth concluded that claimant had suffered an aggravation of his preexisting condition.

20. On December 2, 2008, Dr. Likes reexamined claimant, who reported that his right knee had popped again and he had suffered increased pain.

21. On December 11, 2008, Dr. Likes performed arthroscopic partial medial and lateral menisectomy on claimant's right knee.

22. On December 19, 2008, Dr. Likes released claimant to return to light duty work. Claimant actually returned to work on December 24, 2008.

23. In his deposition testimony, Dr. Likes explained that he did not find extensive bone bruising on the femur and tibia, so he did not think that claimant suffered a recent traumatic ACL tear. He concluded that the patellar changes in the right knee were not the result of the work injury incident. He concluded that the meniscal tears were the result of the work injury. He explained that meniscal tears often occur with twisting or with high velocity motor vehicle accidents. He further explained that a preexisting ACL tear could predispose claimant to meniscal tears from a twisting incident. Because the surgery was solely for the work-related meniscal tears, the entire surgery was caused by the work injury. Dr. Likes also explained that the December 2 pop and symptoms were due to the fact that patients with a torn meniscus will suffer ongoing mechanical symptoms until surgery.

24. At the hearing, claimant denied that he had told Dr. Likes that the incident happened while he was eating lunch. Claimant believed he was just using lunch as a timeline for explanation and believed the pothole incident happened at about 1:00 pm, after lunch.

25. Ms. Norris testified by deposition that Dr. Likes did not require prior authorization of the knee surgery. She admitted that she would not have authorized Dr. Likes for treatment solely because claimant had requested Dr. Olsen to refer him back to Dr. Likes. In her opinion, this made the referral "invalid."

26. Dr. Likes did not seek prior authorization for the surgery he performed on December 11, 2008.

27. Dr. Roth testified by deposition that all of claimant's right knee findings were preexisting, noting that they were similar to the left knee, for which no trauma had been reported. Dr. Roth was unable to identify any acute findings to distinguish them from degenerative findings in the right knee. He admitted that <u>something</u> happened on October 10, 2008, but he thought that it was just as probable that claimant would have the same symptoms without the tripping incident.

28. Dr. Roth concluded that, if claimant suffered a significant physical event on October 10, 2008, the evaluations and care were reasonable.

29. Claimant has proven by a preponderance of the evidence that he suffered an accidental injury on October 10, 2008, arising out of and in the

course of employment. Claimant's testimony is credible that he twisted his right knee in a pothole when he went to his work vehicle to retrieve a plumbing supply to install at the site. He did not suffer the injury while on a lunch break. Claimant clearly had preexisting bilateral knee problems, including the right ACL tear. That ACL tear predisposed him to meniscal tears from twisting injuries. Dr. Roth even admits that something happened to claimant's right knee on October 10. Mr. Benavidez's statement is credible that claimant was limping badly on the evening of October 10. Claimant did not initially recall the incident when he saw Dr. Vialpondo on October 13 or Dr. Likes on October 14. On October 17, Dr. Likes prompted claimant's recall of the seemingly minor accident on October 10. That twisting injury at work probably caused the meniscal tears that were the subject of the December 11 surgery. As explained by Dr. Likes, once the meniscus was torn, claimant was subject to ongoing mechanical symptoms, such as the recurrent pop before the December 2 examination.

30. Claimant has failed to prove that the treatment by Dr. Vialpondo and the treatment by Dr. Likes prior to October 27, 2008, was authorized or was emergency in nature. Claimant waited from October 10 to October 13 to seek treatment from his personal physician, Dr. Vialpondo. Claimant did not report a work injury to respondents on October 13 or at any time prior to October 17. The October 13 and October 14 treatment by Dr. Vialpondo and Dr. Likes was not reasonably perceived as emergency in nature, even though claimant thought that he might have phlebitis. He waited three days and then only sought an appointment with his personal physician. Although claimant's perception of an emergency is not controlling, especially if claimant had an actual emergency, claimant neither perceived nor actually had an emergency. At hearing, the insurer agreed to pay for the ultrasound, although they contested the emergency nature of the treatment by Dr. Vialpondo. Even if the October 13 appointment with Dr. Vialpondo had been emergency in nature, the insurer would not be liable for continuing treatment by Dr. Vialpondo after the ultrasound showed that claimant did not have phlebitis and claimant then reported a work injury to his knee. Thereafter, Dr. Olsen became the authorized treating physician. Dr. Olsen did not refuse to treat claimant due to a nonmedical reason. Dr. Olsen even diagnosed a work injury and referred claimant back to Dr. Likes for surgical evaluation. He even tried to get the adjuster to authorize another surgeon if Dr. Likes could not be authorized. In fact, Dr. Likes was authorized even if the adjuster did not agree. Dr. Likes, in fact, treated claimant, and all of that subsequent treatment is authorized.

31. Dr. Olsen, the authorized treating physician, referred claimant back to Dr. Likes in the normal progression of treating physicians. This referral reasonably constituted an independent medical judgment by Dr. Olsen. The record evidence does not demonstrate that the referral was not a reasoned decision by Dr. Olsen. Contrary to the adjuster's opinion, the fact that she had told claimant that he could not be treated by his personal physicians did not mean that Dr. Olsen could not refer back to those providers.

32. All of the treatment by Dr. Likes was reasonably necessary to cure or relieve the effects of claimant's 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). 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 on October 10, 2008, arising out of and in the course of employment.

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 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). As found, claimant has failed to prove that the treatment by Dr. Vialpondo

and the treatment by Dr. Likes prior to October 27, 2008, was authorized or was emergency in nature.

3. As found, the insurer is liable for the treatment by Dr. Likes after October 27, 2008. 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). As found, Dr. Olsen, the authorized treating physician, referred claimant back to Dr. Likes in the normal progression of treating physicians.

4. In their position statement, respondents for the first time raised the issue of the lack of "prior authorization" for the December 11 surgery by Dr. Likes. At hearing, respondents contested only the "authorization" of Dr. Likes, but did not contest the reasonable necessity of the surgery. Respondents cite *Galica v. Pietraszek*, W.C. No. 4-610-668 (Industrial Claim Appeals Office, May 9, 2008). That case, however, makes clear that a challenge to prior authorization deals with the method of determining the "reasonable necessity" of the treatment and does not deal with the "authorization" of a provider. Application of WCRP 16 is in the nature of an affirmative defense, which respondents must timely raise before or at the hearing. Claimant has not even addressed the prior authorization issue in his position statement. Claimant's questions in the deposition of the adjuster do not indicate that claimant implicitly agreed to try the issue. Consequently, the surgery was "authorized" and respondents did not timely raise the issue of compliance with WCRP 16 prior authorization provisions.

ORDER

It is therefore ordered that:

1. The insurer shall pay to claimant TTD benefits at the rate of $533.33 per week for the period October 20 through December 23, 2008.

2. The insurer shall pay the bills for claimant's treatment at Parkview Medical Center, Dr. Olsen, Southern Colorado Clinic, and the ultrasound at St. Mary Corwin Hospital.

3. Claimant's claim for payment for the treatment by Dr. Vialpondo and by Dr. Likes prior to October 27, 2008, is denied and dismissed.

4. The insurer shall pay for all of the treatment by Dr. Likes and his referrals after October 27, 2008.

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: June 2, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-775-162

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his lower back during the course and scope of his employment with Employer.

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

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits from October 15, 2008 until terminated by statute.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $684.00 while working for Employer.

2. If Claimant suffered a compensable injury, medical treatment from Jeffrey Hawke, M.D. and his referrals were authorized, reasonable and necessary.

FINDINGS OF FACT

1. Claimant worked for Employer as a drywall finisher. His duties included mixing paste or "mud" in buckets in preparation for drywall application. The buckets of "mud" weighed approximately 40 to 50 pounds. Claimant carried

the buckets and lifted them above shoulder height onto a six-foot scaffold. He mixed and carried approximately six to seven buckets each day. Claimant's regular work partner was his brother Daniel Cardenas.

2. Claimant testified that on October 14, 2008 he was lifting a bucket full of mud onto a six-foot scaffold. While lifting the bucket, he experienced pain in the lower right portion of his back.

3. Mr. Cardenas testified that on October 14, 2008 he was working approximately 15 feet away from Claimant. He noticed that Claimant lifted a bucket of mud up to a level of about six feet high and observed that Claimant appeared to injure his back. Mr. Cardenas then contacted supervisor Joel Miramontes by wireless telephone and apprised him of Claimant's injury. Mr. Miramontes responded to the scene and spoke to Claimant.

4. Claimant discussed his injury with Mr. Miramontes and Field Supervisor James Dupree. A coworker then transported Claimant to the home of a woman named "Maria" who massaged Claimant's lower back. Claimant did not return to work.

5. On October 15, 2008 Claimant awoke with significant lower back pain that impaired his ability to walk. He reported his condition to Mr. Dupree and Employer representative Greg Low. Employer referred Claimant to Authorized Treating Physician (ATP) Dr. Hawke for medical treatment.

6. Claimant reported to Dr. Hawke that he was suffering from lower back pain. He explained that he was hoisting 40 pounds of mud plaster above his shoulder level when he experienced "a light sticking pain in the right side of his lower back." Claimant noted that earlier on the day of the visit he felt a "strong, stabbing over the right side of the low back" that traveled into the "lateral aspect of the right thigh to the heel." After a physical examination Dr. Hawke diagnosed Claimant with the following: (1) an acute lumbar strain; and (2) right lower extremity paresthesias and radicular pain." Dr. Hawke prescribed medications and prevented Claimant from working.

7. Claimant's lower back symptoms persisted and he again visited Dr. Hawke on October 17, 2008. Dr. Hawke requested an MRI of Claimant's lumbar spine. The MRI revealed a "central disk protrusion at L4-5" and a "moderate-sized right paracentral extruded disk fragment."

8. On October 21, 2008 Claimant filed a Workers' Claim for Compensation. He noted that, while lifting a 40 pound bucket over shoulder level, he experienced pain in his lower back.

9. Dr. Hawke referred Claimant to Roberta Anderson-Oeser, M.D. for treatment. On November 4, 2008 Claimant visited Dr. Anderson-Oeser for an evaluation. Claimant stated that he continued to suffer from right-sided lower

back and buttock pain that radiated into his right leg. Dr. Anderson-Oeser diagnosed the following: (1) a lumbosacral strain; (2) right lumbar radiculopathy; (3) an L4-5 disc protrusion/extrusion; and (4) right lower extremity pain and paresthesias. She recommended a trial of epidural injections for both diagnostic and therapeutic purposes.

10. On November 7, 2008 Claimant returned to Dr. Hawke for an evaluation. Dr. Hawke stated that Claimant was restricted from bending at the waist, stooping, squatting, sweeping and lifting in excess of 10 pounds. He noted that he contacted Employer about Claimant's options for returning to work but cautioned that the options were limited because of the degree of Claimant's restrictions.

11. On December 1, 2008 Dr. Anderson-Oeser performed an EMG/ NCS on Claimant's right lower leg. The testing results were abnormal and revealed a right L5 radiculopathy. Dr. Anderson-Oeser sought authorization for an epidural steroid injection but Insurer denied the request.

12. On December 29, 2008 Claimant returned to Dr. Hawke for an evaluation. Dr. Hawke remarked that Claimant suffered from the following: (1) an acute lumbar strain with disk herniation at L4-5 and extruded disk fragment; and (2) lumbar facet disease with right-sided facet arthritic changes at L4-L5 and L5-S1. He reiterated that Claimant's restrictions included no bending at the waist, stooping, squatting, or sweeping. He also prevented Claimant from lifting or carrying in excess of 10 pounds.

13. Employer has been unable to provide modified employment for Claimant within his work restrictions. Claimant has thus not worked, with the exception of earning approximately $600 through woodworking, since October 14, 2008.

14. Respondents assert that Claimant did not injure his lower back on October 14, 2008. Instead, Respondents claim that Claimant injured his back on October 2, 2008 while he was engaged in horseplay with fellow employee Jesus Delgado.

15. Claimant testified that on October 2, 2008 he engaged in a game of "handsies" with Mr. Delgado in a common area near the end of their lunch break. Claimant explained that "handsies" involved trying to slap the hands of the other participant. During the game, Mr. Delgado fell backward over a piece of insulation. However, Claimant denied that he fell or was injured. Claimant helped Mr. Delgado up from the floor and both men returned to work.

16. Mr. Delgado explained that he knew Claimant from the job site but did not directly work with him. He stated that while involved in a "handsies" game with Claimant on October 2, 2008 he tripped backward over some insulation that

was lying on the floor. Mr. Delgado also remarked that Claimant did not fall during the game.

17. In contrast, Employer's Field Supervisor Mr. Dupree testified that he observed Claimant and Mr. Delgado engaged in a wrestling or grappling position on October 2, 2008. He stated that the parties then fell onto the concrete floor. The left side of Claimant's body landed on Mr. Delgado, but the right side of Claimant's body struck the floor. Mr. Dupree remarked that, after the parties got up from the floor, Claimant exhibited a slight limp as he walked away from the area.

18. Fellow employee Oscar Varela also testified that he observed Claimant and Mr. Delgado in a wrestling or grappling position on October 2, 2008. He remarked that Claimant fell on top of Mr. Delgado and both parties got up after the incident. Mr. Varela did not observe any injuries to Claimant.

19. Claimant explained that he continued to work for Employer on a regular basis between October 2, 2008 and October 14, 2008. Mr. Cardenas testified that Claimant did not make any pain complaints or exhibit any pain symptoms during the period. Moreover, Mr. Dupree acknowledged that Claimant continued to perform his regular job duties for Employer until October 14, 2008.

20. Claimant has demonstrated that it is more probably true than not that he suffered a compensable injury to his lower back during the course and scope of his employment with Employer on October 14, 2008. Claimant credibly testified that while he was lifting a bucket full of mud onto a six-foot scaffold he experienced pain in the lower right portion of his back. Mr. Cardenas corroborated Claimant's account of the incident. Claimant immediately reported the incident to supervisor Mr. Miramontes and Field Supervisor Mr. Dupree. Throughout the medical records Claimant provided a consistent account of the incident. Doctors determined that he had suffered a disk herniation at L4-5 and lumbar facet disease with right-sided facet arthritic changes.

21. In contrast, Respondents assert that Claimant injured his back on October 2, 2008 while engaged in horseplay with Mr. Delgado. Mr. Dupree and Mr. Varela testified that, while Claimant was engaged in wrestling or grappling with Mr. Delgado, both parties fell to the ground. However, with the exception of Mr. Dupree's statement that Claimant suffered a slight limp as a result of the incident, there was no evidence that Claimant was injured at the time. More importantly, it is undisputed that Claimant continued to perform his job duties without limitations until October 14, 2008. Accordingly, there is scant evidence that Claimant was injured on October 2, 2008. Based on a consideration of all of the evidence presented, Claimant was instead injured while lifting a bucket of mud on October 14, 2008.

22. Based on the stipulation of the parties and a review of the medical records, Claimant has demonstrated that it is more probably true than not that he

is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of his industrial injury. Claimant's need for medical treatment subsequent to October 14, 2008 was designed to alleviate the effects of his October 14, 2008 lower back injury. Dr. Hawke's medical treatment and his referrals constituted a reasonable approach to treating Claimant's condition. However, Claimant has failed to demonstrate that it is more probably true than not that the massage treatment he received from a woman named "Maria" was authorized, reasonable or necessary to cure and relieve the effects of his industrial injury.

23. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the period October 15, 2008 until terminated by statute. Dr. Hawke initially prohibited Claimant from returning to work because of his lower back injury. He subsequently imposed work restrictions that included no bending at the waist, stooping, squatting, or sweeping. Dr. Hawke also prohibited Claimant from lifting or carrying in excess of 10 pounds. Claimant's work restrictions impaired his ability to effectively and properly perform his regular employment. His industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Employer has subsequently been unable to provide modified employment for Claimant within his work restrictions.

CONCLUSIONS OF LAW

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

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

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

been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301 (1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (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 demonstrated by a preponderance of the evidence that he suffered a compensable injury to his lower back during the course and scope of his employment with Employer on October 14, 2008. Claimant credibly testified that while he was lifting a bucket full of mud onto a six-foot scaffold he experienced pain in the lower right portion of his back. Mr. Cardenas corroborated Claimant's account of the incident. Claimant immediately reported the incident to supervisor Mr. Miramontes and Field Supervisor Mr. Dupree. Throughout the medical records Claimant provided a consistent account of the incident. Doctors determined that he had suffered a disk herniation at L4-5 and lumbar facet disease with right-sided facet arthritic changes.

6. As found, Respondents assert that Claimant injured his back on October 2, 2008 while engaged in horseplay with Mr. Delgado. Mr. Dupree and Mr. Varela testified that, while Claimant was engaged in wrestling or grappling with Mr. Delgado, both parties fell to the ground. However, with the exception of Mr. Dupree's statement that Claimant suffered a slight limp as a result of the incident, there was no evidence that Claimant was injured at the time. More importantly, it is undisputed that Claimant continued to perform his job duties without limitations until October 14, 2008. Accordingly, there is scant evidence that Claimant was injured on October 2, 2008. Based on a consideration of all of the evidence presented, Claimant was instead injured while lifting a bucket of mud on October 14, 2008.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his

burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P. 2d 251, 252 (Colo. App. 1999).

8. As found, based on the stipulation of the parties and a review of the medical records, Claimant has demonstrated by a preponderance of the evidence that he is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of his industrial injury. Claimant's need for medical treatment subsequent to October 14, 2008 was designed to alleviate the effects of his October 14, 2008 lower back injury. Dr. Hawke's medical treatment and his referrals constituted a reasonable approach to treating Claimant's condition. However, Claimant has failed to demonstrate by a preponderance of the evidence that the massage treatment he received from a woman named "Maria" was authorized, reasonable or necessary to cure and relieve the effects of his industrial injury.

TTD Benefits

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

10. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period October 15, 2008 until terminated by statute. Dr. Hawke initially prohibited Claimant from returning to work because of his lower back injury. He subsequently imposed work restrictions that included no bending at the waist, stooping, squatting, or sweeping. Dr. Hawke also prohibited Claimant from lifting or carrying in excess of 10 pounds. Claimant's work restrictions impaired his ability to effectively and properly perform his regular employment. His industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Employer has subsequently been unable to provide modified employment for Claimant within his work restrictions.

ORDER

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

1. Claimant suffered a compensable injury to his right lower back during the course and scope of his employment with Employer on October 14, 2008.

2. Respondents are financially responsible for all of Claimant's medical treatment and referrals from ATP Dr. Hawke.

3. Claimant is entitled to receive TTD benefits from October 15, 2008 until terminated by statute.

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

DATED: June 5, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-775-166

ISSUES

Whether Claimant sustained an injury to his right hip in the nature of an occupational disease.

Whether the medical treatment Claimant received prior to the filing his workers' claim for compensation was unauthorized.

Whether the treatment Claimant received for his right hip was caused by non-work related injuries and disease processes.

FINDINGS OF FACT

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

1. Claimant is currently 59 years of age. Claimant worked for Employer from 1997 to November 29, 2005. The majority of that time Claimant worked as a coal truck driver. Claimant's job duties included driving a coal truck

loaded with coal from a coal pit to the Hayden power plant, and then driving the empty coal truck back to the coal pit for a new load of coal. At times, Claimant drove his coal truck down mountains, and during those times, Claimant sometimes had to constantly apply his brakes using his right foot. Prior to working for Employer, Claimant ran a muffler shop in Texas and held other occupations.

2. In his Workers' Claim for Compensation filed January 30, 2007, Claimant alleged that he sustained an injury to his right hip from years of abuse from driving on rough and steep grades and having to hold the brake constantly with his right foot. Claimant alleged a date of onset of his occupational disease as November 29, 2005.

3. Claimant has been diagnosed with morbid obesity. Between 2003 and November 29, 2005 Claimant's weight was recorded by his physicians to range between 308 and 337 pounds.

4. In addition to having a history of morbid obesity, Claimant also has a history of prior low back injury in 2003 requiring a lumbar fusion surgery, a low back injury in the 1980's, hypertension, heart disease, hyperlipedemia and insulin dependent diabetes mellitus.

5. On November 29, 2005, Claimant injured his low back at work for Employer when he was struck from behind by a scraper that was pushing his coal truck up a mountain. Claimant admitted that he did not injure his right hip during this accident. This injury was the subject of a separate Workers' Compensation claim. During the process of reporting his November 29, 2005 low back claim to Employer, after filling out his paperwork that night, Claimant stood up and felt something pop. Claimant was not sure what it was that popped.

6. On November 30, 2005, Claimant was treated for his low back injury at The Memorial Hospital. On that date, Claimant complained of low back pain with radiation of pain into his right buttocks. Claimant did not complain of right hip pain. A lumbar x-ray was ordered, and it was interpreted as showing anterior wedging at T11 and T12 possibly secondary to chronic degenerative changes. Claimant was diagnosed with low back pain, possible compression fracture at T-11, back muscle strain and diabetes mellitus.

7. Claimant was seen by his personal physician, Dr. Dennis Kinder, M.D. on December 7, 2005. Dr. Kinder reported that Claimant was complaining of back pain, and increased lower extremity edema. Dr. Kinder's assessment was T-11 – T-12 compression fractures with back pain; lower extremity edema.

8. On January 25, 2006 Claimant returned to Dr. Kinder complaining of mid and low back pain and pain radiating down the back of his right leg. Claimant was evaluated by Dr. Kinder on February 13, 2006 for continued complaint of low back pain. Dr. Kinder also noted problems to include diabetes, lower extremity edema, decreased mobility and an abnormal persantine/thallium test. Dr. Kinder diagnosed coronary artery disease. Dr. Kinder did not note a complaint of right hip pain.

9. Claimant was seen on several occasions between February 13, 2006 and September 21, 2006 by Dr. Kinder or his Nurse Practitioner, Jona Kohpay. During this time, Dr. Kinder did not note any specific complaint of right hip pain. On September 21, 2006 Claimant presented to Dr. Kinder for follow-up of low back pain that had been present since the injury of November 29, 2005. At this time, Dr. Kinder noted that Claimant also had pain in his right hip especially with weight bearing. On October 6, 2006 Dr. Kinder noted that Claimant had severe osteoarthritis of the right hip and associated leg pain. Dr. Kinder diagnosed Claimant with arthritis of the right hip with associated leg pain.

10. Dr. Kinder saw Claimant in follow-up on October 20, 2006 and noted that he continued to have pain in his back and right hip. Dr. Kinder attributed the pain in the right hip with severe degenerative joint disease to the back pain. Dr. Kinder stated that Claimant had complained of back and right hip pain since the injury of November 29, 2005. The ALJ finds that Dr. Kinder's statement that Claimant complained of right hip pain since the injury of November 29, 2005 to be incorrect. While Claimant did complain of right leg pain, his complaints were of back pain radiating down his buttocks and into the back of his right leg to his knee, not into or around the right hip joint.

11. In a report date October 27, 2006 Dr. Kinder related Claimant's right hip pain to his work. Dr. Kinder stated that Claimant had operated heavy equipment for the majority of the time and attributed the right hip pain to the strain from this work. Claimant admitted at hearing that he did not go into detail with Dr. Kinder about his work duties other than telling him he had a "tough job". Dr. Kinder's opinion relating Claimant's right hip pain to his work is not credible or persuasive.

12. Claimant testified that his right hip has hurt since November 29, 2005. Claimant previously had complaints of right hip pain documented by Nurse Kohpay on July 26, 2004 when Claimant complained of arthritis in his hands and right hip that were controlled by use of the medication Vioxx. On July 30, 2004 Claimant complained to Nurse Kohpay of increasing pain in his hands and right hip. On August 2, 2005 Claimant presented to Nurse Kohpay with a 1 – 2 week history of

joint symptoms in his hips, knees and ankles. These records establish that Claimant had intermittent symptoms of arthritic pain in his right hip prior to November 29, 2005.

13. On May 23, 2006, Claimant was seen by Michael Janssen, D.O. Claimant did not report any right hip problems on that date. Dr. Janssen performed a physical examination that included provocative maneuvers of the low back and hips. The hip maneuvers were negative. Dr. Janssen's assessment was morbid obesity; previous L4-5 occupational related injury requiring a fusion; soft tissue injury with minimal trauma resulting in suspected thoracic spine fracture.

14. Dr. Kinder also referred Claimant to Michael Sisk, M.D., an orthopaedic surgeon, for an evaluation of Claimant's right hip. In a report dated October 2, 2006, Dr. Sisk noted that Claimant's right hip had been so painful during the previous three weeks that he had basically been stuck in bed. Dr. Sisk noted that Claimant's right hip x-rays demonstrated advanced arthritis of his right hip with cyst formation, joint space narrowing and osteophyte formation of the head. Dr. Sisk's assessment was right hip arthritis. He opined that Claimant would need to have his hip replaced at some point in time. Dr. Sisk eventually performed a right hip replacement surgery for Claimant on December 19, 2006.

15. Dr. Sisk authored a report dated February 20, 2007 and opined that Claimant's right hip replacement was at least in part a direct result of Claimant' occupation as a heavy equipment operator. Dr. Sisk based his opinion upon a history that Claimant had run heavy equipment his whole life and that this activity involved going up and down ladders. Dr. Sisk's opinion is not credible or persuasive as it is based upon an inaccurate understanding of Claimant's work history. Dr. Sisk does not address the question of whether Claimant's use of his right foot to press on a brake pedal while driving coal trucks downgrade had any causative effect upon the development or progression of Claimant's right hip arthritis and the symptoms from that condition.

16. On August 6, 2007, Claimant underwent a DIME by John Barrett, M.D., for his low back claim. Claimant told Dr. Barrett his job consisted of pre-checking and driving trucks. Dr. Barrett's diagnosis included musculoskeletal pain syndrome whose relationship to the November 29, 2005 accident was unclear. Dr. Barrett noted that Claimant's condition was complicated by Claimant's morbid obesity, deconditioning, depression, osteoarthritis, and right hip replacement. Dr. Barrett noted that Claimant's prognosis was poor, and his morbid obesity contributed materially to his ongoing pain. With regard to Claimant's right hip, Dr. Barrett opined:

> "The patient has no documented discrete injury to his right hip in an employment setting. He does have strong risk factors for osteoarthritis of the hip regardless of his employment. No data supports his hip disease being work related."

The ALJ finds Dr. Barrett's opinion to be credible and persuasive.

17. Dr. Lawrence Lesnak, D.O. performed an independent medical examination on February 18, 2009 at the request of Respondents. Dr. Lesnak noted that Claimant denied any prior history of right hip or pelvic trauma. Claimant gave Dr. Lesnak a history that he had worked as a "coal truck driver" from 1997 to 2006. Prior to that employment, Claimant told Dr. Lesnak he had run a muffler shop in Texas and held other types of employment. In addition to taking a history from Claimant, Dr. Lesnak reviewed numerous medical records and performed a physical examination of Claimant.

18. Dr. Lesnak noted Claimant's previous diagnoses of morbid obesity, type 2 diabetes mellitus, sleep apnea, mild asthma, hypertension, hypercholesterolemia and depression. Dr. Lesnak further noted that Claimant's right hip had not become symptomatic until September 2006 or 10 months after Claimant had last worked as a coal truck driver.

19. Dr. Lesnak opined, and it is found, that Claimant's morbid obesity, his chronic type 2 diabetes mellitus, his other medical conditions and the aging process were, to a reasonable degree of medical probability, the sole cause of Claimant's radiographic findings involving his right hip which eventually became symptomatic, and led to the need for surgery. Dr. Lesnak further opined, and it is found, that Claimant's work as a coal truck driver did not play a role in his development of chronic osteoarthritis involving the right hip joint. As opined by Dr. Lesnak, Claimant's right hip osteoarthritis and need for surgery were related to a combination of Claimant's body habitus and weight, his polyarthritis, his diabetes, and the natural aging process.

20. Dr. Lesnak's opinions are supported by the fact that Claimant's symptomatic right hip joint pathology did not occur until approximately 10 months following his last work with Employer and was not present at the time of the injury to Claimant's low back on November 29, 2005 or at the time of Dr. Michael Janssen's evaluation in May 2006. Dr. Lesnak's opinion is supported by the opinion of Dr. Barrett.

21. Dr. Lesnak opined, and it is found, that Claimant's right hip osteoarthritis was not caused nor aggravated by Claimant's work duties, including "standing on the brakes". Dr. Lesnak acknowledged that driving a coal truck can be a strenuous job, but he noted that just walking around at Claimant's substantial weight put as much as 10 times more pressure on his weight bearing

joints, including his hip joints, than did applying the brakes on the coal truck from a sitting position. As Dr. Lesnak further explained, osteoarthritis is increased degeneration of joint space and cartilage, which happen to everyone to varying degrees. Dr. Lesnak explained that a person needs good blood supply to keep the cartilage healthy. There is only one small vessel that supplies blood to the hips and therefore the hips therefore do not have a very good blood supply normally, so conditions that affect the blood vessels and decrease the blood supply have a substantial negative effect on the hip joints. Because diabetes and heart disease decreases the blood supply these were significant factors along with morbid obesity in Claimant's development of right hip osteoarthritis.

22. Claimant's right hip joint arthritis, symptoms and eventual need for treatment including the right hip replacement performed by Dr. Sisk were solely related to his underlying general medical condition as well as the natural aging process. Claimant ha not sustained an occupational 'disease' of his right hip as a result of his occupation as a truck driver/heavy equipment operator. The opinions of Dr. Lesnak regarding the causation of Claimant's right hip pathology and the progression of that pathology to become symptomatic and required surgery are credible, persuasive and are found as fact. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable occupational disease to his right hip.

CONCLUSIONS OF LAW

23. 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*.

24. 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).

25. 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 Office*, 12 P3d 844, 846 (Colo. App. 2000).

26. An occupational disease is "a disease which results directly from the employment or 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 which the worker would have been equally exposed outside of the employment." Section 8-40-201(14), C.R.S.

27. A claimant seeking benefits for an occupational disease must first establish the existence of the disease and that it was directly and proximately caused by claimant's employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims,* 989 P.2d 251, (Colo. App. 1999); *Cowin & Co. v. Medina*, 860 P. 2d 535 (Colo. App. 1992). In addition, a claimant must show that the identified disease resulted in disability. *Cowin, supra.*

28. A claimant is entitled to recovery for an occupational disease injury 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 P2d 714, 717 (Colo.App. 1984). 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).

29. As found, Claimant failed to carry his burden of proving he sustained a compensable occupational disease to his right hip. The credible and persuasive opinions of Dr. Barrett and Dr. Lesnak prove that Claimant's condition is related to his pre-existing and underlying non-work-related arthritis, as well as the non-work-related factors that contribute to Claimant's osteoarthritis, including the natural aging process, Claimant's obesity, his diabetes, and his heart

disease. In addition to these medical opinions, the ALJ has found it persuasive that Claimant's right hip condition did not progress to the point of becoming chronically symptomatic and requiring surgery until 10 months after Claimant last worked as a coal truck driver. Although Claimant did have complaints of right hip pain prior to September 2006, these complaints were intermittent. Claimant's work as a coal truck driver prior to November 29, 2005 did not aggravate or cause Claimant's right hip symptoms. Claimant's right hip complaints prior to November 29, 2005 were consistent with a generalized diagnosis of arthritis unrelated to Claimant's work for Employer. The ALJ also finds persuasive the fact that due to Claimant's morbid obesity he would place far greater stress on his hip joints than would result from the pressure applied in a sitting position to press on a brake pedal of his coal truck.

30. Claimant bears the burden of proof to show 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). Because Claimant has failed to prove that the medical treatment and surgery for his right hip were causally related to a compensable occupational disease, Claimant's claims for medical benefits for such treatment and surgery must be denied.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation and benefits for an occupational disease of right hip arthritis is DENIED and DISMISSED in its entirety.

2. Any and all claims for medical benefits or treatment of Claimant's right hip arthritis including the hip replacement surgery on December 19, 2006 are denied and dismissed.

DATED: June 15, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-775-314

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

No further hearings have been held in the above-captioned matter. On June 8, 2009, Respondents filed a Petition for Corrected Order concerning a stipulation on the authorized treating physician, and the Administrative Law Judge's failure to address Respondent's issue concerning reduced benefits, pursuant to Section 8-42-112 (1) (d), C.R.S. (2008), based on Claimant's alleged misrepresentation about her physical ability to do the job for the Employer. The Petition is well taken and the decision is amended accordingly.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 12, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 5/12/09. Courtroom 1, beginning at 10:20 AM, and ending at 12:00 PM).

At the conclusion of the hearing, the ALJ established a briefing schedule (briefs to be filed electronically); Claimant's opening brief to be filed within 5 working days, or by May 19, 2009: Respondent's answer brief to be filed within 5 working days of the opening brief, or by May 27, 2009. Claimant waived the reply brief. Claimant's opening brief was filed on May 19, 2009. Respondents' answer brief was filed on May 27, 2009. The matter was deemed submitted for decision on May 27, 2009.

ISSUES

The issues to be determined by this decision concern compensability of a claimed back injury of September 14, 2008; if compensable, medical benefits; average weekly wage (AWW); and, temporary total disability (TTD) benefits from October 20, 2008 and continuing.

Respondents raised the affirmative defense that Claimant was responsible for her termination on April 29, 2009, and the issue of reduced benefits, pursuant to Section 8-42-112 (1) (d), C.R.S. (2008), based on Claimant's alleged misrepresentation concerning her physical ability to do the job for the Employer.

At the commencement of the hearing, the parties stipulated that Claimant's AWW is $229.90, and the ALJ so finds; and, that Julie Parsons, M.D., is an authorized treating physician (ATP), and the ALJ so finds.

FINDINGS OF FACT

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

The Incident

1. On September 14, 2008, Claimant was working for the Employer as an event coordinator. During the course of this activity, she was called upon to redecorate artificial fichus trees having a weight of between five and ten pounds. She lifted them from the floor to a table where they were to be refurbished. She noted an uptake of low back pain after lifting them but continued to perform her required work activities.

2. Claimant failed to notify the Employer of the full extent of her preexisting back condition, however, the job was described as "event coordinator" with light duties. Claimant believed, in good faith, that she could perform all of the essential job duties and she so informed the Employer. She had no obligation to furnish the Employer with detailed medical records concerning her preexisting back condition. There is no persuasive evidence that Claimant willfully misled the Employer concerning her ability to do the job for which she was hired.

3. Sometime thereafter, the Claimant was carrying fichus trees to the front of the store when a customer stopped and asked her to climb a ladder to bring down floral arrangements that weighed about five pounds. Her back pain accelerated from this activity. She reported this pain to her Department Manager, Judy Stell. She did not ask for a medical referral on September 14, 2008.

4. Aimee Cruz, Assistant Store Manager, testified that Claimant reported on September 20, 2008, that Claimant was assisting a customer with a floral arrangement on September 14, 2008, and the Claimant was going up and down a ladder to bring the customer floral pieces. The ALJ infers and finds that the incident involved going up and down a ladder once. Claimant reported injury to her back. According to Cruz, the floral arrangements are made out of silk, Styrofoam and weigh less than three pounds.

5. Brad Frese, Store Manager, completed the First Report of Injury noting an alleged back injury after repetitive motions of going up and down the ladder. The ALJ infers and finds that Frese, who was not present on the day in question, was mistaken on the "repetitive motions," and Cruz's testimony is more reliable.

6. On Wednesday, September 17, 2008, when her low back pain did not subside, Claimant attempted to report her injury to Jim Van Natten, the Store Manager. He was not in the store on that day, neither was Assistant Manager Amy Cruz.

7. Claimant called the Employer again on September 18, and 19, 2008. Van Natten was not at the store on either day.

8. Both the Claimant and Cruz testified that Claimant finally reported her injury to Cruz on September 20, 2008.

9. Claimant was not immediately sent for medical treatment at that time and her low back pain continued to persist over time, without medical treatment.

Pre-Existing Back Condition

10. The Claimant has a prior history of low back problems dating back to a 1992 work related injury with Wal-Mart for which she received an impairment rating in 1994. She was given permanent restrictions from that injury at that time.

11. Claimant told the Employer that she suffered a preexisting back injury while working for Wal-Mart in 1992. Claimant, however, prior to employment with the Employer, told the Employer that her preexisting back injury had healed. Claimant stated that her job with the Employer did not involve lifting or moving heaving objects.

12. According to the Claimant, the Employer did not request or require her to lift or move heavy objects; and, she did not lift or move heavy objects. For example, Claimant stated that employees from the receiving department would carry Event Kits into the classroom for Claimant. Also, Claimant testified that if tables or heavy items needed to be moved, other store associated would move them for Claimant.

13. As a result of the 1992 Wal-Mart back injury, Kathy McCranie, M.D., on April 28, 1994, assigned Claimant permanent work restrictions, placing the Claimant in the Sedentary work category.

14. On September 1, 1993, Michael McNally, M.D., expressed the opinion that Claimant would not have any success getting back to work; Claimant reports acute pain in the back which has radiated to both legs; Claimant relates the pain is aggravated by almost any activity. The ALJ finds that Dr. McNally's opinion was in error, as illustrated by the Claimant's work for the Employer herein.

15. On April 28, 1994, Dr. McCranie's impressions were chronic low back pain, intervertebral disk and bulging at L5-S1 and myofascial involvement of the left gluteal region. Claimant suffered preexisting back and lower extremity injuries.

16. Following Claimant's release 1994 at maximum medical improvement (MMI) for the 1992 injury, and the passage of time after the 1992

injury, her condition had improved dramatically and prior to starting work with the Employer in 2008 she was pain free. The ALJ finds her testimony in this regard persuasive, credible and essentially undisputed

17. While working for the Employer, the Claimant was able to perform all of the essential functions of her job and was not under disability until her injury of September 14, 2008. Also, Claimant had not received medical care for her 1992 injury since 1994.

Medical Concerning September 14, 2008 Incident

18. Eventually, Claimant's back pain got so bad that it demanded medical attention and the Employer referred her to Julie Parsons, M.D., at HealthOne. The parties stipulated, and the ALJ finds, that Dr. Parsons became the Claimant's authorized treating physician (ATP). Claimant saw Dr. Parsons on October 20, 2008. Dr. Parsons diagnosed a thoracolumbar strain. The ALJ infers and finds that based on the four corners of Dr. Parsons' report, she is of the opinion that the thoracolumbar strain was caused by the Claimant's job duties with the Employer on September 14, 2008. On October 20, Dr. Parsons gave the Claimant restrictions of fifteen pounds lifting, pushing, pulling and carrying. Claimant also was given restrictions of limited bending and twisting.

19. In her Supplemental Answers to Interrogatories, number 3 (admitted into evidence), Claimant indicates that while she was at home, her left leg gave out. Also, Dr. Parson's November 17, 2008 medical report notes Claimant got back pain and her left leg buckled while she was walking with a couple of Christmas stocking in her hand and a small box of glitter. The ALJ infers and finds that her left leg gave out because of the incident of September 124, 2008.

20. Due to back pain, the Claimant stopped working on October 20, 2008 and she has not returned to work since then, and she was never given a written offer employment within her restrictions. Also, Claimant has not been released to return to full duty no has she earned wages or been declared to be at maximum medical improvement (MMI), as of the hearing date.

21. On October 31, 2008, Bradley Frese, an Employer management representative, told the Claimant that the Employer could not accommodate her restrictions.

22. Claimant has not received medical treatment since November 24, 2008. The adjuster at Gallagher Bassett, agent of the insurer, informed Claimant that her case was under denial and that no further medical treatment would be authorized. This is undisputed. Based on this communicated denial, the ALJ finds that the Claimant was denied further medical treatment for non-

medical reasons, after the Respondents had a reasonable opportunity to furnish further medical treatment by Dr. Parsons or to offer substitute medical treatment.

23. On April 7, 2009, F. Mark Paz, M.D., performed an Independent Medical Examination (IME) of the Claimant, at Respondents' request, for the primary purpose of determining causality. Dr. Paz diagnosed low back pain, based on lumbar degenerative disc disease. Dr. Paz was of the opinion that "it is not medically probable that climbing up and down the ladders is a likely explanation for her current symptoms." Further, he was of the opinion that Claimant did not sustain a **permanent** aggravation of a preexisting condition. The ALJ finds that Dr. Paz's opinion in this regard is contrary to the totality of the lay and other medical evidence. Furthermore, Dr. Paz employs an inappropriate measure for a compensable "aggravation and acceleration" of a preexisting condition, *i.e.,* "**permanent**" aggravation, which, in part, compromises his ultimate opinion on causality. Additionally, the ALJ finds the ATP's (Dr. Parsons') implied opinion of causal relatedness more persuasive and credible than Dr. Paz's opinion.

24. The exhibits contain a termination letter dated April 29, 2009. This letter states that Claimant is being terminated because she failed to fill out a Leave of Absence packet after having requested a leave of absence beginning October 30, 2008.

25. Claimant never requested a leave of absence from the Employer. She did not request leave and was not asked by her Employer to request a Leave of Absence. The ALJ finds Claimant's testimony in this regard credible and reasonable because Claimant was temporary and totally disabled from her workers' compensation injury, and the completion of a Leave of Absence form was not required of her.

26. Respondents introduced the Employer's store Employee Handbook, concerning "leave issues," and the only reference to a potential termination over leave of absence issues is failure to provide medical certification to justify leave. To terminate an employee who is claiming a work-related injury, based on failure to submit "leave of absence" forms borders on a pretextual reason for termination.

27. The Employee Handbook makes repeated reference to an employee's "Request for Leave of Absence." It informs the employee that he/she is entitled to a leave of absence under the FMLA (family Medical Leave Act) and various other leave policies. Claimant never requested a leave of absence under FMLA, or otherwise, and therefore, did not violate the Employer's policies.

28. Respondents failed to prove that Claimant precipitated her termination from employment by a volitional act that the she would **reasonably expect** to result in a loss of her employment.

Ultimate Findings

29. Claimant has proven, by a preponderance of the evidence that she sustained a compensable injury to her back on September 14, 2008, while performing duties for her Employer, and this injury arose out of the course and scope of her employment for the Employer. Claimant has further proven, by preponderant evidence that the agent of the insurance carrier denied the Claimant further medical treatment on or about November 24, 2008 for non-medical reasons. Consequently the right of selecting an authorized treating physician (ATP) passed to the Claimant at that time. Dr. Parsons became Claimant's ATP.

30. The Claimant's AWW is $229.90, which yields a TTD rate of $153.27 per week, or $21.90 per day.

31. The Claimant has not been released to return to work without restrictions since October 20, 2008; she has not earned wages since that time; and, she has not been declared to be at MMI. Consequently, the Claimant has proven by preponderant evidence that she has been TTD since October 20, 2008.

32. Respondents have failed to prove, by a preponderance of the evidence that Claimant was responsible for her termination on April 8, 2009, through a volitional act on her part. To show that the Claimant was responsible for her termination, Respondents were required to prove that Claimant committed a **volitiona**l act, or **exercised control over her termination**, in light of the totality of the circumstances. Respondents failed to do this. Also, Respondents have failed to prove, by preponderant evidence that Claimant willfully misled the Employer concerning her physical ability to do the job for which she was hired.

CONCLUSIONS OF LAW

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

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or

unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, the ATP's (Dr. Parsons) implied opinion on causality, plus the totality of the Claimant's testimony, is more persuasive and credible than Dr. Paz's opinion on causality. Also, as found, the Claimant's testimony was credible and persuasive.

b. It is undisputed that Gallagher Basset, the claims management agent of the insurance carrier, denied the Claimant medical treatment on November 24, 2008 for non-medical reasons. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Claimant has sustained her burden with respect to compensability; medical benefits (authorization, causally related, and reasonable necessity); AWW; and, TTD. Respondent has failed to sustain its burden with respect to "responsibility for termination," or the Claimant willfully misleading the Employer about her physical ability to do the job for which she was hired, contrary to Section 8-42-112 (1) (d), C.R.S. (2008).

<u>Compensability</u>

d. An injury is compensable if incurred by an employee in the course and scope of employment. Section 8-41-301(1)(b), C.R.S. (2008); *Price v. ICAO,* 919 P.2d 207 (Colo. 1996). Claimant must show a connection between the employment and the injury, such that the injury has its origins in the employee's work-related functions, and it is sufficiently related to those functions to be

considered part of the employment contract. See *Madden v. Mountain W. Fabricators*, 977 P.2d 861 (Colo. 1999). In order to prove causation, medical evidence is not necessary. As found, the Claimant's testimony and the constellation of facts surrounding her injury establish the requisite nexus between the injury and her work duties. *Also See Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

e. Further, if an industrial injury ***aggravates, accelerates, or combines*** with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). It is not required that the aggravation and acceleration be permanent in nature. As found, the Claimant's work activities of September 14, 2008 aggravated and accelerated her underlying degenerative back condition so as to disable Claimant and require medical treatment.

f. Respondents argument that Claimant's low back injury was a natural progression of her 1992 back injury is rejected. As found, following being released at MMI for her 1992 low back injury, her condition improved to the point that she was able to perform all of the essential functions of her job with Employer until her subsequent September 14, 2008, back injury. Medical records support and corroborate Claimant's testimony. As found, her testimony credible. See *Lymburn v. Symbois Logic,* 952 P.2d 831 (Colo. App. 1997). As further found, following Claimant's release at MMI in 1994 for the 1992 injury, she improved dramatically and was pain free before starting work for the Employer herein.

Medical Benefits

g. If the physician selected by the Employer (Dr. Parsons) refuses to treat for non-medical reasons, and the insurer fails to appoint a willing ATP after notice of the refusal to treat, the right of selection passes to the injured worker. *Weinmeister v. Cobe Cardiovascular, Inc.,* W.C. No. 4-657-812 [Industrial Claim Appeals Office (ICAO), July 10, 2006]. *Also see Lutz v. Industrial Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Ruybal v. University Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988). As found, an adjuster with the insurer's adjustment agency informed the Claimant that further medical treatment would be denied because the claim was denied. Therefore, the right of selection of a treating physician passed to the Claimant and remains with her to this day.

h. Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101 (1)(a), C.R.S. (2008); *Snyder v. Indus. Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Further, Respondents are liable if the employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment. Section 8-41-301(1)(c); *Snyder v. Indus. Claim Appeals*

Office, *supra*. Also, medical care is not subject to apportionment for injuries occurring after July 1, 2008. Section 8-42-104(3), C.R.S. (2008). As found, all of the medical care and treatment rendered by Dr. Parsons was reasonably necessary to cure and relieve Claimant of the effects of the September 14, 2008 compensable injury.

Temporary Disability

i. Claimant is not required to prove that her work-related injury was the ***sole*** cause of her wage loss in order to establish eligibility to TTD benefits. Rather, the benefits are precluded ***only*** when the work-related injury plays "***no part*** in the subsequent wage loss (emphasis supplied)." *Horton v. Indus. Claim Appeals Office,* 942 P.2d 1209, 1210-1211 (Colo. App. 1996). To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42-103 (1), C.R.S. (2008); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses her employment for other reasons which are not her responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair her opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973, (ICAO, December 18, 2000). As found, Claimant's termination in this case was not her fault.

j. The term "disability" connotes two elements: the first is "medical incapacity" evidenced by loss or reduction of bodily function. There is no statutory requirement that the Claimant present medical opinion evidence from of an attending physician establish her physical disability. See *Lymburn v. Symbois Logic*, *supra*. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. The second element is loss of wage earning capacity. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of "disability" may be evidenced by a complete or partial inability to work, or physical restrictions that preclude the claimant from securing employment. The testimony in *Horner* proved this element. As found, Claimant suffered both and this had an adverse impact on her ability to perform her job. *Absolute Employment Service, Inc. v. ICAO,* 997 P.2d 1229 (Colo. App. 1999) [construing disability for purposes of apportionment]. As found, from October 20, 2008 and continuing, the Claimant has been unable to return to her usual job due to the effects of her September 14, 2008, injury. Consequently, she is "disabled" under Section 8-42-105, C.R.S. (2008), and is entitled to TTD benefits from October 20, 2008 and continuing, until terminated by statute. *Culver v. Ace*

Electric, supra; *Hendricks v. Keebler Company,* W.C. No. 4-373-392 (ICAO, June 11, 1999.).

k. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, modified employment is not made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, Claimant has met these criteria since October 20, 2008, sustaining a 100% temporary wage loss.

Allegedly Misleading Employer About Physical Ability To Do Job

l. Section 8-42-112 (1) (d), C.R.S. (2008), provides that benefits "shall be reduced fifty percent… where an employee **willfully** (emphasis supplied) an employer concerning the employee's physical ability to perform the job…." As found, Respondents failed to prove that Claimant **willfully** misled the Employer concerning her physical ability to do the job.

Responsibility for Termination

m. Respondents must prove that the Claimant was responsible for her termination, through a volitional act on her part, in order to trigger the application of Sections 8-42-103(1)(g) and, or of 8-42-105(4), C.R.S. (2008); *CCIA v. Industrial Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000). As found, Respondent has failed to prove "responsibility for termination."

n. To show that the Claimant was responsible for her termination Respondent was required to prove that Claimant committed a **volitiona**l act, or **exercised control over her termination**, in light of the totality of the circumstances. *See Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Padilla v. Digital Equipment*, 902 P.2d 414 (Colo. App. 1994). As found, Respondent failed to do this. An employee is responsible for termination only if the employee precipitated the employment termination by a volitional act that the employee would **reasonably expect** to result in a loss of employment. See *Patcheck v. Colorado Department of Public Safety*, WC# 4-432-301 (ICAO April 27, 2001). As found, Claimant did not volitionally precipitate her termination from employment.

o. The fact that an employer discharges an employee, **even in accordance with the employer's policy**, does not establish that a claimant acted volitionally, or exercised control over the circumstances of termination. *See Gonzalez v. Industrial Commission*, 740 P.2d 999 (Colo. 1987); *Goddard v. EG&G Rocky Flats, Inc.*, 888 P.2d 369 (Colo. App. 1994) [cited with approval in *Kneffer v. Kenton Manor*, W.C. No. 4-557-781 (ICAO, March 17, 2004); *Quinn v. Pioneer Sand Company*, W.C. No. 590-561 (ICAO, April 27, 2005); *Whiteman v.*

Life Care Solutions; W.C. No. 4-523-153, (ICAO, October 29, 2004) [both *Quinn* and *Whiteman* stand for the proposition that if effects of injury render Claimant incapable of performing job offered, Claimant not responsible for termination]; *Hall v. Wal-Mart Stores, Inc.*, W.C. No. 4-601-953 (ICAO, March 18, 2004) [Respondent cannot adopt a strict liability personnel policy which usurp's the statutory definition of "responsibility" for termination where Claimant engaged in a fight it at work but did not provoke assault]; *Maes v. CA One Services, Inc.*, W.C. No. 4-543-840 (ICAO, March 3, 2004); *Wilcox v. City of Lakewood*, W.C. No. 4-76-102 (ICAO, February 13, 2004); *Gallegos v. Sealy, Inc.*, W.C. No. 4-529-704 (ICAO, February 12, 2004); *Fahey v. Brede Exposition Services*, W.C. No. 4-522-492 (ICAO, January 21, 2003); *Bonney v. Pueblo Youth Service Bureau*, W.C. No. 4-485-720 (ICAO, April 24, 2002) [Claimant was not responsible for failure to comply with employer's absence policy if Claimant was not physically able to notify the employer*]; see e.g., Bell v. Industrial Claim Appeals Office*, 93 P .3d 584, (Colo. App. 2004) [Claimant not at fault for termination for refusing to sign settlement agreement waiving statutory rights]. As found, Claimant could not comply with the Employer's leave of absence policy when the Claimant had not requested a leave of absence to begin with.

p. Further, the reason for the discharge, at the time of discharge, is dispositive on the issue of "at fault" termination. *Elliott v. Hire Calling Holding Company*, W.C. No. 4-700-819 (ICAO, November 16, 2007). It is not enough that the Employer later asserts additional reasons to justify a discharge if, at the time of discharge, the Claimant's conduct was not caused by his/her volitional act. As found, Claimant was terminated by the Employer on April 29, 2009 because she allegedly failed to complete Leave of Absence forms following her alleged request for a leave of absence. As found, the Claimant never requested, and did not want, a leave of absence. Further, the Employer never specifically mandated that Claimant request a leave of absence while her compensable injury was under denial and she had not been placed at MMI. Thus, Claimant did not commit a volitional act triggering the application of Section 8-42-103 (1)(g) or Section 8-42-105 (4) C.R.S. (2008), for her April 29, 2009, termination.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. That Claimant suffered a compensable injury on September 14, 2008, for which she is entitled to medical care with Dr. Parsons.

B. Because the Insurer herein refused Claimant further medical treatment for non-medical reasons on November 24, 2008, the Insurer shall advise Julie Parsons, M.D., that it will pay her medical bills for causally related and reasonably necessary medical care and treatment, subject to the Division of

Workers' Compensation (DOWC) Medical Fee Schedule (the "Schedule"). If Dr. Parsons thereafter refuses to treat the Claimant for non-medical reasons, the Claimant will be entitled to select an authorized treating physician of her choice and Respondents shall pay the costs of such causally related and reasonably necessary medical treatment, subject to the DOWC Schedule.

C. For the period from October 21, 2008 through the hearing date, May 12, 2009, both dates inclusive, a total of 203 days, Respondents shall pay the Claimant temporary total disability benefits of $153.11 per week, or $21.90 per day, in the aggregate amount of $4,445.70, which is payable retroactively and forthwith. From May 13, 2009, Respondents shall continue paying the Claimant temporary total disability benefits of $153.11, until terminated by statute.

D. Respondents' affirmative defense of "responsibility for termination," and Respondents' affirmative claim for a 50% reduction in benefits for Claimant's alleged **willfully** misleading the Employer about her physical abilities to do the job for which she was hired are hereby denied and dismissed.

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

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

DATED this_____day of June 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-775-834

ISSUES

- Did claimant prove by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits from September 7 through December 3, 2008?
- Did employer prove by a preponderance of the evidence that claimant was responsible for termination of his employment such that his wage loss

from September 7, 2008, ongoing, may not be attributable to his industrial injury?

FINDINGS OF FACT

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

1. Employer operates an airline business. Claimant has worked for employer for some 11 years as a ramp service agent. Claimant works for employer under a collective bargaining agreement, performing baggage-handling duties. Claimant's job requires him to lift up to 70 pounds. Claimant sustained an admitted injury to his left shoulder while working in the cargo bay of an airplane on August 10, 2008. Claimant was lifting a golf bag when he felt a pop in his left shoulder. The Judge adopts the stipulation of the parties in finding claimant's average weekly wage (AWW) is $700.

2. Employer referred claimant to Kaiser on the Job, where Paul Fournier, M.D., first evaluated his left shoulder injury on August 10, 2008. Dr. Fournier placed claimant's left upper extremity in a sling and restricted lifting, pushing and pulling to 5 pounds. Dr. Fournier's restrictions preclude claimant from performing his regular work as a ramp service agent. Employer did not provide claimant a written offer of modified duty work.

3. Employer held meetings with employees during the week of August 11th to explain procedures and options for an upcoming furlough, effective September 7, 2008. Employees had until August 21st to complete an "IAM Surplus – Location Option Form" (Furlough Option Form) electing options, if available to them under the collective bargaining agreement.

4. Claimant was off work on funeral and other leave until from August 11th through August 21st. Employer telephoned claimant and directed him to return to work on the August 21st deadline to choose his furlough elections. Claimant first learned of the furlough options on August 21st. The furlough options offered for claimant's classification were conditioned upon availability, depending upon the employee's status. All options available to claimant required him to be available to work within his current job classification. As of August 21st, claimant was unable to perform his regular work within his classification because of physical activity restrictions imposed by Dr. Fournier. The Furlough Option Form that claimant completed and signed on August 21st provides:

> If none of the selected options are available or all of the options are declined, you will be placed on layoff with severance pay and recall to your location.

Claimant declined all options because he could not work within his current classification. Employer placed claimant on layoff status as of September 7th, where he retained his recall rights and travel benefits. Employer did not separate or terminate claimant from employment.

5. After claimant signed the Furlough Option Form on August 21st, employer instructed him to contact the TOB Supervisor, who supervises the transfer of bags between airplanes. The TOB Supervisor also supervises employees who are on the list to perform light-duty work. Claimant continued to follow Dr. Fournier's instructions to keep his left upper extremity in a sling from August 21st through September 7th. Claimant had not been placed on the light-duty list. The TOB Supervisor told claimant she would call him if she had light-duty work for him. The TOB Supervisor never telephoned claimant.

6. The Judge credits claimant's testimony as persuasive. Employer's Supervisor of Airport Operations, Robert Herrera, reviewed claimant's file and testified about furlough procedures under the collective bargaining agreement. Mr. Herrera does not know claimant. Mr. Herrera agreed claimant could neither perform work within his classification nor elect any of the options listed for that classification on Furlough Option Form. Mr. Herrera acknowledged that the Furlough Option Form fails to explain light-duty options. Crediting Mr. Herrera's testimony, claimant's supervisor is the employer representative who should have explained claimant's furlough options. Crediting claimant's testimony, his supervisor never explained that he had any light-duty option to elect instead of the furlough.

7. Dr. Fournier eventually referred claimant for a magnetic resonance imaging (MRI) scan of his left shoulder and to Orthopedic Surgeon David M. Oster, M.D. Dr. Oster evaluated claimant on September 3, 2008, administered an injection into his left shoulder, and recommended a trial of conservative treatment. Claimant underwent physical therapy treatment. On December 4, 2008, Dr. Oster performed arthroscopic surgery to repair a partial tear of claimant's left rotator cuff.

8. On December 9, 2008, employer filed a General Admission of Liability, admitting liability for TTD benefits from December 4, 2008, ongoing. Employer contends claimant was responsible for his wage loss from September 7th through December 4, 2008, because he elected the furlough option instead of light-duty work.

9. Employer neither offered claimant light-duty work in writing nor explained to him that he had the option to avoid the furlough by electing light-duty work. Claimant reported for modified duty for several days between August 21st through September 7th, when he had nothing to do but watch television. Employer never offered claimant light-duty work in writing while he was on furlough after September 7, 2008.

10. Claimant showed it more probably true than not that his injury proximately caused his wage loss from September 7th through December 3, 2008. As found, Dr. Fournier's restrictions on August 10, 2008, precluded claimant from performing his regular work as a ramp service agent. Employer provided claimant light duty work until his furlough on September 7th. Because of restrictions, claimant remained unable to perform his regular work after September 7th.

11. Employer failed to show it more probably true than not that claimant was responsible for his termination. First, the Judge finds the termination statutes inapplicable to claimant's claim because employer furloughed him but has not terminated him. Even if the termination statutes apply to a furloughed employee, there was no persuasive evidence otherwise showing claimant performed some volitional act, which he reasonably knew or should have known would result in his termination. As found, from August 11, 2008, ongoing, claimant was unable to perform work within his regular classification because of physical activity restrictions from his admitted injury. Because claimant was unable to perform work within his regular classification, claimant had no options available to him to avoid furlough. Although employer contends claimant had the option of electing light-duty work instead of the furlough, the Furlough Option Form fails to state that as an option. Claimant was unaware of any light-duty option until after he had signed and submitted his Furlough Option Form to his supervisor. Under the totality of the circumstances, claimant's election to accept the furlough was involuntary. Employer thus failed to prove by a preponderance of the evidence that claimant was responsible for termination of his employment.

CONCLUSIONS OF LAW

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

A. TTD Benefits:

Claimant argues he has proven by a preponderance of the evidence that he is entitled to TTD benefits from September 7 through December 3, 2008. 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*.

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).

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 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).

Claimant showed it more probably true than not that his injury proximately caused his wage loss from September 7th through December 3, 2008. Claimant thus proved by a preponderance of the evidence that he is entitled to TTD benefits from September 7th through December 3, 2008.

As found, Dr. Fournier's restrictions on August 10, 2008, precluded claimant from performing his regular work as a ramp service agent. Employer provided claimant light duty work until his furlough on September 7th. Because of restrictions, claimant remained unable to perform his regular work after

September 7th. Claimant injury thus contributed to some degree to claimant's wage loss after September 7th.

B. Application of the Termination Statutes:

Employer argues it has proven by a preponderance of the evidence that claimant was responsible for termination of his employment such that his wage loss from September 7, 2008, ongoing, may not be attributable to his industrial injury. The Judge disagrees.

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).

The Judge however found that employer failed to show it more probably true than not that claimant was responsible for his termination. Employer thus failed to prove by a preponderance of the evidence that claimant was responsible for termination of his employment.

First, the Judge found the termination statutes inapplicable to claimant's claim because employer furloughed him but has not terminated him. Even if the termination statutes apply to a furloughed employee, there was no persuasive evidence otherwise showing claimant performed some volitional act, which he reasonably knew or should have known would result in his termination. As found, from August 11, 2008, ongoing, claimant was unable to perform work within his regular classification because of physical activity restrictions from his admitted injury. Because claimant was unable to perform work within his regular classification, claimant had no options available to him to avoid furlough.

Although employer contends claimant had the option of electing light-duty work instead of the furlough, the Furlough Option Form fails to state that as an option. Claimant was unaware of any light-duty option until after he had signed and submitted his Furlough Option Form to his supervisor. Under the totality of the circumstances, claimant's election to accept the furlough was involuntary.

The Judge concludes that employer's affirmative defense under the termination statutes should be denied and dismissed. Employer should pay claimant TTD benefits from September 7th through December 3, 2008, based upon his AWW of $700.

ORDER

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

1. Employer's affirmative defense under the termination statutes is denied and dismissed.

2. Employer shall pay claimant TTD benefits from September 7th through December 3, 2008, based upon his AWW of $700.

3. Employer shall pay statutory interest at the rate of eight percent (8%) per annum on all compensation not paid when due.

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

DATED: __June 19, 2009__

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-776-156

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 9, 2009, in Denver, Colorado. The

hearing was digitally recorded (reference: 6/9/09, Courtroom 3, beginning at 1:41 PM, and ending at 3:26 PM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel, giving Respondents 3 working days within which to file electronic objections. The proposed decision was filed on June 12, 2009. No timely objections were filed. After a consideration of the proposal, the ALJ has modified it and , as modified, hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether Respondents may prospectively withdraw their General Admission of Liability, dated November 18, 2008. Because Respondents raised the "withdrawal" issue, Claimant has the burden, in the first instance, of proving, by a preponderance of the evidence that she sustained a compensable injury in the course and scope of her employment with the Employer.

FINDINGS OF FACT

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

1. Claimant worked for the Employer as a massage therapist. Claimant sustained an injury to her low back on September 28, 2008, while performing a massage on a client. She was working on the neck area of a client while in a seated position when she turned slightly and felt the immediate onset of pain in the low back. She stopped the massage she was giving, went out to the front desk and told them she didn't think she would be able to complete her schedule for the day. Claimant presented consistently, reasonably and credibly throughout her testimony at hearing.

2. Claimant talked to a senior therapist immediately after her injury to see if massage would help get her back to being able of completing her shift, but was unable to get relief from the pain. According to the Claimant, there were no management personnel on site to refer her to a physician, so she was sent to Littleton Hospital for treatment. Her Employer subsequently referred her to Felix Meza, M.D., at Concentra. Dr. Meza referred Claimant to Scott Primack, M.D., because of his expertise in treating back injuries.

3. Dr. Primack saw the Claimant for the first time on October 14, 2008. According to the Claimant, she told Dr. Primack that she had previously injured her back on multiple occasions and gave him the history of what occurred with the present injury. In his initial evaluation, Dr. Primack reported that he was

aware of the prior injuries and Claimant's previous discogenic problems with her back. The fact that the Claimant disclosed her prior injuries without prompting enhances her credibility. Dr. Primack looked at Claimant's MRI (magnetic resonance imaging) from 2003 and compared it to an MRI taken as a result of the present injury. It was Dr. Primack's opinion that the MRI from 2003 was different than the one for the 2008 injury, specifically at the L4-L5 level. The 2003 MRI reflected problems at L5-S1. It was his opinion that the need for treatment at the L4-L5 level was work related. The ALJ finds that the need for treatment at L4-L5 is related to the 2008 injury.

4. Respondents filed a General Admission of Liability, dated November 18, 2008, admitting liability for the injury of September 28, 2008. Temporary total disability (TTD) benefits were paid beginning September 29, 2008 and ending November 11, 2008, when Claimant returned to work at full duty. Claimant has been able to work, but her shifts have been limited by the Employer due to her injury.

5. Jeremiah Coogan, M.D., subsequently put at the Claimant at maximum medical improvement (MMI) on March 12, 2009. At that time, Dr. Coogan assigned the Claimant a 9% whole person impairment rating for her work injury. Later, in his response to an inquiry from counsel for the Respondents, Dr. Coogan revised his rating to 0%. He referred to two injury dates that he said were not given to him and that he said were substantially similar to the injury of September 28, 2008. Those alleged dates of injury were August 1, 2008 and August 28, 2008. Claimant testified that she did not sustain any injuries on those dates, and there is no record in the medical evidence of any injuries on those dates. Therefore, the ALJ does not find Dr. Coogan's changed opinion persuasive or credible because, among other things, it is based in part on factual errors.

6. Respondents admitted liability for the injury of September 28, 2008, and now seek to withdraw that admission. They do not seek repayment of benefits already paid but seek only a prospective withdrawal. Claimant has the burden of proving, by a preponderance of the evidence, that she suffered an injury in the course and scope of her employment. Here the ALJ finds that Claimant has met that burden, and demonstrated a compensable event that occurred on September 28, 2008, wherein she suffered an injury to her low back that required treatment.

7. Claimant went through massage school for a year and then worked as a massage therapist for one year without any complaints of back pain or the need to seek out treatment for her back. There is no record of any medical treatment for the Claimant during this period of time. Claimant reported to her authorized treating physicians (ATPs) that she had injured her back previously, though many of the prior injuries were to different areas of her back than what is indicated herein.

8. Respondents sent the Claimant to Mark Paz, M.D., who performed an independent medical evaluation (IME) f on February17, 2009. Dr. Paz was of the opinion that the event Claimant described did not cause her back pain. The ALJ finds that Dr. Paz does not persuasively support his difference of opinion with Dr. Primack. The ALJ does not find it to be persuasive and resolves the conflict in medical opinion in favor of Dr. Primack's opinion(an ATP), regarding the work relatedness of the Claimant's 2008 injury . Dr. Primack's opinion is based on more study and familiarty with the Claimant's case than the opinion of Dr. Paz.

9. Dr. Coogan, an ATP, placed the Claimant at MMI. Respondents applied for a Division of Workers Compensation Independent Medical Exam (DIME) to comply with the requirement that they either file a Final Admission or request a DIME once the ATP has indicated MMI. Respondents sought, and were granted, a stay of those proceedings pending the outcome of the hearing herein. That stay should be lifted and the DIME process can continue.

10. Claimant has proven, by a preponderance of the evidence that she sustain a compensable injury to her low back on September 28, 2008. Respondents have failed to prove that the General Admission was filed improvidently or erroneously. A prospectively withdrawal of the previously filed General Admission is **not** warranted because the request was based on Dr. Coogan's changed opinion, which has not undermined the compensability of the Claimant's claim and which has been determined to be invalid.

CONCLUSIONS OF LAW

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

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder

should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, Dr. Primack's opinion on the causal relatedness of the September 28,2008 low back injury to the Claimant's work is more persuasive and credible than Dr. Paz's opinion to the contrary. Thus, Dr. Primack's opinion supports compensability herein. Also, as found, Claimant's testimony at hearing was consistently credible and it supports the compensability of the September 28, 2008 incident.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found,
Claimant sustained her burden with respect to the compensability of the September 28, 2008 low back injury. Respondents failed to sustain their burden with respect to prospective withdrawal of the General Admission.

c. By filing an admission of liability, an employer admits that a claimant has sustained the claimant's burden of proof, it is bound by the admission, and it must pay benefits accordingly. *Rocky Mountain Cardiology v. Indus. Claim Appeals Office,* 94 P.3d 1182 (Colo. App. 2004). Essentially, an admission has the force and effect of an ALJ's order unless and until overturned by an ALJ under legally appropriate circumstances, *e.g.,* error or mistake that would justify a re-opening. Employers may obtain relief from improvident or erroneous admissions on a prospective basis. *HLJ Management Group, Inc. v. Indus. Claim Appeals Office,* 804 P.2d 250 (Colo. App. 1990), *cert. denied* 1991; *Lewis v. Scientific Supply Company, Inc.,* W.C. 3-738-278 (Industrial Claim Appeals Office, July 5, 1994). As found, the General Admission of Liability herein was not filed improvidently or erroneously.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant sustained a compensable injury to her low back on September 28, 2008.

B. Respondents request to withdraw the General Admission of Liability is hereby denied and dismissed. Respondents shall continue to pay benefits pursuant to the General Admission of Liability, dated November 11, 2008.

C. The parties shall proceed with the Division Independent Medical Examination process that was previously stayed pursuant to the Order of Pre-hearing ALJ Sue Purdie on April 28, 2009.

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

DATED this_____day of June 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-776-396

ISSUES

➢Did the Claimant prove by a preponderance of the evidence that she suffered a compensable injury arising out of and in the course of her employment with employer?

➢If Claimant did prove a compensable injury, did Claimant prove by a preponderance of the evidence that she is entitled to temporary disability benefits from November 15, 2008 through March 13, 2009.

➢If Claimant did prove a compensable injury, what is Claimant's average weekly wage?

FINDINGS OF FACT

1. Claimant was a certified nursing assistant ("CNA") with employer. Claimant worked forty (40) hours per week and was paid at a rate of $15.11 per hour. Claimant's job duties included helping patients and nurses in caring for patients. Claimant testified that on September 9, 2008, while attempting to lift a

heavy patient with a Hoyer lift, claimant pulled on the machine that was stuck on cords, and when the machine eventually moved, Claimant slipped, twisted her ankle and fell. Pain had pain in her left heel, but did not immediately report the injury as she was afraid that she would get into trouble for attempting to use the Hoyer lift without a second person present. Claimant eventually reported the incident to her supervisor on September 10, 2008. The incident report is signed by Claimant and the employer and reports the injury as occurring while working with the Hoyer in room 305, which is identified as the room patient named Jaminga was staying. In the incident report, Claimant identifies the injury as occurring while "pushing" the Hoyer.

2. Although reporting her injury to her employer on September 10, 2008, Claimant initially refused medical treatment; however, on September 23, 2008, Claimant requested a referral to a physician and Claimant was referred to Roaring Fork Family Physicians where Claimant was evaluated by Ms. Carlsen, a certified physician assistant. Ms. Carlsen noted that Claimant reported that she injured her ankle approximately nine (9) days ago while pushing a machine when she twisted her foot. Ms. Carlsen noted that Claimant had mild swelling over her lateral ankle and diagnosed Claimant with an ankle sprain. Ms. Carlsen ordered x-rays of Claimant's ankle, that revealed no fractures. Ms. Carlsen referred Claimant for physical therapy and provided Claimant with work restrictions

3. On October 1, 2008, Claimant submitted her resignation to employer, effective two weeks from October 1, 2008. Claimant continued to receive medical treatment during this time, including a referral to Dr. Armstrong with Orthopedic Associates. Claimant testified she did not return to work until March 13, 2009 when she began working in a nursing home performing the same duties she previously performed for employer.

4. Claimant was initially evaluated by Dr. Armstrong on October 17, 2008, two days after her last date of employment with employer. Claimant reported to Dr. Armstrong that she rolled her ankle when se was pushing a cart and felt and heard her ankle pop. Dr. Armstrong diagnosed Claimant with an ankle sprain with symptoms consistent with a possible contusion or a hairline fracture of the tibia. Dr. Armstrong referred Claimant for an MRI of the ankle and requested the Claimant follow up after the MRI was completed. Dr. Armstrong also provided Claimant with increased work restrictions of no standing for more than two (2) hours and no lifting or pushing carts. The MRI was performed on October 28, 2008 and revealed a possible non-displaced fracture in Claimant's foot.

5. Claimant returned to Dr. Armstong on November 4, 2008. Dr. Armstrong opined that Claimant had a osteochondral injury without displaced, rotated or flipped fragment and possible distal tibial fracture and sustentaculum talus fracture. Dr. Armstrong recommended immobilizing Claimant's foot in addition to ultrasound and physical therapy to determine if her symptoms would

improve with conservative treatment. Dr. Armstrong also recommended that the Claimant's work restrictions include no walking, standing, carrying, lifting or pushing. Claimant returned to Dr. Armstrong on November 25, 2008 with continued complaints of pain that increased with activity. Dr. Armstrong provided the Claimant with a cortisone shot and recommended Claimant follow up in two to three (2-3) weeks to determine if Claimant was a surgical candidate. Claimant was evaluated by Ms. Carlsen on December 2, 2008. Claimant reported to Ms. Carlsen that after her injection she initially felt better, but the pain then returned. Ms. Carlsen noted that Claimant was to continue with Dr. Armstrong's care and increased Claimant's work restrictions to include no standing, walking, climbing and restricted Claimant to seated work only. The ALJ credits the reports from Ms. Carlsen documenting an increase in Claimant's restrictions as of December 2, 2008 from her previous restrictions and finds that Claimant's condition had worsened as of December 2, 2008.

6. Respondents presented the testimony of Ms. Marney, one of Claimant's supervisors while Claimant was employed with employer. Claimant reported her injury to Ms. Marney on September 10, 2008 and Ms. Marney instructed Claimant to fill out an incident report. Ms. Marney reported that Claimant reported that she injured her ankle while pushing a Hoyer down the hall when she bumped her ankle against the Hoyer. Ms. Marney examined Claimant's ankle and noted some small red spots on the outside of Claimant's ankle, but did not notice any signs of swelling. Ms. Marney testified that after the incident she did not notice Claimant limping or walking with an altered gait.

7. Respondents presented the testimony of Ms. Hall, the Director of nursing for employer. Ms. Hall testified that Claimant was provided with restrictions after her appointment on September 23, 2008 and employer honored Claimant's restrictions. Claimant's light duty work including obtaining vital signs, testing ice water, and making beds. Ms. Hall did not notice Claimant limping or favoring her ankle. Respondents also presented the testimony of Ms. Williams, another supervisor for employer. Ms. Williams testified that she spoke with Claimant regarding the incident on or about September 12, 2008 and Claimant denied needing medical attention. Ms. Williams reported that Claimant originally reported her injury as occurring when she bumped her ankle while pushing the Hoyer lift. On September 23, 2008, Claimant contacted Ms. Williams after a meeting and indicated her ankle was continuing to hurt. Ms. Williams thereafter referred Claimant for medical treatment with Roaring Fork Family Physicians.

8. The ALJ credits the testimony of Claimant that she injured her ankle while pulling a Hoyer lift on September 9, 2008 while performing duties within the course and scope of her employment. The ALJ notes that there exists a conflict in the evidence regarding whether Claimant was pushing or pulling the Hoyer lift at the time of the incident. However, the ALJ resolves these conflicts in favor of Claimant and finds that it is more likely true than not that Claimant was pulling the Hoyer lift attempting to place a patient on the lift, when the lift became stuck.

After Claimant pulled on the lift, she twisted her ankle and fell, resulting in her ankle injury. The ALJ finds that Claimant did not immediately report the incident to her supervisor as she was afraid that she may get in trouble for attempting to move a patient without assistance. Nonetheless, Claimant did report the incident on September 10, 2008 and eventually sought medical treatment on September 23, 2008.

9. The ALJ notes that Respondents have presented testimony regarding conflicting accident histories provided by Claimant. Nonetheless, the ALJ finds the testimony of Claimant regarding the incident more persuasive than the testimony of other witnesses.

10. The ALJ credits the medical reports of Dr. Roaring Fork Family Physicians in finding that Claimant's work restrictions were increased as of December 2, 2008 to include no walking, standing or climbing. The ALJ finds that as of December 2, 2008, Claimant's work restrictions had been increased that would have precluded Claimant from continuing the light duty work she was performing at the time of her resignation. The ALJ finds that as of December 2, 2008, Claimant's condition has worsened resulting in additional restrictions from her authorized treating physicians.

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 leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. As found, Claimant has proven by a preponderance of the evidence that she suffered a compensable injury on September 9, 2008 arising out of and in the course of her employment with employer. The ALJ credits Claimant's testimony that the injury occurred while at work as she pulled the Hoyer machine. Insofar as there are inconsistencies in the medical records and the translated recorded statement with regard to Claimant's reported accident, the ALJ credits Claimant's testimony at hearing with regard to how the injury occurred.

5. 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).

6. 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). As found, Claimant has confessed that she was responsible for her termination of employment as of October 15, 2008 by virtue of her voluntary resignation. Claimant argues, however, that she would be entitled to temporary disability benefits based upon a worsening of her condition.

7. In *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, (Colo. 2004), the court held that the termination statutes bar wage loss claims when the voluntary or for-cause termination of the modified employment causes the wage loss, but not when the worsening of a prior work-related injury incurred during that employment causes the wage loss. The Industrial Claim Appeals Panel in *Fantin v. King Soopers*, W.C. No. 4-465-221 (Industrial Claim Appeals Office, February 15, 2007), held that the termination statutes were intended to preclude only wage loss claims subsequent to the voluntary or for-cause termination that do not involve a worsening of condition. There, the Panel held that, where the claimant's condition worsens after the voluntary or for-cause termination, and where temporary total disability (TTD) benefits are reinstated to comply with the court's holding in *Longmont Toyota*, such benefits must continue until one of the conditions in Sections 8-42-105(3)(a) through (d) is met. *Fantin v. King Soopers*, *supra*.

8. As found, Claimant has proven by a preponderance of the evidence that she suffered a worsening of her condition as of December 2, 2008 as evidenced by the increased work restrictions established by Roaring Fork Family Physicians. Claimant is entitled to temporary disability benefits beginning December 2, 2008 and ending March 13, 2009 when Claimant returned to work making full wages for a different employer.

9. As found, Claimant's average weekly wage is $604.40 ($15.11 x 40 hours per week).

ORDER

It is therefore ordered that:

1. Respondents are to pay for Claimant's medical treatment from authorized medical providers that is reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury.

2. Respondents are to pay Claimant temporary total disability benefits for the period of December 2, 2008 through March 13, 2009 based upon an average weekly wage of $604.40.

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

All matters not determined herein are reserved for future determination.

DATED: June 8, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-776-688

ISSUES

- Did the claimant prove by a preponderance of the evidence that she sustained a compensable occupational disease proximately caused by the performance of services arising out of and in the course of her employment?
- Is the claimant entitled to temporary total disability benefits commencing March 7, 2009 and continuing?
- In the claimant entitled to reasonable and necessary medical treatment?
- What is the claimant's average weekly wage?

FINDINGS OF FACT

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

The claimant alleges that she sustained an occupational disease affecting her left elbow. As detailed below, the claimant eventually reported that the symptoms she associates with the alleged disease spread to affect other parts of her body including much of the left upper extremity, the left side of her neck, her head, and eventually the right upper extremity.

In approximately March 2008, the claimant was employed by a temporary services agency that assigned her to pick orders at the employer's warehouse facilities. The employer hired the claimant as a regular employee in approximately July 2008. The claimant was paid $12 per hour for 40 hours per week.

The employer had two types of warehouses. When the clamant began work as a temporary she worked in the drug warehouse. This job required the claimant to pick orders of drug samples off of shelves and place them in sample boxes. In the drug warehouse each order weighed no more than 5 pounds. The claimant also worked in the literature warehouse where the claimant would fill boxes with printed materials. Apparently, the boxes were located on a conveyor belt or cart depending on where the claimant was working. The claimant stated that she would fill between 800 and 1,000 orders per day. The claimant worked primarily in the literature warehouse after she was hired as a permanent employee.

The claimant testified that on August 26, 2008, while filling orders in the literature warehouse she experienced the onset of severe pain in her left elbow. The claimant stated that she had never felt this pain before, and had never had problems with her left elbow before August 26, 2008.

The claimant did not immediately report a work related injury to the employer. Instead, she went to an emergency treatment facility over the next weekend. The claimant was advised that her elbow condition was related to her employment. Consequently, on September 2, 2008, the claimant reported to her employer that she believed her left elbow condition was related to her employment. The employer referred the claimant to Dr. Matthew Liebentritt, D.O. for treatment.

In February 2007, more than one year prior to the alleged injury in this case, the claimant was employed at Wal-Mart. On or about February 26, 2007, the claimant sustained a work related injury while lifting a television set into a shopping cart. Wal-Mart referred the claimant to Concentra Medical Center (Concentra) for treatment of this injury.

A Concentra physician's assistant (PA) examined the claimant on February 27, 2007. The claimant gave a history of experiencing sharp pain in the left lateral neck and trapezius when lifting the television. The PA assessed cervical and trapezius strains and referred the claimant for physical therapy (PT).

The claimant first underwent PT on February 27, 2007. At that time the claimant reported that her left shoulder had "stretched" in the accident and she was experiencing left shoulder pain, left neck pain and upper back pain. On March 2, 2007, the claimant advised the physical therapist that she was experiencing numbness down the right upper extremity at the thumb, elbow and upper arm in addition to left shoulder and neck pain. On March 21, 2007, the claimant reported that both upper extremities were going numb, and that the left upper arm and hand were frequently numb. The physical therapist noted the claimant's "symptoms are worsening." On April 25, 2007, the claimant specifically mentioned that she was experiencing a "burning pain" in her left elbow. On April 27, 2007, the physical therapist noted the claimant's symptoms were still worsening.

The Concentra PA examined the claimant on May 30, 2007. At that time the claimant reported increased pain to the neck, arm, numbness to the left arm and side of the face. The claimant stated that PT had made her condition worse. On June 7, 2007, Concentra physician Dr. Yvonne Nelson, M.D., examined the claimant. The claimant gave a history that the "pattern of symptoms" was stable with no change in location, duration, character of and frequency. Dr. Nelson diagnosed cervical and trapezius strains and imposed restrictions of no lifting over 5 pounds and no pushing or pulling with over 5 pounds of force. Dr. Nelson also issued a Physician Activity Status Report on July 11, 2007. The report states the claimant was released to regular duty and that the anticipated date of maximum medical improvement (MMI) was August 9, 2007. There is no credible or persuasive evidence that the claimant was actually placed at MMI by any physician authorized to treat the February 2007 injury.

The claimant filed a workers' compensation claim for the February 2007 injury at Wal-Mart. The claimant filed the claim on or about March 26, 2007. The claimant wrote that she injured the left side of the upper neck, the shoulder blade, the trapezius, the rhomboid, and experienced numbness on the "right side." The claim for this injury was assigned W.C. No. 4-718-757.

On July 24, 2007 the claimant, who was represented by counsel, signed a Stipulation for Settlement and Motion for Approval of Settlement with respect to W.C. No. 4-718-757. The stipulation provides that it applies to alleged injuries to the claimant's neck, back and left shoulder that occurred on February 25 or 26, 2007. The claimant agreed to accept $10,000 in exchange for a full and final settlement of the claim, including surrender of the right to reopen except on grounds of fraud or mutual mistake of material fact. On July 31, 2007, the Director of the Division of Workers' Compensation signed an order approving the settlement.

On September 2, 2008, Dr. Liebentritt examined the claimant for the first time. The claimant gave a history of left elbow pain since August 26, 2008, and numbness in the thumb, index finger and second finger of the left hand. The

claimant advised the doctor that she worked in a warehouse and was required to pickup boxes of literature weighing up to 40 pounds. The claimant also mentioned a history of work related injury to her right shoulder when working at Sound Track, but Dr. Liebentritt's September 2 note contains no mention of the Wal-Mart injury in February 2007. Dr. Liebentritt assessed left lateral epicondylitis (LLE). He prescribed an elbow splint strap, Naprosyn, Voltaren gel, and referred the claimant for occupational therapy. Dr. Liebentritt imposed restrictions on use of the left upper extremity of no lifting in excess of 10 pounds, and no repetitive lifting carrying, pushing and pulling in excess of 5 pounds. Dr. Liebentritt wrote that the claimant had a "greater than 50% likelihood of a work related, work compensable injury pattern claim."

Dr. Liebentritt next examined the claimant on September 11, 2008. The claimant reported the same symptoms as September 2 with the addition of "some pain radiating up into her left shoulder and left neck." Dr. Liebentritt injected the left lateral epicondyle with Marcaine, Lidocaine and Depo-Medrol. He continued the diagnosis of LLE and continued the same restrictions.

Dr. Liebentritt next examined the claimant on September 25, 2008. The claimant described much the same symptoms as before except that she now reported that the left elbow pain was going up into her shoulder and was causing headaches. The claimant also reported numbness and pain into her third and fourth fingers on the left. The claimant denied depression but expressed frustration and irritation because of the injury. Dr. Liebentritt diagnosed LLE and added the diagnosis of "left cervicothoracic muscle strain/sprain." The claimant was given Prednisone, Tramadol and continued on occupational therapy and PT. Dr. Liebentritt gave consideration to EMG nerve conduction studies, and the restrictions were continued.

On October 9, 2008, Dr. Liebentritt referred the claimant to Dr. L. Barton Goldman, M.D., to conduct EMG/NCS studies and for an evaluation.

On October 22, 2008, Dr. Goldman performed electrical studies of the claimant's left upper extremity. Dr. Goldman reported an "abnormal study," noting that the claimant's "left upper limb nerve conduction studies are most consistent but not yet diagnostic of a sensory peripheral polyneuropathy." Dr. Goldman also noted the possibility of a mono-neuropathy at the carpal tunnel superimposed on a polyneuropathy. Dr. Goldman's initial impression was "primarily a myofascial and somaticization condition with some contribution by non-work related sensory peripheral polyneuropathy."

On November 5, 2008, Dr. Goldman conducted a "physical medicine and outpatient rehabilitation evaluation" of the claimant. Dr. Goldman took a history from the claimant who mentioned a work related injury to her right trapezius in 1998 or 1999, but denied "any injuries previously or pain in the left upper limb." The claimant reported symptoms of pain up and down the left arm, but predominantly in the left elbow, index finger and fourth digit. She also reported

pain up her arm to the trapezii into the head with associated headaches. The claimant described her pain as 7-9 on a scale of 10, but Dr. Goldman opined based on his observations that he would peg the pain levels "at more a 3/10 until the patient is being examined at which point in time pain behaviors increase dramatically." The claimant was working a sedentary job based on her restrictions. Dr. Goldman diagnosed left upper extremity and shoulder girdle myofascial pain associated with occupational illness of August 26, 2008, LLE and extensor tendinosis secondary to occupational illness of August 26, 2008, possible carpal tunnel syndrome of questionable relationship to the occupational illness, possible non-work related polyneuropathy, pain disorder with psychological factors, sleep dysfunction and deconditioning. Dr. Goldman noted there "clearly is a somatization pattern here with unconscious symptom magnification that makes interpretation of symptoms very difficult." Dr. Goldman recommended various treatments and studies including bilateral upper extremity bone scans, biofeedback, and blood work with the claimant's primary care physician to assist in clarifying the issue of polyneuropathy.

The claimant returned to Dr. Liebentritt on November 13, 2008. Dr. Liebentritt opined the claimant has some "significant red flags in terms of secondary gain non-work related complaints." Dr. Liebentritt imposed restrictions on use of the left upper extremity of no lifting greater than 5 pounds and no repetitive lifting and carrying in excess of 2 pounds, and no pushing and pulling in excess of 5 pounds.

On March 6, 2009, the claimant was laid off of her light duty employment. This layoff was a general layoff and in no way the result of the claimant's actions.

On April 9, 2009, Dr. Henry Roth, M.D., performed an independent medical examination (IME) of the claimant. The respondents requested this examination. Dr. Roth is board certified in internal medicine, level II accredited, and licensed to practice medicine in Colorado.

Prior to the evaluation Dr. Roth sent the claimant a written questionnaire to complete in preparation for the IME. The claimant completed the questionnaire in her own hand. The claimant listed her primary complaints as neck pain, left arm pain, inability to sleep, and right arm pain.

In a section of the questionnaire labeled "Stress Management" the claimant described herself as "moderately" sad, and "a lot" discouraged with respect to the future. The claimant also answered affirmatively to questions regarding whether or not she had recently felt nervous, worried, depressed and had experienced crying episodes.

In a section of the questionnaire labeled "Pre-Existing Status" the claimant answered "no" to a series of questions that includes the following: (A) Have you ever had any similar or previous problems? (B) Were you ever under a physician's care or in therapy prior to the injury? (C) Have you ever had any other

significant problems or accidents? (D) Prior to the claim/event were you ever evaluated or treated by physical therapy? In a section of the questionnaire labeled Medical History the claimant mentioned "previous trauma" to her right ankle in 2009 but did not mention the 2007 workers' compensation injury or claim.

The claimant admitted that she did not disclose to Dr. Roth the left upper extremity and neck problems she experienced after the 2007 industrial injury at Wal-Mart. The claimant's explanation for this failure was that she thought she was being examined with respect to the elbow injury she sustained while working for the employer in 2008 and Dr. Roth did not ask about "other jobs." The ALJ finds the claimant's explanation for failure to disclose the 2007 injury to Dr. Roth is not credible and persuasive. This is particularly true in light of the clear and simple wording of the questionnaire, and the fact that the claimant disclosed that she had sustained an ankle injury in February 2009. Further the claimant failed to disclose the 2007 injury to Dr. Goldman when he asked her about prior injury and/or pain in the left upper limb. The ALJ infers the claimant had a motive to conceal the 2007 injury and resulting claim from Dr. Goldman and Dr. Roth because many of the symptoms she reported in 2008 were similar to the symptoms she reported in connection with the 2007 claim, and the claimant had settled the 2007 claim on a full and final basis.

In connection with the IME of April 9, 2009, Dr. Roth performed a physical examination and reviewed the claimant's medical records associated with the 2008 injury claim. Dr. Roth noted that the claimant was reporting discomfort in her right upper extremity similar to, but less intense than, the left upper extremity. The claimant associated the newly reported right upper extremity symptoms with "increased use of the right arm due to discomfort in her left arm." Dr. Roth reached twelve diagnoses including a history of chronic pain, history of severe migraine disorder, obesity, deconditioning, major depression, somatization, polyneuropathy, sleep disorder and prediabetic or diabetic. Dr. Roth stated he could not identify any of these diagnoses as a "specific patho-etiologic work related disorder," and opined her symptoms "are independent and unrelated to her work" from July 1, 2008, through September 1, 2008.

Dr. Roth gave the following seven reasons for concluding that the claimant's symptom complex is not causally related to her employment: (1) There is no specific accident or injury to account for the elbow symptoms. (2) The current epidemiologic literature is unable to establish probable cause or relationship between lateral epicondylitis and activities of daily living (including work) that are within an individual's natural inherent ability. Rather ecpicondylitis is "traumatic, activity and idiopathic in its presentation." (3) The claimant does not have isolated epicondylitis, but reports diffuse head, neck, shoulder, elbow and hand pain. This is not consistent with lateral epicondylitis. (4) The claimant reports developing right elbow and upper extremity symptoms in the absence of the work activity that allegedly caused the LLE. In these circumstances it is more likely

the claimant has a “trigger point” in her elbow.” (5) The claimant’s symptoms have not improved with time, which they should have done when she was removed from her work. Instead the claimant’s symptoms have expanded. (6) Somatization and psychogenic pain are reasonable if not probable considerations considering the claimant’s history of migraines, asthma, deconditioning, domestic violence and social stress. (7) The claimant may be suffering from polyneuropathy that is not work related.

The respondents eventually obtained the Concentra medical records pertaining to the February 2007 Wal-Mart injury and forwarded them to Dr. Goldman along with Dr. Roth’s IME report. After reviewing these documents, Dr. Goldman issued a written report dated May 6, 2009. Based on Dr. Roth’s IME report, Dr. Goldman noted that Dr. Liebentritt “apparently did discharge [the claimant] with relatively strong concerns regarding work relatedness, secondary gain and somatization issues.” Dr. Goldman stated that because he considers Dr. Liebentritt to be a strong “patient advocate” he doubts Dr. Liebentritt would have “proceeded with such a discharge in the absence of grave concerns” about the claimant’s presentation. Dr. Goldman further stated that the Concentra records call into question the claimant’s credibility since he asked the claimant about “prior work injuries and particularly injuries involving the arms (especially the left arm),” but the claimant denied such injuries when Dr. Goldman saw her in October and November 2008. Dr. Goldman opined that, “the medical evidence at this point is indeed most consistent with the long-standing and pre-existing chronic somatization and depressive disorder with possible ongoing myofascial pain that had been denied as a work-related injury in 2007, and then was re-introduced as a new claim in 2008.” Dr. Goldman further stated that he would have “difficulty endorsing a work-related event particularly with respect to August 2008 in the absence of other more compelling objective evidence contrary to the above facts.”

Respondents’ counsel forwarded Dr. Goldman’s May 6, 2009, report to Dr. Liebentritt for review. On May 11, 2009, Dr. Liebentritt replied “yes” to counsel’s question concerning whether he agreed with Dr. Goldman’s assessment of the claimant’s condition.

Dr. Roth testified at the hearing on May 13, 2009. Dr. Roth stated that when he examined the claimant in April 2009 she exhibited a “flat affect”,” moved slowly and looked somewhat depressed.

Dr. Roth testified that in the week before the hearing he received and reviewed the medical records pertaining to the claimant’s treatment following the February 2007 injury at Wal-Mart. Dr. Roth stated that the claimant never mentioned the 2007 injury to him, and that the medical records show that the claimant reported many of the same complaints in 2007 that she reported to him at the April 2009 IME. Dr. Roth specifically noted that the claimant complained of left elbow pain to a physical therapist on April 25, 2007. Dr. Roth testified that the “new

information" showing the claimant gave a "false history" by failing to mention the 2007 injury, and that the pattern of symptoms she reported after the 2007 injury is much the same as it has been since August 2008, serves to confirm his opinion that the claimant does not have any work related diagnoses as a result of the August 2008 claim. Dr. Roth further testified that he agrees with the opinions of Dr. Goldman expressed in his report of May 6, 2009, and with the opinion of Dr. Liebentritt expressed in the letter of May 11, 2009.

The claimant failed to prove it is more probably true than not that her left elbow condition, or any of the other symptoms that she reported after August 26, 2008, were proximately caused by the conditions or hazards of her employment as an order filler at the employer's warehouses. The claimant's testimony that she first experienced left elbow symptoms on August 26, 2008, while working in the warehouse is not credible. The physical therapy records that follow the Wal-Mart injury persuasively refute the claimant's testimony. The records from April 25, 2007, show that the claimant told the therapist that she was experiencing "burning" in her left elbow as well as bilateral hand numbness and migraine headaches. Moreover, the medical records demonstrate that after the Wal-Mart injury the claimant reported many of the same symptoms that she later associated with her work at the employer's warehouse. Finally, the claimant's credibility is undermined because the ALJ finds that she deliberately concealed the existence of the February 2007 injury from Dr. Goldman and Dr. Roth. The ALJ infers that the motivation for this concealment is the fact that the claimant settled the Wal-Mart claim and hoped that the records of those events would not come to light in connection with the present claim.

The ALJ is persuaded by and credits the opinions of Dr. Roth that none of the claimant's multiple diagnoses can be causally connected to the duties of her employment at the warehouse between July and September 2008. The ALJ is persuaded by Dr. Roth's analysis of the causation issue based on his reasoning as detailed in Finding of Fact 26. Although Dr. Goldman and Dr. Liebentritt initially attributed the claimant's symptoms to her employment at the warehouses, they have since changed their opinions based on a more complete understanding of the claimant's medical history, including the records from the Wal-Mart injury. Therefore, the opinions of Dr. Goldman and Dr. Liebentritt corroborate those of Dr. Goldman.

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 OCCUPATIONAL DISEASE

The claimant alleges that she sustained the occupational disease of LLE caused by her work filling orders at the employer's two warehouses. As found, the claimant eventually reported that the symptoms she associates with this disease process spread to affect other parts of her body including the left hand, the left shoulder, the left side of the neck, the heard and eventually the right upper extremity. The ALJ concludes the claimant failed to prove it is more probably true than not that her left elbow symptoms or any of the other reported symptoms were proximately caused by the performance of services at the employer's warehouses.

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S., 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 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 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery 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.*

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). Once claimant demonstrates the requisite causal relationship between the disease and the employment, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990).

The ALJ concludes the claimant failed to prove it is more probably true than not that her left elbow symptoms and other conditions were proximately caused by the performance of the duties of her employment at the warehouses. As detailed in Finding of Fact 31, the ALJ discredits the claimant's testimony that she first experienced left elbow pain on August 26, 2008, while working in the warehouse. The physical therapy records for April 25, 2007, refute this testimony. Moreover, the claimant's credibility is called into question by her failure to disclose the February 2007 injury to Dr. Goldman and Dr. Roth despite their direct questions concerning her medical history. Moreover, the ALJ is persuaded by the testimony of Dr. Roth that none of the claimant's multiple diagnoses were caused by the duties of her employment. For the reasons stated in Finding of Fact 32, the ALJ credits Dr. Roth's opinions.

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. 4-776-688 is denied and dismissed.

DATED: June 9, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-777-116

ISSUES

- Did claimant prove by a preponderance of the evidence that she sustained an injury arising out of the course and scope of her employment?
- Did employer prove by a preponderance of the evidence that claimant worked as an independent contractor?
- Is an average weekly wage of $403.49 a fair approximation of the wage loss suffered by claimant?
- Did claimant prove by a preponderance of the evidence that she is entitled to medical benefits or temporary total disability ("TTD") benefits?

FINDINGS OF FACT

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

Claimant worked for employer from July 2006 until her injury on September 1, 2008. Claimant's job duties included mixing milk for employer's calves and occasionally feeding the calves. Crediting employer's testimony, claimant's job duties included loading and unloading milk bottles from trailers.

Employer did not prove by a preponderance of the evidence that, at the time of her injury, claimant acted as an independent contractor and not an employee. The Judge finds that: (1) employer paid claimant bi-monthly at a wage of $7.50/hr for 60 hours of work per week; (2) claimant received paychecks personally payable to her; (3) the only tool claimant used for her work, a vest, was provided by employer; (4) Rick Weber, owner of employer, assigned claimant's work schedule and her days off work. The Judge finds that a balancing of the factors in C.R.S. 8-40-202(2)(b)(ii) weighs heavily in favor of finding it more probably true than not that claimant worked as an employee for employer when she sustained an injury to her right leg on September 1, 2008.

The Judge adopts the stipulation of the parties in finding claimant's average weekly wage ("AWW") at the time of injury was $403.49. Claimant's hourly wage was $7.50 per hour, and claimant averaged sixty hours per week between July 1, 2008, and August 31, 2008. Thus, the Judge finds that $403.49 wage is a fair approximation of the wage loss suffered by claimant based on evidence of claimant's earnings from July 1, 2008, to August 31, 2008.

Claimant sustained an injury to her right leg just above the knee while working for employer on September 1, 2008. Claimant testified that, on September 1, 2008, she stepped off a trailer to refill it with milk bottles when a coworker climbed into the trailer and operated it without seeing claimant. Claimant suffered a crushing injury when her legs were smashed between two trailers. Claimant received injuries to both knees, including a serious injury to her right leg just above the knee. Because her testimony was uncontroverted, the Judge credits claimant's story. The Judge finds it more probably true than not that claimant sustained her injury during the course and scope of her employment with employer. Claimant's job duties included refilling trailers with milk bottles, and her injury occurred during her completion of these duties. Because the Judge finds that claimant acted as an employee, and because claimant sustained the injury during the course and scope of her employment, the Judge finds that the right leg injury claimant suffered on September 1, 2008, is a compensable injury.

On September 1, 2008, claimant sought medical attention for her leg injury at Colorado Plains Medical Center, where she was admitted and treated until discharged on September 4th. Orthopedic Surgeon Kenneth Keller, M.D., diagnosed claimant with a crush injury to her right leg, resulting in a depression of a medial tibial plateau fracture above her right knee. Dr. Keller performed surgery to correct the fracture with an arthroscopically assisted open reduction internal fixation with bone grafting on September 2, 2008.

Claimant underwent a follow-up evaluation with Physicians Assistant David Keller, PA-C, on September 15, 2008. Physicians Assistant Keller reported that claimant's knee appeared to be "[d]oing very well." Physicians Assistant Keller assigned claimant to 2-3 physical therapy sessions per week. On September 29, 2008, Dr. Keller examined claimant and found that her right leg fracture appeared

to be healing well. Dr. Keller recommended that claimant refrain from bearing any weight on her leg and to continue wearing a leg brace. On October 20, 2008, Dr. Keller examined claimant and recommended she begin trying to walk without a walker and to bear some weight on her right leg. Dr. Keller recommended that claimant not return to normal work but could "return to light duty work if some sitting work is available." Physicians Assistant Keller examined patient on November 11, 2008, and determined that claimant had poor range of motion of the right knee and prescribed progressive stretching as physical therapy to prevent future leg problems. Claimant has not returned to work with employer since the injury.

Based on the medical records of Dr. Keller and Physicians Assistant Keller, the Judge finds that claimant proved by a preponderance of the evidence that she is entitled to medical benefits for the right leg injury she sustained while working for employer on September 1, 2008. The Judge finds that the medical treatment provided claimant by medical providers at Colorado Plains Medical Center, by Dr. Keller and by Physicians Assistant Keller was reasonable, necessary, and directly related to the injury she sustained. Claimant has submitted medical billing from Colorado Plains Medical Center showing an outstanding balance of some $45,000.

Based on the medical restrictions of Dr. Keller, the Judge finds that claimant proved by a preponderance of the evidence that she is entitled to TTD benefits beginning September 1, 2008, for wage loss suffered as a result of her right leg injury. Because she was unable to perform her regular work, claimant's injury proximately caused a disability that resulted in claimant's wage loss after September 1, 2008. The Judge finds that employer paid claimant $1200.00 for lost wages from September 1, 2008, to October 15, 2008. The Judge finds that employer's liability for TTD benefits beginning September 1, 2008, should be offset by $1200.00 because of employer's contribution.

Employer was non-insured for liability for workers' compensation benefits at the time of claimant's injury. Pursuant to §8-43-408(1), employer's liability for compensation for claimant's injury shall be increased fifty percent. Claimant's TTD rate is $268.72 (66% of $403.49), which, when increased by 50%, equals a weekly rate of $403.49 or a daily rate of $57.64. September 1, 2008, through June 5, 2009, is a period of 278 days. Employer's current liability to claimant for past TTD benefits is $16,024.32 (278 x $57.64).

CONCLUSIONS OF LAW

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

A. Claimant's compensable injury:

Claimant argues that she suffered a compensable injury arising out of the course and scope of her employment. The Judge agrees.

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

An injury occurs "in the course of" employment where the employee demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991); *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991). The "arise out of " requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *id.* An activity arises out of and in the course of employment when the activity is sufficiently related to the conditions and circumstances under which the employee generally performs his job functions such that the activity may reasonably be characterized as an incident of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996).

Here, the Judge found that claimant showed it more probably true than not that her right leg injury arose out of the course and scope of her employment with

employer. Claimant thus proved by a preponderance of the evidence that her right leg injury is a compensable.

The Judge found that, on September 1, 2008, claimant was loading milk bottles onto trailers at employer. Employer testified that claimant's job duties included loading and unloading milk bottles from trailers. A coworker climbed into one of the trailers, failed to see claimant, and operated the trailer such that claimant's legs were crushed between two trailers. The Judge found that claimant sought and received medical treatment immediately after sustaining the injury. At Colorado Plains Medical Center, Dr. Keller determined that claimant sustained an acute crush injury to her right knee on September 1, 2008. Thus, the Judge found it more probably true than not that claimant's injury had its origins in work-related functions and can be considered an incident of her employment.

Employer argues that he doubts that claimant was injured at employer. Employer testified that claimant had pre-existing leg injuries that caused her to walk with a limp and restricted her job duties. However, the Judge found that weighing the doubts and testimony of employer against the medical evidence shows it more probably true than not that claimant sustained a compensable injury in the course and scope of her employment on September 1, 2008.

The Judge concludes that claimant sustained a compensable right leg injury on September 1, 2008.

B. Claimant's employment status:

Employer argues that claimant worked for employer as an independent contract worker and not as an employee. The Judge disagrees.

Section 8-40-202(2)(a), *supra,* provides that an individual performing services for another is deemed to be an employee:

> [U]nless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.

Section 8-40-202(2)(b)(II), *supra*, then sets forth nine factors to balance in determining whether claimant is free from control and direction in performance of the service and is customarily engaged in an independent trade.

Here, the Judge found that a balancing of the factors in Section 8-40-202(2)(b)(II), *supra*, shows it more probably true than not that, at the time of her injury, claimant worked as an employee for employer. Employer thus failed to prove by a preponderance of the evidence that claimant was not an employee.

The Judge found several factors that weighed in favor of finding that the claimant worked as an employee for employer and not an independent contract worker: (1) employer paid claimant bi-monthly at a wage of $7.50/hr for 60 hours of work per week; (2) claimant received paychecks personally payable to her; (3) the only tool claimant used for her work, a vest, was provided by employer; (4) Rick Weber, owner of employer, assigned claimant's work schedule and her days off work. Although employer argues that many of his laborers are contract laborers, employer did not present sufficient evidence to demonstrate that claimant worked as an independent contractor for employer. Thus, employer failed to prove with a preponderance of the evidence that claimant worked as an independent contractor and not an employee.

The Judge concludes that claimant worked as an employee for employer when she sustained her compensable injury on September 1, 2008.

B. Claimant's average weekly wage:

Claimant and employer stipulated that claimant's AWW was $403.49. The Judge agrees and adopts the stipulation.

The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of injury, which must include any advantage or fringe benefit provided to

the employee in lieu of wages. *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(2), *supra*, requires the ALJ to base claimant's AWW on her earnings at the time of injury. The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

Here, the Judge found that $403.49 is a fair approximation of claimant's earning capacity based on evidence of claimant's hourly wage and average weekly hours at the time of her wage loss.
The Judge concludes that $403.49 is a fair approximation of claimant's AWW at the time of her injury.

C. Claimant's entitlement to medical and TTD benefits:

Claimant argues that she has proven by a preponderance of the evidence that she is entitled to medical and TTD benefits for her work-related right leg injury. The Judge agrees.

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the employee from the effects of the injury. Section 8-42-101, *supra*; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

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 she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). 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). 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).

Here, the Judge found that claimant proved by a preponderance of the evidence that she is entitled to medical and TTD benefits for her injury. Claimant sustained an injury at employer on September 1, 2008 and immediately sought medical treatment at Colorado Plains Medical Center. Dr. Keller performed an open reduction internal fixation of claimant's tibial plateau fracture of her right knee on September 2, 2008. During a follow-up appointment on October 20, 2008, Dr. Keller recommended that claimant begin bearing weight on her injured

leg, attempt to walk without a walker, and "return to light work duty if some sitting work is available." On November 11, 2008, claimant had poor range of leg motion and was prescribed physical therapy to prevent future leg problems. The Judge found claimant's surgery and post-operative medical treatment to be reasonably necessary to cure and relieve claimant of the effects of her work-related injury. Based on medical evidence, the Judge also found that claimant left work as a result of her industrial injury, that her industrial injury caused a disability lasting more than three work shifts, and that her disability resulted in an actual wage loss. Thus, claimant proved by a preponderance of the evidence that she is entitled to medical and TTD benefits for the injury she sustained.

The Judge found that employer paid claimant $1200 for lost wages from September 1, 2008 to October 15, 2008.

The Judge found that employer was non-insured for liability for workers' compensation at the time of claimant's injury. Under §8-47-408, *supra*, the Judge found that employer's compensation for claimant's injury shall be increased fifty percent.

The Judge concludes that employer should pay for medical treatment provided by medical providers at Colorado Plains Medical Center, by Dr. Keller and by Physicians Assistant Keller. The Judge concludes that compensation owed to claimant by employer shall be increased fifty percent (to the weekly rate of $403.49) because employer was non-insured for liability for workers' compensation benefits at the time of claimant's injury. Employer thus should pay claimant TTD benefits at the weekly rate of $403.49 from September 1, 2008, ongoing, until such benefits may be terminated by law. The Judge further concludes that employer may offset its liability for TTD benefits in the amount of $1200.

ORDER

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

1. Employer shall pay medical providers at Colorado Plains Medical Center, Dr. Keller and Physicians Assistant Keller, pursuant to fee schedule, for reasonably necessary medical treatment they have provided claimant.

2. Employer shall pay claimant TTD benefits at the weekly rate of $403.49 from September 1, 2008, ongoing, until such benefits may be terminated by law.

3. Employer may offset its liability for TTD benefits in the amount of $1200.

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

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

6. In lieu of payment of the above compensation and benefits to the claimant, employer shall, within ten (10) days of the date of this order:

a. Deposit the sum of $61,024.32 ($45,000 + $16,024.32) with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/ Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; or

b. File a bond in the sum of $61,024.32 with the Division of Workers' Compensation:
   (1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or
   (2) Issued by a surety company authorized to do business in Colorado.

The above designated sum to the trustee, or bond, shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That employer shall notify the Division of Workers' Compensation of payments made pursuant to this order at:

Sue Sobolik
Division of Workers Compensation
Subsequent Injury Fund
PO Box 300009
Denver, CO 80203-0009

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), *supra*.

DATED: _June 29, 2009__

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-777-647

ISSUES

- Did claimant prove by a preponderance of the evidence that he is entitled to temporary disability benefits?

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

- Did claimant prove by a preponderance of the evidence that claimant suffered a changed condition, such that the resulting wage loss is attributable to the claimant's work-related injury and not termination for cause?

FINDINGS OF FACT

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

Employer is engaged in the business of manufacturing pallets. Claimant worked for employer for more than 13 years. Employer's business environment includes industrial hazards, such as operating manufacturing equipment and forklifts.

Claimant sustained an admitted injury while repairing pallets for employer on October 31, 2008. The Judge adopts the parties's stipulation in finding claimant's average weekly wage (AWW) is $616.79.

William Chythlook, M.D., is an authorized treating physician, who diagnosed claimant's injury as a left shoulder strain on October 21, 2008. While claimant received pain medication and underwent therapeutic exercise, his left shoulder condition failed to improve. Claimant underwent a magnetic resonance imaging (MRI) scan of his left shoulder on December 1, 2008. The MRI showed a left shoulder rotator cuff tear. Dr. Chythlook referred claimant to Orthopedic Surgeon Mark Failinger, M.D. for evaluation and treatment. On December 11, 2008, Dr.

Failinger informed claimant that his left shoulder rotator cuff tear could improve with surgery. Claimant testified that he agreed to the surgery because he was in pain when he raised his arm and because he had difficulty using his arm. Dr. Failinger scheduled the surgery for January 6, 2009, and informed claimant that post-surgical recovery could require up to six months.

During November and December 2008, employer accommodated claimant's left shoulder restrictions by assigning him modified-duty work reclaiming lumber. Claimant carried and loaded pieces of lumber for employer using both arms but did not lift the wood above shoulder level. Claimant's shoulder condition failed to improve while he performed modified-duty work.

Ignacio Bocanegra was claimant's supervisor. Mr. Bocanegra witnessed claimant leaving a liquor store with a coworker during claimant's lunch break on December 11, 2008. Claimant and his coworker carried beverages concealed by brown paper bags our of the liquor store. Mr. Bocanegra testified that claimant drove himself and his coworker back to work at employer where they resumed work. Mr. Bocanegra reported his observation to employer's president, James Ruder, who directed Mr. Bocanegra to observe claimant during lunch break the next day. On December 12, 2008, Mr. Bocanegra observed claimant and two coworkers enter the same liquor store during lunch break, exit the store carrying beverages concealed by brown paper bags, climb into claimant's personal vehicle and return to work in the vehicle driven by claimant. One of the coworkers was a forklift operator at employer. Mr. Bocanegra returned to employer and witnessed the three men, claimant and his two coworkers, sitting in claimant's vehicle drinking the beverages concealed by the brown paper bags. Claimant and his two coworkers returned to work after the lunch break. Mr. Bocanegra again reported the incident to Mr. Ruder.

The Judge credits the testimony of Mr. Bocanegra in finding that claimant admitted to Mr. Bocanegra that the two coworkers consumed alcohol during their lunch break on December 12, 2008. The two coworkers also admitted to Mr. Bocanegra that they consumed alcohol during the lunch break. Claimant denied consuming alcohol.

The Judge credits Mr. Ruder's testimony in finding the following: Employer has a zero tolerance policy prohibiting use or consumption of alcohol during work hours. Employer adopted this safety policy because employer's operations involve a busy manufacturing environment. Employer regularly conducts safety meetings in English and in Spanish. Claimant attended several safety meetings where employees were informed of the zero-tolerance alcohol policy and the requirement to report safety concerns to supervisors. Employer's safety policies state that employees "[s]hall not consume alcohol, or be under the influence of alcohol while on the job." On December 15, 2008, Mr. Ruder terminated claimant for violation of employer's safety policies, effective December 12th.

The Judge credits the testimony of Mr. Ruder in finding that claimant knew or should have known of employer's zero-tolerance alcohol policy, and that claimant knew or should have known that the consumption of alcohol by coworkers created an intolerable safety risk.

Respondents showed it more probably true than not that claimant was responsible for his termination. The Judge credits the testimony of Mr. Ruder in finding that employer justifiably terminated claimant for cause: (1) Because claimant knowingly violated a safety policy of employer when he assisted his coworkers to obtain alcohol to consume during the workday; and (2) because he failed to report to his supervisor that his coworkers consumed alcohol during the workday in violation of employer's safety policies. In the past, employer had worked with claimant to help him overcome his history of alcohol abuse and alcoholism. Claimant thus knew or should have known employer is extremely serious about its no-tolerance policy concerning alcohol. The Judge finds from the testimony of both claimant and Mr. Ruder that it is more probably true than not that claimant knew or should have known that employer would terminate him for violating employer's no-tolerance policy concerning alcohol. The Judge finds claimant's conduct volitional, especially given his past history with employer.

Dr. Failinger performed surgery upon claimant's left shoulder on January 6, 2009. Dr. Failinger found a large supraspinatus tear and partial tear of the biceps tendon. Because he could not repair the biceps tendon tear arthroscopically, Dr. Failinger performed an open rotator cuff repair with a double row including bony tunnels and backup absorpable suture anchors. Dr. Failinger also performed open debridement of the biceps tendon.

After a postoperative examination of claimant on January 16, 2009, Dr. Chythlook imposed work restrictions of no use of the left arm, with the arm to be kept in a sling. Dr. Chythlook and his associate physicians (Gary Landers, M.D., and Raymond Rossi, M.D.) continued to impose these restrictions after follow up appointments on February 6, February 27, March 13, and April 10, 2009.

Dr. Failinger diagnosed claimant with possible adhesive capsulitis, a tightness of the shoulder, on February 25, 2009, and recommended additional stretching. Dr. Failinger testified that adhesive capsulitis could potentially cause a loss of shoulder motion and increase in shoulder pain. On April 15, 2009, Dr. Failinger examined claimant and found that, while his shoulder was improving, claimant still had symptoms of mild adhesive capsulitis. Dr. Failinger expected claimant would not reach maximum medical improvement (MMI) for at least another six weeks. Claimant's medical records and the testimony of Dr. Failinger establish that claimant had not achieved MMI by the time of hearing. The Judge finds from the medical evidence and testimony of Dr. Failinger that the claimant's shoulder surgery resulted in a temporary, but total loss of function of his left arm and shoulder.

The Judge finds claimant showed it more probably true than not that his left shoulder surgery on January 6, 2009, resulted in a worsening of his work-related shoulder injury. The Judge weighed several factors in finding that claimant's injury worsened, including: (1) Claimant was able to use his left arm to perform modified work duties before the surgery; (2) Dr. Failinger discovered a large tear in claimant's rotator cuff during arthroscopic surgery that required him to perform an open and more invasive surgical procedure; (3) Dr. Chythlook on February 6, 2009, found claimant medically unable to work; (4) Dr. Chythlook on March 13, 2009, found claimant medically unable to work; (5) Dr. Rossi on April 10, 2009, continued to find claimant medically unable to work some three months after surgery; and (6) Dr. Failinger testified that most patients who undergo the surgery claimant underwent need to be off work for a week or ten days; (6) claimant suffered adhesive capsulitis while recuperating from the surgery, subjecting him to a risk of permanent shoulder damage and pain. Although claimant testified that the surgery improved his shoulder and that he could at the time of hearing grab items and lift them up with his left arm, and although Dr. Failinger opined that surgery would ultimately improve claimant's shoulder condition when compared with its pre-surgical condition, the Judge finds it more probably true than not that claimant's work-related left shoulder injury temporarily worsened when claimant underwent shoulder surgery on January 6, 2009.

CONCLUSIONS OF LAW

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

A. Claimant's termination for cause:

Respondents argue they have proven by a preponderance of the evidence that claimant was responsible for his termination. 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*. Respondents shoulder the burden of proving by a preponderance of the evidence that claimant was responsible for his termination. 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).

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). Responsibility for termination precludes any subsequent temporary partial disability as well as TTD benefits. *Homman v. Richard Alan Singer D/B/A Furniture Medic*, W.C. No. 4-523-831 (Industrial Claim Appeals Office, March 12, 2003).

Here, the Judge found that respondents showed it more probably true than not that claimant engaged in a volitional act that caused his termination. Respondents thus proved by a preponderance of the evidence that claimant was responsible for his termination.

The Judge found that, on successive days, December 11 and 12, 2008, claimant transported coworkers in his personal vehicle to a liquor store during

their lunch break. Claimant and his coworkers entered the liquor store and exited carrying beverages in brown paper bags on both days. On December 12, 2008, claimant admitted that he knew that the two coworkers he drove to the liquor store consumed alcohol during the lunch break that day. The Judge found that claimant assisted his coworkers to consume alcohol during the workday and failed to report the safety violation to his supervisor. Testimony showed it more probably true than not that claimant knew the effects of alcohol on the coworkers and knew or should have known employer's safety policies, the dangers of intoxication while in a manufacturing workplace with industrial hazards, and employer's zero-tolerance alcohol policy. Claimant thus engaged in a volitional act that resulted in his termination when he enabled his coworkers to consume alcohol during the lunch break and failed to report the safety violation to his supervisor.

The Judge concludes that claimant was responsible for his termination on December 12, 2008, such that his wage loss may not be attributed to his work-related injury.

B. Claimant's worsened condition

Claimant argues that he proved by a preponderance of the evidence that his left shoulder condition changed when he underwent surgery, such that the resulting wage loss from January 6, 2009, ongoing, may be attributed to his injury. The Judge agrees.

In *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, (Colo. 2004), the court held that the termination statutes bar wage loss claims when the voluntary or for-cause termination of the modified employment causes the wage loss, but not when the worsening of a prior work-related injury incurred during that employment causes the wage loss. The Panel in *Fantin v. King Soopers*, W.C. No. 4-465-221 (ICAO February 15, 2007), held that the termination statutes were intended to preclude only wage loss claims subsequent to the voluntary or for-cause termination that do not involve a worsening of condition. There, the Panel held that, where the claimant's condition worsens after the voluntary or for-cause termination, and where temporary total disability (TTD) benefits are reinstated to comply with the court's holding in *Longmont Toyota*, such benefits must continue until one of the conditions in Sections 8-42-105(3)(a) through (d) is met. *Fantin v. King Soopers*, *supra*.

Here, the Judge found that claimant proved by a preponderance of the evidence that his resulting wage loss from January 6, 2009, is attributable to a worsening of his prior work-related injury and not to his for-cause termination. Claimant thus proved by a preponderance of the evidence that his left shoulder condition changed when he underwent surgery.

When he underwent left shoulder surgery on January 6, 2009, claimant suffered a worsening of his prior work-related shoulder injury such that the resulting wage loss may be attributable to his changed condition. Before surgery, claimant had some use of his left arm and shoulder and could complete modified work duty. During surgery, Dr. Failinger discovered a large tear in claimant's rotator cuff that required an invasive procedure that caused surgical trauma to claimant's left shoulder and exposed claimant to the risk of adhesive capsulitis. The Judge found that claimant had no use of his left arm and shoulder and was medically unable to work for more than three months after the surgery. The Judge found that although claimant knew and accepted the risks of surgery on December 11, 2008, the shoulder surgery on January 6, 2009 constituted a worsening of claimant's work-related shoulder injury. This worsened condition, and not the claimant's termination for cause, caused claimant's wage loss.

Respondents correctly argue that the imposition of increased work restrictions is not dispositive of a worsened condition. The Judge agrees that, under *Hammack v. Industrial Claim Appeals Office*, No. 06CA2344 (Colo. App. Dec. 6, 2007) (not selected for official publication), a claimant is not entitled to TTD benefits based solely on the imposition of increased work restrictions. Here, claimant's condition worsened as a result of the shoulder surgery on January 6, 2009. The Judge found that claimant's resulting work restrictions are not dispositive of a worsened condition, but do weigh in favor of the Judge's finding

that claimant's work-related shoulder injury worsened as a result of the shoulder surgery.

Respondents further argue that claimant's condition actually improved as a result of the shoulder surgery. The Judge does not agree. Although claimant's shoulder pain was reduced as a result of the surgery on January 6, 2009, and although claimant's function reasonably should improve over time, Dr. Failinger and Dr. Chythlook found that claimant was medically unable to work for more than three months after the surgery. Claimant had some use of his left arm and shoulder in the months before the surgery. After surgery, claimant suffered a total loss of function for his left arm and shoulder and was medically unable to work in the opinions of Dr. Chythlook and Dr. Rossi. Although Dr. Failinger testified that he believes claimant's work related injury will eventually improve because of the surgery, the act of surgery itself constituted a worsening of claimant's condition. Claimant's total loss of arm and shoulder function following surgery persuaded the Judge to find that claimant suffered a change in condition as a result of the surgery, notwithstanding claimant's eventual recovery from the surgery.

The Judge concludes that claimant's claim for TTD benefits from December 12, 2008, through January 5, 2009, should be denied and dismissed because claimant was responsible for his termination. The Judge further concludes that insurer should pay claimant TTD benefits from January 6, 2009, ongoing, until such benefits may be terminated by law under §8-42-105(3).

ORDER

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

1. Claimant's claim for TTD benefits from December 12, 2008, through January 5, 2009, is denied and dismissed.

2. Insurer shall pay claimant TTD benefits from January 6, 2009, ongoing, until such benefits may be terminated by law under §8-42-105(3).

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

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

DATED: _June 5, 2009__

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-777-755

ISSUES

The sole issue determined herein is temporary total disability ("TTD") benefits from November 28, 2008 through April 14, 2009.

FINDINGS OF FACT

1.In August 2007, claimant began work as a mechanic for the employer.

2.On November 17, 2008, claimant reported an occupational disease to his right hand.

3.On November 21, 2008, Dr. Dickson examined claimant and diagnosed right wrist sprain and right median and ulnar neuritis. She released claimant to return to regular duty work. She prescribed a wrist brace, medications, and physical therapy.

4.Claimant continued regular duty work through November 26, 2008.

5.Claimant did not work on Thanksgiving Day, November 27, 2008.

6.Claimant did not show up for work on November 28, 2008, due to a stomach virus.

7.Claimant again did not show up for work on November 29, 2008, because he overslept and did not feel good. He did not report that his wrist problem prevented him from working.

8.Claimant again did not show up for work on December 1, 2008. The employer terminated claimant's employment.

9.On December 8, 2008, Dr. Finn performed electromyography ("EMG") testing, which showed right median and ulnar neuropathy at the wrist.

10.On December 10, 2008, Dr. Dickson reexamined claimant, who also reported left hand symptoms. Dr. Dickson released claimant to return to regular duty work. She referred him to Dr. Pise for surgical evaluation.

11.On January 5, 2009, Dr. Pise examined claimant and injected the right ulnar bursa. Dr. Pise indicated on the report form that claimant was not working. Dr. Pise did not comment on the ability of claimant to return to work.

12.On January 8, 2009, Dr. Dickson reexamined claimant and again released claimant to return to regular work.

13.On January 18, 2009, Dr. Richman performed a medical record review for the respondents and concluded that claimant's right carpal tunnel syndrome ("CTS") was work-related, but his left CTS was not work-related because the symptoms arose after claimant left the employ of the employer.

14.On January 19, 2009, Dr. Pise reexamined claimant and again indicated that claimant was not working. Dr. Pise again did not comment on claimant's ability to return to work.

15.On January 29, 2009, Dr. Dickson again released claimant to return to regular work.

16.On February 5, 2009, Dr. Griffis performed a repeat EMG, which showed mild right carpal tunnel syndrome ("CTS"). Dr. Griffis thought that claimant also had mild right ulnar neuritis.

17.On February 19, 2009, Dr. Dickson again released claimant to return to regular work.

18.On March 10, 2009, Dr. Pise recommended right CTS surgery for claimant. Dr. Pise did not comment on claimant's ability to work.

19.On March 12, 2009, Dr. Dickson again released claimant to return to regular work.

20.On April 6, 2009, Dr. Dickson again released claimant to return to regular work.

21.On April 15, 2009, Dr. Pise performed right CTS surgery.

22.On April 16, 2009, Dr. Richman performed an independent medical examination for the respondents. He reiterated that the right CTS was work-related, but the left CTS was not. He recommended restrictions of no use of the right upper extremity until claimant healed following the surgery.

23.On April 20, 2009, Dr. Dickson excused claimant from work.

24.On April 20, 2009, Dr. Pise imposed restrictions against forceful or repetitive use of the right upper extremity or lifting over five pounds with the right hand.

25.On April 23, 2009, Dr. Dickson reiterated the same restrictions imposed by Dr. Pise.

26.On April 28, 2009, the insurer filed a general admission of liability for TTD benefits commencing April 15, 2009.

27.Claimant has failed to prove by a preponderance of the evidence that he was unable to return to the usual job from November 28, 2008, through April 14, 2009, due to the effects of the work injury. Claimant admitted that he returned to regular duty work from November 17 through November 26, 2008, in spite of having some difficulties. Dr. Dickson, the attending physician, released claimant to perform regular duty at all times from November 28, 2008, through April 14, 2009. No conflict existed with the opinions of Dr. Pise, who did not comment on claimant's ability to work until April 20, 2009, after the surgery. Contrary to claimant's argument, nothing prevented the attending physicians from addressing claimant's ability to work. He might not agree with the releases, but the attending physicians clearly released claimant to regular work at all relevant times.

CONCLUSIONS OF LAW

1. As found, claimant was able to return to the usual job from November 28, 2008, through April 14, 2009, in spite of the effects of the work injury. Consequently, claimant is not "disabled" within the meaning of section 8-42-105, C.R.S. and is not 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). In addition, TTD benefits terminate if the attending physician provides a release to return to regular duty employment. Section 8-42-105(3)(c), C.R.S. As found, at all relevant times, Dr. Dickson provided claimant with a release to return to regular duty. No conflict existed with the opinions of Dr. Pise. Consequently, the Judge is not required to resolve conflicts in physician releases to work. *See Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d. 680 (Colo. App. 1999).

2. Because claimant was not entitled to TTD benefits, the affirmative defense of responsibility for termination of employment is moot.

ORDER

It is therefore ordered that:

1. Claimant's claim for TTD benefits from November 28, 2008 through April 14, 2009, is denied and dismissed.

DATED: June 9, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-777-895

ISSUES

➢Did Claimant prove by a preponderance of the evidence that he sustained a compensable occupational disease to his bilateral knees?

➢If the claim is compensable, did prove by a preponderance of the evidence that the medical treatment from Dr. Sisk and Dr. Kipe is reasonably necessary to cure and relieve the effects of the occupational disease?

➢Did Claimant prove by a preponderance of the evidence that he is entitled to temporary total disability benefits?

➢Prior to the hearing, the parties stipulated to an average weekly wage ("AWW") of 1,057.71.

FINDINGS OF FACT

1. Claimant is a 51-year old route sales driver, delivering Meadow Gold Dairy products to accounts in Northwestern Colorado and Baggs, Wyoming. Claimant's job duties include driving a twenty (20) foot truck to his accounts, loading and unloading his truck, delivering milk to his customers from the back of his truck and selling his product to existing and new accounts. In order to get into his truck, Claimant is required to take two steps into the truck. In order to get into the back of the turck, Claimant must either climb up into the truck or utilize the ramp attached to the back of the truck. The Claimant testified that the ramp weighs fifty (50) to seventy five (75) pounds. Claimant works five (5) days per week and approximately forty-eight (48) weeks per year. Claimant's job duties require Claimant to load milk crates weighing up to one hundred eighty

(180) pounds using a handcart. In order to get the milk crates onto the handcart, Claimant must drag the milk crates, tilt the milk crates up and slide the handcart underneath. Additionally, while loading the truck, Claimant carries up to forty (40) pounds in product. Claimant loads the truck twice per week.

2. Claimant had a prior injury to his left knee while at work in 2001 when Claimant was picking up crates and fell to the ground. Claimant underwent treatment with Dr. Sisk and Dr. Ossen and was eventually released to return to work without restrictions on February 21, 2001. Claimant currently weighs approximately two hundred seventy five (275) pounds. Claimant has been diagnosed with type II diabetes. Claimant previously played and umpired softball, but has not performed that activity for a number of years. Claimant testified that the activities of his work are more strenuous than his activities outside of work.

3. On November 20, 2008, Claimant arrived at work at 12:30 a.m. and performed the normal job duties of his employment. While driving back to Craig, Colorado, approximately nine (9) hours into his shift, Claimant noticed his left knee was swollen. Claimant immediately sought medical treatment with Dr. Told and reported to Dr. Told that he thought he may have a blood clot. Dr. Told noted suprapatellar swelling on the left leg and instructed Claimant to treat with compression. Claimant continued working his job full duty until January 2, 2009. Claimant reported the swelling in his knee to his employer and his employer referred Claimant to Moffat Family Clinic for treatment.

4. Claimant was evaluated on January 2, 2009 by Dr. Kipe. Claimant reported to Dr. Kipe that his knee swelled up at work in November and that the knee resolved after Claimant took a few days off of work. Claimant reported the swelling and pain returned on January 1, 2009. Claimant denied any specific injury to his left knee. Dr. Kipe noted that Claimant had not had previous imaging studies to his left knee and recommended a magnetic resonance image ("MRI") to be sure there was no internal damage. Dr. Kipe opined that Claimant's present disability was due entirely to this injury with the prior two incidents relating to the present disability. Dr. Kipe noted that the prior two injuries were also work related. Claimant returned to Dr. Kipe on January 8, 2009. Dr. Kipe noted that Claimant's left knee was less swollen, but Claimant still reported significant pain. Dr. Kipe continued Claimant on work restrictions and noted Claimant's job required frequent lifting, climbing, and bending.

5. Claimant returned to Dr. Kipe on January 16, 2009 and reported that his knee was better now that he had rested. Dr. Kipe noted that Claimant's swelling had subsided and released Claimant to return to work without restrictions. Claimant called Dr. Kipe on January 20, 2009 and

reported that his knee had swollen again upon his return to work. Dr. Kipe noted problems with getting the MRI of Claimant's knee approved and referred Claimant to Dr. Sisk for examination.

6. Claimant was examined by Ms. Bertz, a physician assistant with Orthapedics of Steamboat Springs, on January 27, 2009. Ms. Bertz noted Claimant had a history of diabetes and deep vein thrombosis ("DVT") in his left calf. Physical examination revealed some knee effusion and some loss of range of motion. X-rays were performed and showed some significant degenerative joint disease ("DJD") on medial side of the left knee. Claimant was advised he could continue to live with the discomfort of his knee, attempt steroid injections to determine how long the injections would pacify his symptoms, or proceed with a total knee arthroplasty. Dr. Kipe wrote a work release on January 27, 2009 again taking Claimant off of work completely. Claimant returned to work on February 1, 2009. Claimant eventually decided to proceed with the total knee arthroplasty on March 4, 2009 under the auspices of Dr. Sisk. Claimant was off of work after the surgery from March 4, 2009 through April 19, 2009 when he returned to his position with employer.

7. Dr. Sisk testified at hearing that he first examined Claimant in February 2001 following a work related injury to his left knee. Dr. Sisk did not see the Claimant again until January 27, 2009. Dr. Sisk testified that Claimant provided him with a description of his job duties and he has observed Claimant performing his job duties at the hospital, where Claimant delivers milk. Dr. Sisk testified that following Claimant's 2001 injury, his knee would likely wear out at a faster rate than normal. Dr. Sisk testified that he did not believe Claimant's 1999 motor vehicle accident was a significant factor in Claimant's deterioration of his knee condition. Dr. Sisk testified that Claimant has an active job involving a lot of walking, moving up and down stairs and platforms and moving heavy objects. Dr. Sisk testified that these work activities lead to additional abuse for the knee and causes the knee to wear out faster. Dr. Sisk testified that while Claimant's weight has some role in the development of Claimant's osteoarthritis, the work activities combined with Claimant's weight would hasten the development of the advanced stage of the osteoarthritis. The ALJ finds the testimony of Dr. Sisk to be credible and persuasive.

8. Respondents had Dr. Roth perform a comprehensive records review IME of Claimant and literature review. Additionally, Dr. Roth testified live at the hearing. Dr. Roth performed a causation analysis that looked separately at the medical diagnosis and the biologic pathway that could lead to the diagnosis. Dr. Roth reviewed Claimant's medical records documenting his prior injury to his left knee and reviewed Claimant's job description as provided in Claimant's answers to interrogatories. Dr. Roth noted that Claimant had osteoarthritis in his left knee as of November 20,

2008. Dr. Roth opined that there was no documented work related incident in 2008 or 2009. Dr. Roth opined that arthrosis of the knee is a biologic, genetically prescribed disorder that takes place at a cellular level, and that biologic process is not initiated, accelerated, hastened, nor is the natural course in history changed by sprain or strain without direct and specific joint disruption. Dr. Roth noted that Claimant's obesity would accelerate the rate of degeneration of the knees. Dr. Roth opined that direct trauma could accelerate the degenerative changes of the knees, but noted that Claimant's November 2008 accident history did not contain a report of direct trauma. Dr. Roth opined that it is medically probably that the condition of Claimant's knees would be the same, and require the same course of medical treatment whether Claimant had performed his job duties or not.

9. The ALJ finds the testimony of Dr. Sisk and reports of Dr. Kipe more persuasive that the testimony of Dr. Roth. The ALJ notes that Claimant's swelling in November 2008 resolved after he was off of work for a couple of days. Likewise, Claimant's swelling in January 2009 resolved after Claimant was off of work through January 16, 2009. Claimant's swelling returned when Claimant returned to his regular job duties after January 16, 2009. The ALJ finds that it is more probably true than not that Claimant's work activities as a sales driver aggravated to a reasonable degree or contributed to the development of osteoarthritis in Claimant's left knee resulting in the need for medical treatment.

10. The ALJ finds the testimony of Claimant's activities outside of work compared to his activities at work to be more credible. Based upon Claimant's testimony, the ALJ finds that Claimant's work activities are more strenuous and cause more stress on his left knee than the activities he performs outside of work.

11. The ALJ finds that the Claimant has shown that it is more probably true than not that the treatment provided by Dr. Kipe and Dr. Sisk is reasonably necessary to cure and relieve the Claimant from the effects of the occupational disease.

12. The ALJ finds that Claimant was off of work due to the effects of the occupational disease from January 2, 2009 through January 16, 2009 and from January 27, 2009 through February 1, 2009 and from March 4, 2009 through April 19, 2009.

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., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Claimant must show that the injury was sustained in the course and scope of his employment and that the injury arose out of her employment. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 579. A work-related injury is compensable if it "aggravates, accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* Whether there is a sufficient "nexus" or relationship between the Claimant's employment and his injury is one of fact for resolution by the ALJ based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988). The question of whether a claimant has proven that a particular disease, or aggravation of 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 Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

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

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

5. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

6. As found, Claimant has shown by a preponderance of the evidence that his work activities as a sales driver, including but not limited to climbing in and out of the truck, lifting products and moving milk crates, aggravated, accelerated or combined with Claimant's 2001 injury resulting in Claimant's current disability and the need for surgery. The activities of Claimant's work were more prevalent in the workplace than in everyday life or in other occupations.

7. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-42-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once Respondents have exercised their right to select the treating physician, Claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

8. As found, the treatment from Dr. Sisk and Dr. Kipe is found to be reasonably necessary to cure and relieve Claimant from the effects of his occupational disease.

9. 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 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).

10. As found, Claimant has shown by a preponderance of the evidence that the occupational disease caused a disability and Claimant is therefore entitled to temporary total disability benefits based upon the stipulated AWW for the periods of January 2, 2009 through January 16, 2009; January 27, 2009 through February 1, 2009; and from March 4, 2009 through April 19, 2009.

ORDER

It is therefore ordered that:

1. Respondents shall pay for medical treatment from Dr. Sisk and Dr. Kipe that is reasonably necessary to cure and relieve Claimant from the effects of his occupational disease.

2. Respondents shall pay Claimant temporary total disability benefits based on an AWW of $1,057.71 for the periods of January 2, 2009 through January 16, 2009; from January 27, 2009 through February 1, 2009; and from March 4, 2009 through April 19, 2009, subject to any and all statutory offsets or credits.

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

All matters not determined herein are reserved for future determination.

DATED: June 30, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-777-897

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 20, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 5/20/09, Courtroom 5, beginning at 8:31 AM, and ending at 10:06 AM).

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 working days within which to file electronic objections. The proposed decision was filed on May 28, 2009. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified the it and, as modified, hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern average weekly wage (AWW); and, Respondents raised the issues of overpayment and recovery of overpayment.

FINDINGS OF FACT

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

1. Claimant suffered a compensable injury on November 18, 2008.

2. On December 3, 2008, Respondents filed a General Admission of Liability (GAL), admitting to an AWW of $1,100, and temporary total disability

(TTD) benefits from November 19, 2008, and continuing, at $733.33 per week, based on the admitted AWW.

3. An adjuster for the Insurer admitted to an AWW of $1,100 after speaking with Claimant, who indicated that he received $1,100 during his best week of employment with the Employer. The Claimant's earnings' expectations were unrealistically bolstered by the adjuster's agreement to admit an AWW based on Claimant's best week, as opposed to the adjuster actually performing a due diligence check with the Employer concerning the Claimant's actual wage history.

4. After the Insurer filed the GAL, it was notified by the Employer that Claimant's AWW "should actually be $476.23."

5. On January 5, 2009, Respondents filed a Petition to Modify Claimant's AWW from $1,100 to $476.23.

6. On January 22, 2009, Claimant filed an Objection to Respondents' Petition to Modify.

7. On February 10, 2009, Respondents filed an Application for Hearing on the issues of AWW, Overpayment of Benefits, and Recovery of Overpayment.

8. Employer records of Claimant's weekly earnings reflect the following wages: September 27, 2008 – October 3, 2008, $330.82; October 4, 2008 – October 10,2008, $182.87; October 11, 2008 – October 17, 2008, $1,006.25; October 18,2008 – October 24, 2008, $446.29; October 25, 2008 – October 31, 2008, $524.68; November 1, 2008 – November 7, 2008, $554.22; November 8, 2008 – November 14, 2008, $570.31; and November 15, 2008 – November 21, 2008, $194.44.

9. Claimant did not understand, nor was he able to testify concerning the basis of his job compensation. Mark A. Morton, the Claimant's supervisor at the time of injury could not testify concerning a reasonable method to calculate the Claimant's AWW, other than indicating that there was a schedule of various rates per type of job performed. Therefore, the ALJ finds that the fairest method to calculate AWW is to utilize actual Employer wage records for roughly three months preceding the injury, excluding two un-representative weeks, as found below. There was no persuasive evidence of subsequent earnings or fringe benefits. Consequently, a fair analysis of the Employer's wage records is the only feasible method of calculating the Claimant's AWW, based on objective data as opposed to speculation concerning future earnings.

10. During the week of October 4, 2008 through October 20, 2008, when the Claimant earned $182.87, he experienced mechanical problems with his work vehicle so he was unable to work as often as he was scheduled. Claimant did not work the full week of November 15, 2008 through November 21, 2008, when he earned $194.44, because he was injured on November 18, 2008 and did not work for the rest of the week. The ALJ finds that these two weeks are **not** representative of Claimant's weekly earnings and, therefore, in equity and good conscience should be excluded from an AWW calculation.

11. Excluding the two un-representative weeks, the Claimant grossed $3,432.57 for the remaining five weeks, which yields an AWW of 572.10, and a TTD rate of $383.31 per week. Therefore, the ALJ finds that the Claimant's AWW is $572.10.

12. Because of the adjuster's failure to exercise due diligence in the investigation of Claimant's wages, the Claimant was overpaid the difference between the admitted $733.83 per week in TTD benefits and the actual TTD benefits of $383.31 per week (as established at this time), from November 19, 2008 through the hearing date, May 20, 2009.

13. Claimant has proven, by a preponderance of the evidence that his AWW is $572.10. Respondents have proven, by preponderant evidence that the Claimant was overpaid $350.52 per week from November 19, 2008 through May 20, 2009.

CONCLUSIONS OF LAW

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

a. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F. 3d 1361 (D.C. Cir. 2001). As found, Claimant has proven an AWW of $572.10.

Respondents have proven that Claimant was overpaid $350.52 per week from November 19, 2008 through May 20, 2009.

b. Compensation benefits are calculated based upon an injured employee's AWW. Section 8-42-102(1), C.R.S. (2008). The term "wages" is defined by the Workers' Compensation Act (the "Act") as "the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury." Section 8-40-201(19)(a).

c. The ALJ is granted broad discretion in determining "whether the circumstances of a particular case require [an ALJ] to employ an alternative method of computing compensation benefits based upon the employee's [AWW]." *Coates, Reid & Waldron v. Vigil,* 856 P.2d 850, 855 (Colo. 1993). The Act provides that "in each particular case, [the ALJ] may compute the [AWW] of said employee in such other manner and by such other method as will, in the opinion of [the ALJ] based upon the facts presented, fairly determine such employee's [AWW]." Section 8-42-102(3), C.R.S. (2008). As found, utilization of actual Employer wage records, excluding two un-representative weeks, is the fairest and most equitable way to calculate the Claimant's AWW.

d. The entire objective of wage calculation [under the Act] is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. Although [AWW] generally is determined from the employee's wage at the time of injury, if for any reason this general method will not render a fair computation of wages, the ALJ has long been vested with discretionary authority to use an alternative method in determining a fair wage. *Campbell v. IBM Corp.*, 867 P.2d 77, 82 (Colo.App. 1993). An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Industrial Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *Also see Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, there was no persuasive evidence of subsequent earnings or fringe benefits. Consequently, utilization of actual Employer wage records, excluding two un-representative weeks, is the fairest and most equitable way to calculate the Claimant's AWW. As found, the Claimant's AWW is $572.10.

e. Section 8-40-201(15.5), C.R.S. (2008), defines an overpayment as: "[M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles [articles 40 to 47 of title 8]. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits...."
An "overpayment" is anything that has been "paid" but is not "owing as a matter of law." *See Rocky Mountain Cardiology v. ICAO*, 94 P.3d 1182, 1186 (Colo.App.

2004). As found, the Claimant was overpaid the difference between the admitted TTD rate of $733.83 per week and the actual TTD rate of $383.31 per week from November 19, 2008 through May 20, 2009.

f. Recovery of overpayments, based on mistake and on a retroactive basis, was prohibited by the holding in *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). In 1997, the General Assembly amended the re-opening statute to include overpayments as a ground for re-opening as to overpayments only. Section 8-43-303 (1) and (2) (a), C.R.S. (2008). Now, employers have a statutory right to review and recalculate payments if an insurance carrier made a mistake in previous payments. *Simpson v. Industrial Claim Appeals Office,* 2009 Colo. App. LEXIS 576 (No. 07CA1581, April 16, 2009). [Petition for Rehearing in the Court of Appeals or a Petition for Certiorari in the Supreme Court may be pending]. Consequently, retroactive overpayments because of an insurance carrier's failure to exercise due diligence in the investigation of AWW, may be recouped. Previously, an admission of liability could only be withdrawn retroactively on the basis of fraud. *Vargo v. Industrial Commission,* 626 P.2d 1164 (Colo. App. 1981). To the extent that a case may be re-opened if there were overpayments, the *Vargo* fraud grounds for retroactive modification of a previously admitted award has been altered to include employer mistakes in calculations. To require Respondents to file a petition to re-open in order to recoup overpayments would make no sense since this case is presently open, and it would add an unnecessary layer of formality elevating form over substance when, as here, Respondents directly set the matter for hearing on the issue of recovery of overpayments.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant's average weekly wage is $572.10.

B. The General Admission of Liability filed on December 3, 2008, is hereby modified to reflect an average weekly wage of $572.10 and a temporary total disability benefit rate of $381.40 per week from November 19, 2008, ongoing.

C. Respondents may recover the temporary total disability benefit overpayments from November 19, 2008 to May 20, 2009 by recouping the overpayments from any future permanent disability benefits.

D. Any and all matters not determined herein are reserved for future decision.

DATED this_____day of June 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-778-197

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 3, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 6/3/09, Courtroom 3, beginning at 3:15 PM, and ending at 5:01 PM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel (to be submitted electronically), giving Respondents 3 working days after receipt thereof within which to file electronic objections. The proposed decision was filed on June 10, 2009. On June 15, 2009, Respondents filed objections to the proposed decision. After a consideration of the proposal and the objections thereto, the ALJ has modified it and, as modified, hereby issues the following decision.

ISSUES

The principal issue to be determined by this decision concerns whether Claimant is entitled to temporary total disability (TTD) benefits from November 14, 2008, and continuing. The Claimant has the burden of proof, by preponderant evidence, on this issue. If proven, Respondents' affirmative defense of "responsibility for termination," is triggered and Respondents have the burden of proof, by a preponderance of the evidence, on this issue.

FINDINGS OF FACT

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

1. The parties stipulated, and the ALJ finds, that Claimant's average weekly wage (AWW) is $640.00, which calculates to a weekly TTD benefit rate of $426.67.

2. Claimant began working for the Employer in September 2007 in the Medical Billing department. Her medical billing duties and responsibilities required her to use a computer during 80% of her workday.

3. As a result of her employment, the Claimant suffered an occupational disease of right arm repetitive motion syndrome, with possible carpal tunnel syndrome. The date of last injurious exposure for purposes of this claim was October 21, 2008. Respondents filed a limited General Admission of Liability, dated December 17, 2008, for medical benefits only.

4. Prior to her workers compensation claim, Claimant had missed 9 days of work due to various reasons, such as her car being repossessed, issues with her mother and medical appointments for her son. Prior to missing the work, Claimant made an effort to notify her Employer and took time off without pay. Additionally, when asked to reschedule a medical appointment for her son, Claimant complied with Employer's request to change the appointment time.

5. On May 8, 2009, the Lea Contryman, the Employer's Director of Patient Accounts, who did not testify at the hearing, issued a "Final Written Warning," stating that "time off is not approved unless an emergency happens…I have talked to you several times about scheduling doctor appointments during this time (the closing process). This is no longer acceptable." In the May 8, 2009 letter, vague allegations about Claimant's "insubordinate attitude with your supervisor by giving her **glaring** (emphasis supplied) looks when she talks to you and by not taking responsibility for your part in finishing up for the month." The letter concludes as folloiws: "Failure on your part to **not** (emphasis supplied) schedule time off during our closing process…along with a change in your attitude…will result in termination." There was no persuasive explanation at hearing, or otherwise, how Claimant's "glaring looks" were insubordinate. The actual "Termination Form," signed by Claimant's supervisor and dated November 14, 2009, lists the reason for termination as "unsatisfactory performance/inability." The aggregate personnel records of the Employer illustrate that Claimant did not measure up to the Employer's expectations. The personnel records do **not** support a termination because of Claimant's volitional acts, where Claimant exercised a degree of control over the circumstances of her termination or volitionally committed acts that she could reasonably expect would lead to her termination from employment.

6. Claimant, upon filing a claim with the Employer, was directed to see authorized treating physicians (ATPs), chosen by Respondents, Caroline Gellrick, M.D., and Andrew Plotkin, M.D. The ALJ finds that these physicians were authorized and their treatment of Claimant's right upper extremity condition was causally related to her compensable occupational disease, and reasonably necessary to cure and relieve the effects thereof. The ATPs immediately placed Claimant on work restrictions. The restrictions began with a "5 minute break from data entry every 30 minutes" and were increased to "may work on computer 30 minutes per hour" as of Claimant's medical appointment prior to her termination from employment. Accordingly, Claimant was only capable, pursuant to her

restrictions, of working on the computer 50% of the day, when her job duties required computer use 80% of the day. Although Employer indicated compliance with the Claimant's work restrictions, the Employer's actions as more fully described in paragraph 7 below establish a disconnect between the Employer's efforts and what the Employer actually did.

7. Before and after the Claimant was put on work restrictions, her supervisor met with the Claimant and reprimanded her for decreasing performance in her "numbers." During this same time period, Claimant's supervisor added additional job duties to Claimant's workload, including processing "gold forms." In this regard, the ALJ finds that Claimant's testimony consistent with reason and common sense and credible. On the other hand, Claimant's supervisor, Stephanie Louzon attempted to indicate that she was not aware of Claimant's medical restrictions. She did so in a confusing manner. Joe Darmofal, the human resources person with the Employer who handled workers' compensation matters, met with the Claimant numerous times about her work restrictions and indicated that he communicated them to Claimant's supervisors. Louzon, under the circumstances, did **not** persuasively contradict Claimant's testimony in this regard. Consequently, the ALJ finds that Louzon's testimony in this regard is not credible.

8. It was the Claimant's undisputed testimony that she has not worked or earned wages since her November 14, 2008 termination from employment. The aggregate medical records reflect that Claimant's restrictions have not yet been lifted and she has not been declared at maximum medical improvement (MMI). Therefore, Claimant has proven, by a preponderance of the evidence that she has been TTD since November 14, 2008.

9. On November 7, 2008, Claimant was issued another "Final Written Warning," regarding her performance, attendance and attitude. On November 14, 2008, the Employer terminated Claimant from employment, and gave her a memorandum regarding the termination. That letter gave several reasons for termination, including that Claimant had inadequate performance and had "52 gold forms" that had not been worked. Claimant was on work restrictions at the time of her termination of employment by Employer. The termination letter illustrates that Claimant did not measure up to the Employer's expectations. It does **not** establish a termination because of a volitional act over which Claimant exercised a degree of control and/or that Claimant could reasonably expect would lead to her termination from employment, other than inferred knowledge that Claimant was not "making the grade" with the Employer.

10. Respondents have not established that Claimant was responsible for her termination from employment through a volitional act. Claimant missed some work, mostly before her workers compensation claim began. The missed work was due to circumstances that were not of her own volition, such as her car being repossessed or having to care for family members. After her workers compensation claim began, she had some

work performance issues largely dealing with meeting her "numbers" and how many trips she billed in a day. The ALJ infers and finds that these performance issues did **not** become an important issue for Claimant's supervisors until after Claimant had sustained a compensable injury, and Claimant was given work restrictions that inhibited her ability to work for extended time periods on the computer. In order to complete all her job duties, full use of the computer was required. While she was on restrictions, rather than the Employer decreasing the number of trips that the Claimant was expected to bill, they added additional responsibility to complete gold forms. Under these circumstances, Claimant did not commit a volitional act that led to her termination and she did not exercise a sufficient degree of control over the circumstances of her termination.

11. The ALJ finds that Claimant was terminated from employment because of her inability to meet her work quotas, and this inability was caused by Claimant's compensable work related injury. Claimant was **not** terminated because of a volitional act on her part, where she exercised a degree of control or that she could reasonably expect to lead to her termination from employment.

12. Respondents have failed to prove, by a preponderance of the evidence that Claimant was responsible for her termination, through a volitional act on her part, or through any actions that she could reasonably expect to lead to her termination.

CONCLUSIONS OF LAW

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

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The 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; 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). As found, the Claimant's testimony credibly supports the proposition that she was given extra work duties in the face of medical restrictions restricting her work duties. As also found, Louzon's testimony does not support a termination for cause, based on a volitional act on Claimant's part, over which Claimant exercised a degree of control and which the Claimant could reasonably have expected would lead to her termination from employment.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 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). In the first instance, Claimant must establish entitlement to TTD benefits. If the Claimant does so, then, Respondents must establish their affirmative defense of "responsibility for termination. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has proven TTD from November 14, 2008 and continuing. Respondents have failed to prove "responsibility for termination."

c. Pursuant to § 8-42-105, C.R.S. (2008), a claimant is entitled to TTD benefits when there is a disability that requires the claimant to be away from work for more than three working days. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain disability benefits. *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209, 1210 (Colo.App. 1996). As found, Claimant has established these two factors.

d. To establish entitlement to TTD benefits, a claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S. (2008); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses her employment for other reasons which are not her responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's termination in this case was not her fault but as a result of not meeting the Employer's work quotas at a time when she was medically restricted from a full workload. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the opinions of Claimant's ATPs' alone support Claimant's medical restrictions. Nevertheless, Claimant's credible testimony

supports the proposition that she was restricted from performing her full job duties.

e. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring, and there is no actual return to work), TTD benefits are designed to compensate for the temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, Claimant has met all the prerequisites for TTD, and she has been TTD since November 14, 2008.

f. The Workers Compensation Act provides that "[i]n 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." § 8-42-103(1)(g), C.R.S. (2008)," and Section 8-42-105(4). Respondents bear the burden of proving that Claimant was responsible for her termination. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 20 P.3d 1209 (Colo. App. 2000). As found, Respondents failed to prove that Claimant was responsible for her termination, within the meaning of the Workers' Compensation Act.

g. An employee is "responsible" for termination if the employee precipitated the employment termination by a volitional act that the employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 [Industrial Claim Appeals Office (ICAO), September 27, 2001]. Thus, the factual determination of fault depends upon whether a 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). That determination must be based upon an examination of the totality of the circumstances. *Id*. 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 (ICAO, April 21, 2006). As found, the Claimant did not perform a volitional act that she could reasonably beliueve would lead to her termination, her lesser job performance, based on the effects of her injury led to her termination from employment.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant was not responsible for her termination, within the meaning of the Workers' Compensation Act.

B. Respondents shall pay the Claimant temporary total disability benefits at the rate of $426.67 per week, or $60.95 per day, from November 15, 2008 and continuing until terminated as provided by law. For the period from November 15, 2008 through the hearing date, June 3, 2009, both dates inclusive, a total of 200 days, Respondents shall pay Claimant the aggregate sum of $12,190.00, payable retroactively and forthwith. Respondents shall thereafter pay the Claimant temporary total disability benefits of $426.67 per week from June 4, 2009 until terminated pursuant to statute or order.

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

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

DATED this_____day of June 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-778-406

ISSUES

- Did the claimant prove it is more probably true than not that on November 21, 2008, she sustained an injury arising out of and in the course of her employment when she suffered an ankle inversion while walking on a ramp?
- Did the claimant prove it is more probably true than not that the medical treatment provided by Dr. Tentori was reasonable and necessary treatment for the alleged industrial injury?

FINDINGS OF FACT

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

The claimant alleges she sustained a compensable injury on November 21, 2008, when she sprained her ankle while walking from a parking lot to the employer's building to commence work. This incident occurred at approximately

8:25 a.m., a few minutes before the claimant was scheduled to begin her work as an insurance underwriter.

The claimant was walking on a flat concrete sidewalk when she reached a slight downward sloping wheelchair accessible “ramp” that led to an asphalt area of the parking lot. Like the sidewalk, the ramp is made of concrete. The ramp is intersected by six horizontal grooves that are approximately one-half inch deep. These grooves are depicted in Exhibit J, a photograph of the ramp that was taken on November 24, 2008, three days after the accident. Examination of Exhibit J demonstrates that at various points the grooves contain some type of material, perhaps small stones or bits of dirt or sand. It is impossible to determine from the photograph whether any of this material projects above the grooves so as to reach above the level of the ramp itself.

At hearing, the claimant testified that as she stepped from the sidewalk to the top of the ramp her right ankle “rolled” and gave way. The claimant experienced severe pain in the ankle and was assisted into the employer’s building by other employees.

At the time of this incident the claimant was wearing boots with large flat heels that were approximately one-half inch in height.

The claimant testified that the accident happened very quickly and she does not recall catching her boot heel in one of the grooves. The claimant could not recall whether or not there was debris or foreign matter on the ramp on November 21, 2008, nor did she specifically testify that she slipped on debris or foreign material located on the ramp. The claimant did testify that she is familiar with the ramp and that there is usually foreign matter, such as rocks or pebbles, on the ramp.

The claimant testified that, although she can’t remember exactly what happened, it is her opinion that her boot got caught in one of the grooves causing her to fall. The claimant stated that she arrived at this opinion within one or two days after the accident.

The claimant immediately reported the accident to the employer and was referred to Dr. Eric Tentori, D.O., for treatment. Ms. Lucinda Flores, a human resources specialist of the employer, took the claimant to Dr. Tentori on November 21, 2008.

The claimant admitted that she sprained the ankle “back in high school,” and once again in April 2007 when she stepped off of a curb.

Medical records from 2007 reflect that the claimant experienced sudden and sharp pain in her right ankle when she stepped off of a curb, and it became “hard to walk.” The claimant was diagnosed with a right ankle sprain and was prescribed ice, an air cast and ibuprofen.

Dr. Tentori's note of November 21, 2008, reflects that the claimant gave a history of an "inversion-type injury involving her right ankle." The claimant could not "recall any specific event that led to the ankle twist." Dr. Tentori diagnosed a right ankle sprain and prescribed medication and physical therapy. In his deposition, Dr. Tentori testified that when the claimant filled out a patient questionnaire on November 21, and was asked to describe how the injury occurred, the claimant wrote, "Walking from the parking garage ankle gave away."

On November 24, 2008, the claimant completed a written Employee Incident Report. The claimant wrote that when she was walking out of the parking garage her "right ankle rolled." The claimant did not state that her boot got caught in a groove or that she slipped or tripped on any foreign material located on the ramp.

On November 24, 2008, the claimant and Ms. Flores had a conversation, and Ms. Flores asked the claimant what caused the accident. The claimant advised Ms. Flores that she had "rolled her ankle," but the claimant did not know how or why this accident occurred.

Ms. Flores, who is familiar with the scene of the accident and took the photograph depicted in Exhibit J, opined that it is possible that the edge of the claimant's boot heel could have caught in one of the grooves causing the claimant to twist her ankle.

The employer's insurance reviewer, Ray Wilber, spoke with the claimant on November 25, 2008. Mr. Wilber's primary concern was to determine the cause of the accident and he asked the claimant on three occasions whether she might have fallen because of foreign material on the ramp. On each occasion the claimant stated that she did not know what caused the accident. The claimant did not tell Mr. Wilber that the accident was caused by catching a boot heel in one of the grooves on the ramp.

On December 15 and 16, 2008, the claimant again spoke with Mr. Wilber concerning the cause of the accident. On December 15 the claimant mentioned the ramp itself as a possible cause of the accident, although she did not specifically discuss the grooves as a cause. Mr. Wilber credibly testified that at no point did the claimant ever state that she had a specific recollection of what caused her to roll her ankle.

Dr. Tentori testified by deposition. Based on the history given by the claimant and her answers to the patient questionnaire, he opined there was no "external condition" that caused the claimant to suffer the inversion injury to her ankle. Dr. Tentori further testified that an ankle inversion injury could occur simply as a result of walking.

Dr. Eric Lindberg, M.D., of Orthopedic Associates performed a record review, including the records from the non-industrial ankle sprain in April 2007 and Dr. Tentori's notes. Dr. Lindberg opined based on the limited information available to

him that the claimant's injury "occurred because of the previous condition of instability of her ankle." Dr. Lindberg stated the claimant had previous ankle injuries and "one such instance is documented in 2007." Dr. Lindberg stated that, "once a significant sprain has occurred, if the ligaments do not heal well, a chronic condition of ankle instability can occur where patient's [sic] can sprain their ankles on even flat surfaces such as a flat surface or on a carpeted floor."

The claimant failed to prove it is more probably true than not that the ankle inversion on November 21, 2008, arose out of her employment. The weight of the evidence establishes that the cause of the claimant's ankle inversion on November 21, 2008, is either "unexplained" or the product of preexisting internal weakness resulting from the claimant's prior non-industrial ankle sprains in high school and April 2007. The claimant candidly and honestly testified that she does not actually know what caused her ankle to invert on November 21, 2008. The claimant does not consciously recall that her boot heel caught in a groove on the ramp, or that she slipped on rocks or any other foreign matter located on the ramp. The claimant's admitted inability to recall the specific cause of the ankle inversion is consistent with her nearly contemporaneous statements to Dr. Tentori, Ms. Flores, and Mr. Wilber that she did not know what caused the ankle inversion. Although the claimant testified at hearing that she now believes she caught her boot in a groove in the pavement, the ALJ considers this testimony to be speculative and entitled to little weight. The claimant's opinion concerning the cause of the accident is not based on any genuine recollection of the events at the time of the incident, but is instead the result of surmise. Further, the persuasive opinions of Dr. Tentori and Dr. Lindberg establish that the claimant's sudden ankle inversion in November 2008 can be explained by pre-existing ankle weakness caused by prior ankle injuries in high school and in April 2007.

The claimant failed to prove that the ramp itself constitutes a "special hazard" of employment that either contributed to the occurrence of the accident or elevated the degree of injury that she sustained. The ramp itself is of standard design and of a type generally seen at many crosswalks in urban areas. As such, the ramp is a "ubiquitous condition."

In any event, the claimant failed to prove it is more probably true than not that the ramp's construction or design in any way contributed to the ankle inversion or her injuries. First, the claimant failed to prove the grooves in the ramp contributed to her ankle inversion or resulting injuries, even if the grooves could be considered "special hazards" not generally encountered. The claimant failed to show it is more probably true than not that her boot heel caught in a groove causing or contributing to the inversion. Second, the claimant failed to prove that even if there was foreign material on the ramp, such as pebbles or sand, that such material contributed to the ankle inversion or the resulting injury by causing her to slip or trip.

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 INJURY

The claimant contends that she proved the ankle inversion that she experienced on November 21, 2008, arose out of and in the course of her employment. The claimant argues the evidence demonstrates that the inversion was caused either by slipping on foreign matter located on the ramp, or by catching her boot heel in one of the grooves located on the ramp. The ALJ disagrees with the claimant's analysis of the evidence and the contention that the resulting injury arose out of the employment.

The claimant must prove by a preponderance of the evidence that her injury was proximately caused by an injury arising out of and in the course of her employment with the employer. Section 8-41-301(1)(b) & (c), C.R.S.*; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *See Triad Painting Co. 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.* The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968).

If the precipitating cause of a fall at work is a preexisting health condition that is personal to the claimant, or the cause of fall at work is simply unexplained, the injury does not arise out of the employment unless a "special hazard" of the employment combines with the preexisting condition to contribute to the occurrence of the accident or the injuries sustained. *Finn v. Industrial Commission, supra*; *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Rice v. Dayton Hudson Corp.,* W.C. No. 4-386-678 (ICAO July 29, 1999). This rule is based upon the rationale that, unless a special hazard of the employment increases the risk or extent of injury, a fall that is unexplained or due to the claimant's preexisting condition lacks a sufficient causal relationship to the employment. A "special hazard" is a condition or circumstance that is not generally encountered outside the workplace. *Gates Rubber v. Industrial Commission,* 705 P.2d 6 (Colo. App. 2005); *Kidwell v. City of Denver,* W.C. No. 4-601-057 (ICAO December 15, 2004).

The question of whether the claimant proved the requisite causal relationship between the injury and the conditions or circumstances of employment is one of fact for determination by the ALJ. *Cabela v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *Blunt v. Nursecore Management Services,* W.C. No. 4-725-754 (ICAO February 15, 2008).

The ALJ concludes, as determined in Finding of Fact 18, that the claimant failed to prove it is more probably true than not that she sustained an injury arising out of her employment when her ankle inverted on November 21, 2008. The weight of the evidence establishes that the cause of the claimant's fall is either unexplained or was the result of weakness caused by her prior ankle injuries. The claimant simply does not know what caused her ankle to invert, and the medical evidence suggests that the cause of the inversion may well have been pre-existing weakness in the joint that spontaneously caused the inversion on November 21. The ALJ concludes that, based on the existing state of the evidence, it would be speculative to conclude that the conditions of the ramp caused or contributed to the occurrence of the accident in this case.

The ALJ further the ALJ concludes that to the extent the claimant's ankle inversion was precipitated by pre-existing weakness caused by prior ankle injuries, or was "idiopathic," she failed to prove it is more probably true than not that any "special hazard" of the employment contributed to the occurrence of the injury or elevated the degree of the injury. The claimant failed to prove that the

ramp itself is a "special hazard." Rather the ramp is a ubiquitous condition common to many crossings located in urban areas. Moreover, even if the grooves in the ramp could be considered a "special hazard" the claimant failed to prove that the grooves contributed to the occurrence of the injury or the degree of her injury. Similarly, the claimant failed to prove that even if there was foreign material present on the ramp that it contributed to the occurrence of the injury or the degree of injury.

In these circumstances the claim for workers' compensation benefits must be denied and dismissed. Cf. *Blunt v. Nursecore Management Services, supra*; *Fuller v. Marilyn Hickey Ministries, Inc.,* W.C. No. 4-588-675 (ICAO September 21, 2006); *Willis v. Craig Hospital,* W.C. No. 4-627-742 (ICAO February 13, 2006).

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. 4-778-406 is denied and dismissed.

DATED: June 29, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-778-463

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 5, 2009 and June 8, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 5/5/09. Courtroom 3, beginning at 8:33 AM, and ending at 9:45 AM; and, 6/8/09, Courtroom 3, beginning at 8:36 AM, and ending at 9:27 AM).

At the conclusion of the last session of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel, giving Respondents 3 working days within which to file objections. The proposed decision was filed on June 15, 2009. Objections were filed on June 16, 2009.

After a consideration of the proposal and objections, the ALJ has modified the proposal and, as modified, hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability of an occupational disease, specifically thoracic outlet syndrome (TOS); medical benefits [including authorized treating physician (ATP)]and, temporary total disability (TTD) benefits from April 8, 2008 and continuing until termination is warranted by law.

At the commencement of the hearing, the parties stipulated that the Claimant had an average weekly wage (AWW) of $3,846.15. The ALJ so finds.

FINDINGS OF FACT

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

1. Claimant began working as a sales representative for the Employer in October 2007. The date of onset of her occupational disease, TOS, was October 2007. Her territory was the West Coast of the United States.

2. The ALJ takes administrative notice of the Division of Workers' Compensation chronological file in this case, and it reflects that the Employer's First Report in this case was filed on December 5, 2008, less than two years after the October 2007 onset of her occupational disease of TOS.

3. As part of her duties, Claimant was required to travel many times per month. On every trip, Claimant brought two to three cases that contained shoe samples. The cases weighed 50 to 70 pounds each. The cases were very difficult for the Claimant to handle.

4. Claimant traveled by plane and rental car. She had no one to help her with the bags

5. While traveling, the Claimant had one to three appointments per day.

6. The Clamant had done this type of work for several other employers and was very successful.

7. In January 2008, the Claimant developed pain in her neck, shoulder, arms and chest wall. As a result of this pain, her doctor instructed her that she should not travel.

8. After missing one trip, Claimant was instructed by the company that traveling was part of her job and that if she was unable to travel she should take a medical leave of absence. Claimant did so on April 8, 2008. The Employer terminated her position eight weeks later. Claimant has not worked anywhere since leaving the Employer she has earned no wages since April 8, 2008.

9. The Employer never instructed the Claimant where she should get medical attention. Claimant went Elizabeth F. Yurth, M.D., for treatment. Dr. Yurth treated the Claimant with a course of injections and then referred the Claimant to Richard J. Sanders, M.D., who continues to treat the Claimant. Dr. Sanders is a neurosurgeon who specializes in thoracic outlet syndrome.

10. Claimant had previous pain in her neck and shoulder when she worked for an earlier employer doing similar work in 2003. This did not, however, extend into her arms or hands. Claimant took time off from work during 2003. She told Dr. Sanders that she took off work because of pain in her neck. She also stated that she did this to spend more time with her daughter and that the pain did not prevent her from working.

11. In their objections to the proposed decision, Respondents make reference to "contradictory answers" to interrogatories. While limited questioning by use of Claimant's interrogatory responses occurred at hearing, the ALJ finds that the Claimant's testimony was not impeached by her interrogatory responses.

12. Claimant did not seek medical attention for her neck and shoulder pain in 2003. The pain would come and go and it wasn't significant enough for her to seek medical attention. Claimant first sought medical attention for her symptoms while working for the Employer herein.

13. When Claimant returned to work in December 2003, she worked for a competitor of the Employer herein, and she did work similar to the work she would later do for the Employer herein. The bags Claimant used with the previous employer, however, were not as heavy as the bags she had to use for the Employer herein, and there were only two bags to move with the previous employer.

14. Any pain the Claimant had while working for previous employers was intermittent, not as intense, did not prevent her from working and did not warrant medical attention. The pain that she had while working for the Employer herein was more severe and was constant. Also, in addition to pain in her neck and shoulder, Claimant had pain in her arms, hands and neck. Claimant also developed headaches as a result of the pain.

15. Dr. Sanders documented the Claimant's diagnosis in his February 2, 2009 report as right and left thoracic outlet syndrome, and right and left

pectoralis, minor syndrome. He stated in his November 24, 2008 report that "To a reasonable degree of medical certainty, her current symptoms are the result of repetitive-stress injury at her work between 1997 and 2008.

16. Respondents took the deposition of Dr. Sanders on May 19, 2009. In his deposition, Dr. Sanders reiterated his diagnosis and stated that it was caused by Claimant's work with the Employer herein. Dr. Sanders acknowledged that Claimant had similar symptoms in the past but they did not involve the chest wall or the arms and hands. He stated that even if the Claimant had been taking fewer trips than before, her work at with the Employer herein had aggravated Claimant's symptoms to the point where rest alone would not relieve the symptoms.

17. Allison Fall, M.D., performed an independent medical examination (IME) at the request of the Respondents. She stated in her April 21, 2009 report that Claimant did not have thoracic outlet syndrome; but rather, had a subclavian venous obstruction of unknown causation.

18. Dr. Sanders disagreed with Dr. Fall's opinion and pointed out that Dr. Fall performed only one of four tests for thoracic outlet syndrome and in fact, the test was positive for TOS. The ALJ finds that Dr. Sanders is an expert in the diagnosis and treatment of thoracic outlet syndrome. Therefore, his opinion regarding the nature and cause of the Claimant's injuries is entitled to significantly more weight than Dr. fall's opinion.

19. The ALJ finds that the Claimant suffers from TOS and pectoralis, minor syndrome that were caused and/or permanently and substantially aggravated by her work with the Employer herein.

20. The fact that Claimant may have had similar symptoms several years before while working for a previous employer does not shift liability from the Employer herein to another party. The Claimant suffered a permanent and substantial aggravation of her preexisting condition while working for the Employer herein. Any symptoms that Claimant had prior to starting her work at with the Employer herein were not sufficient enough to warrant medical treatment. It was not until she had worked for the Employer herein for several months that she saw a doctor for her symptoms. Also, previous symptoms were intermittent, less intense and were confined to the neck and shoulders. While working for the Employer, these symptoms extended to her arms, hands and her chest wall.

21. The Claimant's TOS resulted directly from the employment as a proximate cause and it did not come from a hazard to which the Claimant would have been equally exposed outside of the employment.

22. The Claimant's testimony was consistent, probable and credible.

23. As a result of her occupational disease, the Claimant has been unable to perform the duties of her employment since April 8, 2008, she has earned no wages since that time, she has not been released to unrestricted duty, and she has not been declared to be at maximum medical improvement (MMI).

24. Claimant has proven, by a preponderance of the evidence that she sustained a substantial, permanent aggravation of her preexisting thoracic condition while working for the Employer herein, and this amounted to a new occupational disease, TOS, with a date of last injurious exposure of April 8, 2008. The Claimant has also proven, by preponderant evidence that when she reported her work-related condition to her Employer, the Employer made no medical referral and the Claimant selected Dr. Yurth for treatment. Dr. Yurth referred the Claimant to Dr. Sanders and this referral was in the natural progression of medical treatment for the Claimant's compensable TOS. The Claimant has further proven, by preponderant evidence that all of her treatment for TOS was, and is, causally related to her compensable TOS and reasonably necessary to cure and relieve the effects thereof; and, that Claimant has been TTD since April 9, 2008 and continuing. Her AWW of $3,846.15 entitled her to the maximum, capped TTD rate for FY 07/08 of $753.41 per week, or $107.63 per day.

Late Attempt to Add Statute of Limitations Affirmative Defense

25. After the first session of the hearing of May 5, 2009, and before the second session of June 8, 2009, Respondents filed a motion to add statute of limitations as an additional issue. Indicating that the "ship had already set sail," and citing *Kersting v. Industrial Commission,* 39 Colo. App. 297, 567 P. 2d 394 (1977), the ALJ found the motion untimely and denied it on the procedural ground of un-timeliness. Regardless, the onset of Claimant's occupational disease, TOS, herein was October 2007 and the Employer's First Report of Injury was filed on December 5, 2008, less than two years after the onset of Claimant's new occupational disease, which amounted to a substantial and permanent aggravation of her preexisting condition.

CONCLUSIONS OF LAW

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

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The same principles

concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, Dr. Sanders expertise concerning the Claimant's TOS condition is more specifically relevant than Dr. Fall's expertise. Consequently, Dr. Sanders' opinion is entitled to more weight and it is more credible than Dr. Fall's opinion. Most importantly, it supports a substantial, permanent aggravation of Claimant's preexisting condition. Also, as found, the Claimant's testimony was consistent, probable and credible.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an occupational disease, substantial, permanent aggravation thereof, and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has sustained her burden with respect to compensability; authorization of medical treatment; causal relatedness and reasonable necessity thereof; and, TTD from April 9, 2008 and continuing.

c. An "occupational disease" is a disease resulting directly from the employment as a proximate cause and one that does come from a hazard to which the employee would have been equally exposed outside of the employment. § 8-40-201 (14), C.R.S. (2008). *See City of Colorado Springs v. Industrial Claim Appeals Office,* 89 P. 3d 504 (Colo. App. 2004). As found, Claimant has proven an occupational disease with an onset date while working for the Employer herein, and a last injurious exposure of April 8, 2008.

d. The purpose of § 8-41-304 (1), C.R.S. (2008) is to assign liability for an occupational disease where a claimant has been exposed to the hazards of prior occupational disease during successive employments. *Robbins Flower*

Shop v. Cinea, 894 P .2d 63 (Colo. App. 1995); *Seyhouwer v. Kristin F. Robbins, D.D.S*. W.C. Nos. 4-462-729 and 4-471-878 [Industrial Claim Appeals Office (ICAO), May 20, 2003]. The statutory language in § 8-41-304(1), which requires proof of a "substantial permanent aggravation," applies when there is a **prior occupational disease** that is aggravated by subsequent employment. *See Monfort Inc. v. Rangel*, 867 P .2d 122 (Colo. App. 1993); *Fisher v. United Parcel Service*, W.C. Nos. 4-114-768 & 4-221-453, (ICAO, May 8, 1996); *aff'd,* (Colo. App. No. 96CA0943, February 20, 1997) (not selected for publication). Consequently, the "substantial permanent aggravation" standard applies **only** where a claimant suffered an occupational disease in the employ of a previous employer; and it does not apply to the aggravation of prior **accidental injuries**. *See Cooper v. Delta County Memorial Hospital* W.C. No. 4-275-780 (ICAO, March 12, 1997); s*ee also Clemons v. Harrison School District #2*, W.C. Nos. 4-357-814, 4-311-981 & 4-351-568 (ICAO, August 8, 2000). As found, Claimant had previous problems in 2003, however, it is doubtful that she had the occupational disease of TOS at the time. Nevertheless, even if she did, she suffered a substantial, permanent aggravation thereof while working for the Employer herein.

e. Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S. (2008), the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, the Employer made no medical referrals when the Claimant reported the work-related nature of her condition. Consequently, the right of first selection passed to the Claimant and the Claimant selected Dr. Yurth.

f. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Industrial Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, the referral to Dr. sanders was within the chain of authorized referrals and within the normal progression of medical care for Claimant's TOS.

g. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the substantial, permanent aggravation of her preexisting condition , manifesting as TOS with a date of last injurious exposure of April 8, 2008. Also, medical treatment must be reasonably

necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. (2008). *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, all of the Claimant's medical care and treatment, as reflected in the evidence, was and is reasonably necessary.

h. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S. (2008); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses her employment for reasons which are not her responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair her opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's termination in this case was not her fault but as a result of her medically imposed travel restriction. As found, Claimant suffered a disability that prevented her from doing her usual job and she was terminated from that job.

i. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, Claimant has met the prerequisites for TTD, and she has been sustaining a 100% temporary wage loss since April 8, 2008.

j. As found, after the first session of the hearing of May 5, 2009, and before the second session of June 8, 2009, Respondents filed a motion to add statute of limitations as an additional issue. Indicating that the "ship had already set sail," and citing *Kersting v. Industrial Commission,* 39 Colo. App. 297, 567 P. 2d 394 (1977), the ALJ found the motion untimely and denied it. In their objections to the proposed decision, Respondents cite *Quinonez v. Town of Platteville,* W.C. No. 4-390-817 (ICAO, January 14, 2002) [ALJ denied claim for an occupational disease because it was barred by the statute of limitations, which began to run from the date of **onset** (which equates with the date of injury), not the date of last injurious exposure. As found, the Claimant's date of onset was in October 2007 when she began work with the Employer herein]. Respondents argue that the Claimant's 2003 problems amounted to the onset date and, therefore, more than two years had elapsed before Claimant filed her claim. There was no clear or persuasive evidence that Claimant had a previously recognized occupation disease. As found, the onset date of the substantial and permanent aggravation of Claimant's TOS was in October 2007, and the

Employer filed a First Report of Injury on December 5, 2008, less than two years after the date of onset. § 8-43-103 (2), C.R.S. (2008), provides that the statute of limitations applies to a claim not filed within two years of the date of injury. A reasonable reading of § 8-43-102 (1) (a) and subsection (2), indicate that an employer who receives notice of an injury may file a written report, *e.g.,* an "Employer's First Report." The two-year statute of limitations contained in § 8-43-103 (2), provides that a claim shall be barred unless "a notice claiming compensation is filed with the division (Division of Workers' Compensation). A written Employer's First Report of Injury **is** "a notice claiming compensation."

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The denial of Respondents' motion to add issue of statute of limitations, mid-hearing, is hereby re-affirmed. Also, the affirmative defense of "statute of limitations" is inapplicable herein and hereby denied.

B. Respondents shall pay all costs of medical care and treatment to cure and relieve the Claimant of the effects of her occupational disease of thoracic outlet syndrome, subject to the Division of Workers' Compensation Medical fee Schedule.

C. Respondents shall pay the Claimant temporary total disability benefits at the rate of $753.41 per week, or $107.63 per day, from April 9, 2008 through June 8, 2009, both dates inclusive, a total of 426 days, in the aggregate amount of $45, 850.38, which is payable retroactively and forthwith. From June 9, 2009 and continuing until termination of benefits is warranted by law, Respondents shall pay the Claimant $753.41 per week in temporary total disability benefits.

D. Respondents are entitled to take any offsets as provided by law.

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

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

DATED this_____day of June 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

ISSUES

Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right shoulder, arm and neck.

Whether Claimant is entitled to temporary total disability ("TTD") benefits from November 21, 2008 and continuing until terminated in accordance with the law.

Whether Respondents have proven that Claimant was responsible for her separation from employment on November 20, 2008 and is barred from receiving TTD benefits under the provisions of Section 8-42-103(1)(g) and 8-42-105(4), C.R.S.

Whether the right of selection of the authorized treating physician passed to Claimant because Employer did not designate a physician.

At hearing, the parties stipulated that Claimant's Average Weekly Wage was $684.23 prior to the inclusion of the cost of conversion of health insurance benefits.

FINDINGS OF FACT

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

1. Claimant was employed as a Quality Assurance Technician at Employer's meat packing facility. Claimant's job was to pull pieces of meat off a table as they come past her station to check them for fat and other defects. Claimant would then pass the defective pieces to a co-worker. Claimant began this job in September 2007 after having previously been employed with Employer.

2. On June 9, 2008 Claimant was pulling a large piece of meat with a long hook using her right arm when she felt something "pop" in the right side of her neck. Claimant reported this incident to her supervisor, Leo Soto, and she was taken to Employer's Health Services department.

3. On June 9, 2008 Claimant was evaluated by a nurse in the Health Services Department of Employer. Claimant complained of right-sided posterior neck pain and stated to the nurse that this was from pulling meat. Claimant was

treated with heat, given a cream and over the counter medications. Claimant then returned to work at her usual job.

4. Claimant returned to Health Services on June 11, 2008 complaining of the same pain as on June 9. The nurse completed a "CTD Treatment Protocol" and instructed Claimant to follow up. Claimant returned on June 13, 2008 noting no improvement. Claimant was treated with heat and given stretches to do at home.

5. Claimant returned to Health Services on June 20, 2008 and on that date was not complaining of pain. The treatment given by Health Services had "calmed" Claimant's pain. No treatment was given and Claimant was discharged from care by Health Services on June 20, 2008.

6. After June 20, 2008 Claimant continued her work as a Quality Assurance Technician. Claimant testified that over time her pain returned and she returned to Health Services. Claimant was seen in Health Services on August 11, 2008 complaining of right neck and shoulder pain from pulling heavy meat. On that date, the Health Services nurse who evaluated Claimant noted negative objective assessment findings.

7. Claimant knew that she could seek treatment from Employer's Health Services department anytime she didn't feel well regardless of whether the problem was a non-work related condition such as a cold or for a work-related problem.

8. After Claimant's visit to Health Services on August 11, 2008, Claimant did not return to Health Services for complaints of her neck and right shoulder pain until November 20, 2008. Claimant was not placed under any work restrictions for her neck and right shoulder pain until November 20, 2008.

9. On August 13, 2008 Leo Soto issued Claimant a written Personnel Action Record to discipline and give Claimant a written warning for poor work performance. Mr. Soto issued this written warning to Claimant because his supervisor had observed Claimant letting meat products go by her station without being inspected. Mr. Soto explained to Claimant that she needed to put more effort into her job and make sure the product was correct. Claimant was advised that further incidents would result in further disciplinary action up to and including termination.

10. On August 20, 2008 Claimant was again given a written Personnel Action Record by Leo Soto to provide her with a written warning regarding her job performance. The basis for this written warning was that Mr. Soto had noticed meat product coming from Claimant's table that did not meet specifications. Mr. Soto told Claimant that she needed to be more motivated and put more effort into catching out of specification product. Claimant was advised

again that further incidents would result in disciplinary action including termination.

11. Claimant was placed on a written final warning for work performance on August 22, 2008 as the result of a plant inspection done by the United States Department of Agriculture ("USDA") on August 21, 2008. As a result of deficiencies noted in the area that Claimant was to perform pre-operation inspection on Employer's plant received a non-compliance report from the USDA. Claimant was advised that if she had any further performance issues her employment would be terminated.

12. Claimant was issued a written second final warning for work performance on October 28, 2008. Leo Soto had observed another supervisor running product that had been left un-inspected by Claimant. Claimant had left the product and gone home. Mr. Soto documented that the prior week he had told Claimant she could not leave her table unattended. Claimant was advised that if she left her table unattended again this would be considered job abandonment and her employment would be terminated. Mr. Soto noted that Claimant was not under any restrictions and had not brought any health issues to his attention.

13. On November 19, 2008 Leo Soto became award of a large claim against Employer by a customer who had received out of specification product. Mr. Soto determined that the product had come from Claimant's line by the detail information on the claim submitted by the customer.

14. On November 20, 2008 Leo Soto pulled boxes of meat that had come from Claimant's line and found out of specification product. Mr. Soto showed Claimant the defective product and told her she needed to improve her performance. At that time, Claimant complained of her right arm and neck and Mr. Soto took Claimant to the Health Services department to be examined.

15. When Claimant returned from Health Services on November 20, 2008 she had been given work restrictions of no lifting, pushing or pulling over 5 pounds with her right arm. Mr. Soto accommodated Claimant's restrictions by placing her on the "tenderloin" line. Mr. Soto then went to discuss Claimant's work performance with his supervisor. After Mr. Soto spoke with his supervisor it was decided that the issues regarding Claimant's work performance should be taken to the Human Resources department for review. Mr. Soto then met with Matt Lovell the Human Resources supervisor to discuss Claimant's performance issues.

16. After reviewing Claimant's performance issues with Leo Soto, Matt Lovell requested Mr. Soto to bring Claimant to the Human Resources department for a discussion about her performance prior to making a decision regarding termination of Claimant's employment.

17. Claimant met with Mr. Lovell and Mr. Soto on November 20, 2008 to discuss her work performance issues. Mr. Lovell credibly testified, and it is found, that Claimant did not offer any explanation of substance for her failure to perform her job as required and Claimant voiced an understanding of the requirements of her job. In the meeting with Mr. Lovell Claimant did not say that her performance issues were due to the injury to her neck and right shoulder/ arm. Mr. Lovell then made the decision to terminate Claimant's employment because of her work performance issues as documented in the prior written warnings and because Claimant's work performance had not improved.

18. Mr. Lovell was aware of Claimant's prior visits to Health Services for neck and right shoulder pain at the time of the meeting on November 20, 2008 resulting in Claimant's termination. Mr. Lovell informed Claimant to follow up with Health Services if she felt she needed further treatment.

19. Claimant testified that her work performance issues arose as a result of the pain in her neck and right arm making it difficult for her to work fast enough to pull off the product that did not meet specifications. The ALJ finds this testimony not credible. Claimant testified that she returned to Health Services when her pain increased. The records from Employer's Health Services department reflect that Claimant did not return to Health Services for complaints of her neck and right shoulder pain after August 11 until November 20, 2008. During this time Claimant was warned on several occasions about her work performance and did not seek treatment from Health Services to complain about her neck or right shoulder. Claimant admitted she could return to Health Services at any time for any reason but did not during the time she was being reprimanded and written up for poor work performance. During this time, Claimant was not under any work restrictions that would have affected her work performance. The testimony of Leo Soto and Matt Lovell regarding Claimant's work performance and the reasons for her termination are found to be more credible and persuasive than the testimony of Claimant.

20. At the time Claimant was terminated on November 20, 2008 she was required to surrender her identification badge that allowed her access to Employer's plant. On November 24, 2008 Claimant returned to the plant to follow up with Health Services for treatment of her injury and was denied entry into the plant because she did not have an identification badge.

21. After being denied entry into Employer's plant on November 24, 2008, Claimant sought treatment with chiropractor Richard Bauer, D.C. Chiropractor Bauer noticed on examination that Claimant had a swelling in her right upper clavicular area and recommended that she be evaluated by a medical doctor.

22. Following the recommendation from Chiropractor Bauer Claimant sought treatment at SCHC Monfort Family Health Clinic on December 10, 2008. Claimant complained of pain in her neck for 5 months. Claimant was examined

by Physicians Assistance Puls who diagnosed neck pain and ordered a CT scan to evaluate the bulge on the right posterior side of Claimant's neck.

23. After being initially reporting he injury on June 9, 2008 and being referred to and treated at Employer's Health Services department, Claimant was not provided with a list of designated medical providers from whom she could select.

24. Claimant has proven by a preponderance of the evidence that she sustained an injury to her neck and right arm on June 9, 2008 arising out of and in the course of her employment for Employer.

25. Claimant was responsible for her separation from employment with Employer on November 20, 2008. Claimant's termination was the result of Claimant's poor work performance over which she had a significant degree of control. Claimant did not improve her work performance after repeated warnings leading to her termination.

26. Because Claimant was not provided with a list of designated medical providers, the right of selection of the authorized treating physician passed to Claimant. The authorized treating physicians are Richard Bauer, D.C. and SCHD Monfort Family Clinic.

CONCLUSIONS OF LAW

27. 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*.

28. 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 or not credible. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

29. 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).

30. Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). 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.

31. As found, Claimant has proven by a preponderance of the evidence that she sustained a compensable injury on June 9, 2008. Claimant reported the injury promptly to her supervisor and was referred to Employer's Health Services department where treatment was given. The need for treatment was related to an onset of pain in Claimant's neck and right arm from pulling a large piece of meat with a hook. Claimant's testimony concerning the onset of the injury is consistent with the medical records from Employer's Health Services department contemporaneous with the report of the injury.

32. To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *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 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 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*.

33. Under the provisions of Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. where it is determined that a temporarily disabled worker is responsible

for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury. A Claimant is responsible for a termination if the Claimant performs a volitional act or exercises some degree of control over the circumstances leading to the termination considering the totality of the circumstances. This concept is broad and turns on the specific facts of each case. *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994). The burden to show that Claimant was responsible for the separation from employment rests with Respondents. *Colorado Compensation Insurance Authority v. Indus. Claim Appeals Office,* 18 P.3d 790 (Colo. App. 2000). If the Claimant's termination is a natural consequence of the injury a Claimant is not responsible for her separation from employment. *Blair v. Art C. Klein Construction Inc.,* W.C. No. 4-556-576 (Industrial Claim Appeals Office, November 3, 2003).

34. As found, Respondents have met their burden of proving that Claimant was responsible for her separation from employment on November 20, 2008. Considering the totality of the circumstances and the credible and persuasive evidence Claimant exercised a degree of control over the circumstances that lead to her termination. Claimant's termination was not a natural consequence of her work-related injury. Claimant was repeatedly warned about her work performance and failed to improve her performance. These failures lead to deficiencies in work production that affected Employer's business and resulted in at least one customer claim against Employer for defective product. Claimant had the ability to improve her performance and did not. Claimant was not under any work restrictions from her work injury that would have prevented or impaired her ability to improve her work performance. As found, Claimant's testimony that her lack of acceptable work performance was due to complaints of pain from her work injury is not credible under the totality of the circumstances presented by the evidence. Prior to Claimant's termination Employer had accommodated Claimant's work restrictions on November 20, 2008 by providing Claimant with modified work on the "tenderloin" line.

35. 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. Under Section 8-43-505 (5)(a)(II)(B), if the employer has its own on-site health care facility, the employer may designate such on-site facility as the authorized treating physician. The employer must also comply with Section 8-43-404(5)(a)(III), C.R.S. to allow Claimant a one-time change of physician to another physician that is on the employer's designated provider list.

36. WCRP 8-4(C) provides:

> If the employer designates an on-site facility, the employer must, within seven (7) business days following notice of an on the job injury, provide the injured worker with a designated provider list consistent with the provisions of Rule 8-2(a)(2).

37. As found, Employer did not provide Claimant with a designated provider list after her initial referral to Employer's on-site Health Services department. As a result, Employer failed to comply with the provisions of Section 8-43-404(5), C.R.S. and WCRP 8-4 to properly designate a treating physician. As a result, the right of selection passed to Claimant. Section 8-43-404(5)(a)(I)(A), C.R.S. In addition, Employer effectively refused Claimant medical treatment with its on-site Health Services when it refused to allow Claimant entry onto the premises for the purpose of visiting Health Services after Claimant's termination. This refusal of treatment was for a non-medical reason and further supports the right of selection of the authorized physician(s) passing to Claimant. *See Ruybal v. University Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988); *Tellez v. Teledyne Waterpik*, W.C. No. 3-990-062, (Industrial Claim Appeals Office, March 24, 1992).

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation and benefits for an injury of June 9, 2008 is found compensable and is GRANTED.

2. Claimant's average weekly wage is $684.23.

3. Claimant's claim for Temporary Total disability benefits beginning November 21, 2008 through the date of hearing is denied and dismissed.

4. Claimant's authorized treating physicians are Richard Bauer, D.C. and SCHC Monfort Family Clinic. Respondents are liable for the medical treatment received by Claimant from these authorized treating physicians that is reasonable, necessary and related to Claimant's compensable injury of June 9, 2008.

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

All matters not determined herein are reserved for future determination.

DATED: June 12, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-778-982

ISSUES

The issue determined herein is compensability.

FINDINGS OF FACT

1.In July 2005, claimant began work as a paraprofessional for special needs children.

2.In 1989, claimant had surgery on her jaw. In 1994, she suffered jaw and neck injuries in a motor vehicle accident.

3.On January 4, 2007, claimant bent over a student in a wheelchair to remove the tray from the chair. The student suffered a spasm, which caused him to strike claimant in the jaw with his hand. Claimant felt dazed and told the bus driver of the incident. Claimant continued working, did not report a work injury, and did not request medical treatment. Even by her own admission, claimant missed only a day of work and one-half day of work the following week.

4.On April 12, 2007, claimant sought care from her personal physician, reporting that she had suffered jaw pain for three months after being hit in the chin. Claimant reported no neck or upper extremity symptoms.

5.On May 2, 2007, Dr. Peters examined claimant, who complained of bilateral arm numbness, neck pain, shoulder pain, and low back pain. She reported no history of being injured in January 2007. Dr. Peters performed electromyography ("EMG") testing, which showed bilateral carpal tunnel syndrome ("CTS"), right worse than left.

6.A June 19, 2007, magnetic resonance image ("MRI") of the brain was normal.

7.An October 29, 2007, MRI of the cervical spine showed a C5-6 disc protrusion with right neurological impingement and C6-7 disc protrusion impinging the dural sac and possibly the left nerve root.

8.On October 30, 2007, a lumbar spine MRI showed no significant disc changes.

9.On November 2, 2007, claimant suffered a compensable work injury in W.C. No. 4-742-077, when a broom fell and struck the right side of her face, causing right facial numbness. Claimant was transported to Memorial Hospital emergency room. A computed tomography ("CT") scan of the neck showed no fractures. Claimant reported no history of injury in January 2007.

10.On November 6, 2007, Dr. Richman began treating claimant for the November 2, 2007, work injury. Claimant reported no history of a January 2007 work injury. Dr. Richman diagnosed cervical spine strain and TMJ dysfunction. He imposed restrictions and referred claimant for physical therapy and medications.

11.On December 11, 2007, Dr. Richman released claimant to return to full duty work. He referred her to Dr. Colt for treatment of the TMJ dysfunction and myofascial pain.

12.On February 8, 2008, Dr. Richman wrote to explain that the November 2, 2007, work injury caused TMJ dysfunction and facial myofascial pain.

13.On February 13, 2008, claimant underwent right CTS surgery, which she reported was unsuccessful.

14.On April 22, 2008, Judge Walsh issued his order in W.C. No. 4-742-077, finding that claimant suffered a compensable injury on November 2, 2007, and awarding temporary disability benefits commencing with the date of injury.

15.On August 27, 2008, claimant underwent an MRI of the TMJ area.

16.On October 8, 2008, Dr. Richman referred claimant to a physical therapist for TMJ and neck pain. He noted that claimant's shoulder and low back pain were not related to the November 2 injury. The physical therapy continued until November 11, 2008.

17.On November 12, 2008, Dr. Peters reexamined claimant, who reported that she had suffered injuries in January 2007 and on November 2, 2007. Dr. Peters repeated EMG testing, which showed mild right CTS, post-surgery, as well as mild left C7 radiculopathy. Dr. Peters concluded that claimant probably suffered a significant injury in January 2007, but her symptoms began with the later November 2007 work injury.

18.On December 3, 2008, the physical therapist wrote to Dr. Richman to request authorization to continue physical therapy for the cranial, cervical, and TMJ problems as well as for the upper extremities and thoracic cage.

19.On December 9, 2008, claimant filed her workers' claim for compensation for the alleged January 4, 2007, work injury.

20.On December 11, 2008, Dr. Hall performed an independent medical examination for claimant. She reported both work injuries to her head and neck. Dr. Hall diagnosed post-concussive symptoms, TMJ dysfunction, chronic headaches and cervico-thoracic myofascial pain, visual problems, mid-line shift, and cognitive problems due to a traumatic brain injury, and bilateral thoracic

outlet syndrome. He recommended neuropsychological evaluation, cognitive evaluation, continued TMJ treatment, Botox injections, and medications.

21.On December 29, 2008, Dr. Richman examined claimant and determined that she was at maximum medical improvement ("MMI") for the November 2007 injury. He concluded that she suffered only jaw and myofascial pain as a result of the November 2, 2007, injury. He concluded that her head, neck, and upper extremity problems preexisted the November 2007 injury. He determined that claimant suffered 5% impairment due to mastication problems from the November 2007 injury.

22.On February 25, 2009, the insurer filed a notice of contest for the current claim.

23.On March 18, 2009, Dr. Finn examined claimant, who reported an injury on January 4, 2007, and a new injury on March 6, 2009, from bending over. Dr. Finn diagnosed chronic cervical spine pain with diffuse weakness and numbness from an uncertain etiology.

24.Claimant has failed to prove by a preponderance of the evidence that she suffered an accidental injury on January 4, 2007, which disabled her or required medical treatment. The incident probably occurred in which the child suffered a spasm and struck claimant on her jaw. She missed only a day and one-half of work over the next week. She did not report an injury and did not request any medical treatment.

25.Several months later, claimant sought treatment under her health insurance for diffuse symptoms involving her head, neck, jaw, and upper extremities. She only reported jaw pain following the January 2007 incident. She had the EMG, brain MRI, cervical MRI, and lumbar MRI. The only clear diagnosis was bilateral CTS, which is unlikely to result from the January 4, 2007, blow to the jaw.

26.By contrast, the November 2, 2007, injury caused claimant to seek immediate medical treatment for neck and TMJ problems.

27.The subsequent determination by Dr. Richman that the neck and upper extremity problems preexisted the November 2, 2007, work injury, does not mean that those problems are necessarily attributable to the January 4, 2007, incident. The trier-of-fact finds that it is unlikely that claimant's varied and diffuse symptoms are attributable to the relatively minor January 4, 2007, incident. Claimant's failure to provide any history of an injury in January 2007 when she first saw Dr Peters or during her treatment by Dr. Richman indicates that she did not consider her symptoms to be from a January 2007 injury. Only after Dr. Richman determined that the ongoing symptoms were not due to the November 2007 injury, did claimant decide that they were due to the January 2007 incident.

Claimant's testimony regarding the nature and duration of her injury is not credible.

CONCLUSIONS OF LAW

1. Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). As found, claimant has failed to prove by a preponderance of the evidence that she suffered an accidental injury on January 4, 2007, which caused disability or the need for medical treatment.

ORDER

It is therefore ordered that:

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

DATED: June 9, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-779-607

ISSUES

➢Did Claimant prove by a preponderance of the evidence that he is entitled to temporary disability benefits from December 12, 2008 through April 7, 2009?

➢Did Claimant prove by a preponderance of the evidence that the physical therapy for his shoulder is a compensable component of the admitted industrial injury?

➢The parties stipulated prior to the hearing to an average weekly wage ("AWW") of $983.02 per week.

FINDINGS OF FACT

1. Claimant was employed as a painter for employer on December 4, 2008 when Claimant slipped in the mud, twisted his left knee and fell on his right side and back. Claimant continued working for approximately four hours before reporting his injury to his supervisor, "Salvador". Salvador took Claimant to Dr. Bullard with Meeker Family Health Center for medical treatment. Dr. Bullard noted Claimant was complaining of left knee pain and pain over his buttocks. Claimant was diagnosed with coccyx and left knee pain and Dr. Bullard recommended ice, rest and over the counter anti-inflammatories.

2. Claimant testified he returned to the work site by bus to pick up his paycheck and asked Salvador if he could stay because he had ridden the bus. Claimant testified his employer gave him additional work to perform during this time, but Claimant could not perform many tasks. Claimant testified that while he worked for several hours, he was not able to do much work other than hand brushes to other employees due to his back and left knee pain. Claimant testified that he told Salvador that he would not be able to return to work on Monday because of the pain and Salvador said that would be OK. Claimant testified he did not work after December 5, 2008 because of back and knee pain.

3. Claimant received his final paycheck for the last week he got hurt after he had quit working for employer. Claimant testified that a friend brought him his final paycheck. Claimant testified that on December 18, 2008 he spoke to Salvador about returning to Dr. Bullard for additional treatment. Salvador reportedly told Claimant he could not take Claimant to the doctor because "the company is going to shut down." Claimant testified that between December 18, 2008 and April 8, 2009 his left shoulder was in pain.

4. Claimant was able to return to Dr. Lorah on April 8, 2009. Claimant reported an accident history of flipping on ice or snow while going to a

shed to get some supplies. Claimant complained of pain in his left shoulder, left knee and lumbar spine. Claimant was diagnosed with a left shoulder strain and provided with lifting restrictions of twenty (20) pounds. Claimant underwent x-rays of his bilateral knees and his left shoulder on April 8, 2009. X-rays of the knees showed evidence of osteoarthritis in the knee joint in the form of marginal osteophytes in the tibiofemoral and patellofemoral articulation. X-rays of the left shoulder were unremarkable. Claimant returned to Dr. Lorah on April 29, 2009 and reported some improvement with physical therapy, including decreased pain around the left arm, cervical and lumbar areas. Claimant was diagnosed with a cervical strain, lumbar strain, left knee and left upper extremity strain, all of which were improving with physical therapy. Dr. Lorah recommended Claimant continue with the physical therapy and continue with the medications.

5. The ALJ finds the Claimant's testimony that he began to experience pain in his left shoulder shortly after his December 4, 2008 injury credible. The ALJ finds Claimant's testimony that he was unable to work after December 5, 2008 as a result of the pain credible. The ALJ finds the reports from Dr. Lorah that Claimant received some relief from the physical therapy recommended by Dr. Lorah credible. The ALJ finds Claimant has shown it is more probably true than not that he is entitled to temporary disability benefits from December 12, 2008 through April 8, 2009. The ALJ finds Claimant has shown it is more probably true than not that he is entitled to physical therapy for the left shoulder component of his December 4, 2008 compensable claim.

6. The ALJ notes that the employment records indicate Claimant worked forty (40) hours the week of December 7, 2008 through December 14, 2008, and that every employee was laid off as of December 11, 2008. The ALJ credits Claimant's testimony over the employment records insofar as Claimant would not have reason to testify that he did not work during this period of time when he was not claiming entitlement to temporary disability benefits. The ALJ notes that the wage records document that Claimant was paid for overtime hours worked on each week except for the final week and that Claimant was paid his regular wage for the overtime hours. The ALJ notes that according to the wage records, Claimant was hired on November 4, 2008, but apparently worked 48 hours through November 9, 2008. The ALJ further notes that Claimant purported worked 68 hours the week of his injury, despite the fact that he was taken to Dr. Bullard for medical treatment that week. Insofar as there exists a conflict in the evidence between Claimant's testimony regarding the work he performed and the wage records, the ALJ resolves the conflict in favor of Claimant.

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" 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 leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. 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).

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

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. As found, Claimant's testimony that he experienced pain in his left shoulder shortly after the December 4, 2008 industrial injury is deemed credible.

The ALJ finds the recommendations from Dr. Lorah for physical therapy for the left shoulder to be reasonable and necessary to cure and relieve the effects of the December 4, 2008 industrial injury.

5. 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 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).

6. As found, Claimant's testimony that he has been unable to work because of the pain from the December 4, 2008 industrial injury is found to be credible. The ALJ notes that was only requesting TTD from December 12, 2008 through April 7, 2009. As such, TTD will not begin until December 12, 2008 and will continue through April 7, 2009.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant TTD from December 12, 2008 through April 7, 2009 at an AWW of $983.02 per week.

2. Respondents shall pay for physical therapy to Claimant's left shoulder.

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

All matters not determined herein are reserved for future determination.

DATED: June 23, 2009

Keith E. Mottram

Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-781-103

ISSUES

➢The issues for determination include compensability and reasonable, necessary and related medical benefits.

FINDINGS OF FACT

1. Claimant is a 59 year old female employed as a traveling social worker for employer. On December 24, 2008, Claimant was walking from the Villa Grand Nursing home to her car in order to return to the office to complete paperwork. While walking on the sidewalk, Claimant noticed Mr. Ray, a co-worker, sitting in his truck, waived to Mr. Ray and continued walking. After passing Mr. Ray's truck, Claimant tripped and fell. Claimant testified she was conscience of falling when she fell and denied fainting. While there was snow and ice on the date of Claimant's fall, Claimant denied that there was snow or ice on the sidewalk. Claimant further testified that she did not notice any abnormality on the sidewalk that caused her to trip and could not indicate why she tripped while walking on the sidewalk. Claimant was scheduled to work from 8:00 a.m. until 12:00 p.m. on the date of Claimant's injury. Claimant's injury occurred at 11:10 a.m. The ALJ finds Claimant's testimony credible.

2. Mr. Ray testified that on December 24, 2008 he was sitting in his truck, talking on his cell phone outside the Villa Grand Nursing home when he witnessed Claimant walking towards him. He waived to Claimant as she passed the truck and continued to watch Claimant walking toward her car in his rear view mirror. Mr. Ray testified that he saw Claimant fall and did not believe Claimant had fainted. The ALJ finds the testimony of Mr. Ray credible.

3. After Claimant fell, Claimant immediately reported her injury to her supervisor, Ms. Nelson, and was directed to the emergency room for treatment. At the emergency room, Claimant underwent an x-ray of the right arm and was diagnosed with a right humeral head fracture. Claimant thereafter received follow up treatment from Dr. Vance who subsequently referred Claimant to Dr. McLaughlin "for advocacy in her work related injury."

4. Respondents presented medical evidence demonstrating a prior history of problems with Claimant's feet dating back fourteen (14) years prior to Claimant's tripping incident. Respondents also presented evidence of Claimant

experiencing prior falls dating back nine (9) years prior to Claimant's tripping incident. The ALJ finds that Claimant's testimony was credible and the tripping incident was not the result of a pre-existing non-work related condition.

5. The ALJ finds that Claimant suffered a right humeral head fracture as a result of a tripping incident in the course of her employment with respondent employer. Claimant's tripping incident did not result from any abnormality in the sidewalk, and therefore, the tripping incident represents an unexplained fall. Under established Colorado case law, truly unexplained falls fail to meet the required burden of arising out of Claimant's employment.

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" 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., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Claimant must show that the injury was sustained in the course and scope of his employment and that the injury arose out of his employment. The "arising out of" and "in the course of" employment criteria present distinct elements of compensability. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). For an injury to occur "in the course of" employment, the claimant must demonstrate that the injury occurred in the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Id.* For an injury to "arise out of" employment, the claimant must 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 a part of the employment contract. *Id.* Whether there is a sufficient "nexus" or relationship between the

Claimant's employment and his injury is one of fact for resolution by the ALJ based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988).

4. Colorado courts have long held that there is no presumption that merely because an injury occurs in the course of employment, that the injury arises out of employment. *See Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). While the ALJ agrees that the Claimant's injury in this case was not the result of fainting, epilepsy or a seizure, Claimant has not shown that the tripping incident arose out of her employment. *See Rice v. Dayton Hudson Corporation,* W.C. No. 4-386-678 (Industrial Claim Appeals Office, July 29, 1999) (claimant's unexplained fall was not compensable because it could not be associated with the circumstances of the claimant's employment nor any preexisting idiopathic condition); *see also Aguilar v. Checks Unlimited*, W.C. No. 4-761-110 (ICAO, April 30, 2009) (claimant's slip and fall while walking to a restroom at work was not compensable where evidence failed to show any defects in the carpet or spilled substances that would have caused or contributed to the fall).

5. Claimant cites two cases from foreign jurisdictions for the premise that unexplained falls should be compensable under the positional risk doctrine, and the ALJ recognizes that Claimant's arguments are well thought out and compelling. However, the ALJ is unaware of any case under Colorado jurisdiction holding that a truly unexplained fall is the result of a neutral force, thereby invoking the positional risk analysis. Furthermore, the ALJ is bound to follow published opinions announced by the Colorado court of appeals. C.A.R. 35(f); *Esola v. Publication Printers Corp.,* W.C. No. 4-671-535 (ICAO, August 8, 2007); *Stegman v. Sears Roebuck & Company,* W.C. Nos. 4-559-482 & 4-483-695 (ICAO, July 13, 2005).

6. As found, Claimant's injuries on December 24, 2008 resulted from an unexplained fall. Unexplained falls are not compensable under the Colorado Workers' Compensation Act. Therefore, Claimant's claim for benefits is denied and dismissed.

ORDER

It is therefore ordered that:

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

All matters not determined herein are reserved for future determination.

DATED: June 19, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-781-144

ISSUES

The issues for hearing were compensability, medical benefits, temporary total disability benefits, disfigurement, and penalties for no insurance coverage.

FINDINGS OF FACT

1.Claimant and Respondent were friends. On February 11, 2008, Claimant solicited work from Respondent by e-mail. Claimant stated that she was looking for a part-time job helping people take care of their animals. Respondent replied that she could use some help grooming and feeding her horses, and asked Claimant to let her know when she was available and how much she charged. On February 12, 2008, Claimant replied that she had a very flexible schedule, and that, "as far as pay I think that whatever you think would be fine." She explained that she was just looking for some income to support her horse hobby. Respondent replied to Claimant, asking her "to figure things out and let me know, to determine what days and hours you would like to work."

2.Respondent was a real estate agent. She did not operate that business on the property where she kept horses and Claimant worked. Respondent owned six horses that she kept on a 12-acre parcel of land with a barn, riding ring, and house where she lived. Respondent did not operate a business on her property. She kept the horses for her own personal use and enjoyment.

3.Claimant was 16 years old when she was hired. Claimant had no previous employment when hired and did not work anywhere else during the time she worked for Respondent. Claimant was home-schooled during the time she worked for Respondent. Claimant was not customarily engaged in the business of caring for horses.

4.On July 25, 2008, one of the horses Claimant was tending on Respondent's property spooked and stepped on Claimant. Claimant's right femur was broken. Claimant received medical care for the injury. Claimant was unable to continue her work for Respondent.

5.Respondent had no employees during 2008 other than Claimant. Respondent did hire an independent contractor to build a fence. The fence contractor was not an employee of Respondent.

6.Respondent paid Claimant in cash. Respondent kept a detailed written log of the amounts paid to Claimant. In 2008, Respondent paid Claimant $1,260.00.

7.Claimant worked for Respondent as a casual farm or ranch laborer, and as a casual employee whose employment is not in the usual course of the trade, business, profession or occupation of Respondent.

CONCLUSIONS OF LAW

1. In order for Claimant to avail herself of the provisions of the Colorado Workers' Compensation Act, Respondent must be found to be an employer under the Act and not subject to any of its exclusions.

2. Respondent maintained her 12 acres with a barn, riding ring, house, and six horses for her personal use. She did not operate a trade, business or other enterprise for profit on that property. Respondent employed no other workers who could be considered employees in 2008. Respondent paid Claimant less than $2,000.00. Respondent is not an employer under the Act. Section 8-40-302(3), C.R.S.

3. Clamant is a casual worker whose employment was not in the usual course of the trade, business, profession, or occupation of Respondent. Claimant is excluded from the definition of employee under the Act. Section 8-40-202(1)(b), C.R.S.

ORDER

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

DATED: *June 9, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-781-287

ISSUES

Whether Claimant has proven that she sustained a compensable occupational disease to her bilateral wrists as the result of the conditions of her employment with Employer.

If compensable, whether Claimant is entitled to an award of medical benefits for treatment received from physicians at Concentra Medical Center beginning November 7, 2008.

FINDINGS OF FACT

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

1. Claimant is employed as a Beneficiary Service Representative for Employer. Claimant began this employment in May 2008.

2. Claimant's job involves data entry inputting authorizations into a computer. Claimant works with 2 computer monitors and inputs information using a mouse and the 10-key pad on her computer keyboard. Claimant also does some mild typing to enter notes into the computer when necessary. Claimant uses her right hand to perform the mousing and 10-key activities.

3. Claimant does not perform the 10-key entries in the typical fashion and instead uses 2 fingers of her right hand to input the entries. Claimant is expected by Employer to process 70 authorizations per day and typically completes between 60 and 65 authorizations per day. Claimant works an 8-hour day with a 15-minute break in the morning and afternoon and a 30-minute lunch period.

4. In September 2008 Claimant began having symptoms of burning and numbness in her right wrist below the thumb. Claimant is right-hand dominant. Claimant noticed that these problems increased during the workday. In October 2008 Claimant began to experience similar symptoms in the same location in her left wrist and thumb.

5. Claimant's work with the 10-key pad is 60% of her daily work. Of the remaining 40%, 35% is using the computer mouse to move between screens and "cells" on the computer monitors. The remaining 5% is typing with both hands. After Claimant reported her wrist symptoms to Employer an ergonomic evaluation was done of Claimant's work-station and no changes were made to the work-station.

6. Claimant saw her personal physician, Dr. George Juetersonke on September 29, 2008 for complaint of pain at the base of her right thumb. Dr. Juetersonke obtained a history that Claimant uses a computer and does keyboard moves 8 hours per day. Dr. Juetersonke diagnosed de Quervain's tendonitis. Dr. Juetersonke did not provide an opinion on the causal relationship of this diagnosis to Claimant's work for Employer.

7. Dr. Juetersonke referred Claimant to Dr. David Bierbrauer, M.D. Dr. Bierbrauer evaluated Claimant on October 7, 2008 and obtained a history that Claimant does "lateral repetitive action at work". In Dr. Bierbrauer's judgment Claimant had right wrist de Quervain's tenosynovitis and Dr. Bierbrauer felt she would benefit from an injection. Dr. Bierbrauer did not provide an opinion and the causal relationship of this condition to Claimant's work with Employer.

8. Judy Mitchell, the Human Resources Manager for Employer became award of Claimant's wrist conditions in early November 2008 and directed Claimant to report the condition as a work injury. Claimant was then referred by Employer to Concentra Medical Center for evaluation and treatment of her bilateral wrist symptoms.

9. On November 7, 2008 Claimant was evaluated by Dr. Joel Boulder, M.D. at Concentra Medical Center. Dr. Boulder obtained a history that Claimant does principally data entry and types on a computer 8 hours per day, 5 days per week. Dr. Boulder noted that activities such as turning the steering wheel and opening jars aggravated Claimant's symptoms as well as typing on the computer. Dr. Boulder diagnosed wrist tenosynovitis, specifically, bilateral de Quervain's tenosynovitis. Dr. Boulder stated that: "As described to me, it is medically probable that this is a work-related injury."

10. Claimant was evaluated by Dr. Daniel Peterson, M.D. at Concentra on November 19, 2008. Dr. Peterson referred Claimant to Dr. Hart, a hand and elbow specialist. Dr. Peterson placed the Claimant on restrictions of a 10 minute break each one hour of date entry activities.

11. Dr. Timothy Hart, M.D., a hand surgeon, evaluated Claimant on December 11, 2008. Dr. Hart obtained a history that Claimant had been working in 10-key and data entry for Employer since May 2008. Dr. Hart's impression was probable bilateral right greater than left de Quervain's clinically and symptomatically. Dr. Hart recommended that Claimant proceed with surgery on the right wrist. Dr. Hart did not express an opinion on the causal relationship between the de Quervain's and Claimant's work with Employer.

12. Claimant was evaluated by Dr. Jan Updike, M.D. at Concentra on December 23, 2008. Dr. Updike noted that Claimant had continued problems with bilateral de Quervain's syndrome. Claimant told Dr. Updike that she was concerned about having disciplinary action taken against her because her productivity had decreased due the breaks she was taking for the de Quervain's symptoms. Dr. Updike wrote a note for Claimant to take to her supervisor stating: "Surgery schedule 1/20, any reduced productivity is due to work related injury therefore anticipate no disciplinary action."

13. Claimant evaluated by Dr. Peterson at Concentra on January 9, 2009 and reported that she felt her symptoms were worsening. In the Assessment section of his report of January 9, 2009 Dr. Peterson stated:

"Causality: Greater than 51% probability that this condition is directly related to the patients duties at work!" Dr. Peterson did not provide a basis for this opinion on the causal relationship of Claimant's symptoms to her work duties with Employer.

14. Claimant was again seen by Dr. Hart on January 12, 2009. In his report of that date Dr. Hart noted that Claimant does data entry and was right hand dominant. Dr. Hart scheduled Claimant for surgery on January 20, 2009 for a first dorsal compartment release on the right wrist. Dr. Hart did not provide an opinion in this report on the causal relationship of Claimant's de Quervain's diagnosis to her work duties at Employer.

15. In a report dated January 29, 2009 following an evaluation on that same date Dr. Peterson again noted that Claimant's symptoms were worsening. Dr. Peterson again stated his opinion that a greater than 51% probability existed that Claimant's symptoms were directly related to her duties and work and were not pre-existing. No further statements or explanation was provided as to the basis for these opinions.

16. On her own decision Claimant obtained a second opinion from Dr. Stephen Topper, M.D. on January 23, 2009 through referral from Dr. Juetersonke. Dr. Topper noted that Claimant did data entry and had had bilateral wrist pain since September 2008 with gradual onset. Dr. Topper performed surgery consisting of a right first dorsal compartment release on February 12, 2009. Upon direct visualization during surgery Dr. Topper noted the tendons in the first dorsal compartment of the Claimant's right wrist were encased in a thick tenosynovium. The office notes and operative report of Dr. Topper do not contain an opinion on the causal relationship of Claimant's symptoms and surgery to Claimant's work duties at the Employer.

17. Dr. Henry Roth, M.D. performed an independent medical examination of Claimant on May 12, 2009. At hearing, Dr. Roth was qualified as an expert in the fields of Occupational Medicine and Physical Medicine and Rehabilitation. Dr. Roth obtained a description of Claimant's work duties from Claimant as party of obtaining a history in connection with his examination. Dr. Roth noted that Claimant's job was entering insurance authorization requests and that Claimant sits in front of two computer screens. Claimant reported to Dr. Roth that her job duties required a lot of mousing and that she would enter social security numbers and physician numbers using the 10-key pad. Claimant told Dr. Roth that there is "some actual typing" of names and sometimes notes. Claimant reported that she performs 70 data entry tasks per day and that all mousing and 10-key was done with her right hand. Claimant's description of her job duties to Dr. Roth as reflected in his May 12, 2009 report is consistent with Claimant's testimony at hearing concerning her job duties.

18. Dr. Roth obtained a history from Claimant that she had onset of right wrist and thumb pain in September 2008 and thereafter in October noticed

the same symptoms on the left. This history obtained by Dr. Roth is consistent with Claimant's testimony at hearing.

19. Dr. Roth obtained a history that Claimant had been involved in a motor vehicle accident in 2005 sustaining injuries to her neck and head. Claimant also had more recently been involved in another motor vehicle accident on December 15, 2007 resulting in similar symptoms.

20. Dr. Roth performed a physical examination and noted mild symmetrical tenderness in the suboccipital, paracervical, trapezius and periscapular musculature in the cervical area. Dr. Roth further noted positive de Quervain's maneuvers in both the right and left wrists.

21. Dr. Roth diagnosed bilateral symmetrical craniocervical and cervicothoracic myofascial pain and bilateral de Quervain's tendinosis. Dr. Roth opined that the de Quervain's tendinosis was part of a more diffuse musculoskeletal condition.

22. Dr. Roth opined that Claimant's bilateral wrist and thumb conditions were independent from and unrelated to Claimant's work activities for Employer. In reaching this opinion, Dr. Roth noted that Claimant's work activities were asymmetric involving primarily use of the right hand while her symptoms were bilateral with relatively simultaneous onset. Dr. Roth further relied upon the Cumulative Trauma Disorder Treatment Guidelines from the Division of Workers' Compensation that reflect current medical literature on both the causation and treatment of repetitive motion type injuries. Dr. Roth opined that Claimant's work duties for Employer do not meet the threshold for the type of forceful repetitive motion necessary to establish causation based upon current medical literature. Dr. Roth testified at hearing that current medical literature does not support a causal relationship between non-forceful keyboarding activities such as performed by Claimant and the onset of symptoms such as those experienced by Claimant.

23. The ALJ resolves the conflicts in the opinions and statements of Dr. Boulder, Dr. Peterson, Dr. Updike and Dr. Roth concerning the causation of Claimant's bilateral wrist and thumb symptoms in favor of the opinion of Dr. Roth as the more informed, reasoned, credible and persuasive opinion.

24. Claimant has failed to prove by a preponderance of the evidence that her onset of right wrist and thumb symptoms in September 2008 with onset of similar symptoms in the left wrist in October 2008 were casually related to the performance of her work duties for Employer. Claimant has failed to prove that she suffered an occupational disease as the result of her Beneficiary Service Representative work with Employer.

CONCLUSIONS OF LAW

25. 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*.

26. 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).

27. 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 Office*, 12 P3d 844, 846 (Colo. App. 2000).

28. An occupational disease is "a disease which results directly from the employment or 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 which the worker would have been equally exposed outside of the employment." Section 8-40-201(14), C.R.S.

29. A claimant seeking benefits for an occupational disease must first establish the existence of the disease and that it was directly and proximately caused by claimant's employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims,* 989 P.2d 251, (Colo. App. 1999); *Cowin & Co. v. Medina*, 860 P. 2d 535 (Colo. App. 1992). In addition, a claimant must show that the identified disease resulted in disability. *Cowin, supra.*

30. A claimant is entitled to recovery for an occupational disease injury 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 P2d 714, 717 (Colo.App. 1984). 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).

31. Claimant relies upon the opinion of Dr. Boulder and the statements of Dr. Peterson and Dr. Updike to support a causal connection between Claimant's onset of symptoms and her work with Employer. Dr. Boulder's opinion is based upon his understanding that the description of Claimant's work duties require her to type 8 hours per day. Dr. Boulder's opinion is therefore based upon an inaccurate or incomplete understanding of the Claimant's work duties and is not persuasive. Dr. Peterson and Dr Updike both made comments in their office notes that Claimant's symptoms were work related without providing any stated basis for such opinions. It could be reasonably inferred that Dr. Peterson and Dr. Updike were simply reiterating the opinion of Dr. Boulder as opposed to making an independent assessment of causation. Even if it could be presumed that Dr. Peterson and Dr. Updike were expressing independent opinions of the causation of Claimant's symptoms, the basis for those opinions is not found in their reports or office notes. In this regard, Dr. Peterson's and Dr. Updike's statements of work-relatedness or causation are not persuasive. Further, and as found, Dr. Juetersonke, Dr. Hart, and Dr. Topper do not express opinions on causation.

32. In contrast, Dr. Roth relied upon a description of the Claimant's work duties that is consistent with Claimant's testimony. Dr. Roth performed a more comprehensive assessment and relied upon current medical literature in reaching his opinion on the causation of Claimant's symptoms. As found, Dr. Roth's opinion is more credible and persuasive and does not support a causal relationship between Claimant's work duties for Employer and the onset of her symptoms. The mere fact that Claimant did not have the symptoms prior to her work with Employer and that the symptoms came on after she had performed the work for an approximate three-month period is not persuasive to establish the causal connection necessary to support compensability of Claimant's claimed occupational disease injury to her bilateral wrists and thumbs. The mere

occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995).

33. As found, Claimant has failed to sustain her burden of proof to show that she sustained a compensable occupational disease as the result of the performance of her work duties for Employer.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation and benefits for an occupational disease injury to her bilateral wrists is denied and dismissed.

2. Claimant's request for an award of medical benefits consisting of the expenses of treatment received from Concentra Medical Centers from November 7, 2008 and ongoing is denied and dismissed.

DATED: June 25, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-781-501

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered lower back and right leg injuries during the course and scope of his employment with Employer on December 3, 2008.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of his industrial injuries.

FINDINGS OF FACT

1. Claimant is a 57 year-old male who has worked for Employer for approximately 28 years. He has been employed as a "bulk picker" for the

previous two years. Claimant's duties involve using a "gopher" vehicle to raise and lower himself off of the floor so that he can pick parts off various shelves in Employer's warehouse.

2. On December 3, 2008 Claimant was using a gopher to collect automobile parts from shelves. As he lowered the gopher, the machine stopped approximately one and one-half feet off the ground. Claimant was unaware that the gopher had not fully descended. As he stepped off the gopher towards the ground he experienced a "twinge" in his right leg and back. Claimant worked without incident for the following two days.

3. Claimant explained that on December 5, 2008, while he was completing his job duties, his right upper thigh and right calf began to stiffen. Because his pain became increasingly bothersome, he chose to lie down for a few minutes. Claimant's supervisor inquired about why he was lying down. He subsequently left work for the weekend.

4. On December 8, 2008 Claimant reported his injuries to Employer. Employer referred Claimant for medical treatment.

5. Claimant initially obtained medical treatment from Raquel B. Backstreet, R.N. Claimant recounted that his right leg pain may have been caused by the December 3, 2008 incident or possibly from his heavy work duties on December 5, 2008. He also sought to obtain a vacation day but noted that he did not believe Employer would allow him to take the day off because several employees were already on vacation. Nurse Backstreet released Claimant to full duty work.

6. On December 9, 2008 Authorized Treating Physician (ATP) Clement Hanson, D.O. evaluated Claimant. Dr. Hanson expressed concerns about Claimant's injury because his description of the injury was vague and there was no inciting event other than stepping off a platform onto the floor. Dr. Hanson also recounted that Claimant had a prior history of right leg pain. In fact, the record reveals that Claimant had suffered industrial injuries to his lower back and right leg in 1990. Moreover, a May 15, 2008 medical report reflects that Claimant suffered from "chronic back pain."

7. On December 23, 2008 Claimant underwent an MRI of his right hip. Dr. Hanson reviewed the MRI and stated that it was normal. He noted that Claimant had been scheduled to undergo a one-time evaluation with orthopedic surgeon Michael S. Hewitt, M.D.

8. Dr. Hewitt examined Claimant on January 5, 2009. Dr. Hewitt reviewed Claimant's MRI and remarked that he did not "see any evidence of any avascular necrosis, degenerative arthritis, muscle strain or other abnormality." He stated that Claimant suffered from right lower extremity pain and numbness that had improved over the past two weeks. Dr. Hewitt noted that Claimant's

symptoms appeared to "correlate with a radiculopathy." He explained that, based on the absence of specific trauma and pathology on the MRI, physical therapy through Claimant's personal physician would be appropriate.

9. Claimant returned to ATP Dr. Hanson on January 6, 2009. Dr. Hanson determined that Claimant had not suffered any permanent impairment and placed him at Maximum Medical Improvement (MMI). He also commented that Claimant's symptoms were not causally related to his work for Employer. Dr. Hanson explained:

> My review of [Claimant's] case to date and my phone conversation with Michael Hewitt, orthopedic specialist, this afternoon and my review of his medical records suggests that his reported right hip pain fails to meet the greater than 50% medical probability threshold that this would be a compensable on the job injury.

10. Claimant requested a change of physician from ATP Dr. Hanson. The parties subsequently stipulated to a transfer of care to ATP Craig Anderson, M.D.

11. On April 8, 2009 Claimant visited Dr. Anderson for an evaluation. Claimant recounted the circumstances of his right leg and lower back injuries. Dr. Anderson then reviewed Claimant's medical history. He noted that Claimant had a "[p]reexisting history lumbar diskopathy and radiculopathy status post surgery 1993." Dr. Anderson discharged Claimant from care because his symptoms were not work-related.

12. On April 16, 2009 Claimant visited Robert W. Watson, Jr., M.D. for an independent medical examination. Dr. Watson considered the history of Claimant's right leg and lower back symptoms. He noted that Claimant suffered from symptoms of radiculopathy and determined that Claimant's condition was not caused by his employment with Employer. Dr. Watson explained that Claimant's symptoms appeared insidiously and there was no distinct work event that caused his condition. He stated that Claimant's right leg symptoms constituted a "non-occupational medical problem" and concurred with the opinions of doctors Hanson, Hewitt and Anderson.

13. Claimant testified at the hearing in this matter. He detailed his December 3, 2008 industrial injury. Claimant also noted several factual inaccuracies in the medical records. He specifically noted that Dr. Hanson erroneously remarked that he had suffered right knee and thigh pain, instead of shoulder pain, in 1998. Claimant also disputed a comment in Dr. Hanson's report from Nurse Backstreet that his job duties did not require heavy lifting.

14. Claimant has failed to demonstrate that it is more probably true than not that he suffered injuries to his right leg and lower back during the course

and scope of his employment with Employer. Doctors Hanson and Anderson credibly concluded that Claimant's conditions were not caused by his work duties for Employer. Claimant's preexisting right leg and lower back symptoms, his vague description of the cause of his injuries and his failure to seek medical attention until December 8, 2008 suggest that his job duties on December 3, 2008 did not cause his conditions. Furthermore, Dr. Hewitt determined that Claimant's injuries were not related to his employment activities because Claimant's symptoms correlated with a radiculopathy, he did not suffer a specific trauma and he did not exhibit any pathology on his MRI. Finally, Dr. Watson persuasively commented that Claimant suffered from symptoms of a radiculopathy and there was no distinct work event that caused his right leg condition. Although Claimant noted several discrepancies in Dr. Anderson's medical records, the factual inaccuracies are insignificant in the context of the overwhelming medical evidence that Claimant's injuries were not caused by his work activities for Employer. Claimant's job duties for Employer thus did not aggravate, accelerate, or combine with his pre-existing right leg and lower back conditions to produce a need for medical treatment.

CONCLUSIONS OF LAW

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

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

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

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered injuries to his right leg and lower back during the course and scope of his employment with Employer. Doctors Hanson and Anderson credibly concluded that Claimant's conditions were not caused by his work duties for Employer. Claimant's preexisting right leg and lower back symptoms, his vague description of the cause of his injuries and his failure to seek medical attention until December 8, 2008 suggest that his job duties on December 3, 2008 did not cause his conditions. Furthermore, Dr. Hewitt determined that Claimant's injuries were not related to his employment activities because Claimant's symptoms correlated with a radiculopathy, he did not suffer a specific trauma and he did not exhibit any pathology on his MRI. Finally, Dr. Watson persuasively commented that Claimant suffered from symptoms of a radiculopathy and there was no distinct work event that caused his right leg condition. Although Claimant noted several discrepancies in Dr. Anderson's medical records, the factual inaccuracies are insignificant in the context of the overwhelming medical evidence that Claimant's injuries were not caused by his work activities for Employer. Claimant's job duties for Employer thus did not aggravate, accelerate, or combine with his pre-existing right leg and lower back conditions to produce a need for medical treatment.

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: June 12, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-765-841 & WC 4-781-576

ISSUES

The issues determined herein are compensability of an occupational disease in W.C. 4-781-576, liability for medical benefits, specifically a total knee replacement ("TKR"), and last employer liable for indemnity benefits. The parties in W.C. 4-765-841 stipulated that claimant suffered an accidental injury to his right knee on June 28, 2003. All parties stipulated that Continental's workers' compensation insurance policy ended on December 10, 2006, and Truck's policy period began on June 22, 2007. The parties stipulated that Continental paid $2,423.60 in medical benefits in 2007 and 2008 and $20,018.40 in indemnity benefits in 2008.

FINDINGS OF FACT

1. Claimant worked for the employer as an appliance repairman since approximately 1990. Claimant's duties included lifting appliances, kneeling to repair appliances, and squatting in order to get to obtain access to appliance parts.

2. On June 28, 2003, claimant knelt on a screw, which became imbedded in his right knee. He pulled the screw out and reported the injury to Mr. Frye. Claimant obtained treatment from Dr. Johnson, his primary care physician, who then referred him to Dr. Fitzgerald.

3. A July 7, 2003, magnetic resonance image ("MRI") of the right knee showed advanced patellar chondromalacia and a metal artifact.

4. On August 4, 2003, Dr. Fitzgerald examined claimant, who reported tightness in his right knee, which had been steadily worsening over the past few months. Dr. Fitzgerald noted that claimant noticed knee

problems when he knelt on a screw. Dr. Fitzgerald diagnosed effusion of the right knee, bilateral rigidity, and a subcutaneous foreign body that was not contributing to his symptoms. Dr. Fitzgerald gave claimant a note to take to his employer, stating that claimant had a small piece of metal in the kneecap tendon where it attaches below the knee and he should be seen by a workers' compensation physician to obtain an x-ray. Dr. Fitzgerald told claimant to use ice and heat, which he did.

5. On September 17, 2003, Dr. Fitzgerald wrote to the carrier, indicating that the claimant had osteoarthritis, which created swelling and fusion in the right knee joint, but which was not related to the industrial injury.

6. Claimant continued to suffer pain in his right knee and he was referred to Dr. Szuszczewicz for evaluation. On September 19, 2003, Dr. Szuszczewicz indicated that the claimant continued to work and his knee was swollen and painful. At that time, claimant had no significant medial or lateral pain in his knee, but noted that kneeling, standing and squatting made his pain worse. Claimant complained of swelling, giving way of the knee without warning or pain, pain at night, which awakened him from sleep. He was unable to engage in sports. Claimant could flex and extend his knee and hips, his gait was normal, and he had relative preservation of the joints both medially and laterally in both knees with minimal to no osteophyte formation in the tibial or foraminal compartments. The patellofemoral space had some loss of joint space and had osteophyte formation. Dr. Szuszczewicz concluded that claimant had developed patellofemoral arthritis in the right knee due to spending several hours a day on his knees. He offered the claimant treatment, including an injection, but claimant refused such treatment. Dr. Szuszczewicz indicated the claimant might be a candidate for a Fulkerson procedure if he continued to have patellofemoral joint pain.

7. Claimant received physical therapy and improved, but was not completely recovered.

8. Claimant did not lose any time from work and did not seek any treatment between 2003 and 2006 due to his right knee. Claimant had unrelated surgery on his toes and was off work for three to four weeks in 2004.

9. In early 2006, the employer downsized the number of appliance repair technicians from three to two. As a result, claimant had an increase in his workload, performing more service repair calls.

10. Claimant suffered a flare of his condition and went to see Dr. Matthews on May 12, 2006, as a referral from Dr. Johnson. Claimant reported spontaneous swelling, which occurred as a result of an insidious onset.

Dr. Matthews suspected gout or pseudogout. Dr. Matthews aspirated the right knee, but the aspiration showed no gout.

11. Subsequently, the claimant returned to see Physician's Assistant Brent Walden on May 16, 2006. His knee was aspirated again and an injection was performed.

12. Claimant did not report his right knee problems as a workers' compensation occupational disease at that time.

13. Claimant worked full time, but took off three days in May 2006. Other days off were noted as vacation days, although the claimant testified he took off intermittent days off, using his vacation and sick leave for his knee problems. The employer had no record of days off other than the 3 days in May for knee problems.

14. Claimant experienced another flare of symptoms in July 2006 and went to see Dr. Szuszczewicz. Dr. Szuszczewicz concluded that claimant's kneeling at work contributed to his right knee problems. Claimant reported that he occasionally used crutches to walk. Dr. Szuszczewicz found relative preservation of the tibial femoral joint space with joint surface irregularities in the patellofemoral joint, but no specific patellar tilt. At that time, the claimant had tenderness to palpation of the patellofemoral joint only. The claimant was offered injection therapy, but he refused.

15. Claimant returned to work at the same job duties.

16. On June 22, 2007, Truck became the insurer on the risk for workers' compensation injuries for employees of the employer.

17. In July 2007, claimant had another increase in his workload, with an increase in the number of service repair calls. He again had an increase in his right knee symptoms.

18. On September 26, 2007, claimant returned to Dr. Szuszczewicz and reported pain, specifically with increased activity. Dr. Szuszczewicz took x-rays of his knee and again drained it. He noted that the claimant had significant tenderness to palpation in the patellofemoral compartment of the knee. Radiographs demonstrated minimal arthritic changes with relative preservation of his joint space. Dr. Szuszczewicz recommended a partial patellofemoral arthroplasty.

19. Claimant returned to work his regular job duties.

20. On Friday, February 1, 2008, claimant kneeled for two to three hours to work on a compressor on a refrigerator. He suffered increased right knee pain. He returned to work on the following Monday and Tuesday.

21. On February 9, 2008, claimant sought care at Memorial Hospital emergency room. He reported right knee swelling over the past five days with joint effusion. Claimant reported a history of working on his knees and suffering recurrent effusions. His knee was drained. Claimant was bedridden for two weeks.

22. On February 14, 2008, Dr. Szuszczewicz examined claimant, injected the right knee, and instructed him to return to work when "comfortable."

23. On February 25, 2008, claimant returned to work for one day. He was on his knees for several hours and could no longer perform the job duties. He left work and was never able to return to his regular job duties. Mr. Frye, the general manager, testified that the employer orally offered claimant modified duty, but claimant declined. There is no evidence that the employer made a written offer of modified duty work.

24. On February 28, 2008, Dr. Szuszczewicz examined claimant, who showed tenderness to palpation on the patellofemoral and medial compartments of the knee as well as the posterior lateral corner of the knee. At that time, claimant was unable to bear weight on his knee. Dr. Szuszczewicz indicated that the claimant had significant arthritis of his right knee and Dr. Szuszczewicz for the first time recommended a TKR.

25. Claimant notified Mr. Frye at that time and filed a workers' compensation claim beginning February 25, 2008, for an occupational disease with a date of injury of February 1, 2008.

26. On March 19, 2008, Dr. Xenos examined claimant and agreed that he needed a TKR.

27. After February 2008, claimant was not able to walk except when using crutches, was not able to work, was bedridden, suffered compromised activities of daily living, and was on narcotics.

28. In September 2008, claimant began to receive Social Security Disability benefits in the amount of $1,540.00 per month.

29. On April 2, 2009, Dr. Goldman performed an independent medical examination for Truck. Dr. Goldman concluded that claimant sustained an occupational disease that first manifested in early 2006.

30. Prior to 2003, claimant had no problems with either knee. Although he suffered renewed right knee problems in 2006, he was able to return to work at his regular job duties until February 2008.

31. Claimant worked 23 more days in 2007 than he did in 2006 and took 286 more calls in 2007. The call schedule reflected that, in 2006, claimant had 126 calls in March, 119 calls in April and 89 calls in May. This would be consistent with the flare of claimant's knee condition in 2006. In 2007, claimant had consistently more calls. In July 2007, claimant had 238 calls. In August 2007, the claimant had 146 calls; in September 95 calls. In January 2008, the claimant had 176 calls.

32. Dr. Szuszczewicz testified in his deposition that the activities the claimant continued to perform 2004 through early 2008 continued to substantially and permanently aggravate his condition. Dr. Szuszczewicz also testified that claimant sustained substantial and permanent aggravation of his knee in early 2008 and had medial compartment pain. For the first time, Dr. Szuszczewicz recommended a TKR.

33. Dr. Goldman testified in his deposition that he believed that the claimant sustained an injury in 2003 and an occupational disease in 2006. He also testified, however, that the work claimant continued to perform between 2006 and 2008 continued to aggravate his condition. Dr. Goldman indicated that claimant suffered accelerating aggravation into 2006 and 2007. He concluded that claimant worsened in 2008 to a point where his condition was permanent and the claimant needed an arthroplasty. Dr. Goldman noted the manner in which claimant sought medical attention about a month or so after each spike of work activity. Dr. Goldman indicated that a substantial amount of permanent impairment occurred in 2008. Dr. Goldman noted that claimant had no similar left knee arthritis because he probably favored kneeling on his dominant right side. Dr. Goldman admitted that it was a "tough call" whether to perform a TKR at this time. He personally favored further conservative treatment before surgery.

34. Claimant has proven by a preponderance of the evidence that he suffered an occupational disease to his right knee as a direct and proximate result of his work for the employer. As an appliance repairman, claimant had to repetitively kneel during the workday, putting most of his weight on the right side of his body. He has patellofemoral and medial compartment degenerative changes in the right knee, but not in the left knee. In early 2006, claimant had an increased workload. He sought treatment on May 12, 2006, due to the occupational disease. Claimant had an onset of his occupational disease as of May 12, 2006, when he had to seek medical treatment for the disease.

35. Claimant's work exposure with the employer, while insured by Truck, caused the actual need for the medical treatment commencing September 26, 2007.

36. The preponderance of the evidence demonstrates that the TKR is reasonably necessary to cure or relieve the effects of the occupational disease and the need for the treatment was caused by the employment during the time that Truck was on the risk.

37. Claimant suffered a substantial and permanent aggravation of his right knee occupational disease after June 22, 2007. Claimant suffered the increase in symptoms in September 2007 and then his condition significantly worsened in February 2008, during another spike in workload and kneeling. Truck is solely liable for the indemnity benefits for claimant as the insurer at the time that claimant had a last injurious exposure and substantial permanent aggravation of the disease.

38. Commencing February 6, 2008, claimant was entitled to TTD benefits, except for the one day he tried to return to work on February 25, 2008. Contrary to the argument of Truck, Dr. Szuszczewicz did not release claimant to return to regular duty work. On February 14, 2008, Dr. Szuszczewicz released claimant to return to work when he felt comfortable. Claimant tried to work, but was unable to continue after one day. The employer orally offered claimant modified duty, which he declined. The employer did not make a written offer of modified duty work.

CONCLUSIONS OF LAW

1. As stipulated, on June 28, 2003, claimant suffered an accidental injury in WC 4-765-841, when he knelt on a metal screw that punctured his right knee.

2. In W.C. 4-781-576, 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).

3. In WC 4-781-576, 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 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). As found, claimant has proven by a preponderance of the evidence that he suffered an occupational disease to his right knee as a direct and proximate result of his work for the employer.

4. The "last employer liable" doctrine is inapplicable to medical benefits and the insurer "on the risk" is liable for medical benefits. *Royal Globe Insurance Co. v. Collins*, 723 P.2d 731 (Colo. 1986). The insurer "on the risk" is determined by "actual causation" of the need for the medical treatment. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001); *Martinez v. Storage Technology Corp.*, W.C. No. 4-175-875 (Industrial Claim Appeals Office, August 31, 1995). As found, Continental Western Group is liable for the medical benefits for the right knee in 2006. Pursuant to the stipulation of the parties, Truck Insurance Exchange commenced workers' compensation insurance coverage on June 22, 2007. As found, claimant's work exposure with the employer, while insured by Truck Insurance Exchange, caused the actual need for the medical treatment commencing September 26, 2007.

5. 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). As found, the preponderance of the evidence demonstrates that the TKR is reasonably necessary to cure or relieve the effects of the occupational disease and the need for the treatment was caused by the employment during the time that Truck Insurance Exchange was on the risk.

6. Section 8-41-304, C.R.S., provides that the employer in whose employment the claimant was last injuriously exposed to the hazards of the disease and suffered a substantial permanent aggravation is liable for all compensation benefits. *See, Royal Globe Insurance Co. v. Collins*, 723 P.2d 731 (Colo. 1986). As found, claimant suffered a substantial and permanent aggravation of his right knee occupational disease after June 22, 2007. Truck Insurance Exchange is solely liable for the indemnity benefits for claimant as the insurer at the time that claimant had a last injurious exposure and substantial permanent aggravation of the disease.

7. As found, commencing February 6, 2008, claimant was entitled to TTD benefits, except for the one day he tried to return to work on February 25, 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). The parties did not stipulate or litigate the issue of average weekly wage. Consequently, no specific order for TTD benefits can enter. Truck is liable for reimbursement to Continental Western Group for TTD benefits to which claimant was entitled after February 6, 2008.

8. Contrary to the argument of Truck, TTD benefits did not terminate pursuant to section 8-42-105(3)(C), C.R.S., upon release by the attending physician to return to regular work. As found, Dr. Szuszczewicz did not release claimant to return to regular duty work.

9. As found, the employer orally offered claimant modified duty, but did not make a written offer of modified duty work. TTD benefits did not terminate pursuant to section 8-42-105(3)(D), C.R.S.

ORDER

It is therefore ordered that:

1. Truck shall pay for the right total knee replacement surgery prescribed by Dr. Szuszczewicz and recommended by Dr. Xenos.

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

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

DATED: June 17, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-781-968

ISSUES

The issue determined herein is temporary total disability ("TTD") benefits. The parties stipulated to an average weekly wage of $622.22.

FINDINGS OF FACT

1.In June or July 2008, claimant began work for the employer as a framer and drywall installer. Mr. Doom, the operations manager, testified that the employer "always" had two people to lift 12 foot pieces of drywall, which weighed 80-90 pounds each.

2.On November 12, 2008, claimant suffered an admitted industrial injury to his low back when he picked up a bundle of studs by himself.

3.On November 17, 2008, Dr. Walsh examined claimant and diagnosed lumbar strain. He referred claimant for a magnetic resonance image ("MRI"), physical therapy, and medications. Dr. Walsh imposed restrictions against lifting or carrying over 30 pounds or doing any climbing.

4.Claimant returned to work for the employer, which purported to assign claimant to perform modified work in framing and in “topping out” smaller pieces of drywall on the ground. Claimant worked full-time, except for attending medical appointments. In fact, claimant had to carry larger pieces of drywall that weighed in excess of 30 pounds. Claimant also had to work on scaffolds to do soffet work.

5.The November 20, 2008, MRI showed disc protrusions at L3-4 and L4-5 without nerve root compression, as well as a disc bulge at L5-S1.

6.On November 24, 2008, Dr. Schwender examined claimant and diagnosed low back pain, sacroiliac (“SI”) joint dysfunction, and herniated discs at L3-4 and L4-5. He continued the same restrictions.

7.On December 5, 2008, Dr. Schwender reexamined claimant, who reported “generally tolerating” his work except for the need occasionally to lie down at work. Dr. Schwender referred claimant to Dr. Finn.

8.On December 8, 2008, claimant failed to appear for work and failed to call in to the employer. The employer prepared a counseling report about the absence, but did not show the report to claimant.

9.On December 10, 2008, claimant again failed to appear for work and failed to call in. The employer prepared a disciplinary warning notice for the absence, but did not show the notice to claimant.

10.On December 12, 2008, claimant did not appear for work. He called the office secretary and left a message. The manager prepared a disciplinary warning notice for the absence, but did not show the notice to claimant.

11.Claimant was confused about the last day of work. He alternatively testified that he did not work after December 6, but also said that he had not worked since December 12, 2008.

12.On December 15, 2008, claimant did not appear for work or call in. The manager prepared a disciplinary warning notice that terminated claimant’s employment pursuant to company policy, but the employer did not show the notice to claimant.

13.On December 16, 2008, the employer sent a facsimile letter to Dr. Schwender, indicating that the employer had a temporary full-time position for claimant to frame walls, screw off sheetrock that someone else has put in place, tape and finish drywall seams, put insulation inside stud cavities, and pick up small debris and sweep the floor. Dr. Schwender approved the modified duty offer on December 16, 2008.

14.On December 17, 2008, the employer representatives met with claimant. A foreman participated by telephone to act as a language interpreter for claimant, who does not read or speak English. The employer showed the English language documents to claimant and did not terminate claimant's employment. The employer "tried" to show the December 17 draft of the modified duty offer to claimant, but claimant left the meeting and did not return, believing that his employment had terminated.

15.On December 17, 2008, Dr. Schwender reexamined claimant. He continued the same previous restrictions, but also added a restriction against repetitive bending.

16.On December 18, 2008, the employer sent a letter to claimant by certified mail with the offer of the modified duty job commencing on December 30, 2008. The letter was addressed to claimant's correct address, but the letter was not delivered to claimant and was returned to the employer as undeliverable as addressed.

17.On December 19, 2008, Dr. Finn examined claimant and recommended a facet block.

18.On December 30, 2008, Dr. Schwender reexamined claimant, who reported that the employer was unable to accommodate his restrictions. Dr. Schwender added another restriction against repetitive twisting.

19.On January 6, 2009, the employer terminated claimant's employment, but made no further communication with claimant.

20.On January 8, 2009, Dr. Finn administered the facet block, with only minimal results.

21.On February 5, 2009, Dr. Finn administered medial branch blocks, with excellent results. He recommended a rhizotomy.

22.On March 25, 2009, Dr. Schwender added another restriction against crawling.

23.On April 28, 2009, Dr. Finn performed the rhizotomy, with 50% symptom relief.

24.On May 13, 2009, Dr. Schwender determined that claimant was at maximum medical improvement ("MMI") with permanent restrictions.

25.At all relevant times, claimant was disabled from performing his regular duties for the employer.

26.The employer failed to provide modified duty to claimant that was within his restrictions after the work injury.

27.Respondents failed to demonstrate by a preponderance of the evidence that the attending physician gave claimant a written release to return to modified employment and the employment was offered to claimant in writing. Dr. Schwender signed the December 16 job description. The record evidence does not demonstrate that this release and offer were provided to claimant at any time before December 30, the start date. The manager could only testify that he "tried" to present the offer at the December 17 meeting. For unknown reasons, the certified mail was not actually delivered to claimant.

28.Respondents failed to demonstrate that claimant was responsible for his termination from employment. Claimant was unable to perform the duties of his modified employment before December 17, 2008. In fact, Dr. Schwender later had to add additional work restrictions. Apparently, the language barrier at the December 17 meeting led claimant to believe that he had been terminated rather than presented with a modified duty job offer. Consequently, claimant had no need to call in to the employer or show up. The January 6, 2009, termination was not due to a volitional act by claimant.

CONCLUSIONS OF LAW

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

2. Respondents have failed to prove that they are entitled to terminate TTD benefits pursuant to section 8-42-105(3)(d)(I), C.R.S. That section provides that TTD benefits terminate if:

> **<u>The attending physician gives the employee a written release to return</u>**
> to modified employment, such employment is offered to the employee
> in writing, and the employee fails to begin such employment.

Claimant must receive the actual written release to return to modified work. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677. The statute imposes no specific mailing provisions, although WCRP 6 requires certified mail in order for the insurer to terminate TTD benefits without a hearing. As found, the record

evidence fails to demonstrate that claimant received the actual written release and job offer.

3. 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, claimant was not responsible for his termination from employment on January 6, 2009. Consequently, claimant is not barred from TTD benefits after that date.

ORDER

It is therefore ordered that:

1.The insurer shall pay to claimant TTD benefits at the rate of $414.81 per week commencing December 15, 2008, and continuing thereafter until modified or terminated according to law.

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

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

DATED: June 16, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-782-293

ISSUES

The issues for determination are average weekly wage, temporary partial disability benefits from November 6, 2008 to January 7, 2009, temporary total disability benefits from January 8, 2009 to March, temporary partial disability benefits from March to April, and temporary total disability benefits from April ongoing. The parties stipulated that the average weekly wage is $741.59. The parties will calculate the temporary total and partial disability benefits for the periods. All issues not specifically raised at this hearing are reserved.

FINDINGS OF FACT

1. On November 6, 2008, Claimant sustained an admitted injury when a heavy door fell on his foot.

2. On November 6, 2008, Dr. David Orgel restricted Claimant to no prolonged standing and/or walking longer than tolerated and no climbing stairs or ladders. On November 10, 2008, Dr. Orgel continued to restrict Claimant to no prolonged standing and/or walking longer than tolerated and no climbing ladders. Dr. Orgel also stated that Claimant should keep foot elevated as possible.

3. On November 12, 2008, Dr. Orgel released Claimant to be the outside containment man, inventory control, or airless sprayer operator. Claimant returned to work in mid November 2008, but he was not offered and did not perform those jobs.

4. On December 1, 2008, Dr. Mark Siemer released Claimant to return to regular duty. On December 15, 2008, Dr. Siemer placed Claimant back on restrictions of no prolonged standing and/or walking longer than tolerated, and no climbing stairs or ladders.

5. On January 7, 2009, Claimant was on the fourth floor, when he told his supervisor he was in pain. The activity of walking up the stairs to the fourth floor exceeded his restrictions from December 15, 2008.

6. On January 8, 2009, Claimant picked up his check and looked to see if he was on standby. He was not on the list so he thought he did not have a job. Claimant did not quit his employment.

7. Claimant was not on the standby list because Pacheco wanted to speak to Claimant. Pacheco testified that Claimant was not terminated and could return to work at any time.

8. On January 12, 2009, Dr. Mark Siemer reported Claimant's restrictions as no prolonged standing and/or walking longer than tolerated.

9. An MRI of Claimant's left foot taken on January 16, 2009, revealed a non-displaced, subacute fifth proximal phalangeal head fracture. There was soft tissue edema at the plantar aspect of the fifth metatarsal head. It was reported that this may represent early development of an adventitial bursa. There was also scattered early osteoarthrosis at the first through fifth metatarsophalangeal and first metatarsal sesamoidal joints.

10. On January 26, 2009, Dr. Siemer restricted Claimant to no prolonged standing and/or walking longer than tolerated, and reported that Claimant must wear a splint. On February 9, 2009, Dr. Siemer reported Claimant's restrictions as no prolonged standing and/or walking longer than tolerated. On February 18, 2009, Dr. Jeremiah Cogan noted that Claimant felt he had a fear avoidance behavior. Dr. Cogan stated, "He is not doing normal things and not working because of fear of increased pain." Dr. Cogan continued Claimant on restrictions of no prolonged standing and/or walking longer than tolerated.

11. Claimant was off work until March 2009 when he found work within his restrictions. He stopped working when the job ended the first of April 2009. His new employer offered him a job in Ft. Lyon that was about four hours away. Claimant could not accept that position due to doctor and lawyer appointments and family obligations.

12. On March 25, 2009, Dr. Cogan noted that Claimant had returned to work, was working light duty within his restrictions, but he was not sure how long the job would last. Dr. Cogan continued to restrict Claimant to no prolonged standing and/or walking longer than tolerated.

13. On April 21, 2009, Dr. Scott Primack referred Claimant for a QSART for the left foot to rule out CRPS crush injury. Dr. Primack also ordered an EMG/NCV of the left foot to rule out left superficial peroneal nerve injury.

CONCLUSIONS OF LAW

1.Respondents argue that Claimant's temporary disability benefits could be properly terminated on January 7, 2009, pursuant to the "termination statutes." These statutes generally bar a claimant from receiving temporary total disability benefits where he is at fault for the termination of his employment. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo.App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P. 2d 542 (Colo. 1995). Hence the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. 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). An individual acts volitionally if he is able to exercise some degree of control in the circumstances that caused the separation. *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo.App. 1998). That determination must be based upon an examination of the totality of circumstances. *Id*.

2.The Workers' Compensation Act is intended to be "remedial and beneficent in purpose, and should be liberally construed" in order to accomplish these goals. *Davison v. Industrial Claim Appeals Office & Mobley v. Industrial Claim Appeals Office, 84 P.3d 1023 (Colo. 2004)*.

3.The termination statutes do not apply since Claimant's employment has not been terminated by Claimant or by Employer. Claimant did not quit his employment. He left his employment on January 16, 2009, when the job duties he was performing were beyond his restrictions. He checked to see if he was assigned other employment, but he was not. Even if one would conclude under these circumstances that Claimant's employment was terminated, Claimant is not at fault for termination when restrictions are not being accommodated. *Kinsey v. Service Mgmt Systems, I.C.A.O.,* W.C. 4-414-499, (ICAO, August 3, 2000). Claimant was not a fault for the termination.

4.Insurer is liable for temporary total and temporary partial disability benefits after January 7, 2009. Temporary disability benefits continue until terminated pursuant to law.

ORDER

It is therefore ordered that Insurer shall pay Claimant temporary total or temporary partial disability benefits after January 7, 2009. Benefits continue until

terminated pursuant to law. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

Matters not determined herein are reserved for future determination.

DATED: *June 3, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-782-620

ISSUES

➢Did Claimant prove by a preponderance of the evidence that she suffered a compensable injury arising out of and in the course of her employment with Respondent-employer on June 19, 2009?

➢The parties stipulated that if the claim is found compensable, Respondents are liable for mileage reimbursement to Claimant in the amount of $25.00 for Claimant's travel to and from authorized medical appointments.

FINDINGS OF FACT

1. Claimant is employed in the fuel department for employer. Claimant began working for employer on August 26, 2008. On January 19, 2009, Claimant testified that she arrived at work at approximately 5:30 a.m. and proceeded to perform her job duties that included filling water dispensers used to clean windshields. In order to fill the water dispensers, Claimant would fill eight (8) buckets with water. Each bucket held approximately five (5) gallons of water. Claimant would place the buckets of water into a cart and push the cart out to the fuel island where the water dispensers were located. Claimant testified that not all of the water buckets had handles and Claimant would lift the bucket to the wire guard in one motion, then lift the bucket to the bumper guard in the next motion before lifting the bucket to fill the water dispenser.

2. Claimant testified that on January 19, 2009 at approximately 6:00 a.m., while lifting one of the buckets of water to fill the dispenser, Claimant had an immediate onset of pain in her back and down both legs. Claimant

testified that she also experienced dizziness. Claimant continued to work her regular shift despite her ongoing physical complaints until her first scheduled break at 9:00 a.m. At 9:00 a.m., another employee came to the fuel center to relieve Claimant for her regularly scheduled break. During her break, Claimant reported her injury to Ms. Martinez and Ms. Leach. Claimant was eventually referred to Ms. Newell to report her injury and Ms. Newell made an appointment for Claimant to receive medical treatment with Dr. Heyl later that afternoon. Claimant testified that she continued to receive medical treatment that initially did not provide significant relief and continues to experience problems with her back getting up and down; however, Claimant testified that she is currently 99% better than she was on January 19, 2009 and is able to get through the day without pain medication.

3. Respondent presented the testimony of Ms. Leech, a customer relations manager for employer. Ms. Leech testified that she arrived at work at approximately 9:00 a.m. on January 19, 2009 and spoke with Claimant who reported that her back was hurting her. Ms. Leech paged Ms. Newell to have the injury reported, but Ms. Newell was in a meeting and asked if Claimant's injury could wait. Ms. Leech believed Claimant was merely reporting the injury and believed Claimant was not in immediate need of medical assistance. Ms. Leech advised Claimant to return to work and report her injury to Ms. Newell after the meeting. Ms. Leech testified that 10 to 15 minutes later, Ms. Martinez received a phone call from Claimant in the fuel center and Claimant reported that her back was hurting and she needed to go home. Ms. Leech testified that she was surprised that Claimant's purported need was so urgent. Ms. Leech also testified that Claimant told her that her back had been hurting "for a while". Respondents also presented testimony from Ms. Newell, the assistant store manager for employer. Ms. Newell testified that she became aware of Claimant's injury on January 19, 2009 when Ms. Leech paged her and reported that Claimant had injured herself. Ms. Newell asked if it was an emergency as she was currently in a meeting. After being advised by Ms. Leech that this was not an emergency, Ms. Newell continued with her meeting. Ms. Newell later met with Claimant and referred Claimant for medical treatment with Dr. Heyl.

4. Respondents presented evidence in the form of employment records which document Ms. Newell reviewing a surveillance video of the alleged incident. Ms. Newell notes in the employee incident claim form that after reviewing the video, there was no indication of an injury while Claimant is filling the windshield wash on the morning of January 19, 2009. Ms. Newell testified at hearing that she does not believe the video she reviewed prior to filling out the incident claim form still exists.

5. Claimant was evaluated by Dr. Heyl on January 19, 2009. Dr. Heyl noted that Claimant reported an injury to her low back while lifting a very heavy bucket full of water when she had sudden pain develop in her lower back along with sciatic-type pain radiating down the posterior aspect of both lower extremities into the feet associated with bilateral toe numbness. Dr. Heyl diagnosed Claimant was having acute low back pain with symptoms and features suggesting centrally herniated lumbar disk and associated in her lumbar muscle strain. Dr. Heyl referred the Claimant to Dr. Wyman for orthopedic consultation and consideration of a lumbar spine magnetic resonance image ("MRI").

6. Claimant underwent an MRI of the lumbar spine on January 22, 2009. The MRI revealed a small annular tear at the L5-S1 level on the right of the midline with a small right paracentral and lateral recess disk protrusion which was contacting but not displacing the transiting right S1 nerve root. The MRI also revealed a far right lateral recess disk protrusion at L4-5 contacting the exiting L4 nerve root but not displacing it and a left foraminal disk protrusion at L3-4 contacting and slightly posteriorly displacing the exiting left L3 nerve root.

7. Claimant was evaluated by Dr. Wyman on January 29, 2009 with complaints of back and leg pain that had reportedly been present since January 19, 2009. Claimant reported a consistent accident history of experiencing significant back and leg pain while lifting a heavy bucket of water. Dr. Wyman noted that Claimant had reports of shooting pain in the S1 nerve distribution to the calf. Dr. Wyman reviewed the MRI and noted that none of the disk protrusions appear to put any significant pressure on any of the nerve roots. Dr. Wyman took Claimant off of work completely and referred the Claimant to Spine Colorado for further management.

8. Claimant returned to Dr. Heyl on February 3, 2009. Dr. Heyl reviewed Claimant's MRI and noted that the MRI did not show significant disk herniation or nerve root impingement. Dr. Heyl noted that if Claimant were in a great deal of pain, it is presumably from a lumbar strain. Dr. Heyl continued Claimant's work restrictions keeping Claimant completely off of work and recommended Claimant return after her consultation with Spine Colorado.

9. Claimant was examined by Dr. Wallach at Spine Colorado on February 18, 2009. Claimant again provided a consistent accident history and reported that after her injury she was referred for physical therapy. The physical therapy reportedly did not help Claimant's symptoms. Dr. Wallach diagnosed Claimant with right-sided sciatica and disc degeneration at the L5 level with annular tear on the right side. Dr. Wallach also diagnosed Claimant as having generalized hyperreflexia. Dr. Wallach noted that Claimant presented a complicated case, and stated

that the pain generator could be an acute injury to the L5 disc, while also noting that it is impossible to tell based on the MRI if the annular tear at L5 was old or new. Dr. Wallach noted that if the annular tear was new, it could drive a lot of the axial back pain and some of the radiated pain. Dr. Wallach also noted that Claimant's sciatica could be caused by the impression of the S1 and possibly L5 nerve roots or cold be referred symptoms from the disc or myofacial structures. Dr. Wallach recommended epidural steroid injections along the L5 and S1 nerves and up to the L5 disc and prescribed Celebrex. Dr. Wallach concurred with the work restrictions set for the Drs. Heyl and Wyman and kept Claimant off of work completely.

10. Claimant returned to Dr. Heyl on February 23, 2009 with continued complaints of "unbearable" pain and right sciatic pain, but no numbness or tingling into the feet. Dr. Heyl recommended that Claimant increase her use of Neurontin and requested the Claimant follow up in one week. Claimant returned to Dr. Heyl on March 11, 2009 and reported that her attempts to increase her Neurontin resulted in daytime grogginess and impaired functioning. Dr. Heyl noted that Claimant's employer was denying her workers' compensation claim and provided Claimant with an extended work excuse until Claimant was evaluated by her primary care physician.

11. Claimant testified at hearing that she sought treatment with Dr. Bagge on April 29, 2009 after Respondent denied further treatment with Dr. Heyl. Dr. Bagge is Claimant's primary care physician. Claimant testified that Dr. Bagge recommended physical therapy.

12. Respondents presented the testimony of Robert Orozco, a private investigator. Mr. Orozco testified that he conducted surveillance of Claimant on April 29, April 30, May 1 and May 2, 2009. Mr. Orozco obtained approximately 27 minutes of footage of Claimant over the four days of surveillance. The 27 minutes contain activities that took place on May 1 and May 2, 2009. The parties reviewed the entire videotape at that hearing and the ALJ has reviewed the videotape entered into evidence. The videotape depicts the Claimant walking, driving, and shopping. The videotape also depicts Claimant lifting what appears to be her four year old son to carry her son from her car to her home during a rainstorm.

13. Claimant has a prior history of complaints of low back pain relating to a kidney stone in August, 2008. Claimant also had a recurrence of the kidney stone complaints in March, 2009. The ALJ finds that both of these incidents are unrelated to Claimant's alleged workers' compensation injury.

14. The ALJ finds the testimony of the Claimant and the medical records from Drs. Heyl, Wyman and Wallach credible. Claimant provided a consistent accident history following her injury in her testimony at the

hearing and to each of her treating physicians. The ALJ finds that it is more probably true than not that Claimant suffered an onset of acute pain while lifting the bucket of water on January 19, 2009. The ALJ finds that the treating physicians have recommended a course of treatment, including possible epidural steroid injections, to treat Claimant's onset of low back pain. The ALJ finds that Claimant reported the injury to her employer during her first scheduled break and the accident history provided to the treating physicians is consistent with the accident history provided to the employer.

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. Likewise, Respondents have the burden of proving any affirmative defenses raised at hearing by a preponderance of the evidence. 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., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Claimant shoulders the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment with employer. Section 8-41-301(1), C.R.S.; *see City of Boulder v.* Streeb, 706 P.2d 786 (Colo. 1985). The fact that an employee has suffered a previous disability or impairment or received compensation therefore shall not preclude compensation for a later injury or for death. Section 8-42-104(1), C.R.S.

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 P2d 1205 (1936); CJI, Civil 3:16 (2008).

4. As found, Claimant has shown that it is more probably true than not that she suffered an acute onset of low back pain necessitating medical treatment on January 19, 2009 while lifting a bucket of water while in the course and scope of her employment with employer.

5. W.C.R.P. 18-6(E) requires Respondents to reimburse Claimant for reasonable and necessary mileage expenses for travel to and from medical appointments and reasonable mileage to obtain prescription medication. The parties have stipulated that if the claim is found to be compensable, Respondents are liable for medical mileage in the amount of $25.00.

ORDER

It is therefore ordered that:

1. Respondents shall reimburse Claimant medical mileage in the amount of $25.00 for Claimant's travel for treatment with Drs. Heyl, Wyamn and Wallach and Claimant's receipt of physical therapy in addition to mileage to obtain prescription medications.

All matters not determined herein are reserved for future determination.

DATED: June 10, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-782-805

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable respiratory exposure to sulfuric acid during the course and scope of his employment with Employer on December 24, 2008.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of his respiratory exposure.

FINDINGS OF FACT

1. Claimant is a 54 year-old male who has been in the construction business for approximately 20 years. In early October 2008 he applied for a job with Employer at the McMurdo Station in Antarctica. McMurdo Station is a research facility maintained by the United States.

2. Employer hired Claimant and transported him to Antarctica in early November 2008. Claimant performed various construction projects and repairs pursuant to work orders. He spent approximately 50% of his work time at a power station and the remainder of his time performing repairs in other parts of McMurdo Station.

3. On December 24, 2008 Employer directed Claimant to fill four large diesel batteries with sulfuric acid. Claimant explained that he was working in a small room that was approximately 10 feet wide by 20 feet long. He commented that there was little ventilation in the room and he did not receive a personal ventilation device. Claimant stated that he filled the batteries with in excess of 20 gallons of sulfuric acid over a five-hour period.

4. Claimant testified that after he finished filling the batteries his face and hands turned red as if they had been sun burned. He subsequently developed a cough that worsened when he lay down. Claimant experienced shortness of breath and felt extremely tired. He also explained that he coughed blood. Claimant reported his symptoms to his supervisor and was transported back to the United States on December 29, 2008.

5. Claimant returned to his home in Parker, Colorado. He continued to experience shortness of breath, coughing and wheezing. On January 9, 2009 he visited the Parker Adventist Emergency Department for medical treatment. Based on Claimant's history the emergency room physician considered a number of different diagnoses but concluded that Claimant's condition was related to a chemical pneumonitis. The emergency room physician prescribed an Albuterol inhaler and Prednisone for Claimant's respiratory symptoms.

6. Insurer directed Claimant to Authorized Treating Physician (ATP) Robert W. Watson, Jr., M.D. for treatment. On January 12, 2009 Claimant visited Dr. Watson for an evaluation. Claimant recounted the December 24, 2009 incident with sulfuric acid. He also noted that he had been a smoker for approximately 20 years. Dr. Watson determined that Claimant suffered "a [r] eported history of respiratory pneumonitis secondary to battery acid, with possible reactive airway disorder." Dr. Watson continued the medications that had been prescribed by the emergency room physician and scheduled a follow-up appointment.

7. Claimant returned to Dr. Watson on January 19, 2009. Dr. Watson diagnosed Claimant with "[c]hronic cough, secondary to chemical pneumonitis." He remarked that Claimant was "clinically doing well" but referred him to Sander Orent, M.D. for an evaluation because of Dr. Orent's expertise in toxicology.

8. On January 22, 2009 Claimant visited Dr. Orent for an evaluation. Dr. Orent obtained a history that detailed Claimant's exposure to sulfuric acid for six or seven hours in an unventilated enclosure with temperatures in the mid 30s. Claimant remarked that his cough began the day after the sulfuric acid exposure. Dr. Orent observed that two spirometry tests were normal, two chest x-rays were normal and Claimant had recently returned from sea level. Dr. Orent concluded that Claimant had not suffered a chemical exposure on December 24, 2009.

9. Dr. Orent provided multiple reasons for his conclusions. He explained that Claimant did not develop his coughing symptoms for approximately 24 hours following the sulfuric acid exposure. Dr. Orent remarked that, if Claimant had suffered a significant sulfuric acid exposure, he would have immediately developed symptoms that included a cough. Claimant also would have reported irritation to his eyes and a sore throat.

10. Dr. Orent commented that Claimant did not have a "substantial sulfuric acid exposure in the sense of having created any significant disease in the lungs or airways." He attributed Claimant's condition to an extensive history of cigarette smoking and a return to elevation after having been at sea level in Antarctica for almost two months. Nevertheless, Dr. Orent remarked that Claimant probably had "mild chronic bronchitis from his cigarette abuse" that may have been "transiently aggravated by an inhalational exposure to sulfuric acid." Dr. Orent summarized that it was "reasonable to give [Claimant] a course of antibiotics as [there] is possibly some mild respiratory irritation from sulfuric acid resulting in a secondary infection in a patient with underlying chronic bronchitis."

11. On February 2, 2009 Claimant returned to Dr. Watson for an evaluation. Dr. Watson commented that Claimant had undergone pulmonary function tests after his visit to the emergency room on January 9, 2009. He stated that the test results were comparable to the testing that had been done prior to the time Claimant traveled to Antarctica. Furthermore, additional pulmonary function tests on January 19, 2009 revealed improved results in comparison to the two prior tests. Dr. Watson also explained that a chest CT scan did not reveal any evidence of chemical pneomonitis and was essentially normal. Based on the diagnostic testing, he concluded that Claimant's persistent cough was the result of extensive tobacco abuse. Dr. Watson thus discharged Claimant at Maximum Medical Improvement (MMI).

12. Claimant testified that prior to his sulfuric acid exposure on December 24, 2008 he had not experienced persistent coughing or shortness of breath. He had engaged in extensive hiking and activities with his children prior to his work for Employer. However, he noted that in the first two months after he returned from Antarctica he experienced coughing, shortness of breath and weakness. Claimant's symptoms subsequently improved over the period from February through April 2009.

13. Claimant has demonstrated that it is more probably true than not that he suffered a compensable respiratory exposure to sulfuric acid during the course and scope of his employment with Employer on December 24, 2008. His sulfuric acid exposure on December 24, 2008 aggravated, accelerated, or combined with his pre-existing chronic bronchitis to produce a need for medical treatment. As credibly explained by Dr. Orent, Claimant probably suffered mild chronic bronchitis from cigarette abuse that was transiently aggravated by an inhalational exposure to sulfuric acid. Claimant credibly explained that he had not experienced persistent coughing or shortness of breath prior to December 24, 2008. However, he experienced respiratory difficulties after he returned home from Antarctica. Claimant's history of his sulfuric acid exposure, subsequent symptoms and gradual resolution of the symptoms constitutes a chronology of events that is consistent with a toxic exposure to sulfuric acid on December 24, 2008. Moreover, Claimant's account is consistent with Dr. Orent's comments that he suffered a transient inhalational exposure to sulfuric acid. Although diagnostic testing did not provide evidence of a toxic exposure, the testing was performed significantly after the exposure. Therefore, Claimant has produced sufficient persuasive evidence to demonstrate a causal connection between his employment and his respiratory condition.

14. Claimant's visit to the Parker Adventist Emergency Department for shortness of breath, coughing and wheezing on January 9, 2009 constituted emergency medical treatment that was necessitated by his December 24, 2008 sulfuric acid exposure. The emergency room visit thus did not require Employer's authorization.

15. Claimant has established that it is more probably true than not that he received authorized medical treatment that was reasonable and necessary to cure and relieve the effects of his respiratory exposure. Claimant's need for medical treatment subsequent to December 24, 2008 was caused by his sulfuric acid exposure. The treatment he received was designed to alleviate the effects of his respiratory condition.

CONCLUSIONS OF LAW

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

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

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

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

Compensability

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable respiratory exposure to sulfuric acid during the course and scope of his employment with Employer on December 24, 2008. His sulfuric acid exposure on December 24, 2008 aggravated, accelerated, or combined with his pre-existing chronic bronchitis to produce a need for medical treatment. As credibly explained by Dr. Orent, Claimant probably suffered mild chronic bronchitis from cigarette abuse that was transiently aggravated by an inhalational exposure to sulfuric acid. Claimant

credibly explained that he had not experienced persistent coughing or shortness of breath prior to December 24, 2008. However, he experienced respiratory difficulties after he returned home from Antarctica. Claimant's history of his sulfuric acid exposure, subsequent symptoms and gradual resolution of the symptoms constitutes a chronology of events that is consistent with a toxic exposure to sulfuric acid on December 24, 2008. Moreover, Claimant's account is consistent with Dr. Orent's comments that he suffered a transient inhalational exposure to sulfuric acid. Although diagnostic testing did not provide evidence of a toxic exposure, the testing was performed significantly after the exposure. Therefore, Claimant has produced sufficient persuasive evidence to demonstrate a causal connection between his employment and his respiratory condition.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P. 2d 251, 252 (Colo. App. 1999).

8. Section 8-43-404(5)(a), C.R.S. grants employers the initial authority to select the ATP. However, in a medical emergency a claimant need not seek authorization from his employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office,* 797 P. 2d 777, 781 (Colo. App. 1990). The question of whether an emergency exists is dependent on the particular circumstances of the case. *In re Timko,* W.C. No. 3-969-031 (ICAP, June 29, 2005). As found, Claimant's visit to the Parker Adventist Emergency Department for shortness of breath, coughing and wheezing on January 9, 2009 constituted emergency medical treatment that was necessitated by his December 24, 2008 sulfuric acid exposure. The emergency room visit thus did not require Employer's authorization.

9. As found, Claimant has established by a preponderance of the evidence that he received authorized medical treatment that was reasonable and necessary to cure and relieve the effects of his respiratory exposure. Claimant's need for medical treatment subsequent to December 24, 2008 was caused by his sulfuric acid exposure. The treatment he received was designed to alleviate the effects of his respiratory condition.

ORDER

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

1. Claimant suffered a compensable respiratory exposure to sulfuric acid during the course and scope of his employment with Employer on December 24, 2008.

2. Respondents are financially responsible for all of Claimant's medical costs for his respiratory symptoms as a result of his December 24, 2008 sulfuric acid exposure.

DATED: June 22, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-782-911

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable right inguinal hernia during the course and scope of his employment with Employer on September 30, 2007.

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

FINDINGS OF FACT

1. Claimant is a 62-year male who worked for Employer as a cashier. His duties involved carrying and lifting items at a "check-out" counter in a retail store.

2. Claimant testified that on approximately September 30, 2007 he lifted a case of water bottles while performing his job duties. He felt something "pop" and experienced the immediate onset of a burning sensation in his groin area. Claimant remarked that he continued to perform his job. However, he noticed a bump on the right side of his groin after he returned home.

3. On October 1, 2007 Claimant contacted personal physician Michael C. Barlow, M.D. and reported his symptoms. Dr. Barlow referred Claimant to general surgeon William M. MacPhee for a hernia evaluation. Claimant had

visited Dr. Barlow on September 13, 2007 and Dr. Barlow had determined that Claimant was not suffering from a hernia.

4. On October 10, 2007 Claimant visited Dr. MacPhee for an evaluation. Dr. MacPhee recounted that Claimant first noticed the hernia two to three years prior to the examination but recently experienced a burning sensation when he was straining. Claimant also reported that the hernia was slowly increasing in size. Dr. MacPhee noted that Claimant had not reported any previous hernias but that his brother had undergone hernia surgery. During Dr. MacPhee's deposition he confirmed Claimant's reported hernia history. Dr. MacPhee diagnosed Claimant with a right inguinal hernia and recommended surgical repair.

5. Claimant testified that he had not experienced any hernia symptoms prior to September 30, 2007. However, on August 22, 2005 Claimant had visited Dr. Barlow for an evaluation. Dr. Barlow noted that Claimant had a small, right inguinal hernia that was easily reducible. He referred Claimant to Dr. MacPhee for an evaluation of the hernia and to determine whether Claimant should undergo a surgical repair. Claimant did not subsequently have the hernia repaired.

6. Following his October 10, 2007 medical evaluation with Dr. MacPhee Claimant elected not to undergo hernia repair surgery. He instead chose to wear a truss for his condition. Claimant explained that he continued to perform his regular work activities through November of 2008. He then noticed a significant increase in his hernia symptoms.

7. At the time of Claimant's September 30, 2007 lifting incident both Sue Simpleman and Rosario Rothmiller served as Claimant's direct supervisors. In the months following the incident, Claimant did not notify either of his supervisors that he suffered an industrial injury, was experiencing discomfort or needed to modify his work duties. Claimant acknowledged that he did not notify Employer about his condition or request any change in work duties until he reported the injury to his Human Resource Team Leader, Patricia Ortiz, in November 2008.

8. Ms. Ortiz testified that during her November 2008 meeting with Claimant he was unable to provide any specific time or date for the lifting incident. She also remarked that Claimant could not describe how the injury occurred. The information received was so minimal that Ms. Ortiz asked Claimant to submit a letter containing sufficient information so that she could file a claim on his behalf.

9. In November of 2008 Claimant contacted Dr. MacPhee and challenged the medical history in the October 10, 2007 report. Initially, Dr. MacPhee wrote a note that he was mistaken about Claimant's two to three year hernia history prior to the examination because the history involved Claimant's

brother. However, based on a subsequent conversation with Claimant, Dr. MacPhee noted that Claimant suffered a hernia for only five months prior to the examination. Claimant later advised Dr. MacPhee that he began to suffer hernia symptoms in September or October 2007.

10. Respondent referred Claimant to Concentra Medical Centers for an evaluation. On January 22, 2009 he visited Raymond F. Rossi, M.D. Claimant recounted that he developed right groin pain in September 2007 after lifting a case of water at work. Dr. Rossi determined that Claimant suffered from a right reducible inguinal hernia. Based on Claimant's history he concluded that there was a greater than fifty percent chance that Claimant's condition was caused by his work activities. However, during Dr. Rossi's deposition, he acknowledged that he was unaware of the August 22, 2005 report from Dr. Barlow and the multiple hernia histories that Claimant had provided to Dr. MacPhee. Dr. Rossi explained that, in the absence of an accurate medical history, he would be unable to properly assess the cause of Claimant's condition.

11. At Dr. MacPhee's deposition he explained that hernias typically become larger and more symptomatic over time. He noted that it is not possible to ascertain the length of time that a hernia has been present. Dr. MacPhee commented that smaller hernias, such as Claimant's, can remain unnoticed and later become symptomatic. He remarked that small hernias can be "difficult to demonstrate at any particular time. They may be present on one day and then not on the next." Nevertheless, Dr. MacPhee acknowledged that it was possible that Claimant's hernia could have developed while he was working as a cashier for Employer in September or October 2007. He remarked that a surgical repair constituted reasonable and necessary treatment for Claimant's right inguinal hernia.

12. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable right inguinal hernia during the course and scope of his employment with Employer on September 30, 2007. His employment activities on September 30, 2007 did not aggravate, accelerate, or combine with his pre-existing inguinal hernia to produce a need for medical treatment. Claimant's testimony is inconsistent with the medical evidence. Claimant asserted that he experienced a spontaneous onset of symptoms around September 30, 2007 while lifting a case of water as part of his job duties. However, the medical report of Dr. Barlow reveals that he had identified a right inguinal hernia as early as August 22, 2005 and referred Claimant to Dr. MacPhee for possible surgical repair. Claimant did not visit Dr. MacPhee until October 10, 2007 and noted that he had suffered from hernia symptoms for two to three years. Claimant also explained that he had experienced a slow or gradual increase in the severity of his condition. Moreover, Claimant continued to work through November of 2008 before he reported the incident to Employer. During the time, he contacted Dr. MacPhee's office about changing the history in the October 10, 2007 report. He initially told Dr. MacPhee that the history should be changed to document that a

hernia had existed for approximately five months prior to the October 10, 2007 examination. Furthermore, when Claimant first reported his symptoms to Ms. Ortiz, he was unable to identify a specific time for the onset of his condition or to give a description of the mechanics of his injury. Finally, Dr. MacPhee testified that smaller hernias, such as Claimant's, can remain unnoticed, can be "difficult to demonstrate" and may later become symptomatic. The progression of Claimant's symptoms is consistent with Dr. MacPhee's characterization. Accordingly, a review of the medical records reveals that Claimant's need for medical treatment was caused by the natural progression of his pre-existing hernia condition.

CONCLUSIONS OF LAW

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

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

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

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

causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P. 3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable right inguinal hernia during the course and scope of his employment with Employer on September 30, 2007. His employment activities on September 30, 2007 did not aggravate, accelerate, or combine with his pre-existing inguinal hernia to produce a need for medical treatment. Claimant's testimony is inconsistent with the medical evidence. Claimant asserted that he experienced a spontaneous onset of symptoms around September 30, 2007 while lifting a case of water as part of his job duties. However, the medical report of Dr. Barlow reveals that he had identified a right inguinal hernia as early as August 22, 2005 and referred Claimant to Dr. MacPhee for possible surgical repair. Claimant did not visit Dr. MacPhee until October 10, 2007 and noted that he had suffered from hernia symptoms for two to three years. Claimant also explained that he had experienced a slow or gradual increase in the severity of his condition. Moreover, Claimant continued to work through November of 2008 before he reported the incident to Employer. During the time, he contacted Dr. MacPhee's office about changing the history in the October 10, 2007 report. He initially told Dr. MacPhee that the history should be changed to document that a hernia had existed for approximately five months prior to the October 10, 2007 examination. Furthermore, when Claimant first reported his symptoms to Ms. Ortiz, he was unable to identify a specific time for the onset of his condition or to give a description of the mechanics of his injury. Finally, Dr. MacPhee testified that smaller hernias, such as Claimant's, can remain unnoticed, can be "difficult to demonstrate" and may later become symptomatic. The progression of Claimant's symptoms is consistent with Dr. MacPhee's characterization. Accordingly, a review of the medical records reveals that Claimant's need for medical treatment was caused by the natural progression of his pre-existing hernia condition.

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: June 26, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-783-526

ISSUES

- Whether claimant suffered a compensable injury that arose out of the course and scope of his employment while working for Knack on January 16, 2009.
- Whether claimant suffered wage loss as a result of a compensable injury and is owed temporary total disability benefits as result of his January 16, 2009 injuries.
- Whether claimant earned an average weekly wage of $4000 while working for Knack.
- Whether Knack, individually and doing business as Chris's Light Company, carried workers' compensation insurance on January 16, 2009.
- Whether medical treatment received by claimant on and after January 16, 2009 was reasonable, necessary, related and authorized.
- Whether penalties for failing to carry workers' compensation insurance on January 16, 2009 should be awarded.
- Whether claimant suffered a disfigurement as a result of his work related injuries.

FINDINGS OF FACT

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

Knack is an individual who operates a business hanging holiday lights on residential homes. Knack operated this business under the trade name of Chris's Light Company. Knack was non-insured for liability for workers' compensation benefits. In November of 2008, Knack hired claimant to work for him providing seasonal labor in his holiday lighting business. On January 16, 2009, claimant sustained severe injuries when he slipped on ice on a residential roof and fell to the ground.

Claimant showed it more probably true than not that he was Knack's employee at the time of his injury on January 16, 2009. On January 16th, claimant was performing services for hire for Knack. Knack was claimant's employer at the time of his injury. Claimant's injury arose out of the course and scope of his employment for Knack. Because he operated his business as an individual, and not as a corporate entity, Knack is personally liable for claimant's injury.

Crediting his testimony, Knack paid claimant $10.00 per hour. Claimant worked for Knack on November 22nd, 23rd, 26th, 29th, and 30th, 2008. Claimant also worked for Knack on December 6th, 7th, and 13th, 2008. On November 22nd, Knack paid claimant $80; on November 23rd, $45; on November 26th, $100; on November 29th, $60; on November 30th, $40; on December 6th, $50; on December 7th, $80; and on December 13th, $40. Claimant next worked for Knack on January 16, 2009.

Claimant showed it more probably true than not that an average weekly wage of $400 more fairly approximates his wage loss and diminished earning capacity as a result of his injury. Knack paid claimant an hourly wage of $10.00. Because claimant's work for Knack was sporadic and seasonal, the Judge finds a full-time weekly wage of 40 hours times $10.00 per hour a more fair approximation of claimant's wage loss due to his injury.

Knack telephone "911" and referred claimant to Littleton Adventist Hospital for urgent medical treatment. At Littleton Adventist Hospital, Orthopedic Surgeon John A. Prall, M.D., diagnosed a burst fracture at the L3 level of claimant's lumbar spine, a compression fracture at the T12 level of his thoracic spine, and epidural hematoma from the T12 through L5 levels. On January 17th, Dr. Prall performed surgery, including a laminectomy procedure at multiple levels of claimant's spine and posteriolateral fusion of the L2 through L4 levels. Dr. Prall discharged claimant from Littleton Adventist Hospital on January 27, 2009. The treatment claimant received from Dr. Prall and from providers to whom Dr. Prall referred him was alike authorized and reasonably necessary to cure and relieve the effects of his work-related injury.

Crediting his testimony, claimant's medical bills from Littleton Adventist Hospital, Dr. Prall, and providers to whom Dr. Prall referred him are at least $25,000, and may exceed that amount.

Claimant showed it more probably true than not that his injury proximately caused his temporary, total wage loss from January 16, 2009, ongoing. As a result of claimant's work-related injury, Dr. Prall hospitalized him until January 27, 2009. At the time of discharge, Dr. Prall imposed physical activity restrictions of no lifting over 10 pounds. Dr. Prall further ordered claimant to wear his back brace at all times out of bed, except when showering. These restrictions prevented claimant from performing his regular job as a seasonal labor employee. The Judge took judicial notice in finding that 125 days elapsed between the date of injury and date of hearing on May 20, 2009.

As a result of the surgery performed by Dr. Prall, claimant sustained scarring consisting of a 12-inch long by ½-inch wide scar over his lumbar spine. Claimant's sustained disfigurement that is serious and permanent bodily disfigurement normally exposed to public view. Considering the size, placement, and general appearance of claimant's scarring, the Judge finds claimant entitled to disfigurement benefits in the maximum amount of $4,000.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that his injury arose out of the course and scope of his employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to

a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

A. Compensability:

Section 8-40-202(2)(a), *supra,* provides that an individual performing services for another is deemed to be an employee. An injury is deemed compensable when claimant proves a causal connection between the work conditions and the injury. *Tolbert v. Martin Marietta Corp.*, 759 P.2d 17 (Colo. 1988). Where, at the time of the accident, the employee is performing a service arising out of and in the course of his employment and where the injury is proximately caused by the accident arising out of and in the course of his employment, and is not intentionally self-inflicted, compensation shall be obtained. *J.W. Metz Lumbar Co. v. Taylor*, 134 Colo. 249 (1956).

The "but for" test should be applied to the totality of the circumstances in determining if a person should receive compensation. *Tolbert v. Martin Marietta Corp.*, *supra*. An injury arises out of the employment if it would not have occurred "but for" the fact that the condition and obligation of the employment placed the Claimant in the position where he was injured. *Tolbert v. Martin Marietta Corp.*, *supra*. An injury may be connected with the employment, and therefore may arise out of that employment, if the employee's work places him in a position in which he ultimately sustains that injury, even though the direct cause of that injury is not employment related. *Ramsdell v. Horn*, 781 P.2d 150 (1989), citing *Irwin v. Industrial Commission*, 695 P.2d 763 (Colo. App. 1984).

Here, the Judge found claimant showed it more probably true than not that he was Knack's employee at the time of his injury on January 16, 2009. On January 16th, claimant was performing services for hire for Knack. Knack was claimant's employer at the time of his injury. Claimant's injury arose out of the course and scope of his employment for Knack.

As found, Knack operated his business as an individual, and not as a corporate entity. Knack thus is personally liable for claimant's injury.

The Judge concludes that claimant met his burden of proving by a preponderance of the evidence that he sustained a compensable injury while working for Knack. Because Knack operated his business as an individual, Knack should be liable for all workers' compensation benefits that are due and owing claimant under the Act.

B. Average Weekly Wage:

The Judge must determine the employee's average weekly wage (AWW) by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of injury, which must include any advantage or

fringe benefit provided to the employee in lieu of wages. *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(2), *supra*, requires the Judge to base claimant's AWW on his earnings at the time of injury. Section 8-42-102(3), *supra*, grants the Judge discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

As found, claimant showed it more probably true than not that an AWW of $400 more fairly approximates his wage loss and diminished earning capacity as a result of his injury. Knack paid claimant an hourly wage of $10.00. Because of the sporadic and seasonal nature of claimant's work for Knack, the Judge found a full-time weekly wage of 40 hours times $10.00 per hour a more fair approximation of claimant's wage loss due to his injury.

The Judge concludes claimant's AWW should be $400.

C. Medical Benefits:

Section 8-42-101(1)(a), supra, provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

Respondent thus is liable for authorized medical treatment reasonably necessary to cure and relieve the employee from the effects of the injury. Section 8-42-101, *supra*; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Section 8-43-404(5), *supra*, allows the employer the right in the first instance to designate the authorized treating physician; the right to select however passes to claimant where the employer fails to designate in the first instance. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

As the Judge found, Littleton Adventist Hospital and Dr. Prall are authorized because Knack referred claimant to Littleton Adventist Hospital. Claimant underwent medical treatment at Littleton Adventist Hospital until Dr. Prall discharged him on January 27, 2009. The Judge thus found that the treatment claimant received from Littleton Adventist Hospital, Dr. Prall, and providers to whom Dr. Prall referred him was alike authorized and reasonably necessary to cure and relieve the effects of his work-related injury.

The Judge concludes that Knack should pay the medical bills, according to fee schedule, for treatment claimant received from Littleton Adventist Hospital, Dr. Prall, and providers to whom Dr. Prall referred claimant.

D. Temporary Total Disability Benefits:

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 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).

Section 8-43-408 (1), *supra*, provides that, in any case where the employer is subject to the provisions of the Act, and at the time of an injury has not complied with the insurance provisions of said articles, or has allowed the required insurance to terminate, or has not effected a renewal thereof, the injured employee may claim an increase of 50% in the amount the compensation and benefits provided under the Act.

As found, claimant showed it more probably true than not that his injury proximately caused his wage loss from January 16, 2009, ongoing. Claimant thus proved by a preponderance of the evidence that he is entitled to TTD benefits from January 16, 2009, ongoing, in the weekly amount of $266.40. The Judge however found that Knack was non-insured for liability for workers' compensation benefits. Knack thus is liable for a penalty increasing the amount of claimant's TTD benefits by 50% (to $400 weekly) pursuant to §8-43-408 (1), *supra*.

The Judge concludes that Knack should pay claimant TTD benefits in the weekly amount of $400, from January 16, 2009, ongoing until terminated under the Act.

E. Disfigurement:

Pursuant to §8-42-108, *supra*, claimant is entitled to a discretionary award up to $4,000 for his serious and permanent bodily disfigurement which is normally exposed to public view. Considering the size, placement, and general appearance of claimant's scarring, the Judge concludes claimant is entitled to disfigurement benefits in the amount of $4,000, payable in one lump sum.

In 2007, two new sections were added to §8-42-108, which provide as follows:

> (2)If an employee sustains any of the following disfigurements, the director may allow up to eight thousand dollars as compensation to the employee in addition to all other compensation benefits provided in this article other than compensation allowed under subsection (1) of this section:
> (a) Extensive facial scars or facial burn scars;
> (b) Extensive body scars or burn scars; or
> (c) Stumps due to loss or partial loss of limbs.
> (3) The director shall adjust the limits on the amount of compensation for disfigurement specified in this section on July 1, 2008, and each July 1 thereafter by the percentage of adjustment made by the director to the state average weekly wage pursuant to section 8-47-106.

As found by the Judge, claimant's injury resulted in scarring consisting of a 12-inch long by ½-inch wide scar over his lumbar spine. Claimant's disfigurement is serious and permanent bodily disfigurement, which is normally exposed to public view. Considering the size, placement, and general appearance of claimant's scarring, the Judge finds claimant entitled to disfigurement benefits in the maximum amount of $4,000.

The Judge concludes that Knack should pay claimant an additional, lump-sum award in the amount of $4000 for his disfigurement.

F. Posting of Surety Bond:

Pursuant to W.C.R.P., Rule 9-5 (A), the Subsequent Injury Fund Unit of the Division of Workers' Compensation is designated as trustee for purposes of §8-43-408(2), *supra*. When the provisions of §8-43-408 apply, an administrative law judge or the Director shall compute, using the best information available, the present value of the total indemnity and medical benefits estimated to be due on the claim. The employer shall provide the funds so ordered by check within ten days of the order. The trustee shall pay an amount to bring the claim current, and continue to pay the claimant benefits on a regular basis in an interval and amount ordered by an administrative law judge or the Director. The trustee shall also make payments for medical services consistent with the order of an

administrative law judge or the Director. Any interest earned shall accrue to the benefit of the trust. The amount ordered to be placed in trust can be amended from time to time, and any excess amount shall be returned to the employer. The trustee shall make such disbursements as appropriate so long as funds are available, and shall not be subject to penalties or any other actions based on administration of the trust. Rule 9-5 (B) states, "In the alternative to the establishment of a trust, the employer shall provide a bond as set forth in §8-43-408(2), C.R.S. In the event that the employer fails to bring the claimant current with medical benefits and indemnity benefits owed, or fails to continue to pay the claimant such benefits on a regular basis in an interval and amount ordered by an administrative law judge or the director, the surety will be obliged to do so. The surety's liability to fulfill such obligation shall extend to the amount fixed, which can be amended by order, and exist in the form prescribed by the Director.

As found, Knack is liable to Littleton Adventist Hospital, Dr. Prall, and providers to whom Dr. Prall referred claimant for medical benefits, currently estimated at $25,000. Knack currently is liable to claimant for TTD benefits in the rough amount of $8,000 and disfigurement benefits in the amount of $4000. The Judge concludes that Knack should post a bond in the aggregate amount of $37,000 to secure claimant's medical benefits and compensation benefits.

ORDER

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

1. Knack shall pay the medical bills, according to fee schedule, for treatment claimant received from Littleton Adventist Hospital, Dr. Prall, and providers to whom Dr. Prall referred claimant.

2. Knack should pay claimant TTD benefits in the weekly amount of $400, from January 16, 2009, ongoing until terminated under the Act.

3. Knack shall pay claimant an additional, lump-sum award in the amount of $4000 for his disfigurement.

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

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

6. In lieu of payment of the above compensation and benefits to the claimant, the Knack shall:

a. Deposit the sum of $37,000 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; or

b. File a bond in the sum of $37,000 with the Division of Workers' Compensation within ten (10) days of the date of this order:
   (1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or
   (2) Issued by a surety company authorized to do business in Colorado.

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

7. **IT IS FURTHER ORDERED:** That Knack shall notify the Division of Workers' Compensation of payments made pursuant to this order.

8. **IT IS FURTHER ORDERED:** That the filing of any appeal, including a petition to review, shall not relieve Knack of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), *supra*.

DATED: June 8, 2009

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-785-536

ISSUES

The issue for determination is compensability and medical benefits.

FINDINGS OF FACT

1.Claimant slipped and fell on April 2, 2008. At the time of the fall, Claimant was carrying documents from the office where she works to another office. She was performing a duty of her employment for Employer.

2.The fall occurred outside Room 394, a patient room. Near each patient room there was a hand disinfectant dispenser. The floor had a terrazzo surface that shined. Claimant had just passed a nurses station. Ahead of her was a room and a hallway used by janitors. Further ahead of her was a housekeeping cart that often contained water or cleaning compounds.

3.In an Injury Report Claimant completed, she reported, "I don't know why it happened. It could have been something on the floor." Claimant testified at hearing that she "believed" that she had slipped on something on the floor. Claimant had walked down the hall where she fell many times before and had not fallen. These statements of Claimant are credible. There could have been water or another liquid on the floor that caused the fall. Claimant believes that there was.

4.Claimant did not see anything on the floor where she slipped. There were no stains on her clothes after the fall. When she fell, papers that she was carrying flew out of her hand. Claimant gathered up the papers and did not see that there were any stains on the papers.

5.When she fell Claimant caught herself with her left arm and banged her left knee and elbow. Claimant did not need and did not seek immediate medical attention.

6.Claimant was examined by her personal physician, Dr. Richardson, on July 22, 2008. The visit was a routine examination not related to her fall on April 2, 2008. Claimant, on her history form, noted pain in knees, hips, and left little toe. Dr. Stahl, on the same form, noted left shoulder pain. In his report, Dr. Richardson noted that Claimant complained of anterior left shoulder pain since the fall at work. Dr. Richardson noted that Claimant had a possible impingement. He gave her a handout with home exercises.

7.Claimant's left shoulder pain increased and Claimant sought medical care. Claimant was examined by Eric Stahl, M.D. He ordered an MRI. On December 16, 2008, after reviewing the MRI, Dr. Stahl stated that Claimant suffered from an impingement syndrome and a partial thickness rotator cuff tear of the left shoulder. He stated that it was his opinion that the tear was caused by the fall in April 2008. Dr. Stahl recommended surgery.

8.Claimant was examined at Concentra by Yvonne M. Nelson, M.D., on January 9 and January 28, 2009. Dr. Nelson noted that "causality is in question" and stated that she would further review medical records. She noted the "long duration between injury and complaint of pain." In a note of February 3, 2009, Dr. Nelson stated that she still had not received notes from Claimant's primary care physician.

9.Claimant had received treatment for right shoulder pain in 2005 and 2006. The pain came on insidiously. The treatment was for impingement or AC joint arthritis. The treatment was not for a rotator cuff tear.

10.It does not appear that Dr. Stahl was aware of Claimant's previous right shoulder problem that arose insidiously. Despite that, the opinion of Dr. Stahl that Claimant's impingement syndrome and rotator cuff tear in 2008 was the result of the fall at work is credible and persuasive.

CONCLUSIONS OF LAW

To establish a compensable claim, a claimant must prove that the injury "arose out of" her employment. Sections 8-41-301(1)(b) & (c), C.R.S. An injury arises out of employment if it is sufficiently related to the conditions and circumstances under which the employee generally performs her job functions such that the activity may reasonably be characterized as an incident of the employment. *Price v. Industrial Claim Appeals Office,* 919 P.2d 207 (Colo. 1996). There is no presumption that a fall is compensable and a truly unexplained fall at the workplace has been determined not to be compensable. *See Rice v. Dayton Hudson Corporation,* W. C. No. 4-386-678 (ICAO, July 29, 1999) (claimant's unexplained fall was not compensable because it could not be associated with the circumstances of the claimant's employment nor any preexisting idiopathic condition) *See also, Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Ultimately, the resolution of this issue is one of fact to be determined by an examination of the totality of the circumstances. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo.App. 1995); *See Aguilar v. Checks Unlimited,* W.C. 4-761-110 (ICAO, April 30, 2009).

The facts here are similar to the facts in *Finn, supra.* In *Finn,* the claimant was found lying on the floor at his place of employment suffering from a fractured skull and numerous bruises and abrasions. The claimant "surmised that he had been struck by a forklift," but he did not know what happened and could not produce evidence of what occurred. The referee concluded the claimant failed to prove his injuries arose out of employment and was upheld on appeal. Similarly here, Claimant has pointed to possible sources of water or other material that may have been present and that may have made the floor slick, but Claimant does not know what caused the fall and could not produce evidence that anything was on the floor that could have contributed to the injury.

Claimant's fall is unexplained. Claimant has failed to establish by a preponderance of the evidence that her injury arose out of her employment. The claim is not compensable.

ORDER

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

DATED: *June 17, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-785-852

ISSUES

➢Did Claimant suffer a compensable injury arising out of and in the course of her employment with employer?

➢If Claimant did suffer a compensable injury, what, if any, medical benefits are reasonable, necessary and related to her industrial injury?

➢If Claimant did suffer a compensable injury, is she entitled to temporary disability benefits?

➢If Claimant did suffer a compensable injury, what is Claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant was employed with employer as a pick up courier/ delivery driver. Claimant has been employed with employer since 2006. According to Claimant's testimony, Claimant worked thirty to thirty-five (30-35) hours per week at an hourly rate of $14.16 per hour.

2. Claimant has a history of prior low back problems. On October 8, 2008, Claimant reported to Dr. Quackenbush, her primary care physician, with complaints of some tingling sensation in her legs from the knees down that comes on after walking. Claimant also reported that her back had been a little bit sore. Claimant returned to Dr. Quackenbush on October 21, 2008 with continued complaints of back pain and paresthesias and lingling in the latter aspect of her leg descending down into her foot. Claimant denied any specific injury to her back, but reported her back would become a bit sore after she lifted. Dr. Quackenbush recommended Claimant set up an appointment with an orthopedic doctor and referred Claimant to Dr. Clifford.

3. Claimant was initially evaluated by Dr. Clifford on November 6, 2008 and reported complaints of right buttock pain and tingling in the lower extremities. Claimant had very mild low back pain and reported most of her trouble being leg pain. Claimant reported her back pain to be 2/10 and her leg pain to be a 4/10. Claimant reported standing and walking aggravated her symptoms. Dr. Clifford referred the Claimant for an MRI that took place on November 10, 2008. The MRI revealed degenerative facet disease at the L4-L5 level with mild to moderate stenosis and facet and ligament hypertrophy at the L3-4 level. Claimant returned to Dr. Clifford on November 26, 2008 for MRI review. Claimant rated her back pain as a 1/10 and her leg pain as a 2/10. Dr. Clifford advised Claimant that her MRI showed a Grade I spondylolisthesis of L4 on L5. Dr. Clifford referred Claimant for physical therapy and noted that if Claimant's condition worsened, he would consider surgical intervention. Dr. Clifford testified in his deposition that as of November 26, 2008, Claimant's subjective symptoms were mild enough that he would recommend conservative treatment before considering surgical intervention.

4. Claimant testified that on December 2, 2008 she began work at 2:30 p.m. and did not have any noticeable back pain. Claimant was picking up several boxes weighing anywhere from six (6) to eight (8) pounds. Claimant testified that she used proper lifting technique while lifting the box, but still experienced sharp pains down her back into her legs. Claimant reported the lifting incident to her supervisor "Chad" immediately, but did not request medical treatment. Claimant testified that she had a previously scheduled physical therapy appointment for the following day and simply attended the physical therapy appointment. Claimant testified that her symptoms improved with the physical therapy. Employer filled out accident reports on December 4, 2008 documenting the lifting incident, but did not refer Claimant for medical care.

5. Claimant returned to Dr. Quackenbush for unrelated problems on January 27, 2009 and February 4, 2009. Claimant saw Dr. Quackenbush for her back complaints on February 13, 2009. Claimant reported to Dr. Quackenbush that she noticed a significant worsening of her back pain while lifting a box at work. Claimant provided Dr. Quackenbush with a history of lifting a box at work and experiencing a sudden sharp pain in the right lower back that radiated down to her legs. Claimant reported her back pain gradually worsened to the point that she had difficulty walking over the course of that day. Claimant reported her back pain was worse when she tries to lift the usual things at work. Dr. Quackenbush provided Claimant with work restrictions for the first time on

February 13, 2009 and referred the Claimant for another MRI. Claimant testified that she has not worked since Dr. Quackenbush provided work restrictions on February 13, 2009. Claimant underwent her second MRI on February 16, 2009 that revealed a right-sided facet cyst at the L4-5 level. Dr. Clifford testified that the right-sided facet cyst was a new finding as compared to the November 10, 2008 MRI.

6. Claimant returned to Dr. Clifford on February 19, 2009 and reported an increase in her back and leg pain over the past 2 to 3 weeks. Claimant reported back pain as a 2/10 and leg pain as a 3/10 but reported her biggest problem as being unable to do the activities she wants to do. Dr. Clifford noted that the recent MRI revealed the L4-5 stenosis and spondylolisthesis and a facet cyst. Dr. Clifford recommended non-operative treatment of right-sided L4-L5 and L5-S1 transforaminal injections for diagnostic and therapeutic purposes. Claimant returned to Dr. Clifford on March 2, 2009 and noted that the planned injections had to be postponed due to billing issues. Dr. Clifford noted that Claimant's symptoms began in November, but there was an issue about a work injury that she sustained in early December. Dr. Clifford noted that Claimant had a predisposing factor of lumbar stenosis and lumbar spondylolisthesis at the L4-L5 level and was making excellent progress with non-operative treatment and then had a significant setback or exacerbation that was directly related to her work related injury.

7. Claimant was referred for an IME with Dr. Douglas Scott on April 21, 2009 by employer. Claimant reported to Dr. Scott an accident history of picking up packages weighing between six (6) and (8) pounds by bending both knees and holding the packages close to her body. Claimant reported an immediate onset of pain in her lower back and down her right leg. Claimant reported to Dr. Scott continued severe pain in the right buttocks and pain that radiates down the right leg to her right foot. Dr. Scott noted that Claimant had a pre-existing history of low back and right leg pain in November, 2008. Dr. Scott noted that Claimant's history of the onset of back pain did not include a mechanism of injury of forward bending. Dr. Scott noted that Claimant had a history of a pre-existing anterolisthesis L4-L5 to a mild Grade I degree and opined that the facet cyst was probably a natural progression of her degenerative facet joint disease with stress placed upon the faced by her pre-existing anterolisthesis at L4-L5. Dr. Scott testified at hearing that Claimant's description of the lifting incident would not cause the facet cyst to develop. Dr. Scott further testified that if Claimant did experience pain during the lifting incident, it was

possible that she had an aggravation of her pre-existing condition, but the aggravation would have stabilized and Claimant would be back at baseline before her condition worsened in February, 2009, causing Claimant to seek additional treatment. Dr. Scott also testified that while the L4-L5 facet cyst was not present in the November 10, 2008 MRI, there were indications on the MRI of a possible site for the future facet cyst. Dr. Scott testified that the facet cyst would develop because of inflammation on the facet joint, and that it was unlikely that Claimant's mechanism of injury, as described by Claimant, would have caused the inflammation.

8. The ALJ finds the opinions of Dr. Clifford and Dr. Quackenbush more persuasive than the opinions of Dr. Scott. The ALJ finds that the Claimant provided a consistent accident history of a lifting incident to her employer immediately after the December 2, 2008 accident, and credibly testified at hearing that she suffered an immediate increase in her pre-existing symptoms. The ALJ finds that the incident of December 2, 2008 was significant enough that Claimant immediately reported the incident to her employer. The ALJ finds the opinions of Dr. Clifford and Dr. Quackenbush persuasive that the December 2, 2008 incident caused an aggravation of Claimant's pre-existing condition. The ALJ finds the opinion of Dr. Clifford persuasive that the facet cyst that developed between the November 2008 MRI and February 2009 MRI was at least aggravated or accelerated by the December 2, 2008 lifting incident.

9. Wage records entered by Respondents document that Claimant has earned $6049.27 in the thirteen (13) weeks prior to her injury. Based upon the wage records, the ALJ finds Claimant's AWW is $465.33 ($6,049.27 / 13).

10. The ALJ finds that Claimant has shown that it is more likely true than not that she suffered a compensable injury arising out of and in the course of her employment on December 2, 2008. Claimant has shown that it is more likely true than not that the medical treatment she has received from Dr. Quackenbush beginning February 13, 2009 in reasonable, necessary and related to her industrial injury. Claimant has shown that it is more likely true than not that the medical treatment she has received from Dr. Clifford beginning February 19, 2009 is reasonable, necessary and related to her industrial injury. Claimant has shown that it is more likely true than not that her wage loss beginning February 13, 2009 is related to her industrial injury and the work restrictions provided by Dr. Quackenbush.

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 leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4.As found, Claimant has shown by a preponderance of the evidence that she suffered an industrial injury arising out of and in the course of her employment on December 2, 2008. Claimant's lifting boxes resulted in an immediate onset of low back pain that aggravated or accelerated her pre-existing L4-L5 spondylolisthesis and resulted in the facet cyst developing at the L4-L5 level. The ALJ finds it significant that the lifting incident was significant enough that Claimant immediately reported it to her employer and finds that the structural changes between Claimant's November 10, 2008 MRI and the February 16, 2009 MRI were caused by the lifting injury.

5. 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 she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P. 2d 542 (Colo. 1995). 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).

6.As found, Claimant's December 2, 2008 injury led to Dr. Quackenbush to provide Claimant with work restrictions as of February 13, 2009. The ALJ finds Claimant's testimony credible that she has not worked since February 13, 2009. As found Claimant is entitled to TTD benefits based on an AWW of $465.33 from February 13, 2009 until cut off by statute or rule.

7. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-42-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once Respondents have exercised their right to select the treating physician, Claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). The right to select the treating physician, however, passes to Claimant where the employer fails to designate a physician willing to treat Claimant in the first instance. *See Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Section 8-43-404(5), C.R.S. now requires the employer to provide an injured employee with a list of at least two physicians or medical providers willing to treat Claimant.

8. As found, Claimant's treatment with Dr. Quackenbush beginning February 13, 2009 is found to be reasonably necessary to cure and relieve Claimant from the effects of her work related injury. Respondents appear to agree that if the injury is compensable, Dr. Quackenbush would be the appropriate authorized provider. Therefore, as found, Dr. Clifford's treatment as of February 19, 2009 represents a referral from the authorized provider, and, as

found, Dr. Clifford's treatment is deemed to be reasonably necessary to cure and relieve Claimant from the effects of her work related injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant TTD benefits based upon an AWW of $465.33 beginning February 13, 2009 until terminated by law, subject to statutory offsets and/or credits.

2. Respondents shall pay for medical care that is reasonably necessary to cure and relieve Claimant from the effects of her industrial injury provided by Drs. Quackenbush and Clifford.

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

All matters not determined herein are reserved for future determination.

DATED: June 29, 2009

Keith E. Mottram
Administrative Law Judge

STATE OF
COLORADO

OFFICE OF ADMINISTRATIVE COURTS
W.C. No.
4-790-320

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 4, 2009 in Denver, Colorado. The hearing was digitally recorded (reference: 6/04/09, Courtroom 3, beginning 1:36 PM and ending 2:10 PM).

ISSUES

The issues to be determined by this decision concern compensability, and medical benefits (reasonably necessary and authorized).

FINDINGS OF FACT

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

Notice

1. On April 27, 2009, the Claimant, by and through counsel, mailed an Application for an Expedited Hearing with the Office of Administrative Courts. Copies of the Application for an Expedited Hearing were also mailed to the Employer at 960 Vallejo St., Denver, CO 80204, and Employers Compensation Insurance Company at P.O. Box 539004, Henderson, NV 89053-9004.

2. On May 1, 2009, the Claimant's attorney received correspondence from Employers Compensation Insurance Company at P.O. Box 539004, Henderson, NV 89053-9004.

3. On May 8, 2009, the Office of Administrative Courts mailed a Notice of Expedited Hearing to the Claimant's attorney and to Employers Compensation Insurance Company at P.O. Box 539004, Henderson, NV 89053-9004.

4. The Notice of Expedited Hearing was not returned by the U.S. Postal Service as undeliverable.

5. There is no indication that any lawyer or law firm had entered an appearance on behalf of the Employer before the date of the hearing on June 4, 2009.

Compensability

6. The Claimant was born on May 22, 1976. He worked as a truck driver for the Employer and had worked in that capacity for approximately two months prior to being injured.

7. On a night between Thanksgiving and Christmas 2008, the Claimant drove a truck owned by the Employer into a loading dock. The loading

dock door was closed. The Claimant jumped into the dock in order to lift open the door and enter the warehouse.

8. When the Claimant jumped into the dock, he felt pain in his back that he described as similar to a strained back or a pulled muscle.

9. About two weeks after the injury, the Claimant reported the injury to his Employer. The Employer's representative did not tell him to seek medical attention nor make any medical referral.

10. During the month of January 2009, the Claimant attempted to treat his pain himself by taking Advil. He experienced back pain and numbness in his left leg down to his foot.

Medical

11. On February 7, 2009, the Claimant sought medical treatment at Piney Creek walk-in clinic in Aurora, Colorado, because his pain had not subsided and he could no longer stand the pain. The doctor at the clinic gave him pain medication and a doctor's note excusing him from work for one week. The Claimant took the medications for one week, but his pain became worse.

12. On February 18, 2009, the Claimant sought medical treatment with J. Scott Bainbridge, M.D., of Denver Spine in Greenwood Village, Colorado. The Claimant was assigned to complete physical therapy two to three times per week for two weeks, was given four milligrams of Dexamethasone, was prescribed Vicodin, and was scheduled for a follow-up appointment in one week.

13. The Claimant informed his Employer that he was seeing Dr. Bainbridge for his injury. The Employer did not refer the Claimant for medical treatment.

14. On February 24, 2009, the Claimant underwent an MRI (magnetic resonance imaging), and it revealed an asymmetric left posterolateral disc pathology at the L4-5 level, which mildly flattens the left L5 nerve root against its posterior elements without producing significant left neuroforaminal narrowing.

15. On March 19, 2009, the Claimant received a lumbar transforaminal epidural steroid injection. After the injection, the Claimant's pain decreased for approximately one week, but then his pain returned to the baseline level, prior to the injection.

16. On April 6, 2009, the Claimant had a follow-up appointment with Dr. Bainbridge. Dr. Bainbridge referred the Claimant to Dr. Sanjay Jatana, M.D., to determine whether he would be a good candidate for surgery and what type of

operation the Claimant would need for his condition. The Claimant received refills for pain medication and was told to continue a home exercise program.

17. On April 16, 2009, the Claimant received another lumbar transforaminal epidural steroid injection for pain. After the injection, the Claimant's pain decreased. The pain increased after about two days.

18. On April 20, 2009, the Claimant sought medical treatment from Dr. Jatana. Dr. Jatana recommended microdiscectomy surgery for the Claimant.

Ultimate Findings

19. The ALJ finds the Claimant's testimony credible and consistent with the medical records and reports of his treating physicians.

20. The ALJ finds that the Claimant's evidence is essentially un-contradicted.

21. The Claimant has established that it is more reasonably probable that the loading dock incident described in paragraph two and three above, caused the injury for which medical treatment was required and for which surgery was recommended. Therefore, the Claimant has proven, by a preponderance of the evidence that he sustained a compensable injury to his back on or about November/December 2008. Additionally, the Claimant has proven by a preponderance of the evidence that the Employer did not make any specific medical referral once the Claimant reported the work-related nature of his back injury in January 2009. Consequently, the Claimant sought emergent care, and then the Claimant made a first selection of Dr. Bainbridge, who then referred him to Dr. Jatana for medical treatment and potential surgery. Alternatively, in February 2009 the Claimant reported to the Employer that he was seeing Dr. Bainbridge, and the employer did not give him a referral for medical treatment. Therefore, the Employer's silence served as its acquiescence for the Claimant seeking medical treatment from Dr. Bainbridge. Consequently, the Claimant has proven that Dr. Bainbridge and Dr. Jatana were within the authorized chain of referrals and within the natural progression of medical care.

CONCLUSIONS OF LAW

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

a. As found, all notices were sent to Employers Compensation Insurance Company at its last known address of record, as verified by Ms. Janice Greening, Esq. in her sworn testimony, and not returned by the U.S. Postal Service as undeliverable, there is a legal presumption of receipt, warranting a

finding of receipt by Employers Compensation Insurance Company. *See Olsen v. Davidson,* 142 Colo. 205, 350 P. 2d 338 (1960). *See also Campbell v. IBM Corp.,* 867 P. 2d 77 (Colo. App. 1993).

b. 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). As found, the medical opinions in the evidence on reasonable necessity are essentially un-contradicted. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. The Claimant's testimony is both credible and also is essentially un-contradicted.

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Claimant has sustained his burden with respect to compensability, authorization of medical care and future surgery, and the causal relatedness of that medical care to the compensable back injury of November/December 2008.

d. As found, after reporting the work-related nature of his injury, the Claimant was never informed where to receive medical care and treatment for his November/December 2008 injury. If the services of a physician are not offered when the employee notifies the employer of an occupational injury, the employee is permitted to select the treating physician. § 8-43-404 (5)(a), C.R.S. (2008). If the employer does not select the physician, the employee's right to pick the

treating doctor becomes vested. *Brickell v. Business Machines, Inc.*, 817 P.2d 536 (Colo. App. 1990). A medical emergency allows an injured worker the right to obtain treatment without undergoing the delay inherent in notifying the employer and awaiting approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing care. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, when the Claimant notified his Employer of his injury in January 2009, the Employer did not provide a referral for medical treatment. The Piney Creek walk-in clinic from which the Claimant sought medical treatment on February 7, 2009 qualifies as emergent care. After seeking emergent care, the Claimant exercised his right to pick the treating doctor, and he selected Dr. Bainbridge. Also, the Claimant notified the Employer that he was seeing Dr. Bainbridge, and the Employer did not provide a referral for medical treatment. Dr. Bainbridge referred the Claimant to Dr. Jatana. Accordingly, the medical providers that treated the Claimant for the November/December 2008 work-related injury are authorized.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant's November/December 2008 injury is compensable.

B. Respondents shall pay all of the costs of medical treatment and surgery for the Claimant's back injury, rendered after February 7, 2009 at the hands of Piney Creek walk-in clinic, Dr. Bainbridge, and Dr. Jatana, subject to the Division of Workers' Compensation Medical Fee Schedule.

C. The pre- and post-surgical treatment that has been and will be provided to the Claimant was, and is, reasonably necessary and causally related to the compensable injury.

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

DATED this _____ day of June 2009.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge