OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-760-465

STIPULATIONS

1. At hearing, the parties stipulated that Claimant's average weekly wage was $1,019.14.

ISSUES

1. Whether Claimant proved by a preponderance of the evidence entitlement to temporary disability benefits beginning on December 19, 2007 and ongoing.
2. Whether Respondents proved by a preponderance of the evidence that Claimant was responsible for his termination from employment.

FINDINGS OF FACT

1. Claimant was hired to work on oil derricks beginning in early July 2007. The crews typically work a "tour" of seven straight 12 ½-hour shifts, followed by seven days off.

2. Claimant reported that on November 29, 2007 – the second day of a tour – he slipped and fell while walking on a catwalk, injuring his right shoulder and elbow. Respondents subsequently admitted liability on a "medical only" basis.

3. Claimant initially sought treatment from Larry Welling, M.D., at Reliance Medical Group, LLC, on December 4, 2007. Claimant reported that he landed on his right shoulder and elbow and that he may have struck a pipe in the fall. Claimant was "able to shake it off" and he continued to work. Claimant had been utilizing over-the-counter analgesics with slight relief of symptoms. Dr. Welling obtained x-rays of the right shoulder, which he read as unremarkable. Dr. Welling released Claimant to "full duty" with instructions to limit use of the right arm and "Use common sense to avoid further injury".

4. Claimant did continue to work his regular duties, completing the tour on December 4, 2007. Claimant's next tour was scheduled to begin on December 12, 2007.

5. Claimant followed up with Dr. Welling on December 11, 2007 with complaints of worsened pain and new symptoms. Dr. Welling assessed persistent right shoulder pain and right brachial plexus injury. Dr. Welling prescribed medications and placed Claimant on light duty. Dr. Welling filled out a Reliance Medical Group, LLC "Return To Work" (RTW) form. The RTW indicated that Claimant was released to partial duty on December 11, 2007 with restrictions of 5-pound lift with the right arm and to avoid overhead reaching, pushing, pulling.

6. Also on December 11, 2007, Respondent-Employer provided to Claimant a bona fide offer of light duty employment. The light duty program conformed to Dr. Welling's

December 11, 2007 work restrictions. The duties of the program included "chores" ranging from sedentary office work, to monitoring and greasing machinery, and cleaning. The position was to begin on December 11, 2007 and continue until Claimant was released to full-duty. Claimant signed and accepted the bona fide offer on December 11, 2007.

7. Claimant began a tour working modified duty on December 12 and completed the tour on December 18, 2007.

8. Upon his return from the rig on December 18, 2007, Claimant saw Ken Stradling, M.D. (a colleague of Dr. Welling at Reliance Medical Group). Claimant complained of worsened pain and requested analgesics. Dr. Stradling filled out an RTW, retaining the 5-pound lifting restrictions and further restricting Claimant from repetitive use of the right arm or hand for pushing or pulling, as well as imposing a 20-pound "altogether" lifting restriction.

9. Claimant saw Cyril A. Bohachevsky, M.D. on December 21, 2007, on referral by Dr. Welling for NCS/EMG. Dr. Bohachevsky interpreted the study results as electrophysiologically normal, with no evidence of cervical neuropathy and no evidence of right median or ulnar neuropathy.

10. Claimant's next seven–day tour was scheduled to begin on or about the evening of December 26, 2007 through January 2, 2008. Although Claimant had accepted Patterson-UTI's December 11, 2007 bona fide offer of light duty employment and had commenced work under that offer on December 12, 2007, Claimant failed to appear and work his shift beginning on December 26, 2008 and thereafter for the tour through January 2, 2008.

11. Claimant advanced several grounds for failing to return to work for the shift beginning December 27, 2007. He variously alleged that he did not report for duty because he was asked to perform work beyond his modified duty restrictions; that his coworkers did not come to pick him up; and that he thought he had been fired.

Adherence to Modified Duty Restrictions

12. Patterson-UTI employee Danny Juckes credibly testified that the light duty job offered to Claimant on December 11, 2007 would still encompass the Claimant's restrictions. Mr. Juckes testified that it was his job to make certain that injured workers' supervisors were aware of work restrictions, and that such restrictions were accommodated. The modified employment was, therefore, flexible, allowing the Employer to temper the Claimant's activities to accommodate any change of restrictions. Mr. Juckes testified to his impression that Claimant's failure to show up for modified duty was based on the fact that Claimant "just didn't want to work."

13. Patterson-UTI employee Sean Moffitt credibly testified that he had personally spoken with the driller and the tool pusher on Claimant's crew and went over the work

restrictions with them. Mr. Moffitt confirmed both the driller (Mr. Robison) and the tool pusher said they were following all Claimant's work restrictions.

14. Mr. Juckes testified that he had personally spoken with the rig manager, William Anderson, regarding Claimant's light duty restrictions. Mr. Juckes also testified that he had personally spoken with Claimant on several occasions regarding the necessity that he follow the work restrictions. Mr. Juckes stated he gave Claimant numerous resources in case he had issues, including: Mr. Juckes' business card with personal cell number; speaking with Mr. Robison; speaking with the rig manager; contacting Gary Miller, the Area Manager; and contacting Mr. Moffitt.

15. Patterson-UTI employee Claude McKenzie credibly testified that he personally observed Claimant working light duty tasks around the rig and did not observe him doing heavy lifting. Mr. McKenzie testified that on one occasion, he had asked Claimant to help with an air tugger, and that Claimant expressly declined to assist him, stating "he wasn't allowed to be on the drilling floor because of his light duty."

16. Patterson-UTI employee Randy Robison was the Claimant's immediate supervisor on the rig. Mr. Robison credibly testified that he gave light-duty work to Claimant, including "picking up trash, sorting the odds and ends out on the rig like nuts, bolts, fittings", but that Claimant's work performance was poor.

Transportation to the Rig

17. Patterson-UTI employees, including Claimant, were provided with training and review of Patterson-UTI's policies and procedures. Patterson-UTI had a written policy in place that every employee is responsible for transportation to the rig for work.

18. Mr. Robison credibly testified that he had gone to Claimant's residence as usual when the new tour started the last week of December 2007, that he waited in the driveway as usual, and that Claimant did not emerge from his residence. Mr. Robison testified that he then called Claimant on his cell phone, spoke with Claimant, and told him that he was to show up for work later that day. Claimant did not do so. Mr. Robison testified that he returned to Claimant's residence the next day to pick him up, but that Claimant again did not emerge. Mr. Robison testified that he attempted to call Claimant on his cell phone, but was only able to leave a voice message, again informing Claimant he was to come to work.

19. Mr. McKenzie confirmed Mr. Robison's testimony. Mr. McKenzie testified that he often drove the truck to pick up Claimant. Mr. McKenzie recalled a time shortly after Christmas 2007, and after Claimant had been injured, when he went with Mr. Robison to pick up Claimant but "no one was home." Mr. McKenzie recalled going to Claimant's house as usual, but no one came out. Mr. McKenzie testified that he knocked on a window at Claimant's home, with no response. Mr. McKenzie testified that he witnessed Mr. Robison call Claimant again after the second time they tried to pick Claimant up the next day, with no response.

20. Claimant testified, “My responsibility is from my house to the location or designation where they asked me to meet them.” Claimant also testified there had been other times when he had to get himself to the rig. Claimant testified he had performed a “dry watch” in September 2007 and that he had paid a friend to drive him to and from the rig. Claimant’s girlfriend, Sherri Bayard, testified that she had driven Claimant to the rig for the dry watch. In either case, Claimant was able to make arrangements for transportation to and from the rig for the dry watch.

Claimant’s Belief that He had been Fired

21. Claimant testified that when he left his shift on December 18, 2009, he was “under the assumption, pretty much, that – with all the fighting and stuff, that I was going to be replaced.” Claimant testified that he believed he had been fired.

22. Mr. Robison’s testimony confirmed he had issues with Claimant’s job performance during the week of December 12 through December 18, 2007. However, Claimant testified that at no time on December 18, 2007 did any employee of Patterson-UTI tell him that he was fired, terminated, or that he should not show up for his next shift. Claimant’s personal belief that he had been “canned” was simply that, his personal belief.

Termination Notice

23. Patterson-UTI Safety Director, Leon Stanley, credibly testified that Patterson-UTI has procedures in place for termination of employees. Mr. Stanley testified that upon being notified an employee was missing light duty work, he would send a letter informing that employee that if they failed to report for work within three (3) days, they would be terminated.

24. On January 10, 2008, Respondent-Employer mailed a letter to Claimant via certified mail, with Mr. Stanley’s signature, informing Claimant that the light duty position he had been working would remain open for three days and that failure to report for work within that period would be interpreted as an indication of voluntary termination of employment.

25. This letter was sent to Claimant’s address provided by him to Patterson-UTI on his application for employment. Claimant had also provided a second address on his application for employment for a post office box number in Ignacio, Colorado.

26. An individual named B. Villanueva signed for the letter on January 15, 2008. Patterson-UTI received no contact from Claimant by January 21, 2008 and Claimant was thus terminated. Under the totality of the circumstances Claimant had significant control over the events that lead to his termination. Thus, Claimant was terminated for cause effective January 21, 2008.

27. Although Claimant argues that January 10, 2008, letter was insufficient to comply with an offer of modified employment, it did not need to comply. This letter told the Claimant that he needed to report for work not the parameters of the light duty position. If there were any confusion on Claimant's part, the letter specifically states that he is to call the Safety Coordinator for further information.

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. In order to be entitled to temporary disability benefits, a claimant must have a disability caused by an industrial injury lasting three or more regular working days' duration. C.R.S. § 8-42-105(1).

5. 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. C.R.S. § 8-42-105(4). The term "responsible" indicates "fault"; therefore, the statute requires that a claimant to have performed (or failed to perform) some volitional act or exercised a degree of control over the circumstances resulting in the termination. *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo.App. 2002).

6. On December 11, 2007, Respondent-Employer provided to Claimant a bona fide offer of light duty employment. The light duty program conformed to Dr. Welling's De-

cember 11, 2007 work restrictions. Claimant signed and accepted the bona fide offer on December 11, 2007. Claimant worked for full pay through December 18, 2007. Therefore, Claimant has no entitlement to temporary disability benefits from the date of injury through December 18, 2007. Claimant seeks entitlement to temporary total disability benefits beginning on December 19, 2007 and ongoing.

7. Claimant advanced several grounds for failing to return to work for the shift beginning December 27, 2007. He variously alleged that he did not report for duty because he was asked to perform work beyond his modified duty restrictions; that his driller did not come to pick him up; and that he thought he had been fired. Claimant's arguments are contradictory and therefore not credible.

8. The totality of the pertinent medical evidence indicates that Claimant was on restrictions and able to perform modified duty. Claimant's assertion that he did not report for duty because he was asked to perform work beyond his modified duty restrictions was further contradicted by the testimony of numerous Patterson-UTI employees, who credibly testified that Claimant's work restrictions were and would be accommodated, that the Claimant himself had asserted his light duty restrictions as a basis to refuse to perform certain tasks, and that Claimant had numerous resources to turn to in case he felt he was being asked to work beyond his restrictions.

9. Claimant has failed to establish by a preponderance of the evidence that he missed three consecutive days of work because of a total disability. Claimant may have missed several consecutive weeks of work but the evidence is not sufficient to establish that Claimant lost the time due to anything other than a misunderstanding. The testimony of Patterson-UTI employees contradicts Claimant's assertion that transportation to the rig was not available. Mr. Robison and Mr. McKenzie credibly testified that they had attempted, in their usual fashion, to pick Claimant up for work at his home on two consecutive days, including telephone calls to the Claimant, but that the Claimant did not appear to accept the ride to work. Even if one were to assume Mr. Robison and Mr. McKenzie did not attempt to pick Claimant up, Claimant failed to persuade the ALJ that he could not have secured other transportation to the rig. Claimant testified he had been able to secure transportation to and from work and to and from medical appointments on a regular basis.

10. Claimant's testimony that when he left his shift on December 18, 2007, he was under the assumption that he was fired is inconsistent with his testimony that he was not picked up for the first two days of the last December 2007 tour. Indeed, if the Claimant was truly under the impression that he had been terminated, he would not have anticipated that his co-workers would have picked him up. Likewise, Claimant's testimony that he was under the assumption that he was fired is inconsistent with his testimony that was unable to perform modified duty. Claimant's testimony is further contradicted by Mr. Robison's testimony that at no time on December 18, 2007 did he tell Claimant he was fired, terminated, or that he should not show up for his next shift. Although the evidence supports that Mr. Robison was displeased with Claimant's performance, the evidence supports that Mr. Robinson's heated communication with

Claimant was meant to motivate Claimant to perform modified duties with a reasonable degree of efficiency.

11. The evidence is insufficient to establish that there was a wage loss subsequent to December 18, 2007 that was attributable to Claimant's partial disability.

12. As found, Respondent-Employer served Claimant a notice on January 10, 2008 (via certified mail) that the light duty position would remain open for three days and that failure to report for work within that period would be interpreted as an indication of voluntary termination of employment. Claimant did not respond to the January 10, 2008, letter. Claimant was subsequently terminated per Patterson-UTI's policy for failure to show up for work after the termination letter was sent. Although Claimant argues that this letter was insufficient to comply with an offer of modified employment, it did not need to comply. This letter told Claimant that he needed to report for work, it did not define the parameters of the light duty position. If there were any confusion on Claimant's part, the letter specifically stated that he was to call the Safety Coordinator for further information.

13. Claimant has not demonstrated that he suffered a disability that prevented him from performing the duties of modified employment that he had accepted.

14. Respondents have demonstrated that Claimant failed to report to work and failed to respond to Respondents' notice of prospective termination. Claimant had an opportunity to present to work for the last tour in December 2007, and had an opportunity to respond to the notice of prospective termination, yet Claimant failed to take advantage of those opportunities. Therefore, Claimant exercised a degree of control over his termination.

15. As Claimant's termination was for cause, Claimant is not entitled to receive temporary disability benefits at this time, as his wage loss is not attributable to the on-the-job injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for Temporary Total Disability (TTD) and Temporary Partial Disability (TPD) benefits from December 19, 2007 and ongoing is denied and dismissed.

2. Because the claim for temporary disability benefits is denied, the ALJ need not address the remaining issues endorsed for hearing.

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

DATE: April 1, 2009
/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-733-464

ISSUES

The issues to be determined by this decision are the following:

1) Compensability of a right biceps injury claimed to have occurred on August 17, 2007;

2) If compensable, whether the treatment provided in the form of a right biceps tendon repair was reasonable, necessary and related to the alleged injury on August 17, 2007.

FINDINGS OF FACT

1. Claimant alleges he sustained a work related injury to his right upper extremity on August 17, 2007 while working for the Respondent-Employer as a custodian in a K-8 school. Claimant alleges he tore his right biceps tendon while folding a lunch table at 11:35 a.m. on August 17, 2007.

2. Claimant began work for the employer on August 7, 2007, ten (10) days before his alleged injury. Shortly after he began work, Claimant asked numerous questions about the employer's health insurance policy and sick leave benefits.

3. On August 15, 2007, two days before the alleged injury, Claimant told a supervisor that he was aware of two lunch tables not latching properly. On August 16, 2007, Claimant told his supervisor that he would bring tools to fix the tables.

4. On August 17, 2007, at approximately 9:00 a.m., Claimant told his supervisor he intended to repair tables. Claimant began drilling or grinding on a table and was asked to stop because school was in session and he was in a common area.

5. At 11:35 a.m., the elementary school children were sitting down to the lunch they were served. Claimant's supervisor and a school secretary were in the common area with the children. Claimant approached the school secretary. Claimant was holding an

ice pack to his right arm and told the school secretary that he had hurt his arm. Claimant did not recall having this conversation with the school secretary.

6. The school secretary told Claimant's supervisor what Claimant had reported to her. Claimant's supervisor approach Claimant and asked Claimant what happened. Claimant replied – "I felt three tears – just like my other arm." Claimant told his supervisor that a table fell while he was holding on to it and that he needed to go to the hospital.

7. Claimant testified that the table fell after lunch had been completed, but Claimant reported the injury at 11:35 a.m. Both the supervisor and the school secretary were in the lunchroom at the time. Lunch had not ended and in fact had just begun. Claimant's supervisor testified that 11:35 a.m. was not after lunch, but shortly after the children had sat down to and were eating lunch. Claimant's supervisor and a school secretary were present in the lunch area observing the children when Claimant alleges the accident occurred. Neither saw Claimant folding a table while the children were eating. Neither heard a table falling into a flat position. Claimant testified his supervisor was mere feet from where the accident occurred. Claimant's report of an accident is not credible.

8. An accident report was immediately generated and Claimant was directed to the designated provider. Immediately, Claimant packed up all of his belongings – including taking personal pictures off of his office wall. Claimant remarked to his supervisor he would not be returning any time soon to his job because "he knew he needed surgery."

9. Claimant's supervisor and two school secretaries testified Claimant was offered a ride to a medical provider. Claimant refused the offer. Claimant's supervisor and two school secretaries watched Claimant drive away from the school in his manual transmission vehicle. The parking lot at the school is a loop that requires a vehicle to pass in front of the school. Claimant testified he did not see that his supervisor and two school secretaries were watching him drive away. Claimant's supervisor and the two school secretaries saw Claimant driving his manual transmission car out of the parking lot – shifting the gears with his right arm. Claimant testified he drove his manual transmission vehicle by shifting with his left upper extremity.

10. Claimant was initially evaluated at CCOM by Al Shultz, P.A. on August 17, 2007 at 1:13 p.m. Claimant denied any prior history of right elbow injury at his initial evaluation. The history provided by Claimant to CCOM is inconsistent with Claimant's medical history. Prior to moving to the Pueblo area in July of 2007, Claimant had a significant injury that affected his right upper extremity, including his right elbow. In an IME report from June 22, 2004 with William A. Jackson Ross, M.D., Claimant described a history of right upper extremity problems initiated by two work injuries. The first occurred in the summer of 2001 and the second on March 1, 2002. The 2001 injury was reported as stemming from maintaining 3000 lockers at his employment. The March 1, 2002 injury was a lifting injury (garbage bags) that caused sharp pain in Claimant's right upper extremity from the right shoulder to the right hand. Claimant described the 2001 injury as causing "right elbow aching" to Michael Sacco, M.D. There was tenderness in the "ex-

tensor origin" of his right upper extremity in November of 2001. It was diagnosed as "resolving right lateral epicondylitis." On June 27, 2005, Dr. Robin Tomita noted Claimant had right upper extremity pain at the elbow. On June 30, 2006, Claimant noted to Dr. Tomita that he has right arm pain, especially at night, and sometimes awakens with numbness and tingling in the right upper extremity. Treatment for both his cervical and upper extremity complaints continued through June of 2007. On June 20, 2007, Claimant was treated for right upper extremity pain. Claimant reported to Dr. Tomita that he would continue with care in Colorado after moving and finding a physician to take over his care. Claimant's last treatment with Dr. Tomita in June of 2007 included prescription of Neurontin and Lidoderm patches.

11. Claimant denied this history of prior right upper extremity problems to subsequent medical providers and evaluators, including Drs. Olson and Paz.

12. Claimant was diagnosed with a right bicep tendon rupture at CCOM. Claimant was referred for a surgical evaluation with Dr. DeGroote. Dr. DeGroote took Claimant to surgery on August 27, 2007. Dr. DeGroote's preoperative diagnosis was "Right biceps tendon rupture." Dr. DeGroote's postoperative diagnosis was "Right chronic biceps tendon rupture."

13. Dr. DeGroote's surgical record documents Claimant's right biceps tendon tear was an injury older than Claimant's alleged date of injury. Scar tissue encased the biceps tendon tear. According to Dr. DeGroote, this "indicated this rupture was greater than three weeks of age." The alleged injury Claimant asserts at work was only ten (10) days prior to the surgery with Dr. DeGroote on August 27, 2007. Dr. DeGroote's opinion (the rupture was more than three (3) weeks old at the time of the surgery, making the rupture and the repair unrelated to any activity on August 17, 2007) is persuasive.

14. Additionally, Dr. Paz' concurrence Dr. DeGroote's opinion is also persuasive. Dr. Paz performed an IME at the request of respondents on April 29, 2008. Dr. Paz opined Claimant "was unlikely to have sustained an acute bicep tendon tear on August 17, 2007." Dr. Paz noted there was significant scar tissue found in the surgery, which indicates a tear older than the date of injury that is the subject of this claim. Additionally, Dr. Paz testified there were no findings consistent with an acute injury, including swelling and erythema (redness) in the surgical report.

15. Dr. Paz opined that even if there was some falling of a table on August 17, 2007, surgery would not have been a reasonable, necessary and related treatment modality. The surgery was reasonable, necessary and related to a biceps tendon tear. By August 17, 2007, Claimant's biceps tendon had already ruptured.

16. Claimant's testimony is not credible. The testimony of the lay and medical witnesses, the medical histories provided to medical personnel by the Claimant, and the totality of circumstances demonstrate Claimant's lack of credibility.

CONCLUSIONS OF LAW

1. An injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210 C.R.S. (2006). *See City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact or facts, more reasonably probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1977).

2. In order to prove the industrial injury was the proximate cause of the need for medical treatment and disability benefits 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 disability and the 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). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

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

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). A Workers' Compensation case is decided on its merits. Section 8-43-201.

5. 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).

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

7. No benefits flow to the victim of an industrial accident unless the accident results in a compensable injury. A compensable industrial accident is one which results in an

injury requiring medical treatment or causing disability. *H&H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988).

8. As determined in Findings of Fact 1 through 16, the Claimant failed to prove it is more probably true than not that he sustained a compensable injury to his right upper extremity arising out of and in the course of his employment with the employer.

9. The ALJ concludes that based upon Claimant's testimony, the testimony of the lay and medical witnesses, the medical histories provided to medical personnel by the Claimant, and the totality of circumstances that the Claimant is not credible. Claimant's testimony was not credible. Claimant reported no prior injury to his right upper extremity to medical providers and an evaluating physician, but the medical evidence supports a conclusion that he had a right biceps tendon tear sometime prior to August 17, 2007 and other treatment to his right upper extremity. Claimant's actions at work demonstrate his lack of credibility in regards to the cause of his right biceps tendon tear. The testimony of the employer's employees is credible as to claimant's actions before and after the alleged injury.

10. Claimant failed to meet his burden of proof by a preponderance of the evidence that his right upper extremity was injured on August 17, 2007. The medical evidence establishes that Claimant's right biceps tendon tear existed prior to the date of his alleged injury, August 17, 2007. In the surgical report of Dr. DeGroote on August 27, 2007, Dr. DeGroote noted that the biceps tendon tear was more than three (3) weeks old. At the time of the surgery, only ten (10) days had elapsed since the alleged date of injury.

11. The medical documentation demonstrates that it is more likely than not that treatment for claimant's right upper extremity was not due to an injury on August 17, 2007, but was for pre-existing chronic tear. The evidence supports a conclusion that claimant's right upper extremity problems were pre-existing. The evidence provided by Drs. DeGroote and Paz are credible as to the pre-existing nature of claimant right biceps tendon tear.

ORDER

It is therefore ordered that:

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

DATE: April 1, 2009
/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-737-225

ISSUES

The issues of compensability and relatedness of Claimant's low back and right sciatica conditions were raised for consideration at hearing.

FINDINGS OF FACT

1. Since 2002, Claimant has been employed as a para-professional, taking care of disabled K-5th grade students.

2. On April 24, 2007, Claimant fell on ice to the ground, sustaining injury to, among other areas, her lower back. At Montrose Memorial Hospital the following day, "low back pain" ... radiating to R buttock" was noted. Claimant's authorized medical treatment has been provided primarily by Dr. Jeffrey Krebs, who has seen Claimant on more occasions and over a longer time than any other provider.

3. Claimant experienced multiple symptoms after the April 24, 2007 injury, but she was and continues to be most concerned about her head and neck symptoms and much of her treatment in the year post-injury focused on those complaints. However, addressing her secondary lumbar spine symptoms, Dr. Krebs ordered an x-ray of Claimant's lumbar spine on April 25, 2007, ordered massage therapy for Claimant's "neck and lumbar spine" on August 28 2007, ordered physical therapy for "lumbar strain, right sciatica" on June 9, 2008, ordered an EMG on July 17, 2008, ordered a lumbar MRI on August 8, 2008, and ordered an epidural injection on August 15, 2008.

4. Claimant credibly testified that she experienced low back and right buttock pain that persisted after April 24, 2007. Claimant's testimony is corroborated by medical records, including:

a. April 26, 2007, "…neck pain and back pain."

b. May 8, 2007, "osteopathic adjustment to neck, mid back, low back."

c. May 17, 2007, "…much improved low back discomfort."

d. August 9, 2007, "RS [right side] Sciatica still extant ..."

e. August 28, 2007, "Kim has low back pain. She has radiation of pain down the right buttock ... "

f. September 11, 2007, “RS [right side] Sciatica ...”

g. September 28, 2007, “low back pain, and right sciatica.”

h. October 2, 2007, “low back pain Saturday evening.”

i. November 11, 2007, “R leg + Sciatica….”

j. December 4, 2007, per Dr. Douglas Scott, Respondents’ IME physician, “probable myofascial (muscular) pain in the head, neck, right shoulder, and lower back.”

k. January 15, 2008, “she has right leg buttock tingling ...L spine dysfunction”

l. April 10, 2008, per Dr. Karen Nelson, seen on Dr. Scott’s referral, “low back pain and ‘right sciatica.’ ”

m. June 9, 2008, “right buttock type discomfort.”

n. July 17, 2008, “Right leg discomfort, low back pain bilaterally.”

o. July 24, 2008, “EMG of the right leg reveals a mild acute and chronic L3,4 and L4,5 irritation.”

p. August 15, 2008, “I did offer Kimberly an epidural injection at the L4-L5 level ... This is a work related injury ...”

q. August 28, 2008, “low back pain with MRI scan demonstrating lumbar disk dehydration L4-L5, mild narrowing of the L4-L5 neural foramen on the right side...”

5. In response to Dr. Krebs’ August 15, 2008 request for Claimant to have a lumbar epidural injection, Dr. Hemler reviewed Claimant’s medical records and opined on August 26, 2008 that, “[t]he patient bringing the low back to the attention of physicians at this point has a long hiatus from the original event and cannot clearly be related to the Worker’s Compensation claim. It falls well below medical probability as being a direct event. Dr. Hemler’s statement that there was a long hiatus between the original injury and Claimant’s “bringing the low back to the attention of physicians” is incorrect, and diminishes the probative value of Dr. Hemler’s opinion.

6. Dr. Rachel Basse evaluated Claimant and reported that Claimant has “probable L4 radiculitis”. Dr. Basse acknowledged Claimant’s diagnosis of “a degenerated disc, with a little bit of a bulge or a protrusion or something causing radiculopathy ... is a lifelong, multi-year process that is contributed to by all kinds of life events, includ-

ing trauma ... So I guess to that extent, you can say that any kind of injury is going to somehow impact the discs."

7. Dr. Basse did not acknowledge that the April 24, 2007 injury, with medically documented symptoms of low back pain radiating into the right buttock, caused any disk damage. Instead, Dr. Basse focused her attention on the period between May 17, 2008, when Claimant's low back symptoms were reported by Dr. Krebs to be "much improved" and August 9, 2007, when the massage therapist reported Claimant's right side sciatica was "still extant." During this period Claimant testified that her low back related symptoms were present, but were not the primary pain issue, and that she sustained no new injuries during this time. However, Dr. Basse reported that in her opinion, as of May 14, 2007, "[i]t appears that all lumbosacral symptoms resolved within the first few weeks post slip and fall." In her testimony, Dr. Basse first testified that Claimant's "temporary exacerbation" from the April 24, 2007 injury resolved by May 17, 2007 but later allowed that Claimant's symptoms might not have resolved by May 2007, just improved. Dr. Basse went on to contend that at some unspecified time after May 17, 2008, Claimant must have reinjured or aggravated her low back – this allegedly occurred one or two weeks before August 9, 2008 – and this alleged new incident, according to Dr. Basse, is the cause of Claimant's current low back related symptoms.

8. Dr. Basse's opinion is contradicted by Dr. Krebs, whose opinion is deemed to be more credible. Dr. Krebs stated on October 15, 2008, that "we did not deal heavily with the low back although it continued to bother her I think throughout the duration of her injury but [it] primarily had to do with neck issues ... I do think this [L4-L5 disk bulge] very likely is work related so I disagree if Dr. Basse is saying that she is at MMI from both neck and low back ..." Dr. Krebs credibly reported that Claimant's low back symptoms were present "throughout the duration of her injury."

9. Dr. Basse's assertion that Claimant sustained a new, intervening low back injury or aggravation after April 24, 2007 is not supported by credible evidence. Nor does the fact that many post-injury activities such as sitting, driving, vacuuming, and lawn work cause Claimant to experience increased symptoms warrant a finding that such symptoms were caused by a new, intervening injury, relieving Respondents' from liability for the April 24, 2007 injury.

10. Having considered all the evidence, the ALJ finds Dr. Krebs' medical opinion, as the authorized treating physician with the benefit of having seen Claimant on numerous occasions after April 24, 2007, that Claimant's low back and right sciatica conditions are work related is more credible and persuasive than the opinion of Dr. Basse, who performed a one time independent medical evaluation of Claimant for Respondents.

11. Considered as a whole, Claimant's past medical history fails to support Respondents' contention that Claimant's low back/right sciatica symptoms after her April 24, 2007 low back injury are from some other cause. Claimant had pre-existing right hip symptoms, causing pain on the lateral side of her right hip, restless leg syndrome, and episodic low back pain. These conditions were different from the "low back radiating

into the right buttock" symptoms caused by the April 24, 2007 injury. Notably, Claimant had a comprehensive medical examination on April 2, 2007, which revealed no misalignment, asymmetry, defects, tenderness, or decreased range of motion in her spine. Respondents' contention that Claimant's condition after April 24, 2007 is due to a pre-existing condition is contradicted by the credible testimony of Claimant, and contradicted by the persuasive parts of the medical record.

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 insure 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 8-42-102(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.

2. A preponderance of the evidence is that which leads the trier of fact after considering all of the evidence to find that a fact is more probably true that not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 237, at 235 (Colo. App. 2004). A workers' compensation case is 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. 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 v. ICAO*, 5 P.3d 385, at 389 (Colo. App. 2000).

3. The credibility of witness testimony and the weight to be given their testimony is within the ALJ's authority to determine. When determining credibility, the fact finder should consider, among other things, 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 Company v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil, 3:16 (2005).

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

5. The credible testimony of Claimant, the persuasive opinion of Dr. Krebs and the persuasive parts of the medical record referenced in these Findings of Fact show that after her April 24, 2007 injury, Claimant experienced ongoing low back and right sciatica symptoms that are causally related to the April 24, 2007 injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay reasonable, necessary and related medical expenses incurred by Claimant for treatment of her work related lower back and right sciatica symptoms, including but not limited to the medical care provided by Dr. Krebs and his referrals. The bills for this medical treatment shall be paid pursuant to the Fee Schedule in the WCRP.
2. Issues not determined herein are reserved for future decision.

DATED: April 1, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-640-049

ISSUE

The issue to be determined is the proper apportionment for the surgical procedure recommended by Dr. Donald Corenman.

FINDINGS OF FACT

The parties submitted Stipulated Facts:

1. Claimant injured his lower back in 2000/2001 and underwent a microdiscectomy at the L5-S1 level in 2001 with surgeon Dr. Donald Corenman. He received a 17% whole person impairment rating from Dr. Corenman and returned to work as a self-employed truck driver, delivering dirt, gravel and asphalt.

2. On December 21, 2004, Claimant was working for a hotel owned by Employer and he was passing out bills under room doors. Towards the end of this project, Claimant was sliding the bills under one of the doors and, when he stood, up he felt a pull in his lower back.

3. Claimant was sent to Dr. Donald Corenman for evaluation. Liability for Claimant's claim was accepted by Respondents and Dr. Corenman was designated as the primary treating physician.

4. On June 19, 2006, Dr. Corenman performed surgery for a herniated nucleus pulposus at the L5-S1 level.

5. In February 2007, Claimant underwent a discogram, MRI, and CT of the lumbar spine. Following these studies, Dr. Corenman recommended a fusion procedure. In a report dated May 22, 2007, Dr. Corenman opined that 70% of the need for the fusion procedure would be based upon the subject injury on December 21, 2004, and 30% would be based upon Claimant's pre-existing condition.

6. Michael Janssen, D.O., performed an independent medical evaluation at the request of Respondents on April 12, 2007. In that report, Dr. Janssen stated that Claimant has three fundamental options: 1) to live with his level of symptoms; 2) to consider treating the symptoms as long as he can with methods such as medication, epidural steroid injections, physical therapy, etc.; or 3) to consider having surgical intervention, which would be a stabilization procedure at the L5-S1 level. Dr. Janssen went on to state that the need for a fusion procedure was 80% related to his pre-existing condition and 20% related to the subject injury.

7. Dr. Hugh Macaulay performed an independent medical evaluation at the request of Respondents dated March 20, 2007, and Dr. Macaulay also provided deposition testimony in this case. Dr. Macaulay did not feel that a fusion procedure should be considered until further conservative treatment was attempted, but he did opine in the deposition that if Claimant proceeded with a fusion, that 70% of the need for the fusion would be related to his pre-existing condition and 30% would be related to this compensable injury.

8. After the deposition, the parties agreed that Claimant would undergo the conservative care was outlined both in Dr. Macaulay's report and deposition.

9. Dr. Macaulay has referred Claimant back to Dr. Corenman for consideration of the fusion procedure.

CONCLUSIONS OF LAW

Claimant and Respondents agree that apportionment is appropriate in this case, as per *Duncan v. ICAP*, 107 P.3d 999, and *Resources One v. ICAP*, 148 P.3d 287.

The opinion of Dr. Corenman is found to be credible and persuasive. Seventy percent of Claimant's need for surgery is caused by this compensable injury. The insurer is liable for 70% of the costs of that surgery should it be performed by an authorized treating physician, not to exceed 70% of the Division of Workers' Compensation fee schedule.

ORDER

It is therefore ordered that Insurer is liable for 70% of the costs of the surgery should it be performed by an authorized treating physician, not to exceed 70% of the Division of Workers' Compensation fee schedule.

All matters not determined herein are reserved for future determination.

DATED: *April 1, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-763-886

ISSUES

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

2. Whether Claimant's claim is barred by the two-year statute of limitations in §8-43-103(2), C.R.S.

3. 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 occupational disease.

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits from July 15, 2008 until terminated by statute.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $542.04.

FINDINGS OF FACT

1. Claimant is a 64 year-old male. He worked for Employer from 1983 through May 16, 2008 as an experienced helper. Claimant's duties involved loading, preparing and stripping heavy concrete forms for construction projects. His job responsibilities required forceful and repetitive use of both arms.

2. Claimant began experiencing left shoulder aching and grinding symptoms in approximately 1997 or 1998. He suspected that his symptoms could be related to his

work duties. Nevertheless, Claimant did not seek medical treatment because he was able to complete all of his job responsibilities.

3. On April 11, 2005 Claimant visited the Poudre Valley Hospital Emergency Department because he had tripped and fallen in his home. He landed directly on his right shoulder and suffered a right shoulder dislocation.

4. On April 14, 2005 Claimant underwent an MRI of his right shoulder. The MRI revealed a full thickness rotator cuff tear and a complete rupture of the biceps tendon. The MRI also reflected that Claimant suffered from end stage arthritis in his right shoulder.

5. On April 19, 2005 Claimant visited Sean Grey, M.D. for a right shoulder evaluation. Dr. Grey reviewed the MRI and characterized Claimant's right shoulder condition as an acute tear on top of chronic shoulder damage. He explained that Claimant refused to undergo surgery because he wanted to continue working for Employer. Claimant initially resumed light duty work but then returned to full duty employment.

6. On May 5, 2006 Claimant visited Douglas Lundy, M.D. for an evaluation of his shoulder. Dr. Lundy noted that Claimant had been suffering from shoulder problems for several years and reiterated Dr. Grey's opinion that Claimant had sustained a massive right rotator cuff tear in 2005. Although Claimant had full range of motion in his shoulders, Dr. Lundy stated that Claimant's condition had progressively worsened. Dr. Lundy thus ordered MRI's of both shoulders.

7. On May 11, 2006 Claimant underwent MRI's of both shoulders. The right shoulder MRI revealed that the inflammatory process had subsided, but Claimant continued to suffer from end stage arthritis. The left shoulder MRI revealed a massive, full thickness rotator cuff tear. Claimant also suffered from extensive degenerative disease in the left shoulder.

8. On June 2, 2006 orthopedic surgeon Dale Martin, M.D. reviewed Claimant's shoulder MRI's. Dr. Martin explained that Claimant had suffered from "significant retracted rotator cuff tears for quite some time." He explained that, in the absence of shoulder replacement surgery, there was no other surgical procedure that would benefit Claimant. However, Claimant declined to pursue shoulder replacement surgery because he sought to continue working for a few more years.

9. On September 5, 2006 Claimant visited John S. Hughes, M.D. for an independent medical examination. Claimant sought to determine whether his shoulder problems were related to his construction work for Employer. Dr. Hughes remarked that he agreed with Dr. Grey that the majority of Claimant's "bilateral shoulder disease [was] degenerative in nature." He determined that Claimant's shoulder condition was "related to forceful and repetitive upper extremity use at work." Dr. Hughes commented that clinical evidence supported his determination. He stated that hammering and "other high speed use of the right upper extremity" probably caused Claimant's right biceps

tendon rupture. Dr. Hughes also remarked that there was no evidence that Claimant suffered from any systemic diseases, including diabetes mellitus or rheumatoid arthritis, that would have contributed to his degenerative shoulder condition. Dr. Hughes thus attributed Claimant's shoulder condition to his forceful, repetitive upper extremity use in a manual trade for a number of years. He assigned Claimant physical restrictions that included no reaching or lifting from shoulder level into an overhead position, no hammering in excess of 15 minutes out of every hour and limited lifting.

10. Subsequent to his examination with Dr. Hughes, Claimant continued to work for Employer. However, his shoulder condition progressively worsened and reached a point in 2007 that rendered him unable to perform his job duties.

11. On May 16, 2008 Claimant was terminated from employment with Employer. Claimant's spouse had been suffering from health problems as a result of a motor vehicle accident and Claimant missed time from work in order to care for her. Employer's owner, Jerry Kiefer, explained that Claimant had missed significant time from work during the period February through May, 2008. Mr. Kiefer testified that he met with Claimant on May 16, 2008 and asked Claimant about his future work plans. After Claimant responded that he needed to stay home to care for his wife, Mr. Kiefer terminated him from employment.

12. Claimant reported his shoulder injuries to Employer on June 16, 2008. Insurer referred him to Concentra Medical Centers for treatment. On July 15, 2008 Claimant received restrictions that included no lifting, pushing or pulling in excess of five pounds and no reaching above shoulder level.

13. On September 23, 2008 Claimant visited Dr. Hughes for a second independent medical examination. Dr. Hughes remarked that Claimant's clinical status had slightly worsened over the past two years. He explained that Claimant's left shoulder "degenerative tendinosis with associated rotator cuff tears [was] completely occupational in nature." Because of Claimant's recurrent right shoulder dislocations, Dr. Hughes apportioned Claimant's impairment between occupational and non-occupational factors. He thus concluded that Claimant suffered a 20% upper extremity impairment of the left shoulder and an apportioned 19% upper extremity impairment of the right shoulder.

14. On November 25, 2008 Claimant underwent an independent medical examination with Franklin Shih, M.D. After reviewing Claimant's medical records and work history, Dr. Shih concluded that Claimant suffered from a "longstanding gradual progression of degenerative problems in his shoulders associated with his work activities." He remarked that Claimant "had a progressive degenerative cascade in the shoulders over a period of several years with an acute exacerbating event to the right shoulder in April of 2005." Nevertheless, Dr. Shih commented that Claimant was never completely disabled as a result of his shoulder condition. Dr. Shih determined that Claimant had reached Maximum Medical Improvement (MMI) for his condition and imposed physical restrictions. He assigned Claimant a 14% right upper extremity impairment rating and a

17% left upper extremity impairment rating. Dr. Shih did not apportion any of Claimant's impairment.

15. Dr. Hughes testified at the hearing in this matter consistently with his medical reports. He reiterated that the majority of Claimant's shoulder pathology was degenerative in nature and was related to Claimant's heavy, forceful and repetitive use of his shoulders in performing work activities over a number of years. Dr. Hughes explained that the similar degenerative conditions of both of Claimant's shoulders supported the occupational nature of Claimant's condition and minimized the impact of Claimant's right shoulder dislocations. He stated that, despite Claimant's shoulder problems, he was able to perform his job duties because he compensated for his condition by using other muscles.

16. On February 12, 2009 the parties conducted the post-hearing evidentiary deposition of Dr. Shih. Dr. Shih testified he agreed with Dr. Hughes that Claimant suffered a work related occupational disease in his shoulders with some non-occupational apportionment for the right shoulder. Dr. Shih stated that the pathology found in Claimant's shoulders is consistent with heavy, repetitive and forceful use of the upper extremities. He summarized that the majority of the pathology in Claimant's shoulders is related to longstanding gradual progression of degenerative problems associated with work activities.

17. On February 18, 2009 Claimant testified in rebuttal through an evidentiary deposition. Claimant stated that he missed work in 2007 and 2008 because he had to care for his injured wife. She had suffered injuries as a result of a motor vehicle accident and underwent numerous surgeries. Claimant explained that he did not miss work during 2007 and 2008 because of his shoulder condition.

18. Claimant has proven that it is more probably true than not that the heavy, forceful and repetitive use of his arms during the course and scope of his employment with Employer caused his shoulder problems. Claimant's description of his job duties over a period of 25 consecutive years while working for Employer is consistent with the development of his shoulder condition. Dr. Hughes persuasively determined that the majority of Claimant's shoulder pathology was degenerative in nature and was related to Claimant's heavy, forceful and repetitive use of his shoulders in performing work activities over a number of years. He also noted there are no alternative explanations, such as diabetes mellitus or rheumatoid arthritis, for Claimant's shoulder condition. Furthermore, Dr. Hughes explained that the similar degenerative conditions of both of Claimant's shoulders supported the occupational nature of Claimant's condition and minimized the impact of Claimant's right shoulder dislocations. Dr. Shih also credibly concluded that the majority of Claimant's shoulder pathology is related to longstanding gradual progression of degenerative problems associated with work activities. Therefore, based on the credible testimony of Claimant, Dr. Hughes, Dr. Shih and the medical records, the vast majority of Claimant's shoulder pathology was caused by over 25 years of heavy, repetitive and forceful work for Employer. The hazards of Claimant's

employment thus caused, intensified, or, to a reasonable degree, aggravated his shoulder condition.

19. Respondents have failed to establish that it is more probably true than not that Claimant's claim is barred by the two-year statute of limitations in §8-43-103(2), C.R.S. Claimant did not recognize the nature, seriousness and probable compensable character of his shoulder injuries until September 5, 2006. On September 5, 2006 Dr. Hughes attributed Claimant's shoulder condition to the forceful use of his upper extremities while working for Employer over a number of years. He thus placed physical restrictions on Claimant that consisted of no reaching or lifting from shoulder level into an overhead position, no hammering in excess of 15 minutes out of every hour and limited lifting. Although Claimant suspected that his shoulder pain could have been related to his job duties in approximately 1998, he did not seek medical treatment. Moreover, Claimant was able to perform all aspects of his job and did not have any restrictions, except as a result of non-occupational right shoulder dislocations, until September 5, 2006. Because Claimant filed his Workers' Claim for Compensation on June 26, 2008 his claim occurred within two years of his knowledge of the probable compensable character of his shoulder problems.

20. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure and relieve the effects of his industrial injuries. Initially, all of the medical care that Claimant received prior to June 26, 2008 was unauthorized. However, after Claimant filed his Worker's Claim for Compensation, Insurer directed him to receive medical treatment through Concentra Medical Centers. Because Claimant suffered a compensable occupational disease to his shoulders, all of the medical treatment that he obtained through Concentra Medical Centers was authorized, reasonable and necessary to cure and relieve the effects of his shoulder injuries. Moreover, Respondents are responsible for future medical care that is reasonable, necessary and related to Claimant's compensable occupational disease.

21. Claimant has proven that it is more probably true than not that he suffered a wage loss after July 15, 2008 as a result of his work-related shoulder injuries. On July 15, 2008 Claimant received work restrictions from Concentra Medical Centers that included no lifting, pushing or pulling in excess of five pounds and no reaching above shoulder level. He suffered a wage loss because he was unable to perform his job duties. Finally, because Respondents have not asserted that Claimant was responsible for his termination from employment under the termination statutes, he is not precluded from receiving TTD benefits. Accordingly, Claimant is entitled to receive TTD benefits from July 15, 2008 until terminated by statute.

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

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

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

7. As found, Claimant has proven by a preponderance of the evidence that the heavy, forceful and repetitive use of his arms during the course and scope of his employment with Employer caused his shoulder problems. Claimant's description of his job duties over a period of 25 consecutive years while working for Employer is consistent with the development of his shoulder condition. Dr. Hughes persuasively determined that the majority of Claimant's shoulder pathology was degenerative in nature and was related to Claimant's heavy, forceful and repetitive use of his shoulders in performing work activities over a number of years. He also noted there are no alternative explanations, such as diabetes mellitus or rheumatoid arthritis, for Claimant's shoulder condition. Furthermore, Dr. Hughes explained that the similar degenerative conditions of both of Claimant's shoulders supported the occupational nature of Claimant's condition and minimized the impact of Claimant's right shoulder dislocations. Dr. Shih also credibly concluded that the majority of Claimant's shoulder pathology is related to longstanding gradual progression of degenerative problems associated with work activities. Therefore, based on the credible testimony of Claimant, Dr. Hughes, Dr. Shih and the medical records, the vast majority of Claimant's shoulder pathology was caused by over 25 years of heavy, repetitive and forceful work for Employer. The hazards of Claimant's employment thus caused, intensified, or, to a reasonable degree, aggravated his shoulder condition.

Statute of Limitations

8. Section 8-43-103(2), C.R.S. provides that the right to obtain workers' compensation benefits is barred unless a formal claim is filed within two years after the injury. *In Re Pierce-Kouyate,* W.C. No. 4-717-784 (ICAP, Nov. 21, 2007). The statute of limitations also does not begin to run until an injured employee recognizes the "nature, seriousness and probable compensable character of her injury." *In Re Burnes,* W.C. No. 4-725-046 (ICAP, Apr. 17, 2008). The claimant must recognize all three of the preceding factors in order to trigger the running of the statute of limitations. *Id.* Whether a claimant has recognized the nature, seriousness and probable compensable nature of the injury is a determination of fact for the ALJ. *Id.*

9. As found, Respondents have failed to establish by a preponderance of the evidence that Claimant's claim is barred by the two-year statute of limitations in §8-43-103(2), C.R.S. Claimant did not recognize the nature, seriousness and probable compensable character of his shoulder injuries until September 5, 2006. On September 5, 2006 Dr. Hughes attributed Claimant's shoulder condition to the forceful use of his upper extremities while working for Employer over a number of years. He thus placed physical restrictions on Claimant that consisted of no reaching or lifting from shoulder level into an overhead position, no hammering in excess of 15 minutes out of every hour and limited lifting. Although Claimant suspected that his shoulder pain could have been related to his job duties in approximately 1998, he did not seek medical treatment. Moreover, Claimant was able to perform all aspects of his job and did not have any restrictions, except as a result of non-occupational right shoulder dislocations, until September 5, 2006. Because Claimant filed his Workers' Claim for Compensation on June 26, 2008 his claim occurred within two years of his knowledge of the probable compensable character of his shoulder problems.

Medical Benefits

10. 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).

11. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure and relieve the effects of his industrial injuries. Initially, all of the medical care that Claimant received prior to June 26, 2008 was unauthorized. However, after Claimant filed his Worker's Claim for Compensation, Insurer directed him to receive medical treatment through Concentra Medical Centers. Because Claimant suffered a compensable occupational disease to his shoulders, all of the medical treatment that he obtained through Concentra Medical Centers was authorized, reasonable and necessary to cure and relieve the effects of his shoulder injuries. Moreover, Respondents are responsible for future medical care that is reasonable, necessary and related to Claimant's compensable occupational disease.

Temporary Total Disability Benefits

12. 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).

13. As found, Claimant has proven by a preponderance of the evidence that he suffered a wage loss after July 15, 2008 as a result of his work-related shoulder injuries. On July 15, 2008 Claimant received work restrictions from Concentra Medical Centers that included no lifting, pushing or pulling in excess of five pounds and no reaching above shoulder level. He suffered a wage loss because he was unable to perform his job duties. Finally, because Respondents have not asserted that Claimant was responsible for his termination from employment under the termination statutes, he is not precluded from receiving TTD benefits. Accordingly, Claimant is entitled to receive TTD benefits from July 15, 2008 until terminated by statute.

ORDER

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

1. Claimant suffered a compensable occupational disease to his shoulders during the course and scope of his employment with Employer.

2. Respondents have failed to demonstrate that Claimant's claim is precluded by the two-year statute of limitations in §8-43-103(2), C.R.S..

3. Respondents are financially responsible for all of Claimant's authorized, reasonable and necessary medical treatment subsequent to July 15, 2008.

4. Claimant earned any AWW of $542.04.

5. Claimant shall receive TTD benefits from July 15, 2008 until terminated by statute.

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

DATED: April 2, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-593-923

ISSUES

1. Reopening due to mistake;
2. Reopening due to change in condition;
3. Relatedness of thoracic spine;
4. Relatedness of hernia/groin condition; and
5. Whether Dr. Burns and Dr. Haney are authorized medical providers.

FINDINGS OF FACT

a. Claimant sustained an admitted injury to his low back on or about October 10, 2003, while working for Employer.

b. On October 13, 2003, Claimant began treatment with the authorized treating medical provider, Arthur C. Kuper, D.O. Claimant complained of low back pain during his initial evaluation. There is no indication in the initial report of Dr. Kuper that Claimant sustained injuries to his thoracic spine or to his groin. Dr. Kuper provided medical care to Claimant including referrals for radiological studies, physical therapy, and chiropractic care. Dr. Kuper also imposed work restrictions.

c. Claimant improved subjectively and objectively with the treatment provided. On November 3, 2003, Claimant reported to Dr. Kuper that he was doing much better following physical therapy and chiropractic visits. Dr. Kuper noted that there was no tenderness in Claimant's back and noted Claimant's excellent range of motion.

d. On November 11, 2003, Scott Parker, D.C., noted that Claimant was working full duty, that he denied any additional or new complaints, that his lumbar range of motion was full, and that no discomfort was reported. Dr. Parker released Claimant from chiropractic treatment.

e. On November 12, 2003, Claimant reported to Dr. Kuper that he was doing "much better" and that Claimant "feels he is better and back to his normal baseline level." Claimant denied any back pain, pain radiating into his legs, numbness, tingling, or other symptoms. Dr. Kuper specifically noted in his report that there was no tenderness to Claimant's thoracic spine, lumbar spine, or in the sacral region. Dr. Kuper placed Claimant at maximum medical improvement ("MMI"), and released him to full duty work.

f. Dr. Wunder testified that the treatment of Dr. Kuper was in compliance with the Medical Treatment Guidelines of the Division of Workers' Compensation, that Claimant improved with the medical treatment provided, and that it was appropriate for Dr. Kuper to have placed Claimant at MMI.

g. Based on the statements of Claimant and the physical findings on examination, Dr. Kuper's placement of Claimant at MMI was reasonable. Claimant has failed to prove that it was a mistake for Dr. Kuper to place Claimant at MMI on November 12, 2003.

h. A Final Admission of Liability (FAL) was filed, which Claimant admitted receiving. Claimant did not object to the FAL, file an application for hearing, or request a Division independent medical examination as required. The claim closed.

i. In December 2003, Claimant left his employment for Employer and started working for a new employer. Claimant was able to perform his regular job duties.

j. Claimant received treatment from Kirk Holmboe, D.O., for a right ankle injury that occurred while he was working for another subsequent employer. On July 10, 2006, Dr. Holmboe released Claimant to his regular work.

k. On October 3, 2008, Claimant filed a Petition to Reopen his claim alleging a change in his condition and a mistake. At hearing, counsel for Claimant argued that it was a mistake for Claimant to have been placed at MMI by Dr. Kuper.

l. Claimant's medical treatment history between his placement at MMI on November 12, 2003, and the filing of the Petition to Reopen is inconsistent with ongoing symptoms related to the October 10, 2003, low back injury. On December 10, 2004, Claimant received treatment at an emergency room. The intake history form does not identify any back pain or abdominal pain. On November 8, 2007, Claimant was transported by ambulance to a hospital. Claimant denied back pain and abdominal pain to the EMS personnel. At the hospital emergency room, it was noted that there was a "normal inspection" to Claimant's back and that there was "no tenderness to palpation." On physical examination on November 9, 2007, no musculoskeletal problems were noted.

m. Since December 2003, Claimant has engaged in regular employment activities with various employers and has engaged in self-employment. His subsequent employment included drywall work, painting, installation of mini-blinds, working as a bouncer/cook, and as a carpenter.

n. On August 21, 2008, Dr. Jennifer Burns evaluated Claimant. Dr. Burns, after taking a history and examining Claimant, stated "with respect to relatedness to this worker's compensation injury in 2003, it would be difficult to pinpoint his current pain complaints as a result of the worker's compensation injury 5 years ago."

o. On December 29, 2008, Claimant was re-evaluated by Dr. Kuper. Dr. Kuper notes that the initial pain diagram completed by Claimant on October 13, 2008, showed only achy pain across the lumbar region, but that there was no indication of symptoms in the thoracic spine or groin. Dr. Kuper stated that Claimant did not complain of any thoracic pain during his treatment in 2003. Dr. Kuper opined that he was unable to attribute Claimant's thoracic symptoms to his 2003 work injury. He also noted that there was no indication of groin pain or masses in 2003, and that Claimant did not develop these symptoms until about a year ago. Dr. Kuper was unable to attribute Claimant's hernias to his 2003 work injury. Dr. Kuper opined that Claimant remains at MMI for the effects of his 2003 work injury.

p. On February 2, 2009, Claimant underwent an independent medical examination with Jeffrey Wunder, M.D. Claimant reported to Dr. Wunder that his mid back pain started in January 2008 when he was standing at a sink and sneezed significantly. On physical examination, Dr. Wunder noted Claimant's dramatic pain behavior was in contrast to Dr. Wunder's observation of Claimant during his interview when he observed no pain behavior. Dr. Wunder noted various inconsistencies on his physical examination of Claimant. Dr. Wunder opined that there was no evidence Claimant sustained thoracic spine injuries in the incident that forms the basis of this claim. Dr. Wunder opined that Claimant had no groin symptoms following his work injury, and that if he had such symptoms, they would have been evident at that time. Dr. Wunder concluded that there is no evidence Claimant sustained an inguinal hernia as a result of his October 10, 2003, work injury. Dr. Wunder further opined that Claimant's back pain would not be related to his work-related injury. He noted that Claimant's MRI findings showed typical age-

related degenerative disease and that the MRI findings could not be related to the incident in question. Dr. Wunder opined that it was not an error to place Claimant at maximum medical improvement based on the fact that Claimant had no objective findings on examination at the time he was released. He opined that Claimant does not require any additional medical treatment for the effects of his October 2003 work injury.

q. Dr. Wunder credibly testified that signs and symptoms of injury, such as inflammatory response, usually occur within 72 hours of the injury. Claimant's thoracic and groin/hernia symptoms did not initially present until after MMI. The amount of time that passed between Claimant's injury and the onset of his thoracic and groin/hernia symptoms does not support Claimant's claim of a causal relationship between those symptoms and Claimant's injury.

r. Dr. Wunder testified that Claimant's thoracic MRI was positive for Scheuermann's disease, that this condition as idiopathic in nature, and was not caused, aggravated, or accelerated by the October 2003 work injury.

s. Dr. Perry Haney testified by deposition that it was his opinion that Claimant's current symptoms are related to his work injury. However, Dr. Haney admitted that he did not review Claimant's previous medical records in formulating his opinions.

t. Dr. Burns and Dr. Haney evaluated and treated Claimant at the request of his attorney. There was no referral to Dr. Burns or Dr. Haney by an authorized treating medical provider.

u. As the primary treating physician for Claimant's workers' compensation injury, and the only physician who has examined Claimant before MMI and after MMI, Dr. Kuper's opinions on causation of the thoracic symptoms and the hernia symptoms are more persuasive than the opinions of Dr. Haney. The opinions of Dr. Kuper are consistent with the opinions of Dr. Burns and Dr. Wunder. Claimant's hernia/groin and thoracic spine symptoms are not related to his work injury of October 10, 2003.

v. Drs. Burns, Kuper, and Wunder have each opined that they are unable to attribute Claimant's current low back complaints to his 2003 work injury. The ALJ finds these opinions more persuasive than the opinions of Dr. Haney.

w. Dr. Wunder opined that, to the extent Claimant is complaining of increased subjective symptoms since his placement at MMI, such increase is not causally related to the October 2003 work injury. The opinions of Dr. Wunder are credible and persuasive. Claimant's work related low back condition has not worsened.

x. Claimant does not require additional medical treatment related to the effects of his October 10, 2003, injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. 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); *People v. M.A.*, 104 P.3d 273, 275 (Colo.App. 2004). The facts in a Worker' 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. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo.App. 2000).

3. Section 8-43-301(1), C.R.S., provides that an award may be reopened on the ground of a change in condition. A claimant has the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. A claimant must prove that his change of condition is the natural and proximate consequence of the industrial injury without any contribution from another separate causative factor. *Vega v. City of Colorado Springs,* W. C. No.'s 3-986-865 and 4-226-005 (ICAO, Mar. 8, 2000). As found, Claimant has failed to prove by a preponderance of the evidence that he has suffered a change of condition as a natural consequence of his admitted work injury.

4. In order to reopen based on mistake the ALJ must determine that there was a mistake that affected the prior award. If there was a mistake, the ALJ must determine whether, under the circumstances, it is the type of mistake that justifies reopening the claim. *Travelers Insurance Co. v. Industrial Commission,* 646 P.2d 399 (Colo.App. 1981). Factors the ALJ may consider when determining whether a mistake warrants reopening include the potential for injustice if the mistake is perpetuated and whether the party seeking to reopen could have avoided the mistake by the exercise of due diligence in the handling or adjudication of the claim. *Klosterman v. Industrial Commission,* 694 P.2d 873 (Colo.App. 1984); *Travelers Insurance Co. v. Industrial Commission, supra.* The ALJ concludes Claimant has failed to prove that Dr. Kuper was mistaken in placing the Claimant at MMI on November 12, 2003. The ALJ further concludes that even if Dr. Kuper erred or committed a mistake by placing Claimant at MMI on November 12, 2003, that is not the type of error or mistake that justifies reopening this claim. The ALJ notes that Claimant received timely notice of the Final Admission of Liability (FAL), and does not claim that he was actually prevented from acting in a timely fashion to contest his placement at MMI. Had the Claimant acted with due diligence to respond to the FAL, he could have avoided the closure of all issues by filing a timely written objection and an application for hearing, or by requesting a DIME.

5. Claimant bears the burden to prove, by a preponderance of the evidence, that his thoracic spine and groin/hernia complaints are causally related to the injury of October 10, 2003. The ALJ concludes, based upon the opinions of Dr. Kuper and Dr. Wunder, that Claimant has failed to sustain his burden of proof that his thoracic spine and groin/hernia conditions are causally related to the October 10, 2003, injury.

6. Medical treatment is compensable under the Act where it is provided by an authorized treating physician. *Bunch v. Indus. Claim Appeals Office,* 148 P.3d 381 (Colo.App.2006). If a claimant obtains unauthorized medical treatment, the employer or its insurer are not required to pay for it. *Yeck v. Indus. Claim Appeals Office,* 996 P.2d 228 (Colo.App. 1999). The Act does not permit a claimant to change physicians or to employ additional physicians without notice to the employer or its insurer. See, *Pickett v. Colorado State Hospital,* 513 P.2d 228 (Colo.App. 1973). An employer is liable for expenses incurred when as part of the normal progression of authorized treatment for a

compensable injury an authorized physician refers a claimant to another physician or physicians. *Greager v. Indus. Comm'n,* 701 P.2d 168 (Colo.App. 1985). Dr. Haney and Dr. Burns are not authorized treating medical providers. Dr. Burns and Dr. Haney evaluated and treated Claimant at the request of his attorney. There was no referral to Dr. Burns or Dr. Haney by an authorized treating medical provider. Insurer is not liable for the costs of these unauthorized physicians.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Claimant's Petition to Reopen on the grounds of mistake and change of condition is denied.

2. Claimant's request for medical benefits, including the treatment provided by Dr. Burns, Dr. Haney, and their referrals, is denied.

DATED: *April 2, 2009*

Bruce C. Friend, ALJ

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-774-497

ISSUES

¬ Did claimant prove by a preponderance of the evidence that he sustained a right-knee injury arising out of the course and scope of his employment?
¬ Did claimant prove by a preponderance of the evidence that he is entitled to medical and temporary disability benefits?
¬ Did respondents prove by a preponderance of the evidence that insurer improvidently filed an admission of liability based upon claimant's misrepresentation of how his injured his knee?

FINDINGS OF FACT

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

1. Employer operates an auto-emissions testing facility. Claimant works for employer as a Lane Inspector. Parish is the manager of the station where claimant works. Postlethwait is human resources manager. Claimant's job duties involve driving cars onto the inspection lane where he parks them for testing on a dynometer, which em-

ployees refer to as the “doghouse”. Claimant’s duties also involve significant amounts of walking around equipment and climbing in and out of cars.

2. Claimant testified that he twisted his right knee as he placed his foot onto the floor after stepping off the 5-inch rise of the doghouse in one of the lanes. Claimant says he initially felt pain in his knee but kept working. Claimant stated that his right knee pain worsened the next day when it swelled up, such that he elevated his leg to reduce the swelling.

3. Claimant sustained a brain-shear type injury in a single car motor vehicle accident in 1997. As a result of his injury, claimant was in a coma for 3 months and hospitalized for 10 months. Claimant now has a noticeable speech impediment. Claimant also has problems with motor skills, and he reports problems with his memory. Crediting his testimony, claimant needs to write things down and learns tasks by repeatedly performing an activity.

4. Claimant understood employer’s policy requiring employees to report any work injury within 96 hours. On September 24, 2008, claimant telephoned Parish and told her that he could not work because he “blew out” his knee two weeks earlier. Claimant did not tell Parish on the 24th that he hurt his knee at work. Parish told claimant he needed to bring a physician’s release to return to work before she could allow him to return to work. Claimant came into work the afternoon of September 24th and told Parish he did not want to file a workers’ claim for compensation. Parish suggested claimant go home, ice his knee, and rest. Claimant told Parish he would go to the Veterans Administration hospital the following day to obtain a physician’s release to return to work.

5. Claimant reported to the emergency room at the VA hospital on September 25th. At the VA, Matt Ake, R.N., recorded that claimant reported: “I hurt my right knee”. Nurse Ake further recorded that claimant reported a history of mechanical trauma for two weeks since hyper-extending it. Nurse Ake recorded that claimant denied his visit was due to an injury. Nurse Ake recorded claimant stating his knee “give out (sic)” occasionally. James T. Connor, M.D., recorded claimant reporting he hyper-extended is knee 2 weeks ago. Dr. Connor released claimant from work for 2 days.

6. Although scheduled to work, claimant missed work from September 24th through 27th because of his knee. Claimant eventually told Parish he had hurt his knee at work on September 16th when he slipped stepping over the doghouse and hyper-extended his knee. While Parish testified she thought claimant reported this to her on September 30th or 31st, the Judge credits Postlethwait’s testimony that Parish telephoned her on October 1st to report claimant’s injury.

7. Postlethwait met with claimant on October 2nd to complete the Employer’s First Report of Injury (E-1). Although claimant told Postlethwait he injured his knee on September 16th, Parish confirmed for Postlethwait that claimant had not worked on September 16th. On the E-1, Postlethwait scratched out the 16th as the date of injury and, at claimant’s request wrote the 17th. After completing the E-1, Postlethwait took claimant to the clinic of Michael Ladwig, M.D., for medical treatment.

8. On direct examination, claimant testified that he injured himself on September 17, 2008. While claimant stated he reported his injury to Parish 6 days later, he instead reported the injury to Parish on September 24th. On cross-examination, claimant changed the date of his injury to September 23rd, saying he injured his knee 2 days before going to the emergency room at the VA. Claimant said he recalled going to the VA

on September 25th because that is his birthday. When confronted with the history he reported to Dr. Connor and Nurse Ake of injuring his knee 2 weeks before, claimant explained that his memory is bad. Claimant however stated that he told Dr. Connor and Nurse Ake that he injured his knee at work. Crediting Parish's testimony, claimant did not work either on September 16th or September 23rd. Claimant's testimony concerning the date of his injury is completely unreliable and lacking credibility.

9. Hale is an assistant manager and one of claimant's supervisors. Hale and claimant met on September 17, 2008, to review claimant's performance evaluation. Hale rated claimant's performance in the excellent category. Hale commented: "[Claimant] works very hard and is a great employee to have". Although September 17th is one of the days claimant purportedly injured his knee, claimant did not report any injury to Hale even though the performance evaluation meeting provided a good opportunity for such reporting.

10. Respondents contend they have shown it more probably true that claimant injured his right knee when he became angry while at work and kicked a wall sometime in early September of 2008. Although claimant testified he thought Apodoca witnessed the wall-kicking incident, she was off work on maternity leave from August 26th through October 7th. Apodoca thus could not have witnessed the wall-kicking incident.

11. Francis is one of claimant's supervisors at employer. Francis witnessed the wall-kicking incident, but could not recall the date it occurred. According to Francis, claimant had stacked cars in one of the lanes for inspection. Claimant asked Hale who she wanted to assign to drive the cars in the lane. When Hale told claimant he should drive the cars, claimant became angry and kicked a wall. Francis however agreed that claimant neither damaged the wall nor appeared to have injured his right leg as a result of the wall-kicking incident.

12. Hale's explanation of the wall-kicking incident supports Francis's testimony about the incident. Around 5:00 p.m., claimant had loaded a lane with cars for inspection without realizing the driver had gone home. When Hale told claimant he would have to drive the cars, he became angry and kicked a wall. Hale placed the wall-kicking incident sometime in late August or early September.

13. Insurer filed a General Admission of Liability (GAL) on October 27, 2008, admitting liability for medical benefits and asserting, incorrectly, that claimant had no lost time. Respondents failed to show it more probably true than not that claimant injured his right knee during the wall-kicking incident in early September. Francis's testimony that claimant did not appear to injure himself during the wall-kicking incident amply supports claimant's testimony that the wall-kicking incident did not cause any injury to his right knee. There was no persuasive evidence showing that the wall-kicking incident proximately caused claimant's right knee condition.

14. Dr. Ladwig examined claimant on October 2nd and recorded claimant reporting a mechanism of injury on September 17th consistent with his testimony and with what he reported to Parish and to Postlethwait. Dr. Ladwig referred claimant for a magnetic resonance imaging (MRI) scan of his right knee and released him to modified duty work. Claimant underwent the MRI scan on October 8th and followed up with an examination by Dr. Ladwig.

15. Dr. Ladwig referred claimant to Orthopedic Surgeon James P. Lindberg, M.D., who evaluated him on October 14th. Dr. Lindberg noted claimant had a tear of the me-

dial and lateral menisci, with possible tear of the anterior cruciate ligament (ACL). Dr. Lindberg recommended arthroscopic surgery to repair claimant's knee.

16. Claimant testified that he thought Dr. Ladwig performed surgery on October 16th. Claimant was off work from October 20th through 31st due to his surgery. Claimant returned to work at employer on November 3, 2008.

17. Claimant showed it more probably true by the narrowest of margins that he twisted his right knee while stepping onto the floor from a doghouse in one of employer's inspection lanes. While the Judge found claimant's testimony concerning the date of his injury unreliable and lacking credibility, claimant persuasively explained that his preexisting disability severely affects his ability to remember. When confronted by inconsistencies regarding the date of his injury, claimant agreed he suffered memory problems. More importantly, claimant avoided engaging in any form of dissembling when confronted by such inconsistencies. Claimant's story about the mechanism of his injury largely was consistent, except for what he reported to the providers at the VA. The Judge credits the impression of claimant's supervisors that he is an excellent employee as a factor supporting the credibility of the mechanism of injury he reported.

18. Claimant earned an hourly wage of $9.50 until he received a raise, effective October 22, 2008. Claimant worked full time for employer, but reduced his hours to part time as of July 6, 2008, to attend technical school to become a certified mechanic. Claimant attends school during the morning 5 days per week. According to the E-1, claimant typically worked 24 hours per week, which calculates to an average wage of $228.00 per week. Averaging claimant's historical earnings over the 10 weeks he worked between July 6th and September 13th provides a weekly wage of $227.03. The Judge thus finds it more probably true than not that an average weekly wage of $228.00 fairly approximates claimant's wage loss as a result of his injury.

19. Claimant showed it more probably true than not that his injury proximately caused his temporary wage loss. Because of restrictions from his right knee injury, claimant was unable to perform his regular work on September 26th and 27th. Employer accommodated claimant's restrictions by providing him modified-duty work until he left work for his surgery on October 20th. Claimant was unable to perform any work from October 20th through October 31st.

CONCLUSIONS OF LAW

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

A. Compensablility:

Claimant argues he has proven by a preponderance of the evidence that he sustained a right-knee injury arising out of the course and scope of his employment. The Judge agrees.

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a

preponderance of the evidence that his injury arose out of the course and scope of his employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

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 showed it more probably true by the narrowest of margins that he twisted his right knee while stepping onto the floor from a doghouse in one of employer's inspection lanes. Claimant thus proved by a preponderance of the evidence that he sustained a compensable injury.

In analyzing the facts, the Judge found claimant's testimony concerning the date of his injury unreliable and lacking credibility. Claimant however persuasively explained that his preexisting disability severely affects his ability to remember. When confronted by inconsistencies regarding the date of his injury, claimant agreed he suffered memory problems. More importantly, the Judge noted that claimant avoided engaging in any form of dissembling when confronted by such inconsistencies, indicating he was not attempting to cover the fact that his story was inconsistent. Claimant's story about the mechanism of his injury largely was consistent, except for what he reported to the providers at the VA. Finally, the Judge credited the impression of claimant's supervisors

that he is an excellent employee as a factor supporting the credibility of the mechanism of injury he reported. Claimant thus showed it more probably true that he injured his right knee while performing work for employer.

The Judge concludes claimant's claim for benefits under the Act should be compensable. In light of this finding, the Judge does not address respondents's argument that they have proven by a preponderance of the evidence that insurer improvidently filed an admission of liability based upon claimant's misrepresentation of how his injured his knee. Insurer's request to retroactively or prospectively withdraw the GAL should be denied.

B. Medical and Temporary Disability Benefits:

Claimant argues he has proven by a preponderance of the evidence that he is entitled to medical and temporary disability benefits. The Judge agrees.

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.

Respondents thus 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).

Respondents do not contest that medical treatment provided by Dr. Ladwig, Dr. Lindberg, and providers to whom they have referred claimant is authorized and reasonably necessary to cure and relieve claimant of the effects of his compensable injury. The Judge concludes insurer should pay for reasonably necessary treatment provided by Dr. Ladwig, Dr. Lindberg, and providers to whom they have referred claimant.

The ALJ must determine an employee's average weekly wage (AWW) by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of injury, which must include any advantage or fringe benefit provided to the employee in lieu of wages. *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). 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).

The Judge found that an AWW of $228.00 fairly approximates claimant's wage loss as a result of his injury.

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).

The Judge found that claimant showed it more probably true than not that his injury proximately caused his temporary wage loss on September 26th and 27th and from October 20th through October 31st. The Judge concludes insurer should pay claimant TTD benefits for September 26th and 27th and from October 20th through October 31, 2008, based upon an AWW of $228.00.

ORDER

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

1. Claimant's claim for benefits under the Act is compensable.

2. Insurer's request to retroactively or prospectively withdraw the GAL is denied.

3. Insurer shall pay for reasonably necessary treatment provided by Dr. Ladwig, Dr. Lindberg, and providers to whom they have referred claimant.

4. Insurer shall pay claimant TTD benefits for September 26th and 27th and from October 20th through October 31, 2008, based upon an AWW of $228.00.

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

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

DATED: _April 2, 2009_

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-773-758

ISSUES

The issues to be determined by this order are compensability and medical benefits.

FINDINGS OF FACT

1. Claimant has worked for Employer since February 2004 as a warehouse laborer and beverage distributor. Claimant alleges that lifting of beer kegs at work caused him to suffer a disc herniation in his lower back. Claimant cannot identify any specific incident or injury to his lower back that occurred at work.

2. Claimant was assigned a beer keg delivery route and began to lift and deliver kegs in August of 2007. Claimant stated in the "Commercial Driver Fitness Determination Form," dated July 23, 2007, that he had chronic low back pain. The chronic back pain identified by Claimant was one month prior to his work duties of lifting and delivering kegs in August 2007.

3. Claimant did not report any pain or problems with his back to Allaire, his supervisor, prior to Claimant's last shift worked on September 19, 2008.

4. Claimant worked four days a week. He was on vacation from Tuesday September 23 through September 26, 2008. Claimant was not scheduled to work September 27 through September 29, 2008, and had been off work since his last shift of September 19, 2008. On the morning of September 30, 2008, after eleven days off work, Claimant arrived at his place of employment at approximately 5:30 a.m.

5. Claimant testified that at home on September 25, 2008, he was having intermittent back pain and felt a tightness in his lower back, like a sore muscle. Claimant testified that when he first felt severe pain is when he went to sit on the couch.

6. Claimant was evaluated at Integrated Medical & Wellness Center on September 26, 2008. Claimant stated that he had back pain that began on September 25, 2008. Claimant stated he had a pain history of one day in his mid and lower back and that it was a "sharp" pain. Claimant was on vacation on September 25 and September 26, 2008, and not at work on the days identified in these medical records.

7. Allaire testified that Claimant arrived to work on September 30, 2008, and was having an "issue" getting into the office from his car. Claimant complained of back pain, and was told by Allaire to go home for the day. A short time later, co-workers notified Allaire that Claimant was in the break room and needed medical attention. Allaire called

the paramedics and Claimant was taken to St. Joseph's Hospital. Claimant had not begun any work activities or duties for Employer before he was in the break.

8. Claimant never reported or mentioned to Allaire any back pain or discomfort prior to Claimant's last shift worked on September 19, 2008. The first time Allaire was aware Claimant was having back pain was when Claimant arrived back to work on the morning of September 30, 2008, after returning from vacation.

9. At St. Joseph's Hospital on September 30, 2008, Claimant complained of sharp radiating lower back pain. Claimant stated to the ER physicians he has had years of back pain problems and that his pain began on the Thursday before. Claimant also stated in the medical records that his onset of symptoms was gradual, but the initial onset was six days prior to arrival. Based on these statements, Claimant's initial onset of pain would have been on September 25, 2008, when Claimant was on vacation.

10. Claimant obtained an MRI on November 20, 2008, at Thornton Imaging Center. The results of the MRI revealed that Claimant had multi-level degenerative disc disease L2-3 and L4-5 with the left L4-5 disc extrusion producing mild stenosis, and displacement of the left L5 nerve root.

11. Claimant treated with Employer's authorized medical provider, Dr. Michael Ladwig, on October 15, 2008. The records from Dr. Ladwig state Claimant said he was on vacation when his back spasms began. Dr. Ladwig also noted Claimant reported no accident at work and Claimant said he was playing video games while on vacation and "it just happened." Dr. Ladwig opined Claimant's low back pain was not work-related.

12. Dr. Nicholas Olsen examined Claimant on December 10, 2008. The records from Dr. Olsen state Claimant first noticed pain on September 25, 2008. Claimant was on vacation from work on this date. The records also indicate that Claimant had a natural history of disc disease.

13. Dr. Warren Johnson evaluated Claimant on October 13, 2008. The records from this evaluation state Claimant told Dr. Johnson about his trip to the hospital on September 30, 2008 and the back spasms he was having. Claimant told Dr. Johnson that he "had a similar episode years ago."

14. Claimant had treated at Healthworx on April 29, 1998. The records indicate Claimant stated he had sharp lower back pain and that he received chiropractic treatment once or twice a year. Claimant testified he would relate the pain in felt in this report to the pain he felt on September 26, 2008. Claimant was diagnosed with lumbar facet syndrome. This treatment and diagnosis was six-years prior to beginning employment with employer.

15. Claimant underwent an independent medical examination with Dr. Usama Ghazi on January 19, 2009. Dr. Ghazi's report stated, "Claimant was on vacation on September 26, 2008 when he went to sit on the couch while playing video games and watching

TV and noted severe stabbing low back pain with left lower extremity radicular pain." Dr. Ghazi stated that "The patient does indeed appear to have a left L5 radiculopathy secondary to an L4-5 extrusion, although the mechanism, timing and circumstances surrounding the injury which occurred while he was on vacation and essentially sedentary suggests against this being work-related."

16. Dr. Ghazi's report also stated, "although [Claimant's] job does involve rigorous lifting, flexing, extension, and twisting, the fact the injury occurred while [Claimant] was on vacation and in a sedentary position… underscores the fact that this is not work-related." (Respondents' Ex. A, Bates No. 004).

17. Dr. Ghazi testified that if Claimant suffered the disc extrusion at work, he would not have been able to fulfill his job duties and would not be able to lift kegs, due to the amount of pain a disc extrusion would cause.

18. Claimant has not established by a preponderance of the evidence that he suffered an injury at work or sustained an occupational disease.

CONCLUSIONS OF LAW

Section 8-43-201, provides that "(a) claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo.App. 1998) ("The claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo.App 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). Proof by a preponderance of the evidence requires claimant to establish that the existence of a contested fact is more probable than its nonexistence. *See Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO, March 20, 2002).

Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury or disease and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo.App 1997). In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo.App 2002). 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).

Section 8-41-301(1)(c), C.R.S., establishes as conditions for recovery that a claimant's injury must be one "arising out of and in the course of the employee's em-

ployment." The "arising out of" and "course of" employment criteria present distinct elements of compensability. The course of employment requirement refers to the time, place and circumstances of employment. The "arising out of" criterion requires a claimant to establish a causal connection between the employment and the injury such that the injury has its origins in the claimant's work related functions and is sufficiently related thereto to be considered part of the employment contract. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999).

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

Claimant has failed to establish he suffered a work-related injury while working for Employer. Claimant testified numerous times that his initial onset of pain in his back and into his leg occurred while he was at home on vacation, in the act of lowering himself to sit on the couch. The medical records submitted into evidence show that Claimant stated he felt a sharp pain on September 25, 2008, in his lower back that radiated into his leg and continued on September 26, 2008, for which he sought treatment with Integrated Medical & Wellness Center. Both of these days Claimant was at home.

The medical records dated September 30, 2008, from Saint Joseph's Hospital confirm that Claimant's onset of pain began six days prior when Claimant was on vacation. Claimant stated that on September 26, 2008, he felt a severe stabbing low back pain with left lower extremity radicular pain. The act of sitting on the couch at home is when Claimant suffered the disc extrusion and not in the act of lifting any kegs at work.

Dr. Ghazi stated, within a reasonable degree of medical probability, that Claimant did not suffer a work-related injury. Dr. Ghazi testified that Claimant told him he was attempting to sit on the couch at home while on vacation when he felt an onset of lower back pain that radiated into his leg. Dr. Ghazi stated in his IME report that Claimant repeatedly said the pain and injury occurred while he was on vacation attempting to sit on the couch. Dr. Ghazi testified that, while Claimant has diagnosis of a disc extrusion, the causality and timing of the injury make it unlikely the event occurred at work. Dr. Ghazi testified that Claimant would not have been able to lift kegs and would have felt immediate back pain if the disc extrusion had occurred at work. Dr. Ghazi testified that Claimant has spinal stenosis, a narrowing of the spinal canal. This condition causes Claimant to be more symptomatic as opposed to someone with a wider spinal canal. In Claimant's case, he could have complained of more back pain and be more symptomatic be-

cause he had spinal stenosis. Therefore, considering Claimant was symptomatic on September 25, 2008, while on vacation, and felt the sharp pain radiate into his leg while attempting to sit on the couch, makes it more likely than not that the actual disc extrusion occurred at home and not at work.

Dr. Ghazi testified that the MRI findings show a disc extrusion at the L4-5 level. Dr. Ghazi testified that someone who suffers a disc extrusion will feel an immediate onset of pain radiating into the leg. Dr. Ghazi asked Claimant several times during the independent medical examination when Claimant felt pain and Claimant stated he had some aching pain, but the severe sharp pain happened while attempting to sit on the couch on September 26, 2008. This is also supported by additional medical records submitted into evidence. Dr. Ghazi testified it is highly unlikely for someone to have a disc extrusion and be able to walk, drive, or in Claimant's case, be able to lift kegs. Claimant may have had some back pain, but the actual extrusion, which was evidenced by the onset of sharp pain radiating into Claimant's leg, was while Claimant was attempting to sit down on his couch at home on vacation. The opinion of Dr. Ghazi is supported by the reports of Dr. Ladwig. The testimony and opinions of Dr. Ghazi are credible and persuasive.

While Claimant does appear to have a disc extrusion, the mechanism that caused the injury occurred while Claimant was in the act of sitting down on his couch at home, on vacation, and not at work. The act of sitting down was the causality and mechanism for Claimant's disc extrusion and not the result of his work activities with employer. Claimant documented a ten-year history of back problems and degenerative disc disease, along with a similar episode involving Claimant's back that occurred prior to working for this Employer. Claimant has failed to prove by a preponderance of the evidence that he sustained a work-related injury.

ORDER

It is therefore ordered that Claimant's claim is denied and dismissed.

DATED: *April 3, 2009* Bruce C. Friend, ALJ

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-711-712

ISSUES

¬ Did the Division-sponsored independent medical examination (DIME) physician find the claimant was at maximum medical improvement (MMI) for the 2006 compensable injury?

¬ If the DIME physician found the claimant has not reached MMI, did the respondents overcome the DIME physician's finding concerning MMI by clear and convincing evidence?

FINDINGS OF FACT

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

1. The claimant sustained an industrial injury to her right shoulder on March 4, 2002. In 2002 a company that was a predecessor to the employer in this case employed the claimant. As a result of the injury claimant underwent a course of physical therapy and injections.

2. In August 2002 Dr. Sean Grey, M.D., an orthopedic surgeon examined the claimant. Dr. Grey reviewed a recent MRI of the right shoulder that revealed diffuse tendonitis/tendinosis of the rotator cuff tendon, degenerative changes of the arcomioclavicular joint, and a type II to III acromial morphology. Dr. Grey diagnosed "shoulder impingement, no evidence of rotator cuff tear." Dr. Grey advised the claimant that "nothing has to be done interventionally at this point," and opined that it would be reasonable for the claimant to continue with a home exercise program. He further opined that if the claimant's symptoms persisted, the claimant "would be a good candidate for a subacromial decompression."

3. On August 12, 2002, the Dr. Jeffrey Wunder, M.D., one of the claimant's authorized treating physicians (ATP) for the 2002 injury, examined the claimant. Dr. Wunder noted the claimant had "only mild pain" and diagnosed "chronic mild right shoulder tendonitis." Dr. Wunder noted that the claimant wished to continue with conservative treatment and did not want surgery. Dr. Wunder released the claimant to "full duty."

4. On September 9, 2002, Dr. Wunder noted the claimant reported that her symptoms were under "good control" with exercise and ibuprofen, and that the claimant did not want "further invasive treatment." Dr. Wunder opined the claimant was at MMI with a 7 percent impairment of the right upper extremity. Dr. Wunder stated she was released to "full duty" and her current job was "okay." The claimant subsequently settled the claim for this injury.

5. The claimant returned to work performing her pre-injury duties until sometime in 2006. At that time the employer modified its work schedule to a single shift and the claimant's job duties were changed. The claimant was required to use a hook to lift five to seven pound pieces of meat and throw them over her head. The claimant noticed pain in her right shoulder was increasing, and on April 7, 2006, the claimant noted sharp pain in her right shoulder. This injury resulted in the current claim for benefits.

6. Following this injury the claimant underwent a subacromial injection that temporarily relieved some of her pain. She also underwent another MRI in August 2006 that was interpreted as showing a type II acromion, mild supraspinatus tendinopathy,

moderate infraspinatus tendonosis, and a tear of the superior labrum (SLAP tear). The claimant received additional physical therapy that resulted in only mild benefit.

7. The claimant was referred to Dr. Nathaniel Cohen, M.D., an orthopedic surgeon. Dr. Cohen examined the claimant on September 5, 2006. Dr. Cohen reviewed the recent August 2006 MRI report and noted a "possible superior labral tear." Although he stated the MRI finding of a labral tear could represent an "artifact," he concluded that, "there does appear to be some evidence of a tear of the labrum." Dr. Cohen's impression was superior labral tear and rotator cuff tendinosis. On October 30, 2006, Dr. Cohen noted that he offered the claimant another injection, but she declined in favor of continued physical therapy.

8. On November 30, 2006, Dr. Roberta Anderson-Oeser, M.D., placed the claimant at MMI with a 22 percent right upper extremity impairment rating. Dr. Oeser deducted the pre-existing impairment rating and assigned a 15 percent upper extremity impairment rating for the 2006 injury. Dr. Oeser also placed the claimant on permanent restrictions to avoid lifting above shoulder height, to avoid lifting more than 10 pounds, and to avoid repetitive activities with the right arm.

9. The claimant returned to Dr. Wunder on November 1, 2007, for the purpose of undergoing an independent medical examination (IME). Dr. Wunder opined the claimant had a "worsening of her underlying condition" and that she "sustained further injury to the right shoulder" as a result of the overhead lifting at her job. Dr. Wunder noted the recent MRI showed a SLAP tear that was not present in 2002. He questioned whether the claimant was at MMI and opined she should return to Dr. Grey for a surgical evaluation. Dr. Wunder opined the claimant should not lift, push, pull, or carry more than 10 pounds with the right arm, and should function with the right arm below chest level.

10. Dr. Grey reexamined the claimant on May 27, 2008. He opined that the August 2006 MRI showed "predominantly" a "sublabral foramen" rather than a SLAP tear. He further opined the claimant had experienced "progressive deterioration of her symptoms that she had in 2002 with intermittent episodes of re aggravation." According to Dr. Grey, this included a "re aggravation" when her work duties changed in 2006. Dr. Grey diagnosed "chronic impingement syndrome" with multiple exacerbations. He opined that although the claimant is not an ideal surgical candidate, she has failed conservative therapy and that her only option is to undergo "arthroscopy, decompression, and evaluation of her superior labrum." Dr. Grey did not think the labrum would require surgical repair. The claimant advised Dr. Grey she would consider surgery if she felt there was a "likelihood of significant clinical improvement."

11. Dr. Ranee Shenoi, M.D., performed a DIME on September 22, 2008. Dr. Shenoi reviewed the medical records from the 2002 shoulder injury and the 2006 injury. Dr. Shenoi opined that the MRI of August 2006 constituted "objective testing," and that the MRI revealed a superior labral tear subject to repair with surgery. Dr. Shenoi recommended the claimant be returned to Dr. Grey for to determine whether to repeat the MRI arthrogram for purposes of comparison to the 2002 MRI, and whether to perform

surgery on the right shoulder. Dr. Shenoi assessed a 13 percent impairment upper extremity rating after deducting the 7 percent assigned for the 2002 injury. Further, Dr. Shenoi agreed with the November 1, 2007, restrictions imposed by Dr. Wunder.

12. Dr. Grey authored a report on February 3, 2009. He opined that the claimant's impingement syndrome has been present since 2002, but she experienced a "significant aggravation on April 7, 2006." However, Dr. Grey noted that he first suggested consideration of surgical intervention in 2002. Under these circumstances, Dr. Grey stated that, "the underlying proximate cause of her need for current surgical intervention is related to a chronic impingement dating back to 2002."

13. The claimant credibly testified that her shoulder hurts more than it did after she was released to return to work after the 2002 injury, and that she would like to undergo surgery so that she can regain use of her right arm and return to work.

14. The ALJ finds as a matter of fact that Dr. Shenoi's opinion, as the DIME physician, is that the claimant is not at MMI because she needs a surgical evaluation from Dr. Grey, as well as determination of whether to repeat the 2006 MRI for purposes of comparison to the 2002 MRI. The ALJ finds that it is implicit in Dr. Shenoi's opinion that she believes the need for the surgical evaluation is proximately caused by the 2006 industrial aggravation of the pre-existing right shoulder condition. This is true because Dr. Shenoi's opinion is based, in part, on the observation that the August 2006 MRI showed a SLAP tear, whereas the 2002 MRI did not. Moreover, Dr. Shenoi imposed a higher impairment rating than existed after the 2002 injury, and agreed with the greater restrictions imposed by Dr. Wunder in November 2007.

15. The ALJ finds the respondents failed to prove by clear and convincing evidence that Dr. Shenoi was incorrect in finding that the need for the surgical evaluation was proximately caused by the 2006 injury. The ALJ finds that the weight of the evidence supports Dr. Shenoi's determination that there is a causal relationship between the 2006 injury and the need for a surgical evaluation by Dr. Grey. First, Dr. Shenoi concluded, based on the 2006 MRI report, that the claimant has a labral tear that may warrant surgery. Dr. Cohen corroborates Dr. Shenoi's opinion that the claimant sustained a labral tear in 2006. Although Dr. Cohen noted that the MRI evidence of a torn labrum might reflect an "artifact," he nevertheless diagnosed a torn labrum and stated there was some evidence to support the finding. Further, in November 2007 Dr. Wunder opined the claimant sustained further injury to her shoulder in 2006 and that the 2006 MRI showed a SLAP tear that was not previously noted in 2002.

16. Dr. Grey does not rule out the possibility that the claimant sustained a SLAP tear in 2006. Dr. Grey readily concedes the claimant sustained a "significant aggravation" of her pre-existing impingement syndrome as a result of the 2006 injury. Further, Dr. Grey indicated in May 2008 that if surgery is performed on the claimant's right shoulder the procedure should include "an evaluation" of the labrum. Thus, even though Dr. Grey expects that the labrum is not actually torn and will not require surgical repair, he concedes there is a need to *evaluate* the labrum. Therefore he implies there is a need for a diagnostic surgical evaluation that has developed since he first sug-

gested consideration of surgery in 2002. For these reasons the ALJ finds that Dr. Grey's opinions do not rise to the level of clear and convincing evidence that Dr. Shenoi is incorrect in finding that the claimant is not at MMI and should be referred for a surgical evaluation as a result of the 2006 injury.

17. The weight of the evidence persuades the ALJ that the claimant's condition is worse after the 2006 "aggravation" than it was when she was placed at MMI in 2002. After the 2006 injury the claimant's impairment rating has been increased dramatically. Further, after the 2006 aggravation the claimant has been placed under substantial physical restrictions that did not exist when she was originally placed at MMI in 2002. There is persuasive evidence that the claimant's condition is worse than it was when she reached MMI in 2002, and that the worsening is, at least in part, related to the 2006 injury.

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 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).

DIME PHYSICIAN'S OPINION CONCERNING MMI

At hearing the respondents argued that Dr. Shenoi implicitly agrees with Dr. Grey that the claimant's condition has not changed since 2002. Therefore, the respondents reason that Dr. Shenoi necessarily agreed with Dr. Grey that if the claimant needs surgery, the need for surgery was caused by the 2002 injury. Thus, the respondents assert that Dr. Shenoi has actually opined the claimant is at MMI for the 2006 injury. The ALJ disagrees with the respondents' position.

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

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (I.C.A.O. May 20, 2004); *Hatch v. John H. Harland Co.,* W.C. No. 4-638-712 (I.C.A.O. August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

When a DIME physician issues conflicting or ambiguous opinions concerning whether or not the claimant has reached MMI for the industrial injury, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

As determined in Finding of Fact 14, the ALJ finds as a matter of fact that Dr. Shenoi did not simply defer to Dr. Grey's opinion concerning the need for surgery, or the cause of the need for surgery. Rather, Dr. Shenoi found that the claimant has a surgical lesion (SLAP tear) that appeared after the 2006 injury. Dr. Shenoi has found the claimant is not at MMI for the 2006 injury.

OVERCOMING DIME BY CLEAR AND CONVINCING EVIDENCE

The respondents contend that Dr. Shenoi's opinion that the claimant is not at MMI because she must be referred to Dr. Grey for a surgical evaluation has been overcome by clear and convincing evidence. The respondents argue that if the claimant

needs surgery, the need for surgery is causally related to the 2002 injury, not the 2006 injury. The respondents rely on the opinions of Dr. Grey for the propositions that surgery is not needed to repair the labrum, as assumed by Dr. Shenoi, and that the claimant's condition is essentially unchanged since 2002. The respondents assert that Dr. Grey, a surgeon, is in a better position than Dr. Shenoi to determine the cause of the need for surgery. The ALJ disagrees with the respondents' position.

A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

As determined in Findings of Fact 15, 16, and 17, the respondents failed to prove by clear and convincing evidence that Dr. Shenoi incorrectly determined the claimant needs surgical evaluation as a result of the 2006 aggravation of her pre-existing shoulder condition. As found, Dr. Shenoi has determined the claimant qualifies for surgical repair of a labral tear caused by the 2006 injury. Dr. Shenoi's opinion that the 2006 injury caused s labral tear is supported by the 2006 MRI results as well as the opinions of Dr. Cohen and Dr. Wunder. Although Dr. Grey apparently believes the claimant does not actually have a torn labrum, even he concedes that she needs a surgical "evaluation" of the labrum. Dr. Grey's opinions are not sufficiently persuasive to prove that Dr. Shenoi is incorrect in finding that the claimant has a torn labrum that needs surgical evaluation.

Further the weight of the evidence demonstrates that the claimant's condition is worse after the 2006 "aggravation" than it was when she was placed at MMI in 2002. After the 2006 injury the claimant's impairment rating has been increased dramatically. Further, after the 2006 aggravation the claimant has been placed under substantial physical restrictions that did not exist when she was originally placed at MMI in 2002. There is persuasive evidence that the claimant's condition is worse than it was when she reached MMI in 2002, and that the worsening is, at least in part, related to the 2006 injury. This evidence supports Dr. Shenoi's opinion that the claimant is not at MMI because she may need surgery to repair her shoulder.

ORDER

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

1. The claimant has not reached MMI for the 2006 right shoulder injury.
2. Issues not resolved by this order are reserved for future determination.

DATED: April 7, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-777-118

ISSUES

The following issues were raised for consideration at hearing:

1. Compensability;
2. Medical benefits;
3. Temporary total disability benefits;
4. Average weekly wage; and
5. Penalties.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is a 40 year old male who resides with his family in Arizona. Claimant has worked for the employer for 18 years. Claimant reported to the owner of the employer's business, Jim Whatcott. The employer is non-insurer. Claimant was employed by the Employer as a plasterer and lather. The work performed by Claimant was seasonal work.

2. The employer's business office is located in Durango, CO. Claimant was advised of work with the Employer by calling Jim Whatcott by telephone in Durango from Claimant's home in Arizona. Mr. Whatcott advised Claimant whether he had work for him.

3. Claimant was paid by Mr. Whatcott at the rate of $17.00 per hour for 45 hours per week. Claimant's average weekly wage is $765.00. Claimant was not paid overtime and he received no benefits. Claimant received his paycheck bi-weekly by traveling to Durango and picking it up from Mr. Whatcott.

4. In June 2008, Mr. Whatcott assigned Claimant to work on a project in Farmington, New Mexico where he performed plastering and lathe work. On June 28, 2008, Claimant was performing plaster and lathe work on a large home. Claimant was

working at the front door of the home. Claimant was working on his knees at the front door when a nearby scaffolding fell on him and knocked him out.

5. When the Claimant awakened after being knocked by being struck by the scaffolding, he was in the San Juan Hospital emergency room in Farmington, NM. Claimant injured his head, neck, and right shoulder.

6. Claimant continues to experience pain in his head with headaches and dizziness. Claimant also continues to have problems lifting anything because of the injury to his right shoulder. Claimant also experiences numbness in his right little finger and under his arm from his finger to his elbow. Claimant also experiences right neck stiffness and swelling.

7. On June 28, 2008, Claimant's co-worker contacted Mr. Whatcott to advise him that Claimant was involved in a work related accident. Mr. Whatcott told Claimant's co-worker to take Claimant to the hospital. When Claimant regained consciousness, he called Mr. Whatcott. Mr. Whatcott advised Claimant that he would pay for his medical expenses.

8. On June 30, 2008 Claimant spoke to Mr. Whatcott and he directed Claimant to return to work. Claimant was still injured and the hospital physician had directed Claimant not to work. Claimant was prescribed a neck brace. As instructed by Mr. Whatcott, Claimant returned to work with his two daughters who performed the work for him. Claimant had his daughters work for him for two days while he directed their activities. After two days of working in this manner, Claimant left the work site and has not returned to work again at the Employer's or anywhere else.

9. After July 2, 2008 when Claimant left work, he spoke to Mr. Whatcott several times. Claimant explained that he was still injured and that he needed money to support his family and he needed medical attention. Mr. Whatcott promised to pay Claimant $450.00 per week during his illness. Instead, Mr. Whatcott made three payments to Claimant of $400.00 and one payment to Claimant of $500.00 and another one time payment of $1000.00. Mr. Whatcott paid none of the Claimant's medical bills. He made an offer to Claimant of settlement of the Claimant workers' compensation claim for $5000.00, but after making the offer, Claimant was not paid any money.

10. Claimant has not been returned to work by any physician and has been disabled from work since July 1, 2008. Claimant has not earned any money and, as a consequence, has been unable to afford to maintain a vehicle or cell phone. Claimant has seven children who rely on his support. money.

11. When Claimant was not referred for medical care by the Employer, Claimant returned to the San Juan Hospital in Farmington, NM to seek additional medical treatment, but he was denied treatment at the hospital and directed by hospital personnel to go the Durango, CO and seek treatment there. Claimant had limited money and when he arrived in Durango, Mr. Whatcott told Claimant not to be seen by a Durango physician. Mr. Whatcott did not direct who Claimant should be treated by.

12. Claimant received follow up medical care in Flagstaff and Canyonlands, AZ. Claimant had a MRI and CT scan at the Flagstaff Medical Center of his head, neck, and back.

13. Claimant incurred medical bills related to the work injury, as follows:
a. for medical treatment at the San Juan Regional Medical Center totaling $6,445.73 for accounts numbered D22495535 and D22476675;
b. emergency room physicians at the San Juan Regional Medical Center totaling $467.00 for account numbered ER22495535;
c. radiological studies at Four Corners Radiology totaling $575.28 for account numbered 479980;
d. Canyonlands Community Health Care totaling $706.00 for account numbered 32099; and
e. Darius Moezzi, M.D. and Dr. Hall of Flagstaff, AZ totaling $1328.24 for account numbered 15786.

14. Claimant was prescribed narcotic pain medication and an anti-depressant. Claimant obtained the medications for the work injury from the Fry, Flagstaff, and Walgreen Pharmacies. Claimant incurred a cost of $74.00 for the work related prescribed medications.

CONCLUSIONS OF LAW

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

1. The purpose of the Workers' Compensation Act of Colorado is to insure 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 8-42-102(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.

2. 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 that not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 237, at 235 (Colo. App. 2004). A workers' compensation case is 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. 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 v. ICAO*, 5 P.3d 385, at 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, 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 Company v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil, 3:16 (2005)

4. A preponderance of the evidence establishes that Claimant sustained injury to his head, neck, and right shoulder arising out of the accident of June 28, 2008, which occurred in the course and scope of his employment. There is a consistent medical record reflecting pain and injury in the Claimant's head, neck and right shoulder beginning after the accident, continuing for the duration of care and thereafter.

5. The respondent is liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). The respondent is only liable for authorized or emergency medical treatment. See section 8-42-101(1), C.R.S. (2002); *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973). Under section 8-43-404(5), C.R.S. (2002), 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). Respondents have the right to select the initial authorized treating physician. Section 8-43-404(5), C.R.S. Respondents are liable only for treatment from authorized providers. A physician may become authorized to treat the claimant as a result of a referral from a previously authorized treating physician. The referral must be made in the "normal progression of authorized treatment." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985). If the employer fails to authorize a physician upon claimant's report of need for treatment, claimant is impliedly authorized to choose his own authorized treating physician. *Greager, supra*.

6. In this case, Respondent failed to designate a provider of medical treatment for the June 28, 2008 injury and therefore the right of selection passed to Claimant. To date, Claimant has received treatment at the San Juan Regional Medical Center and the providers and facilities named in Findings of Fact paragraphs 12 through 14 above. These providers and their referrals are authorized medical providers.

7. Claimant received medical treatment for the work injury and Respondent is liable for this treatment. Respondent is liable for the treatment already received by Claimant totaling $9,522.25. Respondent shall continue to be liable for Claimant's reasonable, necessary and related medical treatment for the work injury.

8. To obtain TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 639 (Colo. App. 1997). A claimant must establish a causal connection between a work-related injury and a subsequent wage loss. Section 8-42-103(1)(a), C.R.S.: *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 546, 546 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evi-

denced by loss or restriction of bodily function; and (2) impairment of wage earnings capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The "impairment of earning capacity" element of disability may be evidenced by a complete inability to work or by restrictions that impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy* & Co., 964 P.2d 595, 597 (Colo. App. 1998). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with Section 8-42-105(3)(a)-(d), C.R.S. 2003.

9. The evidence presented at hearing established that Claimant was disabled from his usual employment from July 2, 2008 and continuing. Respondent is liable for TTD from July 2, 2008 and continuing.

10. Claimant established that his AWW is $765.00 and the temporary total disability rate is $409.71. Respondent is liable for 37 weeks of TTD from July 2, 2008 through the date of hearing March 17, 2009, and continuing. During the period July 2, 2008 through March 17, 2009, Respondent shall be liable for TTD in the amount of $15,159.27, subject to all appropriate offsets.

11. Section 8-43-408(1), C.R.S. provides that when the employer is not insured, "the amounts of compensation or benefits provided in said articles shall be increased by fifty percent." This Employer is not insured. Therefore, all compensation and benefits shall be increased by 50%. Respondent shall be liable for a 50% increase in Claimant's TTD benefits. Respondent shall be liable for an additional award of TTD totaling $7580.00

ORDER

IT IS THEREFORE ORDERED THAT:

1. Claimant was injured in an accident arising out of and in the course and scope of his employment with Respondent on June 28, 2008.

2. Claimant's average weekly wage is $765.00.

3. Claimant was temporarily and totally disabled from July 2, 2008 and continuing. Respondent shall pay TTD benefits at the rate of $409.71 per week from July 2, 2008 and continuing. Through the date of hearing on March 17, 2009, Respondent shall be liable for TTD totaling $15,159.27. Respondent shall be liable for additional TTD based on a penalty awarded under section 8-43-408(1) for the failure to maintain insurance totaling $7,580.00. This penalty award for increased TTD shall be paid at the rate of 4% per annum pursuant to Section 8-43-408 (2) C.R.S.

4. The San Juan Regional Medical Center, Four Corners Radiology, Canyonlands Community Healthcare, Dr. Moezzi and Dr. Hall are authorized medical providers.

Respondent shall pay all reasonable and necessary medical costs associated with treatment by these providers for the injuries caused by the June 28, 2008 industrial accident, in accordance with the medical fee schedule, subject to any applicable offset.

5. Respondent shall pay all reasonable, necessary, and related medical benefits to cure and relieve Claimant's condition resulting from his June 28, 2008 industrial accident.

6. Employer shall pay interest at the rate of 8% per annum on all sums which were not paid when due.

7. In lieu of payment of the above compensation and benefits to the Claimant, Respondent shall:

a. Deposit the sum of $32,336.00 with the Division of Workers' Compensation, as trustee, to secure the payment of the unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, 633 17th Street, Suite 900, Denver, Colorado, 80202, Attention Sue Sobolik; or

b. File a bond in the sum of $32,336.00 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 Respondent 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 Respondent of the obligation to pay the designated sum to the trustee or to file the bond, Sec. 8-43-408(2), C.R.S.

8. Any and all issues not determined herein are reserved for future determination.

DATED: April 7, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

WORKERS' COMPENSATION NO. WC 4-761-053

ISSUES

Claimant applied for hearing on the issue of compensability, temporary total disability benefits, reasonable, necessary and related medical benefits from an authorized provider and penalties under Section 8-43-304(1), C.R.S. for the employer's failure to report his injury to the Division of Workers' Compensation pursuant to Section 8-43-101, C.R.S. Respondents endorsed the affirmative defense of responsible for termination of employment.

Prior to the hearing, the parties stipulated that if the claim was found compensable, Claimant's average weekly wage would be $251.00. The parties also stipulated that Dr. Kleinert and Dr. Campbell with Founder's Family Medical Center would be designated as authorized providers.

FINDINGS OF FACT

1. Claimant was employed as an on-site property manager for employer at the Winrock Apartment Homes ("Winrock"). Winrock is owned and operated by employer. Claimant testified that on January 11, 2008, Mr. Nguyen, the owner of employer brought a couch to the apartment complex to be moved into the office. Claimant testified that he was being hurried out of the office to move the couch by his employer, Mr. Nguyen. Claimant was hurrying down the stairs from the office to the truck to assist in the moving of the couch and the next thing he knew, he fell and found himself at the bottom of the stairs. Claimant testified that he landed on his left knee when he fell and that his leg hurt and his arm felt strained.

2. Claimant testified that at the time of the fall his girlfriend, Ms. Roundy, and Mr. Nguyen were present. Claimant testified that Mr. Irizarry was at the premises, but was already out by Mr. Nguyen's truck. Ms. Roundy testified consistent with Claimant regarding the accident. Ms. Roundy did not witness the actual fall, but heard an unusual noise and turned around to see Claimant on the floor. Ms. Roundy testified that on the date in question, Mr. Nguyen had arrived with a couch to be moved into the office.

3. Mr. Nguyen testified that he witnessed the accident. Mr. Nguyen testified that he was standing next to Ms. Roundy when Claimant appeared to miss a step and fall on the stairs. Mr. Nguyen testified that when Claimant fell, he landed on his backside before falling forward onto his outstretched hands.

4. Respondents presented the testimony of Mr. Irizarry who testified that he witnessed Claimant fall, but could not recall the date. Mr. Irizarry testified that Claimant fell directly onto his buttocks and did not strike his left knee during the fall. The ALJ finds that Mr. Irizarry was likely testifying about an incident that is not subject to the present claim because Mr. Irizarry's testimony does not conform to that of the other witnesses. Specifically, Mr. Irizarry testified that Ms. Roundy was not present on the date

of the fall. This fact was refuted by all other witnesses. Next, Mr. Irizarry's description of the fall did not conform with the eye witness testimony from all of the other witnesses who indicated that Claimant ended up on his hands and knees following the incident. Therefore, the testimony of Mr. Irizarry regarding the fall is not credited by the ALJ.

5. Claimant testified that immediately following the incident, he filled out paperwork from the employer entitled "Apartment Community ACCIDENT REPORT". Claimant testified that he left the paperwork in Mr. Nguyen's inbox. However, the language used in the accident report does not appear to have been filled out contemporaneously with the Claimant's accident. Specifically, the accident report indicates the time of the accident as occurring at "approximately 3:30 p.m." The ALJ finds that if the accident report had been filled out immediately following the injury, the Claimant would likely not have used approximations for the time of the injury. Additionally, the Claimant reports that his left knee was bruised and swollen, which is unlikely to have occurred within minutes of the incident. The ALJ does not credit Claimant's testimony that he provided written notice of the accident to the employer on the date of the incident.

6. At the hearing, Respondents presented Claimant with handwritten notes, which documented that a couch was delivered by Mr. Nguyen on January 11, 2008. The notes do not indicate that Claimant fell on January 11, 2008. The ALJ finds that the handwritten notes were kept to document Claimant's employment activities and would not necessarily document if Claimant slipped and fell at work. The notes not a personal journal for Claimant. The ALJ finds it is more probably true than not that he slipped and fell on the stairs at work on January 11, 2008.

7. Claimant continued to work for employer following his incident and did not immediately lose any time from work. The ALJ finds that Claimant's injury did not result in Claimant being unable to perform the functions of his job for the period of January 11, 2008 through January 24, 2008. Claimant testified that when he requested medical treatment in the days following the incident, Mr. Nguyen told him the fall was a result of his own clumsiness, and refused to refer the Claimant for medical care. Eventually, Claimant sought medical care with Dr. Kleinert on January 25, 2008. Claimant reported to Dr. Kleinert that he was stressed at work because his supervisor yells at him. Claimant reported that his boss had not yet filed an accident report following his knee injury. Dr. Kleinert took Claimant off of work due to illness from January 25, 2008 through January 30, 2008. Dr. Kleinert also noted that a job change was highly encouraged because Claimant's reaction appeared to be situational.

8. Mr. Nguyen testified that he asked the Claimant following the injury if he needed medical treatment and Claimant rejected the offer from Mr. Nguyen. Mr. Nguyen testified that he was unaware that Claimant was making a claim for workers' compensation benefits until Claimant filed a workers' claim for compensation on May 26, 2008.

9. The ALJ credits the medical records of Dr. Kleinert and finds it is more probably true than not that Claimant verbally requested medical treatment from employer and employer failed to refer Claimant for medical treatment. The ALJ also finds

that Dr. Kleinert recommended that Claimant consider other employment opportunities for health reasons at the January 25, 2008 medical appointment. The ALJ finds that Dr. Kleinert took Claimant off of work as of January 25, 2008 for reasons unrelated to the industrial injury.

10. Claimant returned to Dr. Kleinert on February 29, 2008. Claimant reported to Dr. Kleinert that his anxiety was better after he resigned his position with employer. Claimant did not report any issues with regard to his knee or back as of the February 29, 2008 appointment with Dr. Kleinert.

11. Claimant contacted Ms. Nguyen, co-owner of employer on January 30, 2008. Claimant testified that he told Ms. Nguyen that he was going to need to take additional time off because he would need to return to his physician to determine if he would be released to return to work. Ms. Nguyen replied that she believed Claimant was a good employee, but that employer needed someone who could be around on a consistent basis. Claimant interpreted the conversation with Ms. Nguyen to mean he was being terminated. Ms. Nguyen testified that she did not terminate Claimant during the January 30, 2008 telephone conversation.

12. Following the telephone conversation with Ms. Nguyen, Claimant authored a resignation letter in which he indicated that he was no longer able to fulfill the duties of his position with employer. Claimant indicated in the resignation that his physician had advised him that it was in his best interest to find another source of employment. Following his resignation, Claimant sought help in filing a workers' compensation claim from the State of Colorado. Claimant eventually filed a workers' claim for compensation on May 26, 2008. Respondents filed a notice of contest on June 6, 2008.

13. Claimant was evaluated by Dr. Campbell on July 17, 2008 with reports of back pain and left knee pain. Claimant reported that his pain started after he fell down a set of stairs at work on January 11, 2008. Claimant complained that his left foot was numb for two days after the fall and he was seeking medical treatment because he did not feel he was better. Claimant complained that his knee was unstable and would give out on him after the fall. Claimant also complained of a feeling that his knee would grate and crack when moving it. Claimant reported his back pain was intermittent. Claimant reported a prior history of scoliosis but reported it did not cause pain. Dr. Campbell provided the Claimant with a prescription for flexeril and referred the Claimant for x-rays. Dr. Campbell also referred the claimant to follow up with Dr. Morfe, a physiatrist.

14. The ALJ credits the testimony of the Claimant and Mr. Nguyen that on January 11, 2008, he was hurrying out of the employer's office when he missed a step and slipped and fell down stairs. The ALJ finds that it is more likely true than not that Claimant missed a step while descending the stairs leading to his slip and fall. The ALJ finds that Claimant was within the course and scope of his employment when the slip and fall incident occurred and finds that the slip and fall injury arose out of and in the course of Claimant's employment with employer. Therefore, the ALJ finds that Claimant's slip and fall injury on January 11, 2008 is compensable.

15. Respondents argue that Claimant's injury should not be found compensable as it is the result of an "unexplained fall." Respondents are correct in asserting that a truly "unexplained fall" is not compensable under the Colorado Workers' Compensation Act. In this case, however, Claimant's fall resulted from his hurrying outside at the request of his employer, following which he missed a step on the stairs, causing his fall. Therefore, the fall is not "unexplained."

16. The ALJ finds that Claimant verbally reported the injury to his employer after the injury and requested medical treatment from the employer, but was denied treatment by employer. Claimant then sought treatment on his own with Dr. Kleinert on January 25, 2008. At the appointment on January 25, 2008, Claimant was complaining of pain in his knee as a result of the fall and the ALJ finds Claimant was seeking medical treatment related to the January 11, 2008 compensable injury. The ALJ finds that as of January 25, 2008, Claimant's slip and fall incident resulted in Claimant believing he was in need of medical treatment and caused Claimant to seek medical treatment on his own. Therefore, the ALJ finds that the medical appointment of January 25, 2008 is a compensable consequence of Claimant's slip and fall injury.

17. Claimant returned to Dr. Kleinert on February 29, 2008. This appointment primarily involved issues with regard to Claimant's anxiety, and not Claimant's physical injuries. The ALJ finds that this appointment was for issues unrelated to the industrial injury on January 11, 2008. Therefore, the ALJ finds Claimant has failed to prove that the medical appointment of February 29, 2008 with Dr. Kleinert was causally related to Claimant's industrial injury.

18. After Claimant filed his workers' claim for compensation, Claimant sought medical treatment with Dr. Campbell. Respondents stipulated at the hearing that if the claim was found compensable, Dr. Campbell and Dr. Kleinert would be considered authorized physicians. When Claimant sought treatment with Dr. Campbell on July 17, 2008, Claimant complained of continued pain in his left knee and back, which Claimant reported was related to his slip and fall injury on January 11, 2008. The ALJ finds that the treatment with Dr. Campbell on July 17, 2008 was reasonable, necessary and related to the injury on January 11, 2008 and finds that Respondents are liable for the treatment from Dr. Campbell and all referrals from Dr. Campbell.

19. Claimant was originally taken off of work by Dr. Kleinert on January 25, 2008 as a result of issues he was having with his anxiety. The ALJ finds Dr. Kleinert did not take Claimant off of work for his physical injuries from the January 11, 2008 injury. Nonetheless, on January 30, 2008, Claimant contacted Ms. Nguyen with regard to his work status. The ALJ finds that Claimant informed Ms. Nguyen that he would need to return to his physician before returning to work. Ms. Nguyen informed Claimant that she believed he was a good employee, but that they needed someone who could come to work consistently. Claimant interpreted this conversation to imply that he was being fired. Ms. Nguyen did not believe she was firing Claimant.

20. The ALJ finds that Claimant resigned his position at the recommendation of Dr. Kleinert due to the anxiety his job was causing him, including issues he was hav-

ing with regard to reporting his injury to his employer. Therefore, the ALJ finds that Claimant was not responsible for his termination of employment.

21. The ALJ finds that Claimant did not provide written notice to Respondents until Claimant filed his workers' claim for compensation on May 26, 2008. The ALJ finds that the Claimant was off of work as of January 25, 2008 due to his anxiety. Notably, Claimant has not alleged an entitlement of temporary disability benefits for the period of January 25, 2008 through January 30, 2008. Instead, Claimant alleges an entitlement to temporary disability benefits beginning February 4, 2008. The ALJ finds that the employer, while put on verbal notice that Claimant was alleging an injury as of January 11, 2008, was not aware for the purposes of Section 8-43-101, C.R.S. that the Claimant had suffered an injury that resulted in three days of lost time or permanent impairment. Therefore, the ALJ finds that no penalty is appropriate for a violation of Section 8-43-101, C.R.S. in this case.

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. Likewise, Respondents bear the burden of proving any affirmative defenses 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).

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. Claimant's injury in this case resulted from a slip and fall injury occurring on January 11, 2008. Claimant slipped and fell when he missed a step while hurrying down the stairs at his employer's residence at the behest of his employer. After the slip and fall injury, Claimant experienced pain in his knee, back and upper extremity that necessitated medical treatment. The treatment Claimant sought with Dr. Kleinert on January 25, 2008 and from Dr. Campbell on July 17, 2008 was related to the industrial injury of January 11, 2008. A compensable industrial accident is one which results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2s 1167, 1169 (Colo. App. 1990). Claimant has proven the need for medical treatment and, therefore, the injury of January 11, 2008 is compensable under the Colorado Workers' Compensation Act.

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. The ALJ finds Claimant was taken off of work by Dr. Kleinert for issues related to his anxiety. Claimant was capable of performing the functions of his employment from a physical standpoint for two weeks following his injury. As such, the ALJ finds Claimant has failed to show that his injury resulted in a medical incapacity evidenced by loss or restriction of bodily function.

7. Respondents allege that Claimant should be precluded from obtaining temporary disability benefits as a result of being responsible for his termination for employment. Because Claimant may establish a prima facie case for temporary disability

benefits in the future, the ALJ will consider Respondents' argument that Claimant is responsible for his termination of employment.

8. Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S. (termination statutes) contain identical language that provides that in cases where it is determined that a temporarily disabled employee is responsible for his or her termination of employment, the resulting wage lost shall not be attributable to the on-the-job injury. The termination statutes bar TTD 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 causes the wage loss. *See Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004). 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 *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). In this 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. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). That determination must be based after an examination of the totality of the circumstances. *Id.* The burden of proving that Claimant was responsible for her termination of employment rests on Respondent. *See Colorado Springs Disposal v. Industrial Claim Appeals Office, supra.*

9. Claimant resigned from his employment based upon the recommendation of his treating physician. As such, the ALJ finds that Claimant's resignation was not the result of a volitional act on the part of the Claimant. *See Blair v. Art C. Klein Construction Inc.,* W.C. No. 4-556-576 (Industrial Claim Appeals Office, November 3, 2003), (claimant's voluntary resignation is not dispositive of the issue of whether he is responsible for termination of his employment).

10. Claimant also alleges that employer is subject to penalties for failing to report the injury to the Division of Workers' Compensation pursuant to Section 8-43-101. Section 8-43-304(1), C.R.S. provides that penalties may be imposed for failure to comply with a rule of procedure adopted by the Director of the Division of Workers' Compensation. *Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001). The imposition of penalties under Section 8-43-304(1) requires a two-step analysis. The ALJ must first determine whether the disputed conduct constituted a violation of a rule or order. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If the ALJ finds a violation, the ALJ must determine whether the employer's actions which resulted in the violation were objectively reasonable. *See City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003). The reasonableness of the employer's action depends on whether it is predicated in a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003).

11. Section 8-43-101, C.R.S. provides in pertinent part:

> Every employer shall keep a record of all injuries that result in fatality to, or permanent physical impairment of, or lost time from work

> for the injured employee in excess of three shifts or calendar days and the contradiction by an employee of an occupational diseases that has been listed by the director by rule. Within ten days after notice or knowledge that an employee has contracted such an occupational disease, or the occurrence of a permanently physically impairing injury, or lost time injury to an employee, or immediately in the case of a fatality, the employer shall, upon forms prescribed by the division for that purpose, report said occupational disease, permanently physically impairing injury, lost-time injury or fatality to the division….

12. As found, Claimant has failed to show that employer was aware of an injury resulting in three days lost time or permanent impairment, which would have triggered employer's reporting requirements under Section 8-43-101, C.R.S. Employer's action in failing to report the injury are reasonable where the employer did not have notice from Claimant that he had missed time as a result of his injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay for Claimant's medical treatment incurred on January 25, 2008 with Dr. Kleinert and July 29, 2008 with Dr. Campbell.

2. Claimant's claim for payment of the cost of medical treatment with Dr. Kleinert on February 29, 2008 is denied and dismissed.

3. Claimant claim for Temporary Disability Benefits beginning February 4, 2008 is denied and dismissed.

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

5. Claimant's claim for penalties pursuant to Section 8-43-304(1) is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED: _April 7, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-723-603

ISSUES

The issues for determination include whether Respondents are entitled to Summary Judgment based on a prior finding of a safety rule violation by ALJ Cannici, whether Claimant's failure to respond to a request for admission from Respondents entitles Respondents to a finding that Claimant's safety rule violation was "willful" and whether Claimant's injury of May 11, 2007 was caused by Claimant's willful safety rule violation pursuant to Section 8-42-112(1)(b), C.R.S. The parties have previously stipulated to an average weekly wage of $1,900.

FINDINGS OF FACT

1. Claimant was employed as a foreman mechanic/fill-in lead with employer for approximately eighteen years. Claimant was scheduled to be off of work on May 11, 2007; however, on May 10, 2007, Claimant's supervisor contacted Claimant and requested that Claimant come to work on May 11, 2007. Claimant agreed to come to work on May 11, 2007 to assist with the changing of ropes on a drag line.

2. Claimant was aware that he would be required to work on the drag line on May 11, 2007; however, he generally took care of the rope on the bucket end. On May 11, 2007, Claimant was not advised of what specific safety equipment he would need to perform his job.

3. While working on the drag line on May 11, 2007, the drag rope worked out of the clamp and got up on top of the u-bolt. Claimant climbed a flight of stairs to the top of the drum and walked underneath a lanyard to where the rope was tangled in an attempt to dislodge the rope. Claimant did not have his safety harness on to tie himself off and as a result, Claimant fell approximately 12 feet off a drag drum, suffering injuries to his back, shoulder, ribs and wrist. Employer had constructed the lanyard on the drum for the use of the fall protection equipment provided to Claimant.

4. Claimant generally worked on the ground, but worked in areas in which he was required to use the safety harness approximately once per week over his 18 years with employer. The employer had in place a safety rule that required the employees to be tied off anytime they were working in an area more than 6 feet off the ground or in an area where there was a danger of falling. The area in which Claimant was working when he fell was one in which Claimant was required to utilize the safety harness. Claimant had not previously attempted to use a pry bar on a drum to untangle a rope, and did not anticipate the bar would react to this activity by causing him to fall.

5. Claimant had been trained in the use of the safety harness and was aware of the safety rule requiring him to be tied off while working in this particular area. Claimant was aware that he was working at heights and was aware that he was not wearing his safety harness. Claimant did not have his safety harness with him, as he did not believe that he would need it on the day in question. Claimant testified that he believed he would be working in the bucket, which would not require a safety harness.

6. When the drag line was tangled, Claimant was standing next to Mr. Reed, a co-worker. After waiting for the drum be stopped, Claimant went up the stairs to get the drag line dislodged. Claimant would have to walk under the lanyard on which he would have tied off in order to get to the drag line which was off the clamp. Claimant's testified his thought process when he went up the stairs was to get the rope back into the clamp so the employees could finish rolling the ropes in. Claimant testified that he did not consider whether he was in danger when he climbed the stairs nor was Claimant contemplating the safety rule. Claimant testified that his only focus was getting the rope back into the clamp. Claimant acknowledged that he was aware of the safety rule and that he was working at heights without his required fall protection.

7. Claimant's job on the date in question was not his normal job with employer. Claimant normally worked on the bucket end of operation, which is not a job performed at heights. On the date in question, there were two other employees performing the work of the welder in the bucket.

8. Claimant sent an e-mail to his supervisors regarding the accident on June 7, 2007. Claimant acknowledged in the e-mail that his failure to utilize his safety equipment led to his accident. Specifically, Claimant stated that "for now on I will not get in a hurry or let other issues distract me from the job at hand, my safety and the safety of fellow employees is very important to me, I will do my very best to be safe and follow all safety procedures and to also work with fellow employees to do the same so wee all can go home at the end of our shift to our families."

9. Respondents presented the testimony of Mr. Brown, the drag lines, drills and shovel maintenance supervisor for employer. Mr. Brown testified that employer had a safety rule in place requiring fall protection to be worn if an employee was working at higher than a 6 foot level or if there was a potential for falling. This company policy was conveyed to the employees in annual refresher courses and safety meetings held on a periodic basis.

10. Mr. Brown acknowledged on direct examination that Claimant would have worked more often on the bucket end during a changing of the drag lines. After the accident, Mr. Brown went to the site of the accident and rode in the ambulance with the Claimant to the hospital. Mr. Brown asked Claimant about his fall protection and Claimant said that he didn't know why he was not wearing his fall protection.

11. Respondents presented the testimony of Ms. Sims, the Health and Safety representative for employer. Ms. Sims testified that Claimant was trained in seminars dealing with fall protection and the wearing of a safety harness. Ms. Sims confirmed employer's policy of requiring fall protection be worn when working at heights over six feet.

12. Respondents presented the testimony of Mr. Callahan, the human resources manager for employer. Mr. Callahan testified that at the time of Claimant's accident, Claimant was working at heights and should have been wearing fall protection. Claimant's failure to wear fall protection was a violation of company policy.

13. Respondents presented the testimony of Mr. Haley, the general manager for employer. Mr. Haley testified that employer has ten basic safety standards, one of which is working at heights. Mr. Haley testified that if an employee is working at a height of six feet or greater, or if there is a risk of falling, the employee must wear the required fall protection.

14. This matter originally proceeded to hearing on January 17, 2008 and April 18, 2008 before ALJ Peter J. Cannici. ALJ Cannici issued an order on May 19, 2008 finding that Claimant was responsible for his subsequent termination of employment on September 17, 2007. Therefore, ALJ Cannici denied and dismissed Claimant's request for temporary disability benefits after September 17, 2007. In ALJ Cannici's order, ALJ Cannici found that "Claimant's failure to wear a safety harness constituted a safety rule violation." The order only addresses specifically the issue of termination for cause.

15. Claimant appealed the decision of ALJ Cannici insofar as the order made a finding of a safety rule violation. On September 19, 2008, the Industrial Claim Appeals Office (ICAO) dismissed the petition to review without prejudice, finding that the ALJ's order was not final and reviewable with regard to that issue. Therefore, the Industrial Claim Appeals Office did not have jurisdiction to resolve this question.

16. Respondent sought summary judgment prior to the hearing on the issue of the safety rule violation based on the prior order of ALJ Cannici, arguing that the Claimant was precluded from relitigating this issue by virtue of issue preclusion. An order was issued on March 2, 2009 denying Respondents' Motion for Summary Judgment, finding that the issue of a safety rule violation was not identical to the issues litigated at the first hearing.

17. At the March 3, 2009 hearing, Respondent renewed their motion for summary judgment and presented a transcript of the previous hearing. At the prior hearing, the parties acknowledged that they were litigating the issue of a claimed safety rule violation.

18. Respondent also requested that the court find that Claimant admitted to a willful safety rule violation by virtue of his failure to respond to Respondents requests for admissions served to Claimant with interrogatories on December 2, 2008. Claimant answered Respondents' interrogatories on December 12, 2008, but did not provide answers to the requests of admissions. Respondents therefore request that the admissions be deemed confessed by Claimant.

19. In this case, Respondents have established that they had a reasonable safety rule which required employees to use fall protection when working at heights higher than six feet. On the date of Claimant's injury, Claimant did not believe that he would need to have his harness to perform his job due to the fact that his usual job while changing ropes on a drag line did not require fall protection.

20. When Claimant noticed that the drag line was tangled, Claimant went on top of the drum to attempt to free the drag line. Claimant testified that he did not think about the safety rule and was only focused on getting the drag line back in the clamp.

21. The ALJ credits the testimony of Mr. Brown, who spoke to Claimant regarding the accident immediately following the incident on the ambulance ride to the hospital. Mr. Brown inquired as to why Claimant wasn't wearing his fall protection, to which Claimant told Mr. Brown that he did not know why he wasn't wearing the required equipment.

22. The ALJ credits Claimant's testimony that when he went on the drum to put the drag line back in the clamp Claimant was not thinking about the requirement to use fall protection. Claimant's usual work on the drag line did not require his use of fall protection, and his failure to utilize his fall protection on the day in question was a result of his negligence, not a deliberate act.

23. The ALJ finds that Claimant's injury was a result of carelessness, negligence, and forgetfulness, but was not the result of a willful violation of the employer's reasonable safety rule.

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. Likewise, Respondents bear the burden of proving any affirmative defenses 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).

3. Respondents argue that Claimant is precluded from claiming that his injury was the result of a willful safety rule violation by virtue of the prior order of ALJ Cannici under a theory of issue preclusion. The ALJ is not persuaded.

4. Collateral estoppel, or issue preclusion, is a judicially created, equitable doctrine that operates to bar re-litigation of an issue that has been finally decided by a court in a prior action. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. 2001). Issue preclusion bars re-litigation of an issue if: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.*

5. In this case, while the parties may have agreed to litigate the issue of whether Claimant's injury resulted from a willful violation of a safety rule, the ALJ's order makes no finding of the "willful" nature of the safety rule violation. Additionally, the order from ICAO dismissing the appeal specifically noted that the Order of the ALJ was not "final" for purposes of finding a willful violation of a safety rule. See ICAO Order at page 2. The fact that there has been no specific finding regarding the willful nature of the safety rule violation, combined with the fact that the Order from ALJ Canici specifically notes that "all issues not resolved in this order are reserved for future determination," results in the issue of the willful safety rule violation lacking a final judgment. Therefore, the doctrine of issue preclusion does not apply where Respondents cannot meet the four required criteria.

6. Respondents also argue that Claimant's failure to timely respond to Respondents' Request for Admissions pursuant to C.R.C.P. 36(a) result in the admissions being deemed confessed. The ALJ is not persuaded.

7. Colorado Rules of Civil Procedure apply to Workers' Compensation hearings, unless they are inconsistent with the rules set forth in the Workers' Compensation Act or set forth by the Division. *Speier v. Industrial Claim Appeals Office*, 181 P.3d 1173 (Colo. App. 2008).

8. C.R.C.P. 36(a) provides that a party may serve upon any other party a request for the admission of the truth of any matters within the scope of C.R.C.P. 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. C.R.C.P. 26(b) relates to discovery scope and limits. Discovery in a workers' compensation proceeding is limited pursuant to W.C.R.P. 9-1 to a set of 20 interrogatories and/or depositions upon motion and order. Nothing in W.C.R.P. 9-1 allows for the parties to issue requests for admissions. Respondents have cited no authority through statute, rule or case law, and this court is unaware of any such authority, which would expand discovery in Colorado Workers' Compensation cases to include requests for admissions. Therefore, the court refuses to expand discovery in this case to include requests for admission.

9. Even if there were a finding that Claimant's failure to respond to the request for admission would be deemed a confession of the request, C.R.C.P. 36(b) would allow the court to permit withdrawal or amendment of the admission. As such, Claimant's failure to respond to the admission does not preclude Claimant from litigating the willful safety violation issue.

10. Respondents also argue that Claimant's injury resulted from a willful violation of a safety rule. Section 8-42-112(1)(b), C.R.S. permits imposition of a fifty percent reduction in compensation in cases of claimant's "willful failure to obey any reasonable rule" adopted by the employer for the claimant's safety. The term "willful" connotes deliberate intent, and mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968). The respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondent carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

11. The claimant's conduct is "willful" if he intentionally does the forbidden act, and it is not necessary for the respondent to prove that the claimant had the rule "in mind" and determined to break it. *Bennett Properties Co. v. Industrial Commission, supra; see also, Sayers v. American Janitorial Service, Inc.,* 162 Colo. 292, 425 P.2d 693 (1967) (willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer). Moreover, there is no requirement that the respondent produce direct evidence of the claimant's state of mind. To the contrary, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Industrial Commission, supra; Industrial Commission v. Golden Cycle Corp.,* 126 Colo. 68, 246 P.2d 902 (1952). Indeed, it is a rare case where the claimant admits that his conduct was the product of a willful violation of the employer's rule.

12. The ALJ finds that Respondents had a reasonable adopted by the employer for the safety of the employee. The ALJ finds that Claimant violated this rule, but the Claimant's violation of the reasonable safety rule was not willful for purposes of the Colorado Workers' Compensation Act.

ORDER

It is therefore ordered that:

1. Respondents request for reconsideration of the Motion for Summary Judgment is denied and dismissed.

2. Respondents request for a finding that Claimant has admitted to a safety rule violation by virtue of his failure to respond to a request for admission is denied and dismissed.

3. Respondents request for a 50% offset for a safety rule violation pursuant to Section 8-42-112(1)(b) is dismissed.

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

All matters not determined herein are reserved for future determination.

DATED: _March 31, 2009

Keith E. Mottram
Administrative Law Judge

STATE OF COLORADO

OFFICE OF ADMINISTRATIVE COURTS
633 17th Street, Suite 1300, Denver, CO 80202

In the Matter of the Workers' Compensation Claim of:

Claimant,

vs.

COURT USE ONLY

CASE NUMBER:
Employer, and
WC 4-700-878

Insurer, Respondents.

ORDER GRANTING SUMMARY JUDGMENT IN PART AND DENYING SUMMARY JUDGMENT IN PART

This matter comes before the undersigned Administrative Law Judge ("ALJ") of the Office of Administrative Courts ("OAC") upon a Motion for Summary Judgment dated February 6, 2009 on behalf of Claimant. Respondents filed a timely Objection to the Motion on February 12, 2009 and, in the Objection, moved for partial Summary Judgment on the Claimant's penalty claims. Claimant filed a timely Objection to Respondents Motion for Summary Judgment on March 2, 2009.

This matter is for hearing on March 5, 2009 in Denver, Colorado and also set for hearing on April 8, 2009 in Denver, Colorado.

I.
DISCUSSION

1. Claimant seeks an Order granting summary judgment in his favor on the issue of the timeliness of the filing of the Respondents application for hearing following a Division IME, which would effectively strike Respondents application for hearing. Respondents seek on Order granting summary judgment in their favor on the issue of Claimant's claim for penalties for the untimely filing of the application for hearing following the Division IME. In that regard, Respondents also seek attorney fees pursuant to § 8-43-211(d) with regard to Claimant's penalty claim.

2. OAC Rule 17 authorized a party to file a motion for summary judgment concerning any endorsed issue for hearing. Summary judgment is appropriate only if the pleadings and supporting documents demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to establish that no genuine issue of fact exists, and any doubts in this regard must be resolved against the moving party. *Wilson v. Marchiondo*, 124 P.3d 837 (Colo. App. 2005). The non-moving party is entitled to all favorable inferences that may be drawn from the undisputed facts. *A.C. Excavating v. Yacht Club II Homeowners Ass'n., Inc.*, 114 P.3d 682 (Colo. 2005). However, OAC Rule 17 also provides that if "there is a disputed issue of material fact, the objection [to the motion] must specifically identify the disputed issue of material fact."

3. Summary judgment is a drastic remedy and is not warranted unless the moving party demonstrates it is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714 (Colo. App. 1987). If the moving party establishes that no material fact is in dispute, the burden of proving the existence of a factual dispute shifts to the non-moving party. *Gifford v. City of Colorado Springs*, 815 P.2d 1008 (Colo. App. 1991). The party opposing a Motion for Summary Judgment may not rest upon mere allegations or denials of the opposing party's pleadings, but the opposing party's response by affidavit or otherwise must set forth specific facts showing that there is a genuine issue for hearing. CRCP 56(e). The

Rules of Civil Procedure apply so long as they are not inconsistent with OAC Rules of the Workers' Compensation Act, OACRP 2.B. The provisions of CRCP 56(e) outlining the duty of a party opposing a Motion for Summary Judgment are not inconsistent with OAC Rules or the Act.

4. As an initial note, Claimant's Motion for Summary Judgment does not contain a proposed Order that includes findings of fact, conclusions of law and an order, and therefore, does not comply with OACRP 17. However, this ALJ will consider the motion in order to avoid additional motions for summary judgment being filed in this case.

5. Claimant argues in his Motion for Summary Judgment that a Division IME was held with Dr. Fry on September 16, 2008 and a DIME report was issued by Dr. Fry on or about October 6, 2008, which found the Claimant not at MMI. Respondents filed an application for hearing on November 13, 2008. Claimant alleges in his Motion for Summary Judgment that the application for hearing was mailed more than 30 days after the mailing of the Division IME report, and therefore was not timely pursuant to the plain language of § 8-42-107.2(4), CRS.

6. Respondents rely on *Ratnecht v. Kettle River Corp. & Truck Ins. Exch.*, W.C. No. 4-547-777 (June 18, 2004) for the principle that the time frame for responding to the Division IME results begins to run with the issuance of the Notice of Completion from the Division of Workers' Compensation IME Unit. In *Ratnecht* the Industrial Claim Appeals Office, citing an "Interpretive Bulletin" issued by the Director of the Division of Workers' Compensation dated June 13, 2001, found that the Division of Workers' Compensation is required to review DIME reports for completeness to ensure the DIME report is consistent with the requirements of the AMA Guides and rule concerning apportionment. Then the Division of Workers' Compensation issues a statement to the parties that the report has been accepted and may be considered final. The Interpretive Bulletin also states that the issuance of the Division of Workers' Compensation'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 § 8-43-203(2)(b)(II). ICAP therefore determined that "the time frame for responding to the IME results do not begin to run until the Division notifies the parties the IME report is complete and final." In this case, the Division of Workers' Compensation issues of Notice of "Not at MMI" on October 7, 2008.

7. Claimant appears to acknowledge in his Objection to Respondents Motion for Summary Judgment that there is a question with regard to whether the findings in *Ratnecht* are limited solely to situations where the finding of the DIME physician is that the Claimant has reached MMI. As such, there is at least a question of fact of whether the Claimant is at MMI. It should be noted that Dr. Fry's DIME report could, at the very least, be interpreted to make a finding that the Claimant is at MMI if he does not elect to undergo surgery. As such, summary judgment on this issue is not appropriate. Regardless, however, based on the holding of *Ratnecht*, which stands for the proposition that the time frame for contesting the DIME physician's findings of *MMI* and impairment are

triggered by the "notice of completion", Respondents application for hearing, which was filed within 30 days of the October 7, 2008 notice from the Division of Workers' Compensation, is timely.

8. Respondents have also moved for summary judgment on the issue of penalties for the late filing of an application for hearing following the Division IME. Respondents contend that the filing of the application for hearing was timely pursuant to the *Ratnect* decision, and therefore, penalties are not appropriate.

9. Claimant maintains that pursuant to § 8-42-107.2(4), CRS, and WCRP 5-5(F), the filing of an application for hearing must be filed within 30 days of the mailing of the DIME report if the DIME physician finds the Claimant to not have reached MMI.

10. In order to assess penalties under § 8-43-304(1), CRS, an ALJ must engage in a two step analysis. First, the ALJ must find that the putative wrongdoer has violated the Act, failed to perform a duty lawfully enjoined of failed to obey a lawful order. *Allison v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). Second, if a violation is found, the ALJ must determine whether the violation was objectively reasonable in the sense that it was predicated on an argument rationally based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003).

11. Blacks Law Dictionary, Fifth Edition, defines the word "fails" as "fault, negligence or refusal." Thus, the Industrial Claim Appeals Office has held that an insurer does not "fail" or refuse to perform an act, as contemplated by § 8-43-304, if its actions are "reasonable" based on an "objective standard." *Brown v. Gosney & Sons, Inc.*, W.C. No. 3-104-140 (August 30, 1994). An insurer's actions are considered reasonable under the "objective standard" if the actions are predicated on a rational argument based on law or evidence. *Id.* Moreover, § 8-43-304 does not impose a "strict liability" standard on parties to a workers' compensation proceeding. See *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990).

12. In this case, Respondents reliance on the holding in *Ratnecht* is reasonable from an objective standard as it is predicated on a rational argument based in law. Moreover, insofar as there is already a finding above that the application for hearing was timely filed pursuant to the holding of *Ratnecht*, there is, consequently, no violation of § 8-42-107.2(4), CRS or WCRP 5-5(F). Therefore, summary judgment is appropriate on the issue of penalties.

13. Respondents have also requested attorney fees pursuant to § 8-43-211(1)(d) for Claimant's filing of an application for hearing on an issue which was not ripe for adjudication at the time the request or filing was made. However, it is unclear from the record whether this section of the statute was affirmatively pled by Respondents in their response to Claimant's application for hearing. As such, summary judgment on this issue will not be considered.

II.

ORDER

Claimant's Motion for Summary Judgment regarding the issue of the late filing of Respondents application for hearing is denied and dismissed without prejudice. Respondents Motion for Summary Judgment regarding the issue of penalties for the late filing of the application for hearing after the DIME is granted.

DATED:

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-724-017

ISSUES

- Whether penalties should be imposed against Respondents for failing to pay benefits when due, specifically temporary total disability (TTD) benefits and mileage reimbursement.
- Whether Claimant's claims are barred by the applicable statute of limitations.
- Claimant withdrew the issues of temporary partial disability from January 20, 2007 through May 27, 2007, and the request for mileage reimbursement because she had received a recent payment from the Respondents.

PROCEDURAL BACKGROUND

At the outset of hearing, Claimant's Exhibits 1-14 and 21 were admitted into evidence and Respondents' Exhibits A-I, with the exception of G, were admitted into evidence. Following admission of the exhibits, Respondents moved to dismiss the penalties claims citing Claimant's failure to apply for hearing as to penalties within one year of the date that she knew of the facts giving rise to the penalties. Claimant argued that she had seven years to apply for hearing pursuant to §8-43-203(2), C.R.S. Section 8-43-203(2), C.R.S., pertains to the failure of an insurer or employer to timely admit or deny liability for the workers' compensation claim. As found in the Findings of Fact herein, Claimant's application for hearing filed in November 2008 did not specifically endorse whether a penalty should be imposed against Respondents for failing to timely admit or deny liability. Accordingly, the Judge granted the motion to dismiss that issue, but only for the hearing held on March 17, 2008, due to the improper endorsement.

The Judge permitted the Claimant to proceed on the merits of whether penalties should be imposed against Respondents for failing to pay TTD or TPD and mileage reimbursement when due. Following Claimant's presentation of her case, Respondents

renewed their motion to dismiss, which the Judge granted for the reasons set forth below.

FINDINGS OF FACT

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

1. Claimant sustained an injury on January 20, 2007. Claimant timely reported the injury to her supervisor. On February 1, 2007, Claimant saw Paul Springer, PA-C, at Arbor Occupational Medicine. Her supervisor accompanied her to the appointment.
2. Respondents filed a General Admission of Liability (GAL) on May 24, 2007. The GAL admitted for medical benefits and temporary total disability benefits beginning on May 7, 2007. The GAL stated no position regarding TTD or temporary partial disability (TPD) benefits from January 20, 2007 through May 27, 2007.
3. On June 26, 2007, Claimant wrote a letter to the DOWC wherein she objected to the GAL and noted her entitlement to compensation for lost wages. Claimant requested a hearing as to the lost wages and as to penalties for the insurer's failure to timely admit or deny liability under § 8-42-203, C.R.S.
4. On July 20, 2007, Claimant filed an Application for Hearing with the Office of Administrative Courts and endorsed the following: Compensability, Temporary Total Disability Benefits from 1-20-07 to 5-07-07, Penalties: Failure to timely state a position with regard to liability 8-43-203, and Mileage. Hearing was continued or vacated upon agreement of the parties.
5. Claimant filed another Application for Hearing on November 17, 2008 and an Amended Application for Hearing on November 24, 2008. The hearing held on these applications is the subject of this order. Both application and amended application endorsed the following issues: "TPD from 1/20/2007 through 5/27/07; Penalty for failure of insurer to pay benefit when due. Section 8-43-203(2). 8-43-305. C.R.S. Rule 5(B)(5) Colorado Division of Workers' Compensation Rules of Procedure. Section 8-43-301(1), C.R.S. *Holliday v. Bestop* 23 P3.d 700 (Colo. 2001). TPD was due from 1/20/07. Requests for this benefit began by Claimant then pro se and continued by attorney." Mileage claim from date of injury through present. Penalty for failure of insurer to pay complete mileage benefit when due. A short mileage check was sent with no explanation to claimant. Rule 5(5)(B), Colorado Division of Workers' Compensation Rules of Procedure. Lacen v. Spray Systems, W.C. No. 4-224-505 (ICAO, September 17, 1998)(Stuber).
6. While the Amended Application for Hearing cited § 8-43-203(2), C.R.S., it noted, "Penalty for failure to pay benefit when due" pertaining to the TTD or TPD and "Penalty for failure of insurer to pay complete mileage benefit when due" obviously pertaining to the mileage reimbursement request. Claimant did not state with specificity that she sought penalties for Respondents' alleged failure to timely admit or deny liability pursuant to § 8-43-203(2), C.R.S.
7. Claimant responded to interrogatories propounded by the Respondents in December 2008 in preparation for the hearing held on March 17, 2009. Claimant indicated in her responses that she was pursuing penalties for Respondents' failure to pay the

TPD and mileage reimbursement. She did not indicate that she was seeking penalties for failure to timely admit or deny liability.

8. Claimant's initial application filed in June 2007 did not seek penalties for failing to pay TTD, TPD or mileage reimbursement. It only requested penalties for Respondents' alleged failure to timely admit or deny liability.

9. On June 20, 2007, Claimant wrote to claims adjuster, S.S., regarding mileage reimbursement requests and temporary disability benefits. Claimant continued to request mileage reimbursement and temporary disability benefits for many months beginning in June 2007. As such, Claimant knew or should have known of the conduct that gave rise to the penalties claim as early as June 2007 and continuing through November 9, 2007 (*See* Claimant's Exhibit 11, reflecting mileage reimbursement requests for travel through November 9, 2007). Claimant, however, did not apply for penalties as to these issues until November 17, 2008.

10. Claimant failed to apply for hearing within one year of the date she knew or reasonably should have known of the facts (Respondents' alleged failure to timely pay mileage reimbursement and TTD or TPD for the period of January 20, 2007 through May 27, 2007) giving rise to possible penalties.

11. In the November 25, 2008 amended application for hearing, Claimant did not properly endorse the issue of whether penalties should be imposed for Respondents alleged failure to timely admit or deny liability for her workers' compensation injury.

CONCLUSIONS OF LAW

1. Section 8-43-304, C.R.S., governs when penalties may be imposed in a workers' compensation matter and provides in relevant part, that any employer or insurer:

> who violates any provision of [the Workers' Compensation Act], 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…, or fails, neglects, or refuses to obey and lawful order…, shall be subject to … a fine of not more than five hundred dollars per day for each such offense.

2. In any application for hearing for penalties, the applicant shall state with specificity the grounds on which the penalty is being asserted. Section 8-43-304(4), C.R.S. As found, Claimant did not state with specificity in her Amended Application for Hearing filed on November 25, 2008, that she sought imposition of penalties for Respondents' alleged failure to timely admit or deny liability pursuant to § 8-43-203(2), C.R.S. Thus, the hearing held on March 17, 2009 did not determine the merits of that issue.

3. A request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty. Section 8-43-304(5), C.R.S. *See* also *Spracklin v. Indus. Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002). Claimant knew that she had claimed, but had not received, temporary disability benefits or mileage reimbursement as early as June 2007. Claimant, however, did not file an

application for hearing seeking penalties as to those two issues until November 17, 2008, at the earliest. Claimant's earlier application filed in June 2007 did not endorse penalties for Respondents' alleged failure to pay benefits when due rather it only sought penalties for Respondents' alleged failure to timely admit or deny liability for the claim.

4. Under § 8-43-203, penalties may be imposed against an insurer or employer for failing to admit or deny liability within 20 days after a report of injury is filed with the Division of Workers' Compensation. As Claimant correctly pointed out, a claim for penalties under this section may be filed within seven years of the alleged violation. Claimant, however, did not present this issue in her Amended Application for Hearing filed on November 25, 2008. Accordingly, the Judge dismissed the issue without prejudice for the purposes of the hearing held on March 17, 2008, and makes no determination herein as to the merits of that issue.

ORDER

It is therefore ordered that:

1. Claimant's request for penalties regarding Respondents' alleged failure to timely reimburse Claimant for mileage expenses incurred through November 9, 2007, is hereby denied and dismissed.
2. Claimant's request for penalties regarding Respondents' alleged failure to timely pay TTD or TPD from January 20, 2007 through May 27, 2007, is hereby denied and dismissed.
3. The issue of whether penalties should be imposed for Respondents' alleged failure to timely admit or deny liability for Claimant's workers' compensation claim was not properly endorsed for the hearing held on March 17, 2008.
4. All matters not determined herein are reserved for future determination.

DATED: April 8, 2009

Laura A. Broniak
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-768-591

ISSUES

The issues for determination are: (1) Compensability; (2) Medical Benefits; and (3) Temporary Total Disability (TTD) Benefits commencing September 7, 2008, and ongoing. Respondents raised the affirmative defenses of responsible for termination and Section 8-42-112(1)(d), C.R.S. The parties stipulated at hearing to an average weekly wage (AWW) in the amount of $369.80.

FINDINGS OF FACT

1. Prior to the injury in this claim, Claimant injured his low back in a motor vehicle accident in 2003. Claimant was given an 18% whole person rating on August 29, 2003. Claimant complained of right leg pain in September and October 2006. On December 27, 2006, Claimant sustained a low back injury while working for a previous employer. Claimant continued to treat with Dr. Myhra into January 2007 for low back pain and right leg pain.

2. In March of 2007, Claimant underwent an independent medical examination to determine whether Claimant's continued need for treatment was a result of the 2003 motor vehicle accident. During this medical examination, it was reported that during the Fall of 2004 and in early 2005, Claimant sustained a work-related injury while lifting. There is no physical record of this injury. Claimant was then working for a logging company. The evaluating physician, Dr. Masteller, determined that Claimant's symptoms were related to the work-related injury occurring in December 2006. Claimant was seen by Dr. Christian Updike on June 26, 2007, for determination of causality of the December 2006 injury. Claimant denied a history of back problems. Claimant was prescribed Advil and Flexeril.

3. Claimant returned to Dr. Updike on September 6, 2007. Claimant reported he had been sent to an independent medical examination demanded by the insurance company. Claimant also reported flare-ups lasting for two to three days during which time he was miserable. Claimant told Dr. Updike that he was applying for a new job as a supervisor for Employer. Claimant indicated he would be working outside and that he would not be handling bags on a continuous basis. Dr. Updike indicated that Claimant was seen for a one-time evaluation and that the claim was never officially opened or accepted by the insurance company. The doctor prescribed Advil and Biofreeze. Dr. Updike specifically referenced a discussion concerning Claimant's future job selections. Claimant described his potential job at Employer as mostly driving a luggage cart and shuttling misplaced bags. Claimant reported that he would only occasionally be handling bags. Dr. Updike opined that this was a reasonable fit and that occasional lifting and exercise would strengthen and maintain Claimant's body core. The doctor noted that it was specifically recommended that Claimant not seek jobs that have constant lifting, given his age and resolving problems with his back. The doctor prescribed six months of Advil, six months of Biofreeze, and six chiropractic visits. The doctor stated that Claimant was at maximum medical improvement. The doctor noted that Claimant would be entitled to consultation with a physiatrist for evaluation of an impairment rating, though impairment might be minimal based primarily on loss of range of motion. Claimant returned to see Dr. Updike on September 20, 2007, for the December 27, 2006, injury. Dr. Updike noted that Claimant had two flare-ups in the previous three months, and that Claimant was in the midst of a flare-up that began over the weekend on September 20, 2007. Claimant described his pain as being 6 to 7 out of 10 over the weekend and 5 out of 10 on the date of the evaluation. Claimant reported financial distress because of being off work and being unable to pay for his prior medical care. The doctor prescribed Ibuprofen and anticipated a small impairment rating.

4. Claimant began employment for Employer as a ramp agent in August 2007. The September 6 and 20, 2007, medical reports of Dr. Updike do not indicate that Claimant revealed to the doctor that he was working as a ramp agent and was required to lift 50 pounds frequently and 100 pounds occasionally.

5. Claimant settled his claim with a previous employer on November 1, 2007.

6. Claimant testified he filled out emergency medical information consistent with his application for employment with Employer on July 31, 2007. He testified that he checked the box marked "no" for questions requesting information regarding whether he had any injury or injuries on the job, whether he had other injuries or illnesses not on the job, and that he had not been diagnosed as having any illness or injury for which he was not seeking treatment at the time. However, medical records reveal that Claimant had a motor vehicle accident in 2003 and a work-related injury in December 2006. Claimant was seeing a chiropractor in July 2007 and Dr. Updike through September 2007. The medical records of Dr. Updike reveal that Claimant did not indicate that he had a previous motor vehicle accident, nor did Claimant report to Dr. Updike that he was working as a ramp agent in August 2007.

7. Claimant's job as a ramp agent required him to lift 70 to 100 pounds throughout the day. Flak, Claimant's supervisor, had no idea that Claimant had a previous back injury. Claimant willfully mislead Employer concerning his physical ability to perform the job.

8. On January 5, 2008, Claimant was lifting an unusually large number of bags for Employer. The strap of one bag caught as Claimant twisted to put the bag on a cart. Claimant felt pain in his back. The pain did not radiate. The back pain worsened after the accident. The injury was a result of the physical ability about which Claimant willfully mislead Employer,

9. On January 7, 2008, two days later, Claimant was evaluated by the company physician at HealthOne Occupation. Claimant correctly advised the physician that his previous work injuries included a fall that had resolved without impairment and a lightning strike. Claimant was diagnosed on January 7, 2008, with a lumbosacral strain. He was placed on restrictions and prescribed narcotic medications.

10. Dr. Parsons at HealthOne treated Claimant's lumbosacral strain. She referred Claimant to a chiropractor. Claimant continued to work full duty. Claimant's condition improved. On March 24, 2008, Claimant reported to Dr. Parsons that he was doing much better and had minimal to no pain. In her "Discharge Summary", Dr. Parsons stated that Claimant's lumbosacral strain had resolved. Claimant was released at full duty. This opinion of Dr. Parsons is credible and persuasive.

11. Claimant sought care from Dr. Kistler at Healthone on April 24, 2008. He stated that his pain in his low back had increased without any particular reason.

12. Dr. Parsons examined Claimant on April 30, 2008, and noted that Claimant now had pain down into his right leg with some numbness and tingling. Dr. Parsons' assessment was still lumbosacral strain. Claimant was referred for an MRI. Claimant con-

tinued treatment at HealthOne until medical care was transferred to Samuel Chan, M.D., on May 8, 2008.

13. An MRI on May 8, 2008, showed multi-level degenerative disk bulges contracting nerve roots. Claimant was examined by Dr. Chan on May 27, 2008, who noted that the MRI showed multilevel spondylosis. Dr. Chan treated Claimant with injections. On June 10, 2008, Dr. Chan stated that, "I feel that this is a pre-existing condition that was exacerbated by his job injury and our plan is to return the patient back to baseline." On July 8, 2008, Dr. Chan noted that Claimant's pain complaint was "0/10." He stated that the exacerbation was temporary, without any permanent impairment.

14. Claimant sought additional care from Dr. Chan on July 24, 2008. Claimant stated that as he returned to work his pain had slowly returned. Dr. Chan stated that Claimant might not be able to continue his work, but that it was more a fit-for-duty issue rather that restrictions due to an injury. Dr. Chan treated Claimant with another injection and referred Claimant to Dr. Reiss. On August 21, 2008, Dr. Chan reaffirmed that, "I do feel that the patient's current complaint is an exacerbation of his preexisting condition and it should be treated."

15. Claimant was first examined by Dr. Reiss on August 13, 2008. He recommended a laminotomy and decompression at L4-5 for the buttock and leg pain. He stated that the back pain was not a surgical problem.

16. Flak, Claimant's supervisor, credibly testified that Claimant was on limited duty beginning in the Summer of 2008 and ongoing. Prior to September 6, 2008, Claimant had not missed any time from work. On September 6, 2008, Claimant and Flak met with Amanda, another supervisor. At that first meeting there was discussion on whether Claimant's current back problems were work-related or non-work-related. At the second conversation that occurred on September 7, 2008, between Claimant, Flak, and Amanda, it was discussed that, if Claimant's injury was not accepted as an on-the-job injury, that Claimant would have to apply for medical leave of absence. Flak credibly testified that if Claimant submitted and was approved for a medical leave of absence, which is a form used for a non-work-related injuries, Claimant had no obligation to call in when missing time from work. On September 9, 2008, at Employer's direction, Claimant submitted a request for a medical leave of absence. The Human Resource contact for Employer testified that she never contacted Claimant after receiving Claimant's request.

17. On September 22, 2008, Claimant was terminated for no call/no shows that occurred after September 7, 2008. The termination notice specifically sets forth "Your last working date was September 7, 2008, and you have missed 2 shifts without contacting us." Claimant filed for and received unemployment benefits.

18. The Human Resource Manager for Employer who handles all of the Employer's claims indicates she did not recall calling Claimant after receiving his medical leave form. Flak testified that Claimant worked without restrictions until his injury of January 5, 2008. Claimant was back at full duty and was on restrictions as of the events of September 7, 2008. Flak indicated that, after the events of September 7, 2008, he no longer had any input in the claim and was not involved with the decision to terminate Claimant's employment.

19. On October 13, 2008, Dr. Reiss stated. "Re-reviewing his MRI, he definitely has lateral recess stenosis at L4-L5 off to the right, thickening of the facets, and bulging of

that disc. The surgery that we were discussing before would be simply a decompression and I think that is what he needs. The L3-L4 level is definitely much less, so we are looking at doing a laminotomy decompression, L4-L5 on the right, with the use of a microscope." The surgery was scheduled for November 3, 2008. That surgery never occurred as Respondents denied the claim in late October 2008.

20. Hugh McPhearson, M.D., examined Claimant. Dr. McPhearson issued his first report on November 12, 2008. In that report, Dr. McPhearson reviewed an MRI dated May 6, 2008, and stated, "I was also able to review an MRI scan from July 22, 2004, done at Advanced Medical Imaging. The sagittal views show a similar pattern of mild multilevel degenerative disc disease through the lumbar spine, with the exception perhaps at L3-L4. The axial images at L4-5 show less of a spur on the right lateral recess, and certainly there is no evidence of significant disc herniation at that level. The adjacent segments appear to be intact. There is evidence of an annular tear, however, L2-3, primarily on the left side."

21. Dr. McPhearson's original opinion following his evaluation on November 12, 2008, was: "I believe the recommendation is for lumbar decompression at L4-5 with decompression of the lateral recess. He certainly has this diagnosis. The diagnosis was not present on the 2004 MRI scan, so it does not stem from the injury suffered in the motor vehicle accident. If there is a subsequent accident then I would be happy to address this concern. Otherwise, in the absence of contravening factors it would appear that the injury at [Employer] initiated the symptoms that required surgical intervention. It is reasonable and appropriate." Dr. McPhearson concluded that: "[Claimant] certainly has a degenerative component to his symptoms, but it was not symptomatic until he had the work-related injury. Apportioning out a previous employer and injury would require documentation of that injury." Dr. McPhearson did request additional medical records.

22. On December 17, 2008, Dr. McPhearson issued an Addendum to his November 12, 2008, report. That Addendum in pertinent part set forth on the bottom:

> The only MRI scan I had an opportunity to review was 7/22/2004. I presume there is a newer MRI scan and I would need to have access to it.
>
> I cannot complete my full report until I receive the MRI scan that was done after his date of injury for Frontier Airlines. . .
>
> It would appear that the MRI scan dated 5/6/2008, I have not had the opportunity to review it.
>
> Currently it would appear that the patient was not symptomatic in the month preceding his work injury but certainly was within the twelve months prior.

23. Dr. McPhearson's Addendum of December 17, 2008, is in error as he had previously reviewed the MRIs as set forth in his original November 12, 2008, report.

24. Dr. McPhearson issued another report on February 2, 2009, amending his November 12, 2008, and December 17, 2008, reports. Of note, Dr. McPhearson, when requested as to what surgery Dr. Reiss was performing, stated, "I am not familiar with

what surgery is being recommended, I do not have that information." This statement is in direct contradiction to Dr. McPhearson's original report of November 12, 2008, where stated that, "I believe the recommendation is for a lumbar decompression at L4-5 with decompression of the lateral recess."

25. Dr. McPhearson, in his report of February 2, 2009, stated that the MRI results from May 6, 2008, were not available to him at the time of the original Independent Medical Evaluation of November 12, 2008. At hearing, Dr. McPhearson could not provide an explanation as to why he made the statement he did not have the MRI when, in fact, it was in his possession on November 12, 2008.

26. Dr. McPhearson concluded his third and last report by stating that: "Of course, overall, I would consider that [Claimant] had an exacerbation of underlying pre-existing disease. He has received reasonable and appropriate treatment for that." This opinion of Dr. McPhearson is credible and persuasive, despite his misstatements in some earlier reports.

27. Claimant desires the surgery recommended by Dr. Reiss.

28. Dr. McPhearson testified at hearing that the surgery recommended by Dr. Reiss was reasonable and necessary, but he did not feel it was related to Claimant's industrial injury of January 5, 2008. This opinion of Dr. McPhearson is credible and persuasive.

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. Claimant had a pre-existing back condition when he began working for Employer in the Summer of 2007. On January 5, 2008, Claimant was lifting an unusually large number of bags for Employer. The strap of one bag caught as Claimant twisted to put the bag on a cart. Claimant felt pain in his back. The pain did not radiate. Claimant sought treatment. Dr. Julie Parsons diagnosed a lumbosacral strain. Claimant has established by a preponderance of the evidence that he aggravated his pre-existing condition in the course and scope of his employment. The claim is compensable.

3. Insurer is liable for the care an injured worker receives that is reasonably needed to cure and relieve the injured worker from the effects of the compensable injury. Section 8-42-101(1), C.R.S.

4. Dr. Parsons treated Claimant's lumbosacral strain. She referred Claimant to a chiropractor. Claimant continued to work full duty. Claimant's condition improved. On March 24, 2008, Claimant reported to Dr. Parsons that he was doing much better and had minimal to no pain. In her "Discharge Summary", Dr. Parsons stated that Claimant's lumbosacral strain had resolved. Claimant has established by a preponderance of

the evidence that the treatment he received from January 5, 2008, through March 24, 2008, was reasonably needed to cure and relieve him from the effects of the compensable injury. Insurer is liable for the costs of such care, in amounts not to exceed the Division of Workers' Compensation fee schedule. Section 8-42-101(3), C.R.S.

5. Dr. McPherson testified credibly that the need for the recommended surgery comes from Claimant's pre-existing condition and not from the January 2008 injury. Claimant has failed to establish by a preponderance of the evidence that his treatment after March 2008 was reasonably needed to cure and relieve him from the effects of the January 2008 injury. Insurer is not liable for medical expenses after March 24, 2008.

6. To establish entitlement to temporary disability benefits, an injured worker must prove that the industrial injury, or occupational disease, has caused a "disability," and that he suffered a wage loss that "to some degree" is the result of the industrial disability. Section 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanburg,* 898 P.2d 542, 546 (Colo. 1995).

7. Claimant requests temporary disability benefits commencing in September 2008. Claimant has not established that his disability in September 2008 was the result of a disability from the compensable injury in January 2008. Claimant's request for temporary disability benefits is denied.

8. Respondents argue that they are not responsible for Claimant's wage loss due to his failure to call in or show up for work following the events of September 7, 2008. Respondents bear the burden of proving that Claimant was responsible for termination to trigger the application of Section 8-42-105(4) or Section 8-42-103(1)(g), C.R.S; *CCIA v. Industrial Claim Appeals Office*, 18 P.3d 790 (Colo.App. 2000). To show that Claimant was responsible for termination, Respondents must show, by a preponderance of the evidence, that Claimant committed a volitional act, or exercised control over his 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). 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 *Patchek v. Colorado Department of Public Safety*, WC No. 4-432-301 (ICAO, September 27, 2001).

The fact that an employer discharged 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 *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987); *Goddard v. EG&G Rocky Flats, Inc.*, 888 P.2d 369 (Colo.App. 1994).

9. Claimant was terminated for no call/no show. Claimant's supervisor credibly testified that an individual under medical leave was not required to call in. There is no evidence in the record that Claimant was advised of the obligation to call in when he was on medical leave. Additionally, the ALJ places great weight on Claimant's supervisor's testimony that Claimant did not miss time from work prior to September 7, 2008. There were two meetings between Claimant's supervisor, and another supervisor as to whether Claimant's need for light duty was related to his workers' compensation injury or a non-workers' compensation injury. Claimant was not permitted to return to work after September 7, 2008. The evidence is that Claimant did not undertake a volitional act that would have made him responsible for his termination. The Respondents have

not satisfied their requirement to establish that Claimant is responsible for his termination.

10. When an employee willfully misleads an employer concerning the employee's physical ability to perform the job and the employee is subsequently injured on the job as a result of the physical ability about which the employee willfully mislead the employer, a 50% reduction in compensation is appropriate. Section 8-42-112(1)(d), C.R.S.

11. Claimant provided information to Employer subsequent to being offered a job. Claimant represented that he had no prior injuries, automobile or otherwise, for which he was seeking treatment or for which he had sought treatment in the past. Claimant testified that he filled this document out and that he checked the boxes as indicated in Respondents' Hearing Submission O. He testified that he recognized his signature and that the document was signed on July 31, 2007. Claimant's supervisor testified that he had no idea that Claimant had a previous back injury and that Claimant's job was one that required him to lift 70 to 100 pounds all the time. It is clear from Dr. Updike's report dated September 6, 2007, that Claimant represented that he was applying for a new job as supervisor at Employer and that he would not be handling bags on a continuous basis. Claimant was already working as a ramp agent for Employer at the time he represented that he would be a supervisor and would not be handling bags on a continuous basis. Dr. McPherson testified that Claimant did not reveal to him the details of the injury that occurred in December 2006. Rather he obtained that information from questions posed to him. Medical records clearly establish that Claimant did in fact have a motor vehicle accident and that even in 2007 he was receiving treatment for that motor vehicle accident through Dr. Myhra and inquiries were made regarding the ongoing relatedness of that treatment to the original motor vehicle accident. In addition, the evidence demonstrates that Claimant had a preexisting back injury in December 2006, which he did not reveal. Claimant did not report that he already had a job as a ramp agent handling baggage on a consistent basis, when Dr. Updike released Claimant.

12. The evidence establishes that Claimant willfully mislead Employer by not disclosing the prior injury when he applied for the position. Claimant's subsequent need for treatment on the job was a result of the physical ability about which Claimant willfully mislead Employer. Dr. Chan indicated that, from a fitness for duty perspective, Claimant was unfit to perform the job as baggage handler based upon his preexisting condition. In addition, Dr. Updike commented that Claimant reported that he would occasionally be handling bags and that occasional lifting and exercise would strengthen Claimant's body core. However, it is noted that the doctor specifically recommended that Claimant not seek jobs that have constant lifting given his age and his resolving problems with his back. The doctor further indicated he did not give restrictions because the evaluation was a one-time only evaluation. Furthermore, it is clear from the reports of Dr. Updike that permanent impairment was anticipated at the time Claimant was released. However, Claimant testified that he thereafter settled his claim in November of 2007. Insurer has established that Section 8-42-112(1)(d), C.R.S., applies in this claim.

13. Issues not determined by this order are reserved.

ORDER

It is therefore ordered that:

1. Insurer is liable for the medical care Claimant received on January 5, 2008, through March 24, 2008, for the compensable injury.
2. Claimant's request for medical benefits after March 24, 2008, to the date of the hearing is denied.
3. Claimant's request for temporary disability benefits from September 2008 to the date of the hearing is denied.
4. All matters not determined herein are reserved for future determination.

DATED: *April 8, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-701-019

ISSUES

¬ Did claimant prove by a preponderance of the evidence that another surgery to revise/salvage the January 9, 2007, fusion-surgery is reasonable and necessary to cure and relieve the effects of his work-related injury?
¬ Did claimant prove by a preponderance of the evidence that treatment of his Non-Hodgkins Lymphoma disease is reasonable and necessary to cure and relieve the effects of his work-related injury?

FINDINGS OF FACT

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

Employer operated a custom homebuilder business. Claimant's date of birth is December 1, 1971; his age at the time of hearing was 37 years. Claimant worked for employer as a punch-list-man, performing warranty work and associated minor repairs. Claimant sustained an admitted injury on September 5, 2006, while moving an armoire to fix a squeaky floor.

The following history of claimant's injury and initial symptoms is based upon the medical records: While moving the armoire, claimant noted a strain to his upper back, with soreness and burning around the right scapular region. The burning sensation spread to his right arm some 30 to 45 minutes later. Claimant thought he might be experiencing a heart attack. Some 2-3 hours after the incident, claimant experienced a similar numb sensation in his right leg. Because he had 2 prior workers' compensation claims while working for employer, claimant waited until Saturday, September 8, 2006, to report his injury to employer.

J. Tashof Bernton, M.D., is the authorized treating physician providing primary care for claimant's injury. At respondents' request, Henry J. Roth, M.D., performed an independent medical examination (IME) of claimant on November 28, 2006, and on November 24, 2008. On January 9, 2007, Neurosurgeon John Oro, M.D., performed surgery upon claimant's cervical spine: A 3-level decompression and fusion with mechanical fixation at the C4-5, C5-6, and C6-7 levels. Orthopedic Spine Surgeon Henry S. Fabian, Jr., M.D., initially evaluated claimant on September 15, 2008, and later recommended a revision/salvage surgery of the 3-level fusion site. JoAnne Vigilio, M.D., treats claimant's Non-Hodgkins Lymphoma disease, which physicians discovered in the fall of 2008. By report of October 20, 2008, Neurosurgeon James Ogsbury, M.D., performed a record review of claimant's treatment in response to Dr. Fabian's surgical recommendation. At claimant's request, Orthopedic Surgeon Brian E.H. Reiss, M.D., performed an IME of claimant on November 26, 2008, to give his opinion regarding the reasonableness of another surgery.

Prior to the January 9, 2007, surgery, claimant underwent a psychological assessment by Suzanne Kenneally, PsyD., to determine whether claimant was a surgical candidate. Dr. Kenneally evaluated claimant and had him undergo psychological testing on October 11, 2006. Psychological testing suggested a diagnosis of Bipolar disorder, manic phase, which Dr. Kenneally felt was consistent with claimant's presentation. Dr. Kenneally wrote:

> Of note, despite [claimant's] report of being scheduled for tri-level back surgery in the near future, he was able to sit comfortably for 90 minutes with no observable pain behavior.
>
> ****
>
> There was evidence on testing of [claimant's] translation of psychological distress into functional deficits and heightened pain sensitivity and symptom report. [Claimant] should be **considered a very poor surgical risk** ….

(Emphasis added). Dr. Kenneally recommended that all physicians obtain objective confirmation before believing claimant's subjective pain symptoms and complaints. In light of Dr. Kenneally's findings and his own examination findings, Dr. Roth recommended against the January 9, 2007, surgery.

The January 9, 2007, surgery by Dr. Oro involved removal of disk material and decompression of the spinal cord and nerve roots at those levels. Although claimant testified that his symptoms initially improved following surgery, the Judge credits the medical record in finding claimant's testimony unreliable. In spite of surgery, claimant continued to complain of substantially the same unchanged, vague, and diffuse symptoms. Claimant's chronic, 14-year history of smoking cigarettes has complicated his recovery.

In September of 2008, Dr. Fabian referred claimant for additional magnetic resonance imaging (MRI) scanning of his cervical spine, which showed a growth representing a finding of Non-Hodgkins Lymphoma. Dr. Fabian referred claimant to his personal care physician for treatment of the lymphoma. Dr. Vigilio is treating the lymphoma disease.

Dr. Fabian diagnosed pseudarthrosis (false joint) of the levels surgically treated by Dr. Oro. In response to a letter from claimant's counsel in October of 2008, Dr. Fabian wrote that he recommended a posterior cervical fusion of the C3 through C6 levels. It is clear from his testimony that Dr. Fabian recommends what he terms surgical salvage or revision of the fusion at the same levels Dr. Oro attempted to fuse. Dr. Fabian theorizes that he can produce a better result than Dr. Oro, with resulting solid fusion, by using autograft bone material from claimant's body. Dr. Fabian explained that, because claimant is a chronic smoker, autograft bone material is more likely to graft into a fusion because claimant's body is less likely to reject it.

Dr. Fabian explained that smoking adversely affects the ability of the body to develop bone material to form a solid fusion:

> The problem with smoking is that the active ingredient … is nicotine. That is a know agonist of the disease to veins and arteries which causes them to constrict.
>
> ****
>
> The problem with fusions is that there's a process of new genesis or angiogenesis.
>
> ****
>
> That's a process where you place bone graft someplace new, venules and capillaries need to grow into that site to support it with oxygen, proteins, and water. [If nicotine blocks] angiogenesis in an attempted procedure of … bone grafting, it will not heal ….
>
> So there have been studies that have shown that this ingredient of nicotine adversely affects our body to grow bone.

Dr. Fabian explained why he believes claimant's fusion surgery resulted in pseudarthrosis:

> I'm of the opinion that **aside from his smoking**, the lack of autograft, that the lymphoma adversely affected the potential for him to heal his anterior fusion.

Dr. Fabian agreed with the other physicians that claimant's lymphoma is totally unrelated to his work injury and must be treated before he has a reasonable chance of a

successful revision surgery. Dr. Fabian stated that revision surgery is not an immediate need in claimant's case and that the priority should be resolving his lymphoma.

In his October 20, 2008, report, Dr. Ogsbury disagrees with Dr. Fabian's surgical recommendation. According to Dr. Ogsbury, most examining physicians describe claimant's complaints primarily as axial (mainly involving neck and shoulder pain), as opposed to radicular pain that might otherwise indicate spinal cord or nerve caused pain. Dr. Ogsbury noted that Dr. Oro initially suspected that claimant's post-surgical pain generator might be the level below the fusion (C7-T1), but diskogram and CT evaluations ruled out that level as a pain generator. Dr. Ogsbury found no evidence of neurologic abnormality. Dr. Ogsbury opined:

> [G]iven that two excellent spine surgeons have strongly differed as to the nature of further surgery and given that an excellent pain manager [Dr. Bernton] has recommended that no further surgery be performed at all; given the low odds he estimated for the surgery, it is my impression that I would have to agree with [Dr. Bernton] that the chances of further surgery at this point are not very great.

Dr. Ogsbury remained unconvinced that claimant's pain generator involved the 3-level fusion site.

Based upon his view of claimant's development of symptoms after the fusion surgery by Dr. Oro, Dr. Fabian stated that claimant's history of symptoms after surgery fit a classic pattern for patients who develop pseudarthrosis:

> [Claimant has] followed the typical pattern of someone who had partial or fairly good response to the cervical fusion over the first three to five months and the started developing a recurrence of symptoms.

Dr. Fabian stated that typical recurrence of symptoms involves increasing axial pain focused in the neck itself, referred pain into the upper shoulder girdle, or numbness in the same pattern distribution as before the surgery. Crediting Dr. Roth's testimony, Dr. Fabian's view of claimant's symptoms post-surgery is contrary to the weight of the medical records.

Dr. Fabian agreed that he would not recommend surgical revision of a pseudarthrosis where the patient is asymptomatic or experiencing a low level of symptoms. Dr. Fabian explained the basis for his surgical recommendation:

> [F]or lack **of any other imaging studies pointing to anything else**, the clinical history and the timing of such, I would say that this patient is a very high likelihood that his **pain generation was coming at least to some extent from a pseudarthrosis**.

The Judge finds equivocal Dr. Fabian's statement that there's a high likelihood that "to some extent" the pseudarthrosis is a pain generator. This statement is more specula-

tive than probable. When weighed against the medical opinions of other treating and examining physicians, the Judge is unpersuaded by Dr. Fabian's testimony that the psuedarthrosis might be claimant's pain generator.

Dr. Fabian stated that he relies upon clinical history and exam findings rather than imaging studies to determine stability of the vertebral segments following fusion surgery:

> [W]e talk about views in flexion and extension in plain radiographs. We talk about MRIs and seeing consolidation through the vertebral bodies. We talk about CT scans. All of these modalities are notoriously inaccurate for determining pseudarthrosis. We have no consensus in the spine community as how to determine these things. We go basically by clinical history and clinical exam findings more than anything else.

Dr. Fabian does not expect the revision surgery to improve claimant's symptoms such that he is pain-free. Dr. Fabian instead anticipates a good result for claimant would be to relieve his pain by 30% to 50%. Dr. Fabian explained:

> I think [claimant] is going to require just based on all the other issues he's dealing with and the psychosocial overlay issues, he's going to need some component of chronic pain management going forward. And it may take him quite some time to dramatically reduce his narcotic load. He may … need to be on a pain contract at least for a year to 18 month (sic) as part of his rehab from any proposed operation.

Dr. Fabian expects the revision surgery to relieve claimant's mechanical pain from the pseudarthrosis and to improve his function. When weighed against the medical opinions of other treating and examining physicians, the Judge is unpersuaded that Dr. Fabian's belief that he can relieve claimant's pain by 30% to 50% is either medically probable or reasonable.

At respondents' request, Radiologist Charles Seibert, M.D., performed an extensive review of claimant's medical records and numerous imaging studies to give his opinion whether the fusion surgery succeeded in stabilizing motion of the vertebral segments. Dr. Seibert reviewed numerous dynamic radiographs, CT scans, and MRI scans of claimant's cervical spine, including post-operative MRI scans taken on February 27, 2007, April 10, 2007, and September 23, 2008.

Crediting Dr. Seibert's opinion, the goal of claimant's surgery was to prevent abnormal motion of the involved vertebral segments by promoting bone growth to bridge the spaces between the vertebrae. Dr. Seibert thus defines "fusion" as:

> [N]o evidence of abnormal motion, no radiographic lucency, and there is evidence of … bony bridging over the intended fusion operative site.

Crediting Dr. Seibert's medical opinion, the surgery resulted in a pseudarthrosis, lacking the desired formation of a bony fusion. The surgery however produced a fibrous union, meaning that it resulted in stability of the involved vertebral segments, where there is no radiographic evidence of abnormal motion of the segments. Dr. Seibert reported:

> [T]here is only minimal motion at two levels, C4-5 and C6-7, but, the third level, C5-6, appears "stable." Also, as shown on the postoperative MRIs, there is no impingement on the cord or nerve root elements; additionally, **a pain generator has not been identified in the cervical spine and the mere presence of non-union with minimal motion is not necessarily an indication that the non-union is a pain generator nor … an indication for additional surgery** ….

(Emphasis added). Dr. Seibert was unable to appreciate from the imaging studies any apparent cause of the pseudarthrosis, such as hardware failure. Dr. Seibert however noted that smoking is one of the commonly quoted factors adversely affecting fusion. As found, claimant was a habitual cigarette smoker before and after the January 9, 2007, fusion surgery. Dr. Seibert's medical opinion here was credible and persuasive.

Dr. Reiss testified: Many patients who develop a pseudarthrosis following surgery are asymptomatic. Absent reasonably specific symptoms identifying the pseudarthrosis as the pain generator, surgical revision of the fusion site is contraindicated under the medical treatment guidelines promulgated by the director of the Division of Workers' Compensation. Dr. Reiss noted that claimant had the same vague and changing symptoms after his surgery that he had before the surgery. Dr. Reiss stated that claimant's vague, diffuse symptoms fail to reasonably identify the pseudarthrosis as the pain generator or source of claimant's symptoms.

Dr. Reiss further explained his opinion that the pseudarthrosis likely is not the pain generator:

> [I]f you look at the surgery that he had done, which was a three-level fusion, that surgery is unlikely to resolve axial neck pain ….
>
> So I believe one of his major diagnoses prior to surgery was a lot of axial pain, myofascial pain, neck pain – not nerve pain, but neck pain – that I would definitely predict would not be made better by three-level fusion in the vast majority of people.
>
> So the fact that he still had that **pain after the surgery** he had done is expected … and **would be related to his original pain complaints, not to a pseudarthrosis** which has not occurred yet.

(Emphasis added).

Dr. Reiss noted that, following his injury, claimant reported subjective symptomatology that was more widespread and diffuse than imaging studies objectively sup-

ported. Dr. Reiss further noted that, prior to surgery, claimant had a questionable psychological status and widespread symptoms that failed to fit the objective pattern. Dr. Reiss noted that claimant's symptomatology following the January 9, 2007, fusion surgery should have been limited to neck pain from the surgery; instead, claimant complained of diffuse pain similar to his preoperative pain, but more intense. Dr. Reiss opined:

> I would have to agree that [claimant] is a **very poor surgical candidate** … and I would not suggest any further surgical intervention and this would be taking into account the various physician's opinions, his imaging studies, his history given to me, his physical examination, and the various reports.

(Emphasis added). Dr. Reiss further explained the basis for his recommendation against surgery:

> [H]e is a poor surgical candidate … from the standpoint of his diffuse symptomatology and his psychological profile …. He had a poor response to his surgery. He has had widespread pain ever since, not easily explained by his findings and I think most of his pain is myofascial and indeed **his nonunion** at C6-C7 **is only a possibility, not a probability**, and the **pain pattern does not appear to fit** with the presentation of a **nonunion pain, which should have presented late and not immediately after his surgical intervention** ….

(Emphasis added).

Indeed, Dr. Reiss doubted the veracity of claimant's pain complaints; he wrote:

> Certainly here in front of me today, [claimant] did not appear in any significant pain yet he rated his pain at 7/10. He looked like he was functioning well ….

Both Dr. Fabian and Dr. Reiss are spine surgeons. Dr. Reiss read the transcript of the deposition of Dr. Fabian in preparing for his testimony. Dr. Reiss also reviewed the report of Dr. Seibert. Dr. Reiss explained his opinion that claimant's pseudarthrosis is stable:

> You can have a solid, stable fusion with just a few points of bone growth from one bony elements (sic) to another.
>
> ****
>
> But if you get some bone growth and there is enough contact between the two surfaces, either through implants of some sort of scar tissue then the two could be considered fused and stable and won't have any movement.

> And I like to consider it analogous to items that are spot welded together.
>
> ****
>
> So, in [claimant's] situation, there certainly isn't any gross movement. And there may be a very stable pseudarthrosis, if not a solid fusion, at two of the three levels.

Dr. Reiss stated that even solid fusions allow some bending movement of the spine.

Dr. Reiss stated that Dr. Oro initially performed the fusion surgery to relieve symptoms suggesting nerve root irritation at the C6 level from foraminal narrowing. Dr. Reiss stated that post-surgical imaging studies show no residual evidence of spinal cord or nerve irritation at the fusion site requiring any surgical correction. When asked whether Dr. Oro's surgery relieved claimant's C6 nerve root symptoms, Dr. Reiss stated:

> Possibly. There is a note or two that says he had less numbness in the C6 distribution. But his symptoms were so variable … that certainly one could claim almost anything as far as his upper extremities.

When asked what symptoms claimant reported were resolved by Dr. Oro's surgery, Dr. Reiss stated:

> Unfortunately, [claimant's] statements to me were somewhat less than totally clear. When asked about different things, he found it very difficult to stay on topic. And he was very evasive in a lot of the answers as far as that. So I never got a very clear picture … whether or not [surgery] really helped him at all.
>
> My impression, after asking [claimant] several times … was that there was not any clear difference in his pain pattern [before or after surgery].

The above history Dr. Reiss got from claimant is contrary to the history Dr. Fabian relied upon in attributing claimant's current symptoms to the pseudarthrosis. Crediting Dr. Roth's review of claimant's medical records, the surgery by Dr. Oro resulted in no change in claimant's symptoms. This finding undermines Dr. Fabian's opinion concerning the likely cause of claimant's pain complaints.

Crediting Dr. Reiss's medical opinion, it is medically improbable that claimant's symptoms following Dr. Oro's surgery are caused by pseudarthrosis. Dr. Reiss testified:

> I think [claimant's] symptoms actually showed up within three or four weeks of his surgery. And that, indeed, would not be the typical history of a nonunion, especially considering the vaguity of his symptoms and how well it resembles the pre-operative symptoms.

Dr. Reiss explained that the procedures Dr. Oro used to stabilize claimant's cervical spine would not have allowed sufficient motion of the vertebral segments to be a pain generator. Dr. Reiss explained:

> [I]f you have fairly good bone, as one would assume a young male would have, then the screws are very solidly fixed to the bone. And they are solidly fixed to the plate. And the interbody devices are impacted in place very securely.
>
> And so you would have to wear away or crush down the bone, which takes time.
>
> ****
>
> In my experience, it is usually more than three or four months before it shows up, unless you have a little old lady with extremely soft bone.

Dr. Reiss's medical opinion here was credible, persuasive, and consistent with medical opinions of Dr. Seibert, Dr. Roth, Dr. Goldman, and Dr. Ogsbury.

Because claimant's complaints after surgery mirrored those from before, Dr. Reiss opined it unreasonable to assume it medically probable that another surgery would alleviate claimant's pain complaints. Dr. Reiss stated:

> [T]he cause of [claimant's] pain was very nebulous and poorly defined [before surgery] and continues to be nebulous and poorly defined. But is unlikely to be due to the pseudarthrosis because the pain is poorly defined, difficult to localize, unclear what its source is, however you want to define it. That is the kind of pain he had before, and that is the kind of pain he has now.

Indeed, like Dr. Roth, Dr. Reiss would have recommended against the first surgery because of claimant's diffuse complaints; he stated:

> I do believe that his pain syndrome that he presented with prior to surgery is virtually the same as the pain syndrome he is presenting with now.
>
> And **prior to** surgery, I would have to say that **it would have been unlikely that those symptomatologies would be helped by the surgery**. And, at this point, any further surgery is equally unlikely to change his pain syndrome.

(Emphasis added). Dr. Reiss's medical opinion here was credible, persuasive, and consistent with medical opinions of Dr. Seibert, Dr. Roth, Dr. Goldman, and Dr. Ogsbury.

The Judge credits the testimony of Dr. Reiss and Dr. Roth in finding unreliable claimant's testimony concerning his pain generator. The Judge finds that, because the fixation installed during surgery prevents motion of the vertebral segments, the typical

course of developing symptoms resulting from pseudarthrosis requires a period of months after surgery to develop. The decompression portion of the surgery should have resolved any complaints attributable to nerve pathology, such as nerve pain or radiculopathy. The medical opinions of Dr. Reiss and Dr. Roth were persuasive and amply supported by claimant's medical records showing him complaining of the same pre-operative pain within weeks of the surgery performed by Dr. Oro. Claimant's development of symptoms after Dr. Oro's surgery thus fails to fit this profile for attributing his complaints to pseudarthrosis.

Claimant failed to show it more probably true than not that the revision surgery recommended by Dr. Fabian is reasonable and necessary to cure and relieve the effects of his injury. Claimant failed to show it more probably true that his pseudarthrosis is a pain generator. The Judge credits the testimony of Dr. Reiss and Dr. Roth in finding it unlikely claimant's pseudarthrosis is a pain generator.

Claimant further failed to show it more probably true than not that the revision surgery recommended by Dr. Fabian is reasonably necessary in light of the following findings: The Judge credits the testimony of Dr. Reiss and Dr. Roth in finding that claimant psychologically is not a surgical candidate and was unlikely to benefit from the first surgery performed by Dr. Oro. Claimant similarly is unlikely to benefit from the surgery recommended by Dr. Fabian. The warning signs of psychological failure were present before and after Dr. Oro's surgery: Vague, diffuse, complaints of symptoms that are inconsistent with objective findings. In light of claimant's psychological profile, the Judge found no persuasive medical evidence showing that claimant's pseudarthrosis is a pain generator. The Judge has credited the testimony of Dr. Reiss and Dr. Roth in finding it improbable that revision surgery likely will resolve or reduce claimant's complaints.

Finally, claimant failed to show it more probably true than not that the revision surgery recommended by Dr. Fabian is reasonably necessary because claimant is a chronic smoker. Claimant's smoking likely reduces his body's ability to form or promote new bone growth. Crediting Dr. Fabian's opinion, claimant's smoking adversely affected his ability to optimally heal from Dr. Oro's surgical intervention by forming a solid bony fusion. Claimant's smoking remains an adverse factor for any fusion surgery. The Judge credits the testimony of Dr. Reiss and Dr. Roth in finding claimant's pseudarthrosis nonetheless is a fibrous union that is sufficiently stable to prevent abnormal motion. Thus, even with claimant's chronic smoking habit, Dr. Oro's surgery was successful in preventing abnormal motion of claimant's cervical spine.

Claimant failed to show it more probably true than not that treatment of his lymphoma disease is reasonable and necessary to cure and relieve the effects of his injury. The testimony of Dr. Vigilio, Dr. Reiss, Dr. Fabian, and Dr. Roth supports a finding that claimant's lymphoma disease developed independently and is unrelated to his work injury or treatment for the injury. The Judge further credits the testimony of Dr. Vigilio, Dr. Reiss, Dr. Fabian, and Dr. Roth in finding that claimant easily can proceed with treatment for the lymphoma without impacting treatment for his work injury.

CONCLUSIONS OF LAW

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

Claimant argues he has prove by a preponderance of the evidence that Dr. Fabian's recommendation of revision surgery is reasonable and necessary to cure and relieve the effects of his work-related injury. Claimant further argues he has prove by a preponderance of the evidence that treatment of his Non-Hodgkins Lymphoma disease is reasonable and necessary. The Judge disagrees with both of claimant's arguments.

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).

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.

Respondents thus 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).

Here, the Judge found claimant failed to show it more probably true than not that the revision surgery recommended by Dr. Fabian is reasonable and necessary to cure and relieve the effects of his injury. The Judge further found claimant failed to show it more probably true than not that treatment of his lymphoma disease is reasonable and

necessary to cure and relieve the effects of his injury. Claimant thus failed to prove by a preponderance of the evidence that insurer should pay for either for surgery recommended by Dr. Fabian or for treatment provided by Dr. Vigilio for his lymphoma disease.

The Judge concludes that claimant's request for an award of medical benefits requiring insurer to pay for revision surgery recommended by Dr. Fabian should be denied and dismissed. The Judge further concludes that claimant's request for an award of medical benefits requiring insurer to pay for treatment provided by Dr. Vigilio for his lymphoma disease should be denied and dismissed.

ORDER

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

1. Claimant's request for an award of medical benefits requiring insurer to pay for revision surgery recommended by Dr. Fabian is denied and dismissed.

2. Claimant's request for an award of medical benefits requiring insurer to pay for treatment provided by Dr. Vigilio for his lymphoma disease is denied and dismissed.

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

DATED: __April 8, 2009___

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-760-972

ISSUES

- Whether Claimant established by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment;

- Whether Claimant established by a preponderance of the evidence that he is entitled to medical benefits to treat the injury, including the surgery proposed by Dr. Tice; and

- Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits.

STIPULATIONS

- Drs. Patrick O'Meara, Michael Hehmann and Larry Tice are authorized medical providers.

- Claimant's average weekly wage, without considering health insurance benefits, is $693.82 and Claimant is not precluded by this stipulation from asserting a modified AWW in the future.

FINDINGS OF FACT

Claimant was employed as a maintenance mechanic for Employer. He started working for Employer in September 1991.

In 1995, Claimant sustained a work related injury to his cervical spine. An EMG performed in May 1995 revealed that Claimant had radiculopathy at C6 and C7 nerve roots. In October 1995, Claimant underwent an anterior fusion at levels C5-6 and C6-7 which Dr. Larry Tice performed.

EMG testing performed in May 1996 revealed that Claimant had radiculopathy at C7 and new radiculopathy at C5 which was not present before the surgery.

The medical records reflect that Claimant continued to complain of neck, right shoulder and right arm pain through December 22, 1998, when Dr. Tice placed Claimant at maximum medical improvement (MMI). By that time, Claimant had returned to work for Employer performing his regular job without restrictions. Claimant last saw Dr. Tice for the 1995 injury on December 22, 1998.

Between December 22, 1998 and May 22, 2008, Claimant did not receive medical treatment for his neck. Medical records from Claimant's family physician, Dr. Terry Wade, confirm that Claimant did not complain of neck pain despite repeated visits for various reasons. Claimant saw Dr. Wade in 1998, 1999, 2000, 2004, 2005, 2006, 2007, and 2008 for a variety of a reasons, including low back pain, but no neck pain complaints were noted in the medical records. On May 11, 2007, Dr. Wade described Claimant's neck as "Supple. No rigidity . . ."

Claimant also sought chiropractic treatment with Dr. Klippert on seven occasions between August 3, 2006 and September 19, 2006 for low back pain. No symptoms of neck pain were reported or treated.

Claimant performed full duty work without restrictions from December 1998 or earlier to May 2008. Claimant was not under any work restrictions imposed by a physician during that time period.

On May 22, 2008, Claimant was working on an overhead electrical box when he "cranked" his neck back to look into the box to retrieve a wire. He felt immediate pain in his lower neck and right shoulder. When Claimant straightened his spine, the pain subsided and he continued to work.

At the end of his shift on May 22, 2008, Claimant mentioned the incident to a co-worker. The following day, May 23, 2008 Claimant was experiencing severe right shoulder pain by the end of his shift. He again mentioned the incident to his co-worker, who observed that Claimant could barely put on his shirt by the end of the shift.

May 23, 2008 fell on a Friday before a three-day holiday weekend. Claimant also worked second shift which began at 3:15 p.m. and no supervisors were working. Claimant was, therefore, unable to immediately report the injury to the Employer.

On Sunday, May 25, 2008, Claimant went to the Delta County Memorial Hospital Emergency Department in severe pain. No narrative report exists for this visit. A form was completed that stated, "® post shoulder pain – suspect cervical radiculopathy." The hospital form also circles "no" next to "recent injury?" The form also states "chronic neck pain."

Claimant reported the injury to his Employer on Tuesday, May 27, 2008, and Employer referred Claimant to its designated medical provider, Dr. Patrick O'Meara. Claimant saw Dr. O'Meara on May 29, 2008. Dr. O'Meara's report indicates a date of injury of May 22, 2008, a description of the injury, a diagnosis, the imposition of work restrictions, and a statement that Claimant was not at MMI. Claimant provided essentially the same description of the May 22, 2008 incident to Dr. Tice on August 5, 2008 and independent medical examination physician, Dr. Weaver, on August 11, 2008.

EMG testing performed after May 22, 2008, showed that Claimant had acute and chronic changes, which included C5-6 motor irritation to the biceps and deltoid and C7 dermatomal changes. Dr. O'Meara referred Claimant to Dr. Tice for a surgical evaluation.

Dr. Tice indicated that the EMG shows radiculopathy emanating from C5-6 and C6-7. Dr. Tice also initially diagnosed Claimant with possible right C6-7 radiculopathy and suggested that Claimant needed surgery for adjacent segment disease, right C7-T1 disc rupture and C4-5 neuroforaminal narrowing. Dr. Tice later changed his opinion regarding the disc levels that required surgery. Dr. Tice opined that Claimant needed surgery at C7-T1 and T1-T2. Dr. Tice opined during the hearing that Claimant ruptured the disc at T1-T2 when he cranked his head back. EMG testing did not reveal any radiculopathy emanating from T1-T2.

Dr. James Weaver performed an independent medical examination in August 2008 at the request of Respondents. Dr. Weaver concluded that Claimant had pseudoarthrosis at C6-7 due to the fusion surgery in 1995. Dr. Weaver opined that Claimant's condition was not work related. Specifically, Dr. Weaver opined that Claimant's overhead activity could not be considered an injury rather Claimant's symptoms stem

from preexisting degenerative disc disease. Dr. Weaver felt that Claimant should not undergo surgery due to the extent of degeneration in Claimant's cervical spine.

Dr. Neil Pitzer performed a review of Claimant's medical records at Respondents' request. Dr. Pitzer opined that Claimant's activity of "looking up" was an everyday activity that, even if it caused an increase in symptoms, does not constitute an "injury." Claimant's activity of extending his neck to full extension is not an ubiquitous activity of daily living.

Dr. Pitzer did not find evidence of radiculopathy at T1-T2 and that Claimant's right upper extremity symptoms were not consistent with T1-T2 radiculopathy. Dr. Pitzer testified that he could not explain how the act of full extension of the neck would cause a T1-T2 injury.

Dr. Pitzer agreed with Dr. Weaver that Claimant should not undergo surgery at the T1-T2 levels of the spine because Claimant is not exhibiting symptoms related to that area. Dr. Pitzer feels that Claimant should undergo conservative treatment before additional surgical options are explored.

Claimant's symptoms from the May 22, 2008 incident have not resolved and Claimant has not returned to his preexisting baseline condition.

Claimant last worked on June 2, 2008. His employment with the Employer has been terminated because he has not been released for full duty work. The initial report of Dr. O'Meara dated May 29, 2008 established work restrictions for the May 22, 2008 injury. Dr. Tice's September 30, 2008 report states, "Certainly at this point he is incapacitated to return to work." Drs. Weaver and Pitzer agree Claimant cannot currently perform his job.

Based on the foregoing, it is more probably true than not that Claimant aggravated his pre-existing cervical spine condition when he extended his neck to perform overhead work on May 22, 2008. Claimant had been working full duty without restrictions for nearly ten years. He also had not reported any neck pain symptoms to his family physician despite multiple visits. Because Claimant has sustained a work-related injury, he is entitled to reasonable, necessary and related medical benefits to treat the injury. Finally, Claimant has established that he has lost wages due to his inability to physically perform his normal job duties as a result of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, 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. An industrial aggravation of a preexisting medical condition can result in a compensable injury as long as the aggravation is the proximate cause of the need for treatment. *H&H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). However, when a claimant experiences symptoms while at work it is for the ALJ to determine whether subsequent need for treatment was caused by an industrial aggravation of a pre-existing condition or by the natural progression of the pre-existing condition. The mere experience of symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the pre-existing condition. Resolution of that issue is also one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

5. As found, Claimant established that it is more probably true than not that he aggravated his pre-existing cervical spine condition, with symptoms radiating into his right shoulder and right upper extremity, on May 22, 2008 while acting within the course and scope of his employment with Employer. Claimant's job duties required overhead work which required him to fully extend his neck in order to perform the overhead work. The act of fully extending one's neck is not an ubiquitous activity of daily living. Furthermore, Claimant had worked without physical restrictions in the same job for nearly ten years without a problem. He had also not sought medical treatment for his neck condition for nearly ten years. As such, the Judge infers that Claimant was relatively symptom free during that ten-year period. He did not begin to have disabling symptoms until he fully extended his neck on May 22, 2008, to perform overhead work for Employer.

6. 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.

Respondents thus are liable for authorized medical treatment reasonably necessary to cure and relieve the Claimant the effects of the injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). As found, Claimant has established that he is entitled to reasonable, necessary and related medical treatment for his work injury. Claimant, however, has not established that he is entitled to the surgery at levels C7-T1 and T1-T2 as recommended by Dr. Tice. The Judge credits the opinions of Drs. Pitzer and Weaver as more credible and persuasive than the opinions of Dr. Tice regarding the need for surgery at C7-T1 and T1-T2. The credible medical evidence also does not support that surgery at those levels is medically necessary or reasonable. The EMG test results confirm that Claimant does not have radiculopathy emanating from the T1-T2 level. Accordingly, Claimant is not entitled to surgery at C7-T1 and T1-T2.

7. 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) 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). As found, Claimant has established that his work injury has resulted in wage loss beginning on June 3, 2008.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant's reasonable and necessary medical expenses to treat the May 22, 2008 work related injury, including but not limited to Claimant's visits with Drs. O'Meara, Hehmann and Tice and their referrals. However, Respondents are not liable to pay for the C7-T1 and T1-T2 surgery recommended by Dr. Tice.
2. Respondents shall pay Claimant TTD benefits beginning June 3, 2008 and continuing until terminated pursuant to law, based on Claimant's AWW of $693.82.
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 expressly determined herein are reserved for future determination.

DATED: April 9, 2009

Laura A. Broniak
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-343-336

ISSUES

The issues to be determined by this decision concern the Claimant's Petition to Reopen based on fraud and the Respondent's Motion for a Directed Verdict.

PROCEDURAL MATTERS

At hearing, the Judge admitted into evidence the following Claimant's Exhibits: 1, 2, 3, 4, 8, 10, 12, 14, 16, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 32, 39, 40, 48, 49, 50, 51, and 52. Respondents' Exhibits A through O were admitted into evidence.

FINDINGS OF FACT

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

1. On June 11, 1997, the Claimant was employed by the Respondent as an all purpose clerk. On that date, she was physically attacked by a customer at the location where she worked and suffered multiple injuries. The Respondent filed a General Admission of Liability admitting that the Claimant's injuries arose out of and in the course of employment on August 29, 1997. The Claimant was initially treated at the emergency department at the Rose Medical Center on June 11, 1997. The initial treatment was for a human bite to the cheek. The Claimant then came under the care of Dr. Raschbacher. In his initial report of June 17, 1997, he sets forth a history of the June 11, 1997 attack and he assesses the Claimant's condition as being cervical and thoracic strain as well as a human bite.

2. The Claimant continued to treat with Dr. Raschbacher through December 10, 1997 when he placed the Claimant at MMI and indicated that she had no permanent impairment as a result of her injuries. In the MMI report of December 10, 1997, Dr. Raschbacher assesses the Claimant's condition as being cervicothoracic and lumbar strains. The doctor's reports throughout the period the Claimant was under his care established that he continued to evaluate and treat the Claimant for both cervical and thoracic injuries.

3. After suffering a new work-related injury, the Claimant returned to Dr. Raschbacher on January 22, 1998. In his report, he indicates that the Claimant's past medical history was significant for prior complaints of back and neck pain and the human bite.

4. The Claimant was also referred by Dr. Raschbacher to Dr. Greg Reichhardt for evaluation. In the doctor's report of September 9, 1997, he notes that the Claimant was injured on June 11, 1997 and she was being referred for evaluation of back and neck

complaints. On September 20, 1997, the Respondent filed a Final Admission of Liability (FAL). The date of maximum medical improvement was December 10, 1997 and the Respondent denied that the Claimant had suffered any permanent partial impairment. The FAL was based on a report from Dr. Raschbacher.

5. On June 24, 2008, the Claimant filed a Petition to Reopen claim based on fraud. The Claimant testified that in 2006, she obtained a number of records from the Respondents, including medical records. Claimant further stated that the packet included a document which is contained in the record as Claimant's Exhibit 1. This appears to be a computer generated form which lists Dr. Gregory Reichhardt as the provider. It further describes the injuries as cervical with an admitting history of a back sprain. The document does not contain a signature block for any physician or other medical provider.

6. The Claimant stated during her testimony that she had neck and back pain following the June 11, 1997. She also acknowledged that she had reported neck and back pain to the treatment providers and received care for her neck and back following the June 11, 1997 incident. Claimant, however, claims that Respondents committed fraud because they knew she had sustained injuries to her neck but did not inform her and did not provide treatment. She further claims that medical documents were intentionally withheld from her. There is no persuasive or credible evidence to support that Respondents withheld medical records intentionally or otherwise.

7. At the conclusion of the Claimant's case in chief, the Respondent moved for a Directed Verdict.

CONCLUSIONS OF LAW

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

1. The purpose of the Workers' Compensation Act of Colorado (Act) Section 8-40-101, et seq. C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving by a preponderance of the evidence that she is entitled to benefits. See *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The Claimant must establish by a preponderance of the evidence that her claim should be reopened. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents. Section 8-43-201, C.R.S.

2. 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. Section 8-43-303(1), C.R.S., provides that a claim may be reopened based on fraud.

5. The elements of fraud or material misrepresentation include: 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 of the existence of the fact; 4) Making of the representation or concealment of the fact with the intent that it be acted upon; 5) Action based on the representation or concealment resulting in damage. *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 (1937). See *Arczynski v. Club Mediterranee of Colorado, Inc.*, W.C. No. 4-156-147 (December 15, 2005).

6. A directed verdict may be entered after the Claimant has presented her case in chief, if the Claimant has failed to present a prima facie case for relief. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988). The ALJ is not required to view the evidence in light most favorable to the non-ruling party in ruling on a Motion for Directed Verdict. *Rowe v. Bowers,* 160 Colo. 379, 417 P.2d 503 (1966); *Blea v. Deluxe/ Current, Inc.*, W.C. No. 3-940-062 (June 18, 1997).

7. As found, the Claimant testified that she not was aware that she had injured her neck and back as a result of the altercation on June 11, 1997. However, she acknowleged feeling pain in her neck and back following the June 11, 1997 injury, reporting such pain and receiving care for her neck and back. Claimant's Exhibit 1 does mention cervical and back injuries. However, the medical reports of Dr. Raschbacher and Dr. Reichhardt establish that the Claimant was receiving treatment from the time of her injury through the date of MMI for the cervical and back problems. The Claimant has failed to establish that Respondent withheld or falsified any material existing fact and also failed to establish that she relied on any material fact withheld or falsified by the Respondent. Taking into account all evidence contained in the record, it is found that the Claimant has failed to establish a prima facie case that the Respondent committed fraud and, therefore, the Respondent's Motion for Directed Verdict is granted.

ORDER

It is therefore ordered that:

A. The Respondent's Motion for Directed Verdict is granted and the Claimant's Petition to Reopen based on fraud is denied and dismissed.

DATED: April 10, 2009

Laura A. Broniak
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-601-418

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable industrial injury to his left knee 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 made a proper showing that he is entitled to a change of physician pursuant to §8-43-404(5), C.R.S.

FINDINGS OF FACT

1. Claimant has worked for Employer over the past 17 years in a number of different capacities. During the course of his employment he suffered two admitted Workers' Compensation injuries to his back. He underwent three back surgeries and suffers from chronic radiculopathy. Claimant is presently receiving medical maintenance treatment for his back condition.

2. Claimant testified that he injured his knee on January 28, 2008 while working for Employer. He explained that his left leg became caught under the arm of a chair and he collapsed to the floor. Claimant landed on his left knee and side. While on the floor, he experienced severe pain as the result of a back spasm and was transported to Platte Valley Medical Center for treatment.

3. Records from the Platte Valley Medical Center reveal that Claimant reported back pain from a fall at work. Claimant did not mention any knee pain or any other leg problems. He received pain medications and was released.

4. On January 29, 2008 Claimant visited Authorized Treating Physician (ATP) Franklin Shih, M.D. for an evaluation. Dr. Shih had provided Claimant with medical treatment for his lower back condition since 2005.

5. Dr. Shih reported that Claimant did not mention a left knee problem during the course of the exam. He also noted that, although Claimant's pain diagram showed

a line delineating complaints into the left lower extremity that extended over the left knee, Claimant had no specific knee symptomatology. Dr. Shih thus remarked that the pain diagram was consistent with a radicular pain complex and not a specific knee injury. He stated that, if Claimant would have told him that he had injured his left knee, he would have noted the complaint in his report and provided treatment.

6. On February 7, 2008 Claimant visited ATP Scott Hompland, D.O. for an evaluation. Claimant reported that he had experienced a "pop" in his back that caused pain radiating down his left leg. He also experienced intermittent back spasms and suffered from incontinence. However, Claimant did not mention any knee injury.

7. On February 15, 2008 Claimant contacted Dr. Hompland and requested a change in his work restrictions because of prolonged sitting at his desk. Claimant also sought a letter from Dr. Hompland so that he could move his workstation closer to the restroom in order to accommodate bladder problems. Notably, Claimant again did not mention any left knee concerns.

8. Based on a referral from Dr. Hompland, Claimant underwent an examination with Jeffrey J. Sabin, M.D. on February 22, 2008. Dr. Sabin noted that Claimant's primary complaints included back pain, left leg pain and bowel and bladder problems. An examination of Claimant's legs caused back pain and made "any useful information from the clinical exam difficult." During the examination Claimant did not report that he had suffered any left knee injury. Dr. Sabin concluded that Claimant suffered from degenerative disc disease and psychosomatic issues. He commented that, although Claimant had undergone previous decompression surgeries, he was not currently a surgical candidate.

9. During the period from March through June, 2008 Claimant made several visits to Dr. Hompland. During the visits Claimant stated that he was experiencing back pain that radiated into his left leg. However, Claimant did not mention that he had suffered a left knee injury or felt pain that was localized to the left knee area.

10. On July 31, 2008 Claimant visited Dr. Hompland for a follow-up examination. Dr. Hompland recorded that Claimant "has a new onset of some left knee pain and his leg giving out. He feels that this is secondary to his back, although he feels the pain is coming from his intra-articular region." Dr. Hompland commented that he could provide treatment if the left knee condition constituted a Workers' Compensation claim.

11. On August 8, 2008 Claimant returned to Dr. Shih for an evaluation. Dr. Shih noted that he had been treating Claimant for "ongoing back and lower extremity symptomatology" but that Claimant had now been referred for an evaluation of his left knee. Claimant stated that he hurt his knee when he fell on January 28, 2008 and mentioned his knee pain at the emergency room. However, Dr. Shih responded that Claimant's knee had not been symptomatic during an examination on the day after the incident. Dr. Shih thus characterized Claimant's left knee condition as a "new concern" and recommended an MRI to ascertain the underlying pathology.

12. Claimant subsequently underwent an MRI of his left knee. The MRI reflected "nonspecific multi-factorial degenerative changes." Dr. Shih explained "there is no one terrible area of pathology, but there are multiple areas that could all be playing into his pain complex." After exploring possible treatment options, Dr. Shih referred Claimant to Dr. Fallinger for a surgical consultation.

13. On October 22, 2008 Respondent asked Dr. Shih to render an opinion regarding the medical probability that Claimant's left knee complaints were related to the January 28, 2008 incident. Dr. Shih responded that Claimant's left knee symptoms were not caused by the incident. He explained:

> There is no specific knee symptomatology nor physical exam findings suggesting a knee problem until the evaluation with me in August of 2008. [Claimant] in pain diagrams preceding the August 8, 2008, note did delineate complaints going into the left lower extremity and frequently overlying the left knee, but had no specific knee symptomatology and the pain diagram is consistent with a radicular pain complex as opposed to a specific knee injury.
>
> I reviewed pain diagrams on [Claimant] going back to my initial evaluation of him in 2005 and [Claimant] has had pain diagrams similarly going into the lower extremity and overlying the knee as far back as 2005 and intermittently through the years to the most recent complaints. I do not feel the medical records up and to August of 2008 indicate, via pain diagram, patient report, or physical examinations, of specific problem of the knee. I would not be able to relate [Claimant's] complaints of knee pain to me in August of 2008 to the January 2008 injury.

14. On December 19, 2008 Claimant underwent an independent medical examination with George A. Leimbach, M.D. Dr. Leimbach commented that the emergency room records from January 28, 2008 documented increased back and left leg pain symptoms but did not mention isolated knee pain. He explained that, because Claimant's left leg symptoms typically included pain in the left thigh and knee region, it was reasonable for medical providers to attribute the pain in Claimant's leg to "potential neurologic issues from the lumbar spine." However, Dr. Leimbach also stated that the history of Claimant's January 28, 2008 fall was consistent with the type of injuries documented on his left knee MRI scan. He thus concluded that Claimant's January 28, 2008 fall was the cause of Claimant's left knee injury and that the "neurologic weakness that [Claimant] has in the left lower extremity is the underlying cause of the injury that occurred to his knee."

15. Claimant testified that he began to experience pain in his left knee about one day after his fall at work. He commented that his knee pain differed from the radicular pain he had previously experienced. Claimant explained that, prior to the January 28, 2008 incident, he experienced shooting pain in his left knee. However, subsequent

to the incident, he has had severe pain in his left kneecap area. He concluded that he would like to visit Dr. Fallinger for a surgical evaluation.

16. Claimant has failed to demonstrate that it is more probably true than not that he suffered an injury to his left knee during the course and scope of his employment with Employer on January 28, 2008. Although Claimant explained that he fell to the floor and injured his left knee, the Platte Valley Medical Center records from January 28, 2008 reveal that Claimant was suffering from back pain and did not mention any specific knee symptoms. Moreover, Claimant did not mention any specific knee pain on the day after the incident during his evaluation with ATP Dr. Shih. In fact, Dr. Shih commented that Claimant's pain diagram showing a line delineating complaints into the left lower extremity was consistent with a radicular pain complex and not a specific knee injury. Furthermore, during the period February through June, 2008 Claimant made several visits to ATP Dr. Hompland. Claimant stated that he was experiencing back pain that radiated into his left leg, but did not note that he had suffered a left knee injury or felt pain that was localized to the left knee.

17. Notably, Claimant did not mention any specific knee pain to ATP Dr. Hompland until July 31, 2008. Dr. Hompland characterized Claimant's symptoms as "a new onset of some left knee pain." Claimant subsequently mentioned specific left knee pain to Dr. Shih on August 8, 2008. Dr. Shih noted that he had been treating Claimant for "ongoing back and lower extremity symptomatology" and characterized Claimant's left knee condition as a "new concern." Dr. Shih thus opined that Claimant's pain diagrams from 2005 until August 8, 2008 were similar because they reflected pain "going into the lower extremity and overlying the knee" and did not reflect a specific left knee concern. He thus persuasively concluded that Claimant's left knee symptoms were not related to the January 28, 2008 incident. Although Dr. Leimbach contradicted Dr. Shih's conclusion, his explanation is less persuasive because it is inconsistent with the medical records and pain diagrams. Moreover, his medical treatment was considerably more limited. The hazards of Claimant's employment thus did not cause, intensify, or, to a reasonable degree, aggravate his left knee condition.

18. Claimant has failed to establish that it is more probably true than not that he is entitled to reasonable and necessary medical treatment designed to cure and relieve the effects of his left knee condition. He has experienced back and lower extremity pain over several years as a result of his back condition and chronic radiculopathy. However, because Claimant did not suffer a new left knee injury on January 28, 2008, his request for specific left knee treatment and a referral to Dr. Fallinger is denied.

19. Claimant has failed to make a proper showing that he is entitled to a change of physician. A change of physician is not required simply because Claimant may have expressed dissatisfaction with Dr. Shih or would prefer to receive treatment from a doctor of his choosing. Because the record reveals that Claimant has been receiving adequate medical treatment he is not entitled to a change of physician.

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 failed to demonstrate by a preponderance of the evidence that he suffered an injury to his left knee during the course and scope of his employment with Employer on January 28, 2008. Although Claimant explained that he fell to the floor and injured his left knee, the Platte Valley Medical Center records from January 28, 2008 reveal that Claimant was suffering from back pain and did not mention any specific knee symptoms. Moreover, Claimant did not mention any specific knee pain on the day after the incident during his evaluation with ATP Dr. Shih. In fact, Dr. Shih commented that Claimant's pain diagram showing a line delineating complaints into the left lower extremity was consistent with a radicular pain complex and not a specific knee injury. Furthermore, during the period February through June, 2008 Claimant made several visits to ATP Dr. Hompland. Claimant stated that he was experiencing back pain that radiated into his left leg, but did not note that he had suffered a left knee injury or felt pain that was localized to the left knee.

7. As found, Claimant did not mention any specific knee pain to ATP Dr. Hompland until July 31, 2008. Dr. Hompland characterized Claimant's symptoms as "a new onset of some left knee pain." Claimant subsequently mentioned specific left knee pain to Dr. Shih on August 8, 2008. Dr. Shih noted that he had been treating Claimant for "ongoing back and lower extremity symptomatology" and characterized Claimant's left knee condition as a "new concern." Dr. Shih thus opined that Claimant's pain diagrams from 2005 until August 8, 2008 were similar because they reflected pain "going into the lower extremity and overlying the knee" and did not reflect a specific left knee concern. He thus persuasively concluded that Claimant's left knee symptoms were not related to the January 28, 2008 incident. Although Dr. Leimbach contradicted Dr. Shih's conclusion, his explanation is less persuasive because it is inconsistent with the medical records and pain diagrams. Moreover, his medical treatment was considerably more limited. The hazards of Claimant's employment thus did not cause, intensify, or, to a reasonable degree, aggravate his left knee condition.

Medical Benefits

8. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999).

9. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment designed to cure and relieve the effects of his left knee condition. He has experienced back and lower extremity pain over several years as a result of his back condition and chronic radiculopathy. However, because Claimant did not suffer a new left knee injury on January 28, 2008, his request for specific left knee treatment and a referral to Dr. Fallinger is denied.

Change of Physician

10. Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* W.C. No. 4-597-412 (ICAP, July 24, 2008). Because §8-43-404(5)(a), C.R.S. does not define "proper showing" the ALJ has discretionary authority to determine whether the circumstances warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (ICAP, May 5, 2006).

11. The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.* The ALJ may consider whether the claimant and physician were unable to communicate such that the physician's treatment failed to prove effective in relieving the claimant from the effects of the industrial injury. *See Merrill v. Mulberry Inn, Inc.,* W.C. No. 3-949-781 (ICAP, Nov. 16, 1995). However, a change of physician is not required merely because a claimant expresses dissatisfaction with the designated treating physician or would simply prefer to receive treatment from a doctor of his choosing. *In Re Hoefner,* W.C. No. 4-541-518 (ICAP, June 2, 2003). Finally, where an employee has been receiving adequate medical treatment, courts need not permit a change of physician. *See Greenwalt-Beltmain v. Dep't of Regulatory Agencies,* W.C. No. 3-896-932 (ICAP, Dec. 5, 1995); *Zimmerman v. United Parcel Service,* W.C. No. 4-018-264 (ICAP, Aug. 23, 1995).

12. As found, Claimant has failed to make a proper showing that he is entitled to a change of physician. A change of physician is not required simply because Claimant may have expressed dissatisfaction with Dr. Shih or would prefer to receive treatment from a doctor of his choosing. Because the record reveals that Claimant has been receiving adequate medical treatment he is not entitled to a change of physician.

ORDER

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

1. Claimant's claim for Workers' Compensation benefits as a result of a January 28, 2008 left knee injury is denied and dismissed.

2. Claimant is not entitled to medical treatment, including a referral to Dr. Fallinger, for his left knee condition.

3. Claimant is not entitled to a change of physician.

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

DATED: April 10, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-775-618

ISSUES

The sole issue determined herein is compensability.

FINDINGS OF FACT

1. Claimant was employed as a truck driver for the employer.

2. Claimant is a very large man, weighing approximately 360 pounds.

3. On October 27, 2008, at approximately 10:00 to 10:30 a.m., claimant dumped the load from his dump truck. He then got out of the cab to check his dump bed. As he stepped on the top step down, the outer rail on the step came loose. Claimant's foot slipped and he held onto the steering wheel with his right hand. The slip caused an injury to claimant's right shoulder. Claimant pushed the outer rail back onto the aluminum connecting rods.

4. Claimant promptly reported the injury to the foreman, Mr. Mason. He also called Mr. Barton, the supervisor, and Ms. Stabler, the bookkeeper, and reported the injury.

5. Mr. Herman, the owner, and Mr. Nussbaum, the mechanic, later checked the step on the truck and found nothing wrong. Mr. Nussbaum explained at hearing that the rails are connected with aluminum connecting rods. He admitted that the outside rail might come off the step if something ran into it. The photographic evidence at hearing demonstrated that the top step was bent. Mr. Nussbaum admitted that the bend was likely caused by something running into it.

6. On October 27, 2008, Dr. Baptist examined claimant, who reported a history of slipping from the truck and suffering pain in his right shoulder and across his neck to his left shoulder. Shoulder x-rays were normal. Cervical spine x-rays were normal, except for loss of curvature, which could be attributed to muscle spasm. He prescribed medications and physical therapy.

7. Dr. Sharma diagnosed a rotator cuff tear, but the November 6, 2008 magnetic resonance image ("MRI") showed only a type II acromion with spurring and mild osteoarthritis of the acromioclavicular joint.

8. On November 10, 2008, Dr. Sharma noted that claimant was much improved.
9. On November 17, 2008, Dr. Walden diagnosed a right rotator cuff strain. He injected the subacromial bursa.

10. On December 1, 2008, Dr. Sharma determined that claimant was at maximum medical improvement without any restrictions.

11. Mr. Gaines, an investigator for the insurer, conducted an on-site inspection of the truck on November 12, 2008. The conclusions of Mr. Gaines are not credible.

12. Claimant has proven by a preponderance of the evidence that he suffered an accidental injury to his right shoulder on October 27, 2008, arising out of and in the course of his employment. Claimant's testimony is credible. He presented consistent histories to his providers. Respondents' argument that the mechanism of injury is implausible is not well-founded. The mechanism is realistic. The outer rail of the top step was clearly bent, as depicted in the photo exhibits. That outer rail was likely to come loose from the aluminum connecting rods when claimant's weight was placed on the rail, causing him to slip. The slip reasonably would cause the right rotator cuff strain diagnosed by Dr. Walden and Dr. Sharma.

CONCLUSIONS OF LAW

1. As found, claimant has proven by a preponderance of the evidence that he suffered an accidental injury to his right shoulder on October 27, 2008, arising out of and in the course of his employment. Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

2. 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.

ORDER

It is therefore ordered that:

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

DATED: April 13, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-775-559

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 12, 2009, in Denver, Colorado. The hearing was digitally recorded (reference3/12/09, Courtroom 3, beginning at 3:15 PM, and ending at 4:12 PM).

At the conclusion of the hearing, the ALJ established a briefing schedule: Claimant's Opening Brief was filed on March 24, 2009. Respondents' Answer Brief was filed on April 2, 2009. Claimant filed no timely Reply Brief. The matter was deemed submitted for decision on April 8, 2009.

ISSUES

The issues to be determined by this decision concern compensability; if compensable, average weekly wage (AWW), temporary total disability (TTD) benefits, stipulated offsets. Respondents raised the affirmative defenses of statute of limitations and late reporting penalty versus the Claimant.

At the commencement of the hearing, the parties stipulated that Claimant's AWW is $679.02, and the ALJ so finds.

FINDINGS OF FACT

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

1. The Claimant was an employee of the Employer on November 23, 2006.

2. The Claimant worked at the Employer's Distribution Warehouse on November 23, 2006. He was loading dry goods on pallets. Toward the end of the day, the Claimant felt pain in his side that he described as burning pain. This was at approximately 2:30 or 3:00 p.m. He was unsure of the cause for the burning pain. He took a break from his duties and then returned to finish the rest of the day's work he began his shift early on November 23, 2005, the day before Thanksgiving. According to the Claimant, he was stacking a pallet of boxes containing six one-gallon Clorox bottles. The boxes weighed 75 lbs. each. After he had moved approximately six boxes, he experienced an onset of severe pain in his lower abdomen. He temporarily stopped working and was approached by his then supervisor Ken Jones (hereinafter "Jones"),

3. Jones asked Claimant if something was wrong with him physically and Claimant told Jones that he was not sure but it started after Claimant was loading the Clorox boxes. Jones then told Claimant to take a break, but also instructed him to continue to work thereafter so that this area of the warehouse could close early. Claimant continued working for the rest of his shift.

4. Claimant was in the process of leaving the warehouse when he encountered Charles Miller and Jim Hayes, both of whom are senior supervisors in the receiving department of the warehouse. Hayes, upon observing Claimant, commented that Claimant looked like he was not doing well and asked him what was wrong. Claimant told both Hayes and Miller that he was suffering pain in the abdominal area and that he wasn't sure what this was from.

5. Hayes and Miller asked Claimant to sit and rest in the receiving office, which he did. While there, Claimant spoke with Hayes and Miller about ulcer problems he had suffered and his use of medications that he brought daily to work for this. Miller extracted the medication from Claimant's lunch box while Hayes secured a bottle of water. They gave Claimant the medicine and water mixed. Claimant remained with them for another 25 minutes but his pain did not subside.

6. The ALJ infers and finds that a reasonably prudent employer, under the circumstances outlined above, would not have cause to believe that the Claimant had suffered a work-related injury or occupational disease.

7. Claimant returned home and experienced a greater onset of pain. He eventually went to St. Anthony's Emergency Room and had emergency surgery for an incarcerated inguinal hernia.

8. The St. Anthony's Emergency Room records on November 23, 2005 indicated that the Claimant had noticed a "bump" in his abdomen for the "past year which he has always been able to push back in. Today he has increased pain and has not been able to push it back in. He has also vomited six or seven times." Nothing in the St. Anthony's records admitted into evidence at the hearing show any link between the hernia surgery and work with the Employer.

9. In an Employer record filled out and signed by the Claimant on December 28, 2005, the Claimant represents that his condition was **not** the result of an accident and that he was not eligible for workers' compensation. The second part of the document, filled out by the attending physician, represents that the hernia was **not** the result of an accident and was not the result of a "work injury." It indicated that the Claimant should be able to return to full duty on January 9, 2006 and was signed by Gregory Pinson, M.D., the surgeon at St. Anthony's Hospital.

10. Another "Report of Attending Physician," filled out on November 29, 2005 by the Claimant, bearing his signature next to that date, filled out within one (1) week of the alleged industrial accident, indicates that Claimant's condition was not the result of an accident and that he was not eligible for workers' compensation benefits. Claimant's treating physician, Gregory Pinson, M.D., also filled out this document. Dr. Pinson's signature is dated December 6, 2005. Dr. Pinson indicated that the incarcerated umbilical hernia was not the result of an accident and was not a "work injury."

11. With regard to his hernia of November 2005, Claimant submitted a certification of the healthcare provider under the Family and Medical Leave Act of 1993 documenting a "serious health condition." There is no indication of work-relatedness on this certificate.

12. The Claimant admitted at the hearing that he had had prior workers' compensation claims and was aware that workers' compensation claims had to be submitted in writing. He also stated that he was aware of the procedure for submitting a workers' compensation claim.

13. According to the Claimant's testimony, he thought the hernia was caused by his activities at work on November 23, 2005. He claims, however, that his supervisors and an unidentified human resources representative at the Albertson's Distribution Center told him that it was not a work-related condition. Although the Claimant had received workers' compensation forms, he stated that he threw them away. In light of the Claimant's actions as outlined above, the ALJ finds inconsistencies that are at odds with reason and common sense, especially in light of Claimant's familiarity with workers' compensation claims.

14. Claimant used some vacation time and then received short-term disability benefits from the Employer after November 2005.

15. The Claimant did not file a claim for workers' compensation until October 28, 2008. In that claim form, the Claimant erroneously identified the date of November 23, 2006 as the date of the hernia incident.

16. The Claimant testified that he always believed that the hernia and subsequent emergency surgery were related to his employment activities with the Employer. In light of Claimant's actions and statements to treating physicians after the November 23, 2005 incident, especially in light of Claimant's familiarity with workers' compensation

claims, the ALJ finds the Claimant's testimony inconsistent and contradicted by his actions after November 2005. Therefore, the ALJ does not find his testimony credible.

17. It is undisputed that the Claimant was released to return to full duty on January 10, 2007.

18. The medical records do not support the Claimant's contention that his incarcerated hernia was work-related. The emergency room record on November 23, 2005 indicates that the Claimant had had a "bump" for the "past year" which he had always been able to push back in and had an increase of pain on that date. He was not able to push the bump inwards.

19. Nowhere in the St. Anthony's Hospital emergency room records is there a statement that the Claimant's hernia was the result of employment activities. The treating surgeon, Gregory Pinson, M.D., filled out more than one form for the Claimant and his employer indicating that the hernia was **not** the result of an accident and it was not a "work injury."

20. The ALJ infers and finds that If the Claimant believed that his condition was work-related, he could have filed a claim in 2005. He was familiar with the workers' compensation process and was aware that he had to file a claim in writing. Although he testified that he was of the belief that his hernia condition was the result of his work-related activities on November 23, 2005, within a week of this incident, he also submitted a form to the Employer, a "Report of Attending Physician," wherein he and his surgeon indicated that the condition was not the result of an accident and was not related to work activities. He also testified that he expected the Employer to rely upon these statements.

21. The Claimant filed a form on December 28, 2005, with the same representations. Again, his physician also confirmed that it was neither a work-related injury nor the result of an accident on both forms that were completed in 2005, close in time to the incident. The ALJ finds that the Claimant has given no credible or reasonable excuse for waiting almost three years, until October 28, 2008, to file a claim for workers' compensation under these circumstances. The ALJ further finds that the Employer's first notice that Claimant was claiming a work-related injury occurred on October 28, 2008, when the Claimant filed his Worker's Claim for Compensation.

22. Based on his testimony at hearing, The Claimant argues that he had a "lost time injury" of more than three days at work and that, therefore, the Employer had a statutory obligation to report his injury to the Division of Workers' Compensation (DOWC). The Claimant, however, submitted a document with his signature and the treating physician within one week of his incident which indicated, in no uncertain terms, that there was no accident, the Claimant was not eligible for workers' compensation and that it was the physician's opinion that the condition was not the result of a work-related accident. Thus, the Employer was not placed on notice sufficient to trigger the reporting duties. All documentation suggested no work incident.

23. The Claimant testified that he was always convinced that the hernia was result of work-related activities on November 23, 2005, yet he threw the workers' compensation forms away. Under these circumstances, the Claimant submitted forms to his Employer that indicated that his condition was not work-related and also had the statements of his treating physician. There is no "excusable neglect" to make a claim after two years but before the expiration of three years. This is particularly true when the Claimant was aware of how to file a workers' compensation claim.

24. The weight of substantial evidence, in the form of statements by the Claimant's treating physicians, supports the finding that the Claimant's hernia and emergency surgery was not the result of an accident or work-related incident. In fact, there is no medical evidence to the contrary. The most credible evidence consists of the medical records and the statements provided to the Employer shortly after the incident in November and December of 2005.

25. The Claimant has failed to prove that it is more reasonably probable that his incarcerated hernia that manifested on November 23, 2005 is work-related. Therefore, the Claimant has failed to prove, by a preponderance of the evidence that he suffered a compensable injury while working for the Employer on November 23, 2005.

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 actions after the alleged injury contradict his testimony and are not consistent with reason and common sense. Therefore, as found, the Claimant's testimony concerning an alleged work-related hernia is not credible.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). 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 "pre-

ponderance 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 failed to sustain his burden with respect to compensability. Although moot, Respondents sustained their burden with respect to the applicability of the two-year statute of limitations provided in Section 8-43-103 (2), C.R.S. (2008), and Claimant failed to establish a reasonable excuse to enlarge the statute to three years.

c. It is the Claimant's burden to prove when the Employer had sufficient knowledge to trigger the duty required by Section 8-43-101(1), C.R.S. (2008). *See City and County of Denver v. Industrial Claim Appeals Office,* 58 P.3d 1162 (Colo. App. 2002) [burden of proof rests upon the party asserting the affirmative of a proposition]. 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 [Industrial Claim Appeals Office (ICAO), June 10, 2005]. The question of whether the Employer was placed on notice sufficient to trigger its reporting duties is largely one of fact. *Wallace v. Stone Gate Homes,* W.C. No. 4-650-504 (ICAO, April 18, 2006), *Doughty v. Poudre Valley Health,* W.C. No. 4-488-749 (ICAO, January 13, 2003). As found, Claimant failed to prove a reasonable excuse for extending the statute of limitations to three years.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this_____day of April 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-761-223

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 December 31, 2008 and was concluded on March 6,

2009, in Denver, Colorado. The hearing was digitally recorded (reference: 12/31/08, Courtroom 3, beginning at 8:31 AM, and ending at 11:10 AM; and, 3/6/09, Courtroom 3, beginning at 1:30 PM, and ending at 3:30 PM).

At the conclusion of the hearing, the ALJ established a briefing schedule. Claimant's opening brief was filed electronically on March 31, 2009 (Claimant incorporated the statement of facts therein, which was contained in her mid-hearing brief, filed electronically on January 13, 2009. Respondents' answer brief was filed electronically on April 9, 2009. Claimant's reply brief was filed electronically on April 16, 2009, and the matter was deemed submitted for decision on that date.

ISSUES

The issues to be determined by this decision concern compensability; medical benefits (authorized treating provider, reasonably necessary medical benefits); average weekly wage (AWW); and temporary total disability (TTD) benefits from May 23, 2008 and continuing. Respondents raised the affirmative proposition of late reporting by the Claimant.

FINDINGS OF FACT

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

Compensability

1. Claimant is a 59-year-old home health care worker, who has been working for the Employer since August of 2005. Her job duties were helping elderly and disabled clients at their homes, with various activities of daily living (ADLs), such as bathing, personal hygiene, and eating. Claimant would also help her clients attend appointments, would shop for groceries and cook meals for clients, and would do various housecleaning tasks such as vacuuming, dusting and cleaning bathrooms and kitchens.

2. On the evening of May 7, 2008, Claimant was attending alone to an 86-year-old woman with dementia and an amputated right leg. This woman had an episode of diarrhea, and while Claimant was struggling to clean her while in front in of the toilet, the patient suddenly attempted to get up unassisted and slipped and fell on top of the Claimant, while Claimant was bent down in front of the patient, trying to clean up the mess. The top part of the woman's body fell primarily on Claimant's head and neck. The patient was not hurt in the fall, and Claimant managed to get the patient back up, get her cleaned up, and she finished out her shift. Claimant noted the episode of diarrhea in the work diary she kept.

3. The following day, the Claimant noticed that she was stiff, and felt sore in her lower back and thighs. She noticed some soreness in her neck and shoulders as well. Claimant went to work, attending both her morning and evening client on May 8, 2008 and her morning client on May 9, 2008.

4. Starting on May 10, 2008 however, the Claimant began to experience increased stiffness followed by headaches and extreme neck pain, and radiating pain into her arms. The pain became so extreme that Claimant experienced pain induced-nauseated severe enough to induce vomiting. Since the May 7, 2008 incident, Claimant has also been experiencing headaches, difficulty sleeping, loss of strength in her arms and hands, and dizziness, in addition to continued severe neck pain at the base of her head and neck. Subsequent to the May 7, 2008 incident, Claimant has also had trouble with her balance and has experienced subsequent falls as a result.

5. One factor buttressing the Claimant's credibility regarding the circumstances of her injury is that her testimony was consistent with Employer and medical records generated nearest in temporal proximity to her alleged date of injury. Claimant's work diary dated May 7, 2008 confirms that her client had suffered from diarrhea. The fact that she made no mention of the fall is consistent with her testimony that the Claimant believed that the incident itself was not reportable as part of her job duties, as the client was not hurt. Moreover, the work diary also serves to confirm her testimony that initially she did not realize how badly the incident had affected her.

6. Claimant's testimony that she suffered a work-related injury is confirmed in the contemporaneous medical records generated nearest in time to the date of injury. Claimant testified that her pain worsened during the weekend following the May 7, 2008 incident, and that she sought treatment with Dr. Karen Cain, D.C., on Monday, May 12, 2008. Consistent with this testimony, Dr. Cain's medical records reflect that she went in for treatment on that date. The most complete form documenting her treatment on this date, found in Dr. Cain's medical records notes the word "work", and also "lifted, very heavy". Dr. Cain's account of the May 12, 2008 visit also serves to confirm Claimant's testimony regarding what occurred at this visit. In that report, Dr. Cain noted that: "[Claimant] came to my office May 12 in very bad condition. She reported extreme neck pain & pain into arms, so bad that she had been vomiting..."

Employer Witnesses

Kelly Sisson

7. Kelly Sisson was Respondents' primary lay witness. She acted as Claimant's supervisor. She stated that the Employer had a policy that required all care givers to report any "unusual incidents" that occur while on duty to her or to someone on call by the end of that caregiver's shift. Sisson then testified that Claimant did not report the incident with her client falling on her on May 7, 2008, although Sisson, in her opinion, would consider it to be an "unusual incident" that should have been reported, because it

may have affected the safety of the client. . The implication of Sisson's opinion was that Claimant's failure to follow the procedure in reporting the incident indicates that incident did not occur. Sisson further testified that when she saw the Claimant on May 12, 2008, upon being told by Claimant that her back was hurting, she specifically asked whether Claimant's back problems were work related, and that Claimant specifically denied that her condition was work related. Moreover, Sisson recalled that on May 12, 2008, Claimant complained to her about her low level of pay, and that the Claimant explained that she had a lot of other "extra-curricular" activities going on such as gardening and raising a foster child, which Claimant felt was a higher priority than her job as a care giver. Finally, at Sisson noted that in her interaction with Claimant on May 12, 2008 and subsequently on May 23, 2008 and May 28, 2008, that Claimant had no difficulty speaking, and was able to drive. The implication of this testimony is that the Claimant's testimony regarding the development of her symptoms after May 7, 2008 is not credible, because she was able to engage in conversations without difficulty on May 12, 2008, and on those subsequent dates, contrary to her testimony and the testimony of Dr. Cain that she was in severe enough pain on May 12, 2008 and in the week subsequent to impede her ability to easily communicate.

The ALJ finds that Sisson's testimony is not credible because it is inconsistent with the contemporaneous records she prepared and moreover, there is evidence in the record to indicate that she is not being truthful. First, regarding Sisson's implied claim that because Claimant did not follow company policy in reporting the incident, the incident did not occur, her testimony is not borne out by forms she filled. Specifically, on May 28, 2008, when Sisson filled out the SRS claims reporting form, there is nothing to indicate that Sisson was concerned that a safety violation or failure to report a "unusual incident" had occurred, although the form allowed for such concerns to be expressed. In fact, the form specifically requested information concerning "unsafe acts." In this slot Sisson wrote "we are not allowed to perform dead weight lifts" but did not note anything about the various "serious" health and safety issues which she testified to on the witness stand. If Claimant's failure to follow alleged "company protocol" was as serious and concerning as Sisson claimed, the ALJ infers and finds that this would have been something she would have noted in the First Report of Injury. Instead, Sisson only noted that Claimant should not have lifted the patient. Again, this statement does not indicate a preoccupation with the safety of the client, contrary to her testimony at hearing. Nor do her subsequent emails to Heather Foromoso indicate concern for the safety of Claimant's client, or concern regarding Claimant's failure to report the incident. Rather, the ALJ infers and finds that Sisson was primarily concerned with investigating Claimant's account of the injury, in a quasi-risk management-type role.

8. Sisson's testimony concerning the Employer's policies and the manner in which she filled out the SRS claim report form also indicates that she may have been under a misconception of how the incident on May 7, 2008 occurred. As Claimant testified, Claimant did not lift the patient from the ground. Moreover, the patient's upper body fell on her neck, and Claimant's body essentially cushioned her fall. Thus, much of Sisson's alleged concern for Claimant's failure to report "a fall" by the end of her shift, has no grounding in how the incident actually occurred.

9. Even if the ALJ were to credit Sisson's testimony concerning the seriousness with which the Employer's policy is enforced, Sisson also testified that it was up to the discretion of the care giver to determine what constituted a reportable incident, and that there was no written policy or clear guidance provided to care givers as far as what constitutes a reportable incident. Thus, given that Claimant knew that her client had not "fallen", and that her client wasn't hurt by the incident, it is clear that it was well within Claimant's exercise of reasonable discretion to determine that this was a minor incident, that did not warrant any incident report. As Claimant testified, her client wasn't the person who really was really affected by the incident.

10. Sisson's testimony is inconsistent with her prior account as contained in the log found in Respondents' Exhibit B. Because of Sisson's inconsistent account and the unreliability of the Exhibit B itself, the ALJ finds Sisson's testimony and that of her colleagues not credible. The testimony of the Employer witnesses does not "add up", as a simple examination of the allegedly contemporaneously generated Employer records shows. Starting with the log: Sisson testified that she kept this log of all interactions with Claimant, as part of her regular job duties. She confirmed that an accurate and true copy of this log is found in Respondents' Ex. B p. 23. Furthermore, she testified that this log was the log referenced in the true and accurate copy of an email she sent to H.F., found in Respondents' Ex. p. 22. The email time stamp indicates that the email was sent at 8:34 am and in it Sisson references a conversation that she anticipates she will have with Claimant at some point in the future (*See e.g.,* Ex. B, p. 22 "Once I do speak with her…"). Significantly, however, the log itself that K.S. claims was attached to this email contains an account of a conversation that K.S. allegedly, according to the log, had with the Claimant at 10:06 am, **more than an hour later that same day**. Sisson testified that this was the only log attached to her email. It could not be because of the timing discrepancy. Moreover, Sisson's account of how the alleged "log" was produced is further suspect in that this "log" also contains an account of a conversation that Ronda Maul had with Claimant on May 13, 2008, contrary to the email's description of the log being " a log of the contact I have had with [Claimant] for the last couple of weeks" (See Ex. B p. 22) Sisson testified that she would record her notes of her conversations with her employees while or shortly after or the conversation took place. The ALJ finds it lacking in credibility that Sisson was even aware of a conversation between Maul and the Claimant, and how this would end up in Sisson's "contemporaneously kept" log of *her* interactions with Claimant.

11. Given the suspect nature of Sisson's account, she further impeached herself, by then testifying to the alleged conversation on May 12, 2008 in which Claimant supposedly explicitly denied having a work-related injury. Sisson's log, did not go quite so far, and in fact, implies that on May 12, 2008 Claimant did in fact report a work-related injury "[Claimant] was complaining about doing extra work with her client and that it was affecting her back…". The ALJ infers and finds that a reasonably prudent employer would have probable cause to suspect that the employee in question was reporting a work-related injury or occupational disease. Sisson's testimony, however, deviated from her log, and in fact more accurately mirrors the conversation that according

to her supposedly "contemporaneous notes" occurred on May 28, 2008, in which Sisson described Claimant discussing her concerns with her garden and her ward. Sisson's testimony was inconsistent, and both her testimony, the documents produced by her and those of her fellow employees add up to Sisson's testimony not being credible.

Ronda Maul

12. The testimony that Ronda Maul recounts an alleged conversation she had with Claimant on May 13, 2008. In this alleged conversation, Maul asserts that Claimant called her to complain about her work conditions, and that Claimant reported that she was having back problems. Maul testified that upon learning of Claimant's back problems, she specifically asked Claimant whether these problems were due to a work-injury, and apparently, Claimant explicitly denied that this was the case. This conversation was also summarized in Sisson's "log" and in an email sent by Maul to Heather Formoso on June 3, 2008, almost a month after the alleged date of injury. Contrary to Maul's account, Claimant testified that the first conversation that she had with anyone from the Employer, after letting Sisson know that she was unable to work on May 12, 2008, was the message that she left for Sisson on May 23, 2008, thus, admitting a late reporting of injury. Thus, the ALJ infers and finds that Maul's testimony in this regard is inconsistent with the weight of the evidence and, thus, not credible. First, given that this account was most likely inserted in the "log" produced by the Employer and the fact that there was an apparent effort to "confirm" the existence of this conversation in Sisson's log, in itself, makes Maul's account lacking in credibility. It makes not sense and it is inconsistent with reason and common sense that Claimant, the day before, on May 12, 2008, reported to her doctor that an injurious incident happened at work and then when asked explicitly by Maul on May 13 whether she suffered a work injury, deny the connection. Claimant credibly testified that she did not know anything about the workers' compensation system, and that if she had been asked whether she had suffered a workers' compensation, she would have had to ask for clarification, as she did not know what workers' compensation really was. Based on the totality of the evidence, the ALJ finds Maul's testimony lacking in credibility.

Carla Koepel

13. Carla Koepel testified, consistent with Sisson's testimony concerning the Employer's policy concerning "reportable incidents" that it was her job as an H.R. representative, to investigate incidents that may implicate the safety of the Employer's clients. Apparently, in this capacity as an "incident investigator, " Koepel followed up with the daughter of the client who allegedly fell on Claimant and determined that that there was no information that would indicate that the fall took place. Koepel allegedly did this investigation to make sure that the client wasn't hurt. Koepel's alleged involvement, however, in the claim is inconsistent with the contemporaneous records she produced, which show that her job as an H.R. (human resources) representative was not to investigate the incident in order to make sure that everyone was safe but to engage in risk management on behalf of the worker's compensation carrier. First, the ALJ infers and finds that Heather Formoso, the H.R. representative whom Koepel succeeded after

Formoso left on maternity leave would not have been making the phone calls described by Koepel, given that the Formoso was the person who first learned about the incident, and that if such investigations really were conducted for the safety of the Employer's clients, one would believe that delay would be unadvised. Koepel did not engage in any sort of investigation involving Claimant's invalid client until June 23, 2008, as accounted for in her H.R. notes. Koepel, in contacting the client's daughter, was more concerned about trying to verify Claimant's account of what occurred on May 7, 2008 rather than making sure that Claimant's patient was in good health subsequent to the incident. Based on the totality of the evidence, the ALJ finds Koepel's testimony inconsistent with reason and common sense and, therefore, lacking in credibility.

Medical

14. When Claimant went in to see Dr. Cain, she was having difficulty filling out the paperwork, and Dr. Cain's staff helped her fill out the form. Dr. Cain's records, along with Claimant's work diary, are the two records closest in time to Claimant's date of injury. Claimant's testimony was consistent with these records and her testimony that the injury occurred as she described is credible.

15. Claimant does have a prior history of neck problems. In 2001, she underwent a spinal fusion at C3-C6 performed by Sanjay Jatana, M.D. This surgery was necessitated by degenerative changes in the cervical spine. Starting in June 2004, Claimant began seeing Dr. Karen Cain, D.C., for chiropractic treatment to help manage the pain she had associated with the fusion. In July of 2006, at Dr. Cain's recommendation, Claimant went to see John Schultz, M.D., at the Centeno-Schultz Clinic for an evaluation. She went to see Dr. Schultz due to an increase in her level of pain, which she believed was exacerbated by her inability to sleep. Dr. Schultz diagnosed post-fusion syndrome, cervical degenerative disease and pseudoarthosis at C5-C6 as his primary three initial impressions and recommended that she undergo a CT scan of the cervical spine. He also performed trigger point injections, and prescribed a Medrol dosepak. However, after this visit, Claimant found additional treatments that allowed her to return to her normal sleep schedule. Her neck symptoms lessened and she was able to manage her symptoms such that she was able to work and handle other activities of daily living without substantial difficulty.

16. Prior to the May 7, 2008 incident, Claimant had also had some other accidents that had caused her to experience increased symptoms in her neck, such as an auto accident in 2005, and an incident where she fell and hit her head and neck sometime in the week prior to April 28, 2008. None of these incidents, however, resulted in the Claimant requiring time off from her work, and none caused her to be unable to handle daily tasks of living.

17. On the Monday following the May 7, 2008 incident, (May 12, 2008), Claimant sought treatment with Dr. Cain, D.C. Dr. Cain, after examining the Claimant, recommended that she wear a neck brace, and also recommended anti-inflammatory medications. Dr. Cain also recommended that Claimant try to see a neurosurgeon, or if

her symptoms continued to worsen, to go the emergency room. On May 16, 2008 at a follow-up visit, Dr. Cain also provided Claimant with a note to her Employer, informing them, that Claimant was unable to work or drive. Claimant has been unable to work since that time, due to the severity of her symptoms.

18. Claimant told her supervisor, Kelley Sisson, on the morning of May 12, 2008, that she was experiencing severe pain, and that she could not work. At this time, however, Claimant did not explain that she believed that this was due to the incident on May 7, 2008. Claimant had not considered the possibility that there might be a worker's compensation injury nor did she realize the substantial and compensable nature of her condition. She was hopeful that she would get better if she rested and be able to return to work. Prior to filing the claim related to the May 7, 2008 incident, Claimant had never been involved in the worker's compensation system. Sometime in the few weeks following May 12, 2008, she had a discussion with a naturopath who told her that since the May 7, 2008 incident occurred while she was working, she may want to report the injury to her Employer and file a workers' compensation claim. Claimant also received similar advice from Dr. Cain. Because her symptoms were not improving, and because of the advice she had received, Claimant called Sisson on May 23, 2008 and left a message letting Sisson know that she had suffered a work-related injury and that she needed advice on what to do next.

19. Subsequently, Claimant received a letter dated June 9, 2008, directing her to two facilities for treatment. Claimant initially attempted to schedule an appointment with a Dr. Ephraim but could not reach the doctor despite repeated attempts. Claimant had no choice but to seek medical care at the other listed option, "any Concentra Facility" instead. On June 11, 2008, Claimant went to the Littleton Concentra facility Raymond Rossi, M.D., saw her. He diagnosed her with a neck sprain. He also noted, regarding whether Claimant suffered a work-related injury that "causality is determined to be more than 50%, given mechanism of injury and present complaints." Dr. Rossi did not recommend or take any x-rays or order any other imaging, despite Claimant's disclosure that she had had a prior neck fusion. He recommended a course of physical therapy and placed her on work restrictions of no lifting or pushing of 5 lbs or more, and no frequent bending. At that visit, Claimant expressed her concern to Dr. Rossi regarding his decision not to order any diagnostic imaging prior to recommending physical therapy. She explained to him that she was worried that the May 7, 2008 incident may have disturbed the fusion hardware. At a follow-up visit with Dr. Rossi on June 16, 2008, Claimant again expressed her concerns to Dr. Rossi, who, after dismissing her concerns again, eventually told her that he did not wish to provide her further treatment and that she should get her care at another Concentra facility.

20. In contradiction to the note he made when he first saw the Claimant, Dr. Rossi testified at hearing, under subpoena, that he believed that Claimant's injury may not have occurred due to the May 7, 2008 incident described by Claimant, because her symptoms could also be attributed to a fall that Claimant suffered as documented in Dr. Cain's record of April 25, 2008. Dr. Cain does not support this alternative theory of causation. Indeed, in light of the ending of the doctor-patient relationship between Dr.

Rossi and the Claimant, the ALJ finds his initial opinion that causation is more than 50% related to the May 7, 2008 work incident more reliable than his subsequent modification at hearing. Indeed, the ALJ finds that Dr. Rossi's initial opinion that the May 7 incident caused the Claimant's injury (more than 50%) is an opinion to a reasonable degree of medical probability. The opinion expressed at hearing is speculation on an alternative cause of the Claimant's condition.

21. Dr. Cain, the chiropractic treatment provider who would be in the best position to determine whether the April incident or the May 7 incident caused Claimant's symptoms because she treated Claimant after both, was of an opinion contrary to Dr. Rossi's alternative theory. While noting that the Claimant had been suffering from prior neck problems, Dr. Cain goes on to state:

> In the two initial years that I treated [Claimant], she was always able to work, in spite of discomfort until this work injury of May 7, 2008. Until this event, I have never know [Claimant] to be so debilitated that she could not go to work.

22. Additionally, Dr. Rossi's testimony at hearing that he now believed that Claimant's symptoms could have been due to the April 2008 incident, is not credible, because when asked by Respondents to address the precise issue of whether the April 2008 incident could have been the cause of Claimant's injuries just a few months before, Dr. Rossi refrained from giving this opinion, instead attributing her symptoms to the May 7, 2008 incident. As Dr. Rossi testified, after seeing Claimant in June 2008, he saw Claimant again (in the nature of an independent medical examination) on October 28, 2008. Prior to arranging for this examination, Respondents sent Dr. Rossi complete copies of Dr. Cain's records including the record describing the April 2008 fall. Accompanying these medical records, a cover letter invited Dr. Rossi to specifically explain the significance of the incident that was documented in Dr. Cain's record dated April 25, 2008. Dr. Rossi, however, left that section blank. Moreover, in his narrative report dated October 28, 2008, generated from the examination arranged by Respondents, Dr. Rossi wrote again:

> Given the data I have before me (no CT report), the findings on the x-ray represent a chronic process, and her injury on 5/7/08 exacerbated this conditions. However, if she does have a cervical disc [sic], this could have been produced by her injury mechanism described to me.

23. On cross examination, Dr. Rossi tried to explain that he did not attribute the injury to the April incident at that time because he was not "invited to do so" but in the second sentence of his October 28, 2008 report he explicitly noted that [Claimant] is here for causality determination". He had Dr. Cain's records in front of him, he had been specifically directed to examine the April 25, 2008 record and to give an opinion as to causality, and yet, in his October 28, 2008 report he still expressed the opinion that Claimant's symptoms were reasonably attributable to the May 7, 2008 incident. For this reason, his testimony at hearing that Claimant's injuries could have occurred outside the scope of her employment contrary to his October 28, 2008 report is given no

weight or credit. Dr. Rossi found the Claimant credible. At hearing, on direct examination, he stated that Claimant's description of her symptoms "set off alarms" in his mind regarding the credibility of her account. However, after being presented with her full medical records, and even after being invited to re-consider Claimant's account of what caused her symptoms, on October 28, 2008, he still found Claimant credible and attributed her symptoms to the May 7, 2008 incident. If, as he testified at hearing, he was placed "on his guard" by Claimant's description of her symptoms, his repeated determinations that her symptoms were attributable to her May 7, 2008 injuries amounts to the most credible assessment of what portion of Dr. Rossi's opinions are most credible.

24. After the June 16, 2008 visit with Dr. Rossi, Claimant then contacted the workers' compensation insurance carrier to receive direction as to where to receive treatment. On June 18, 2008, she was directed to Rocky Mountain Urgent Care, which she went to on the following day. At Rocky Mountain Urgent Care, Rebecca Andrick, D.O., saw her. Dr. Andrick had x-rays of the cervical spine taken which showed that the fusion hardware appeared to still be in alignment, but that there was severe exiting neural foraminal encroachment at C5-C6. Dr. Andrick diagnosed the Claimant with severe cervical strain, and recommended that she be evaluated by a neurosurgeon. Dr. Andrick directed Claimant to follow up with the workers' compensation carrier regarding further care. The workers' compensation carrier did not follow up on this recommendation, and since the June 18, 2008 visit with Dr. Andrick, the workers' compensation carrier has not authorized further treatment and has contested the claim pending further investigation.

25. Due to Claimant's lack of private health insurance, she has been limited in her ability to seek additional care. At Dr. Cain's recommendation, however, the Claimant underwent a CT scan on October 8, 2008. This most recent scan, in comparison with the last CT scan ordered by Sanjay Jatana, M.D., in 2004, shows that Claimant is suffering from a new disc herniation at C2-C3, causing "at least moderate central canal stenosis."

Medical Opinions Supporting Compensability

26. Claimant credibly testified that her pain levels after the May 7, 2008 injury were different than anything she had experienced prior. She stated that unlike past difficulties she has had with her neck, after the May 7, 2008 incident she was unable to engage in everyday activities, such as lifting groceries out of the car, without experiencing substantial stabbing pain in her neck, shoulders and arms. In addition to Claimant's testimony, there is a substantial medical evidence supporting the fact that the May 7, 2008 incident substantially aggravated Claimant's pre-existing condition. Every treatment provider and/or independent medical examiner (IME), including Dr. Cain, Dr. Rossi, Dr. Andrick, Joseph H.Fillmore, M.D., and James S. Ogsbury III, M.D., who examined and/or treated the Claimant has rendered an opinion supportive of the fact that Claimant suffered a compensable aggravation of her pre-existing cervical spine condition, as a result of the May 7, 2008 incident

27. Dr. Cain began treating Claimant in June of 2004. She is the most familiar with Claimant, and in the best position to determine whether there was a substantial change in Claimant's condition after May 7, 2008. Dr. Cain believes that there was a substantial change. As she notes in her report:

> When she first came to this office [Claimant] was in considerable neurological pain from both pre and post-surgical conditions. We were able to make process with treatment concentration on keeping C1 adjusted & in alignment...In June of 2006 Ms. Miller was having considerable trouble sleeping that was 6 months in duration. The intense exhaustion was overwhelming to her & her condition, to the point where she was having trouble speaking clearly. The extensive lack of sleep was decreasing her pain threshold, thus increasing the intensity of her pain, which was becoming debilitating. I referred her to Dr. John Schultz, MD for evaluation & pain management. Once Ms. Miller was sleeping better, her ability to function increased and we were able to get her condition back on track as best could be expected, given her post surgical condition.
>
> In the two initial years that I treated [Claimant], she was always able to work, in spite of her discomfort, until this work injury on May 7, 2008. On this day when this 4' 10" woman weighing approximately 115 pounds, working as an in-home care taker for a patient relatively on and a half times her size, 86 years old, blind, with dementia & an amputated right leg, fell on top of [Claimant]...[she] has been so debilitated, she has not been able to work since. Until this event, I have never known [Claimant] to be so debilitated that she could not go to work.

Dr. Cain attributes this aggravation to new herniation, not noted on prior CT films:

> The cervical CT [taken on 10/6/08] was compared with a previous CT taken January 2004. <u>New injury</u> is evident by a C2/3 disc herniation that protrudes into the central canal, impinging/compressing on the spinal chord...Spinal cord compression at such a *high level* is consistent with Ms. Miller's entire body complaints & continually worsening condition. *Of particular significance is that the new injury <u>is outside</u> the area of prior surgery.*

(emphasis in original). As is noted above, Dr. Rossi in his October 28, 2008 report agrees that such a disk herniation is a plausible consequence of the May 7, 2008 incident.

28. On June 19, 2008, Claimant was directed by Respondents to see Dr. Andrick at Rocky Mountain Urgent Care. Dr. Andrick ordered an X-ray that indicated that Claimant had severe exiting neuroforaminal encroachment at C5-C6. Dr. Andrick also filled out a WC164 form identifying the work-related medical diagnosis as severe cervical strain, and a possible diagnosis of cervical stenosis. Dr. Andrick recommended that Claimant be provided with a neurosurgical consult. From the totality of her records, the ALJ finds that Dr. Andrick believed the May 7, 2008 work incident was the cause of Claimant's discomfort.

29. On November 20, 2008, Claimant underwent an IME with Dr. Ogsbury. Although Dr. Ogsbury disagreed with Dr. Cain's assertion that the CT scan of October 6, 2008 is indication of a new injury, he still expressed the following opinion:

> Taking all of this information into account, Dr. Cain's strong advocacy of her patient, but also Dr. Andrick's appropriate evaluation and Dr. Rossi's initial evaluation and opinion later amended by his letter, it has to be my opinion that she had suffered at a least a significant aggravation of her pre-existing condition.

Dr. Ogsbury then goes on to say that the issue of causality as 50% to her pre-injury status and 50% to the work-related injury of May 7, 2008. However, embedded in this analysis, is the clear assumption that Claimant suffered a 50% aggravation of her pre-existing condition. Dr. Ogsbury's belief is confirmed throughout his discussion as he repeatedly states that the May 7, 2008 episode was "necessary" to cause the increase in her symptoms to the present level. The ALJ finds that Dr. Ogsbury's opinion in this regard does not prove a pre-existing condition for which apportionment is warranted. Indeed, a prior injury has **not** been sufficiently identified, treated, evaluated and rated as a contributing factor.

30. On November 14, 2008, Claimant underwent another IME with Dr. Fillmore. Similar to Dr. Cain, Dr. Rossi, Dr. Andrick and Dr. Ogsbury. Dr. Fillmore also expressed the following opinion:

> I do believe it is medically probable that the patient has an exacerbation of her neck and pain complaints after the work injury of 5/7/08. My opinion is related in part to the objective report of Dr. Cain, as well as the patient's report. She did appear to be functioning quite well, even though she had pain complaints prior to this incident. It is medically probable that a 150-pound patient falling on her neck could exacerbate her previous complaints. The C2-C3 disk herniation may have either have been caused or progressed from this injury. I do believe this is medically probable.

31. All of the medical providers who have either examined Claimant or treated her are in agreement that the May 7, 2008 incident exacerbated her pre-existing condition. Thus, the medical evidence supports a finding that Claimant suffered a compensable injury on May 7, 2008. Additionally, all of the medical treatment providers have given opinions that Claimant's description of her injury is consistent with her subsequent symptomology. This combined with Claimant's consistent and credible testimony concerning the circumstances of her injury, support a finding that Claimant suffered a compensable injury on May 7, 2008 that occurred in the scope of her employment and that arose out of her employment.

Authorization of Medical Providers

32. Contemporaneous medical records and the Claimant's testimony demonstrate that Respondents did not provide Claimant with two legitimate choices as re-

quired under Workers' Compensation Rules of Procedure,W.C.R.P. Rule 8-2, 7 CCR 1101-3, upon receiving Respondent's June 3, 2008 letter designating Dr. Ephraim and "any Colorado Concentra Facility" , Claimant repeatedly tried to contact Dr. Ephram's office, but could not get through to schedule an appointment. Claimant noted this fact on the signed confirmation of receipt that Respondents requested that she return, to confirm that she had received the choice of providers letter. The Employer confirmed the unavailability of Dr. Ephraim, as Carla Koepel documented this fact in her notes from June 17, 2008. Instead of remedying the situation, and providing Claimant with an additional alternative to Concentra, the Employer simply insisted that if Claimant wanted to receive authorized treatment she had no choice but to go a Concentra facility. Therefore, the right to appoint an authorized treating physician (ATP) reverted to Claimant pursuant to Rule 8-2(D), and Claimant designated Dr. Cain as her ATP.

33. Also, after Dr. Rossi refused to treat Claimant further on June 16, 2008, for non-medical reasons, Claimant sought direction from the carrier as to where she could receive further treatment. As Claimant testified, she was directed to Rocky Mountain Urgent care, where Dr. Andrick saw her. After seeing the Claimant, Dr. Andrick told her to contact the carrier for further instructions regarding future care and her reports indicate "work comp admin for RMC will manage f/u care." Te ALJ infer and finds that either: (1) Dr. Andrick was truly never given the authority to act as Claimants ATP. If Dr. Andrick had been authorized, she could have directed Claimant to a neurosurgeon of her choice; or, (2) Dr. Andrick did not want to treat Claimant further, not due to medical reasons, but apparently due to concerns about insurance. In either scenario, the right to appoint necessarily fell back to Claimant. In the first case, Respondents failed to effectively appoint a new ATP after Dr. Rossi refused to treat for non-medical reasons, and the right to appoint reverted to Claimant. In the second case, Dr. Andrick, while validly designated, refused to treat for non-medical reasons, and despite the fact that the carrier was aware that Dr. Andrick would provide no further treatment, they did nothing to direct Claimant to any other provider. Thus, the right to choose the ATP again reverted to Claimant and she validly designated Dr. Cain.

Average Weekly Wage (AWW)

34. As a threshold matter, Respondents admit $480.00 per week in the First Report of Injury. Based on Claimant's testimony, the fairest method for calculating her AWW would be to average her earnings as documented in the Employer pay records, for the pay periods of March 7, 2008 forward**,** which yields an AWW of $392.62. Starting in March of 2008, Claimant began taking care of a new client for about 20 hours a week, and shortly thereafter, she began working part-time for another, thereby working at minimum around 30 hours per week but on some weeks going up to 40 hours per week. This is reflected in the wage history found in Employer pay records. Neither of these two clients were likely to stop needing her care, therefore, but for her work-related injury of May 7, 2008, Claimant would have continued to bring in on average $392.62 per week. Respondents argue that Claimant's AWW should be based on a flat average based on her wage history of all of 2008 should not be adopted, as it would yield an inaccurate picture of Claimant's pre-injury earnings. At hearing Claimant testified that

January and February 2008 were somewhat unusual for her, as far as her earnings, in that the client she had primarily been providing in-home care services for in the prior year had recently gone into a nursing home. Respondents' argument thus rests on a non-representative sample of Claimant's earning potential. Because Claimant starting in March began working two jobs, the fairest method in calculating Claimant's AWW is to base it on the jobs that she had in the months immediately prior to her injury, and that but for the May 7, 2008 injury she would have continued to receive.

Temporary Disability

35. Although Claimant may have been temporarily disabled from May 7, 2008 through May 23, 2008, the fact that she did not report her work-related injury until May 23, 2008 negates any entitlement to temporary disability benefits because of the late reporting penalty. At that point, the Claimant was under restrictions provided by Dr. Cain and upon her first visit with Dr. Rossi, he also placed her under restrictions that would not allow her to continue her job as home-health care aide. Dr. Rossi also confirmed at hearing during his direct examination that he felt the work restrictions he assigned were appropriate, based on both his objective and subjective findings while examining the Claimant. Claimant has not actually worked or earned wages since that date. She has been experiencing a 100% temporary wage loss since then and she has not been declared to be at maximum medical improvement (MMI). Dr. Rossi at hearing stated that he believed that the Claimant may be at MMI, but this statement is given no credit because in his letter of September 26, 2008, he refused to render an opinion regarding MMI, and his October 28, 2008 report that indicates that he did not believe her to be at MMI. In his October 28, 2008 report he noted that Claimant's condition had not significantly changed since he last saw her in June. In his last full report of June, he states that Claimant is not at MMI. Moreover, all other treatment providers who have seen Claimant do not believe that she is at MMI. Even Respondents' own IME physician, Dr. Ogsbury has stated that:

> …I believe it is medically reasonable that [claimant] undergoes at least an evaluation and based on that evaluation further treatment by a spine specialist, either a physiatrist or a spine surgeon. The issues are several, whether or not injection therapy might be helpful and even whether or not the pseudoarthrosis at C5/6 should be addressed surgically.

Ultimate Findings

36. The Claimant has proven, by a preponderance of the evidence, that she suffered a compensable aggravation of her pre-existing neck condition, arising out of and within the course and scope of her employment, when lifting a home care patient on May 7, 2008; that Respondents failed to offer Claimant two viable medical providers, as provided by Section 8-43-404 (5) (a) (I) (A), C.R.S. (2008), thus, the right of selection passed to the Claimant and the Claimant selected Dr. Cain, D.C., who became an authorized provider after May 23, 2008; that all of Claimant's medical care and treatment for the aggravation of her neck is causally related to the May 7, 2008 compensa-

ble injury and reasonably necessary to cure and relieve the effects of that injury; that the Claimant's AWW is $392.62; and, that the Claimant is entitled to temporary total disability benefits from May 23, 2003 (the date of her late reporting of injury) and continuing until any of the conditions, as provided by law, occur.

37. Respondents have proven, by a preponderance of the evidence, that Claimant was late in reporting her injury and did not report it until May 23, 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, Claimant's testimony was consistent with the contemporaneous medical records and with reason and common sense. The testimony of all three of the Employer's lay witnesses was inconsistent with their own contemporaneous written records and inconsistent with reason and common sense. Therefore, all credibility conflicts are resolved in favor of the Claimant and against the Employer's lay witnesses. As further found, the medical opinions support a compensable injury on May 7, 2008. Opinions seemingly to the contrary amount to either speculation, or alternative plausible explanations of Claimant's neck condition. These opinions seemingly to the contrary, do not lessen the reasonable probability that Claimant suffered a compensable injury on May 7, 2008.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts,

more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has sustained her burden with respect to compensability; authorization of medical treatment; causally related and reasonably necessary medical benefits; AWW; and, temporary disability benefits from May 23, 2008 and continuing. Respondents have sustained their burden with respect to their affirmative proposition of late reporting penalties, pursuant to Section 8-43-102 (1) (a), C.R.S. (2008). Respondents have failed to sutain their burden with respect to apportionment.

c. Only those injuries "arising out of" and "in the course of employment," are compensable under the Workers' Compensation Act. Section 8-41-301(1), C.R.S. (2008); *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17 (Colo. 1988). The course of employment requirement is satisfied when a claimant shows that the injury occurred within the time and place limits of the employment. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991). The "arising out of" element of the compensability test is a question of causation. It requires that the injury have its origin in an employee's work related functions and be sufficiently related to his work so as to be considered part of the employee's service to the employer. *Rockwell International v. ICAO*, 802 P.2d 1182 (Colo. App. 1990). As found, the Claimant's injury arose out of her lifting a patient during her work. Therefore, it is compensable.

d. A claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving workers' compensation benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. Section 8-41-301(1)(c), C.R.S. (2008). *See Merriman v. Industrial Commission,* 120 Colo. 400, 210 P.2d 448 (1949); *National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). *Also see* Section 8-41-301(1)(c), C.R.S. (2008); *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Industrial Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, prior to the May 7, 2008 incident, Claimant had suffered from symptoms in her neck and back. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *See Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988). As found, Claimant sustained a work-related compensable aggravation of her pre-existing neck condition on May 7, 2008.

e. "Apportionment" is an affirmative defense. It is Respondents burden to prove this defense. Section 8-43-210, C.R.S. (2008). *See Anderson v. Brinkhoff,* 859 P. 2d 819 (Colo. 1993); *Askew v. Industrial Claim Appeals Office,* 927 P. 2d 1333 (Colo. 1996). Apportionment is appropriate when a prior injury has been sufficiently identified,

treated, evaluated and rated as a contributing factor. *Askew v. Industrial Claim Appeals Office, supra.* Indeed, where successive injuries contribute to disability and the need for medical treatment, an apportionment, based on medical opinions, was held appropriate. In the case of successive employers, the Court of Appeals determined that an apportionment was compelled where the contribution of the previous employer was significant and it would be fundamentally unfair to hold the second employer to a full responsibility rule. *See Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004). As found, Respondents failed to prove this affirmative defense.

f. Pursuant to Section 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 had knowledge of Claimant's work related claim on May 23, 2008 and furnished her only one viable medical provider, Concentra, in violation of Section 8-43-404 (5) (a) (I) (A), thus, the right of selection passed to the Claimant on May 23, 2008 and the Claimant selected Dr. Karen Cain, D.C., as her ATP. Dr. Cain is an authorized provider.

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 aggravation of his neck condition on May 7, 2008. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. Section 8-42-101 (1) (a), C.R.S. (2008). *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, all of the Claimant's medical care and treatment, as reflected in the evidence, was and is reasonably necessary.

h. 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). As found, Claimant lost wages from the Employer and sustained a 100% wage loss since she last worked for the Employer. An ALJ has the discretion to determine a claimant's AWW, including a claimant's cost for COBRA insurance, based not only on a claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). Section 8-42-102(2)(d), C.R.S. (2008), sets forth the method for calculating the AWW. The overall purpose of the statutory scheme is to calculate "a fair approximation of the claimant's wage loss and diminished earning capacity." *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). As found, the fairest method for calculating Claimant's AWW is to average her earnings as documented in Employer pay records in evidence, for the pay periods of March 7, 2008 forward**,** which yields an AWW of

$392.62 per week. As found, Claimant, starting in March of 2008, began taking care of a new client for about 20 hours a week, and shortly thereafter, she began working part-time for another, thereby working at minimum around 30 hours per week but on some weeks going up to 40 hours per week. This is reflected in the wage history found in Claimant's Ex. 1. Neither of these two clients were likely to stop needing her care, therefore, but for her work-related injury of May 7, 2008, She would have continued to bring in on average $392.62 per week.

i. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S. (2008); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not her responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. This is true because the employee's restrictions presumably impair her opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973, (ICAO, December 18, 2000). As found, such is Claimant's case.

j. 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 been sustaining a 100% wage loss since she stopped working for the Employer herein.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant sustained a compensable injury on May 7, 2008, while working for the Employer herein.

B. Respondents claim for late reporting penalties of one day's indemnity benefits for each day's failure to report is hereby granted from May 7, 2008 through May 22, 2008.

C. Any and all claims for apportionment are hereby denied and dismissed.

D. Dr. Karen Cain, D.C., is an authorized medical provider.

E. Respondents shall pay all of the costs for authorized treatment of the Claimant's compensable injury, subject to the Division of Workers' Compensation Medical Fee Schedule.

F. Claimant's average weekly wage is $392.62, thus, entitling the Claimant to a temporary total disability benefit rate of $261.75 per week, or $37.39 per day.

G. Respondents shall pay the Claimant temporary total disability benefits of $261.75 per week, or $37.39 per day, from May 23, 2008 through March 6, 2009, both dates inclusive, a total of 288 days, in the aggregate amount of $10,768.32, which is payable retroactively and forthwith. From March 7, 2009 and continuing until cessation of benefits occurs as provided by law, Respondents shall pay the Claimant temporary total disability benefits of $261.75 per week, less any offsets permitted by law.

H. 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.

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

DATED this_____day of April 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-757-911

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 April 7, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 4/7/09, Courtroom 4, beginning at 1:37 PM, and ending at 2:32 PM).

At the conclusion of the hearing, the ALJ ruled from the bench, referring preparation of a proposed decision to Respondents' counsel, to be submitted electronically, giving Claimant's counsel three working days after receipt thereof within which to file electronic objections. A proposed decision was filed on April 8, 2009. No timely objections were filed. After a consideration of the proposal, the ALJ has modified the proposed decision and hereby issues the following decision.

ISSUES

The issue to be determined by this decision concerns whether or not the Claimant is entitled to temporary total disability (TTD) benefits from June 24, 2008 through November 17, 2008. Respondents raised the affirmative defense that Claimant was responsi-

ble for his termination from employment on June 24, 2008, stopping temporary disability benefits under Section 8-42-105(4), C.R.S. (2008). Claimant has the initial burden of proving entitlement to TTD benefits by a preponderance of the evidence. If proven, Respondents have the burden of proving "responsibility for termination, within the meaning of Section 8-42-105 (4), by preponderant evidence.

FINDINGS OF FACT

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

1. Respondents judicially admitted that Claimant sustained a compensable cervical work injury on April 24, 2008 while working for Employer, and the ALJ so finds.

2. The Claimant timely reported the injury to his Employer and the Employer provided the Claimant with modified work within the his medical restrictions.

3. The parties stipulated and the ALJ finds that the Claimant's average weekly wage (AWW) is $806.90.

4. According to the Claimant, he was terminated on June 24, 2008, after a dispute arose regarding his ability to perform work within his restrictions (painting beam plates) outside. Claimant testified that a Jan Smith, physical therapist, had notified the Craig Haight, the branch manager of the Employer, during a phone call that the Claimant could not work in sunshine. Haight denies that this occurred.

5. Haight explained that he assigned the modified work assignments for Employer, and had done so for the Claimant. Haight stated that at 10:00 AM on June 24, 2008, there was a verbal dispute with the Claimant when they discussed Claimant's assignment to paint outdoors.

6. At the time of the dispute, Haight testified, there were no documented restrictions regarding outdoor work that had been provided to the Employer. Haight disputed having spoken with Jan Smith by telephone. Both Haight and the Claimant testified that the Claimant stated he was going to leave the worksite to obtain written work restrictions addressing outdoor work. Both Haight and the Claimant stated that the Claimant was instructed to "clock out" before leaving the worksite. Haight testified that clocking out before leaving a worksite was company policy.

7. The Claimant stated that he then left the worksite. Haight testified that the Claimant "got in his [Haight's] face," Claimant stating "Don't fuck with me boy." Both men agreed that no physical altercation occurred. Claimant did not specifically deny that he used this phrase. He simply did not mention anything about it, thus, implying that he did not use this phrase.

8. Haight testified that the Claimant was terminated for violation of the company policy and the insubordinate behavior that occurred during this confrontation at approximately 10:00 AM on June 24, 2008.

9. Haight stated that he did ultimately receive an Addendum restriction dated June 24, 2008 of "No working out in the direct sun." This addendum was received on or about 1:19 PM on June 24, 2008, as documented by a fax time stamp on the report. Based on Haight's previous accommodations of Claimant's medical restrictions, the ALJ infers and finds that if Haight had known of the "no work in the sun" restriction before the altercation, Haight would have accommodated this restriction.

10. In weighing the credibility of the differing accounts presented at hearing of the events surrounding the Claimant's termination, the ALJ considers, among other things, the interests each witness would have in the outcome of the case. The Claimant has an interest in obtaining benefits; and while Haight may have an interest in containing workers' compensation premiums for his former Employer, such an interest is remote. Among other things, Haight contemporaneously documented the incident with a memo that is consistent with his testimony.

11. Language such as that used by the Claimant could be playful in nature or provoked due to escalating situations. The ALJ finds, however, that at the time of the confrontation on June 24, 2008, there was no provocation for the use of the language that Claimant used. Also, there was no situation justifying or excusing the language the Claimant used. While Claimant may have understood that he had restrictions against working outdoors, Haight had no documentation of these restrictions. Haight was discussing a job within the restrictions that were, at that time, available and known to the Employer. Based on the totality of the evidence, the ALJ finds Haight credible. The ALJ further finds that Claimant's implication that he did not use the phrase not to be credible.

12. Although construction sites may not be renowned for the use of the Queen's English, the ALJ finds that the language directed at Haight, Claimant's supervisor, by the Claimant on June 24, 2008 was neither playful nor provoked. The ALJ infers and finds that the language used by the Claimant, in the context of the transaction between him and Haight was a volitional act of insubordination and but for this insubordination, Claimant's restriction of "no work in the sun"

would have been accommodated and the Claimant would still be employed by the Employer. The ALJ finds that the Claimant exercised a degree of control over the circumstances resulting in his termination.

13. Claimant has proven, by a preponderance of the evidence, that he was temporarily and totally disabled from June 24, 2008 through November 17, 2008 because he was medically restricted; not released to full duty; not working or earning any wages; and, he had not been declared at maximum medical improvement (MMI).

14. Respondents have proven by preponderant evidence that Claimant was responsible for his termination on June 24, 2008, through a volitional act on his part.

CONCLUSIONS OF LAW

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

a. A judicial admission is defined as a "formal, deliberate declaration that a party or his or her counsel makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or facts about which there is no real dispute." *Kempter v. Hurd,* 713 P.2d 1274 (Colo. App. 1986). Judicial admissions must be unequivocal but become binding once they are made. *Salazar v. American Sterilizer Co.,* 5 P.3d 357 (Colo. App. 2000). *Also see Valdez v. Texas Roadhouse,* W.C. No. 4-366-133 [Industrial Claim Appeals Office (ICAO), January 25, 2001]. As found, Respondents made a judicial admission at the commencement of the hearing that Claimant sustained a compensable injury on April 24, 2008.

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 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, Haight's testimony concerning the confrontation with the Claimant is more credible than the Claimant's implication that it did not happen because, among other things, Haight contemporaneously documented the incident with a memo. Also, as found, Haight had less of an interest in the outcome of the case than the Claimant.

c. 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 initially proven that he was temporarily and totally disabled from June 24, 2008 through November 17, 2008. Respondents have proven that Claimant was responsible for his termination from employment on June 24, 2008, through a volitional act on his part.

d. To establish entitlement to temporary disability benefits in the first instance, an injured worker must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S. (2008); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Once the prerequisites for TTD has been met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant has initially established that he was TTD from June 245, 2008 through November 17, 2008.

e. Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S. (2008) [responsibility for 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. As found, Respondents sustained their burden that the Claimant was responsible for his termination for cause. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 20 P.3d 1209 (Colo.App. 2000). By enacting the responsibility for termination statues, 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 of whether the industrial injury remains the proximate cause of the subsequent wage loss. *Colorado Disposal v. Martinez*, 58 P.3d 1061 (Colo.App. 2002) [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 that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colo-*

rado Department of Public Safety, W.C. No. 4-432-301 [Industrial Claim Appeals Office (ICAO), September 27, 2001]. Thus, the fault depends on whether the claimant exercised a degree of control over the circumstances resulting in termination. *Padilla v. Digital equipment Corp.,* 902 P.2d 414 (Colo.App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo.App. 1995). As found, the Claimant exercised control over the volitional conduct on his part that resulted in his termination from employment.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims for temporary disability benefits from June 24, 2008 through November 17, 2008 are hereby denied and dismissed.

B. Any and all issues not determined herein, including entitlement to temporary disability benefits after November 17, 2008, are hereby reserved for future decision.

DATED this_____day of April 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-695-962

ISSUES

Whether Respondent has proven by a preponderance of the evidence that Claimant is precluded from receiving Temporary Partial Disability (TPD) and Temporary Total Disability (TTD) benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

FINDINGS OF FACT

1. Claimant worked in the loading dock area of Employer's warehouse. He was responsible for loading and unloading furniture. On July 4, 2006 Claimant suffered an admitted industrial injury to his left knee during the course and scope of his employment.

2. Subsequent to his injury, Claimant continued to work for Employer in a light duty capacity. By August 22, 2006 Claimant's work restrictions included performing seated work and limited walking.

3. On Sunday, September 3, 2006 Claimant reported to Employer's loading dock area to begin work. However, his left knee became painful and he attempted to locate a supervisor so that he could visit a doctor. Claimant remarked that, although Employer had a workers' compensation clinic at its warehouse, the clinic was closed. In fact, the clinic was also closed on Monday September 4, 2006 because of the Labor Day Holiday, and would not reopen until Tuesday, September 5, 2006. Claimant testified that he found trainee manager "Scott" and received authorization to visit the emergency room at Sky Ridge Hospital.

4. Claimant testified that at the emergency room on September 3, 2006 he was instructed to rest, ice and elevate his leg. He was also directed to follow-up with his workers' compensation physician on the following day. Claimant explained that when he left the emergency room, he called "Scott," who then directed him not to return to work until after he had visited the workers' compensation physician on Tuesday September 5, 2006.

5. Claimant explained that he returned to work on September 5, 2006 and visited Crystal Hayes in Employer's Human Resources Department. He testified that Ms. Hayes advised him that he had failed to report for work on Labor Day. She explained that Labor Day constituted one of Employer's "blackout" or mandatory workdays. Claimant remarked that Ms. Hayes then informed him that he would have to meet with management to discuss possible termination.

6. Jeff Harris testified that on September 3, 2006 he was Employer's warehouse manager. He remarked that he was aware of Claimant's work restrictions as a result of a left knee injury. Mr. Harris stated that no other warehouse manager was present, there was no trainee manager and there was no manager named "Scott." He explained that on September 3, 2006 Claimant informed him he was experiencing left knee pain. Mr. Harris initially enlisted Claimant to help fold Employer's T-shirts, but subsequently directed Claimant to the emergency room at Sky Ridge Hospital.

7. Mr. Harris testified that, before Claimant left Employer's facility, he gave Claimant a form that authorized treatment for a work-related injury. He also gave Claimant a slip of paper with two telephone numbers. One of the phone numbers was for Mr. Harris' cell phone and the other one was for Mr. Harris' office. Mr. Harris commented that he told Claimant to either return to work or to call him when he left the emergency room. He remarked that when Claimant left Employer's premises, neither he nor any other person told Claimant to remain away from work until he could see Employer's workers' compensation physician on Tuesday, September 5, 2006.

8. Mr. Harris stated that Claimant did not call any supervisor after he was discharged from the emergency room on September 3, 2006. In fact, Claimant failed to report to work for his next three consecutive shifts. Mr. Harris also remarked that Employer could have accommodated the restrictions that Claimant received during his emergency room visit.

9. Phil Sierra testified that on September 3, 2006 he was Claimant's immediate supervisor. Mr. Sierra explained that he was aware of Claimant's work restrictions as a result of his left knee injury. He stated that, after Claimant reported to work on September 3, 2006, Claimant reported left knee pain. Mr. Sierra thus directed Claimant to Mr. Harris. He corroborated Mr. Harris' account that, on September 3, 2006, there was no other manager or trainee manager named "Scott" at Employer's facility. Mr. Sierra commented that, when Claimant left for the emergency room, he was directed to come back to work or contact Mr. Harris about his status. However, Claimant failed to subsequently contact Employer or report to work.

10. Mr. Harris explained that all employees are trained that, if they are unable to report for a scheduled shift, they are required to contact their immediate supervisor. Mr. Sierra also commented that he provided all of his employees, including Claimant, with his telephone number so that they could contact him in the event they were unable to attend a scheduled work shift.

11. Mr. Harris described Employer's policy regarding "blackout" or mandatory workdays. They are typically Employer's three busiest days of the year including Memorial Day, Independence Day and Labor Day. If an employee misses a "blackout day" and fails to contact a supervisor he is subject to discipline and termination. Mr. Harris and Mr. Sierra both commented that Claimant failed to report for work or contact a supervisor on Labor Day September 4, 2006.

12. Deann Smith, one of Claimant's former coworkers, testified that she worked for Employer on September 4, 2006. Shortly after she began her shift at approximately 1:30 p.m. she received a telephone call from Claimant. Ms. Smith commented that Claimant asked her to tell his supervisors that he had contacted Employer in the morning so that he would not receive a disciplinary action for failing to report to work or contact Employer. She responded that she would not lie for Claimant. Ms. Smith also remarked that she apprised Mr. Sierra later in the afternoon about her conversation with Claimant.

13. Mr. Harris testified about Employer's "no call/no show" policy. If an employee fails to report to work or contact Employer for three days the employee is deemed to have abandoned his job. Mr. Harris and Mr. Sierra explained that, following Labor Day, Claimant was scheduled to work on September 5, 2006 and September 6, 2006. However, Claimant failed to report to work or contact Employer on both days. Mr. Harris and Mr. Sierra remarked that Claimant thus missed three consecutive shifts, in the absence of authorization or justification, in violation of Employer's "no call/no show" policy. Claimant was thus deemed to have abandoned his job and was terminated from employment on September 6, 2006. Mr. Sierra prepared a personnel action form consistent with his explanation for Claimant's termination.

14. Respondent has demonstrated that it is more probably true than not that Claimant committed a volitional act or exercised some control over his September 6, 2006 termination from employment. Claimant failed to contact Employer or report to work for scheduled shifts on September 4-6, 2006. Claimant testified that, when he left

the emergency room on September 3, 2006, he called "Scott," and was directed not to return to work until after he had visited Employer's workers' compensation physician on Tuesday September 5, 2006. However, in the context of other testimony, Claimant's explanation for his September 4, 2006 absence is not credible. Coworker Ms. Smith credibly commented that Claimant asked her to tell his supervisors that he had called Employer on the morning of September 4, 2006 so that he would not receive a disciplinary action for failing to report to work or contact Employer. However, she refused. Moreover, Mr. Harris and Mr. Sierra persuasively noted that, on September 3, 2006 there was no other manager or trainee manager named "Scott" at Employer's facility. Finally, Claimant had been directed to return to work or contact Mr. Harris about his status after the emergency room visit but failed to follow Employer's instructions.

15. Mr. Harris testified that all employees are trained that, if they are unable to report for a scheduled shift, they are required to contact their immediate supervisor. Mr. Sierra also commented that he provided all of his employees, including Claimant, with his telephone number so that they could contact him in the event they were unable to attend a scheduled work shift. Mr. Harris explained that, if an employee fails to report to work or contact Employer for three days, the employee is deemed to have abandoned his job. Based on the credible testimony of Mr. Harris and Mr. Sierra, Claimant was aware of Employer's "no call/no show" policy. Following Claimant's failure to contact Employer or report to work on Labor Day, he was scheduled to work on September 5, 2006 and September 6, 2006. However, Claimant failed to report to work or contact Employer on both days and was thus terminated for violating Employer's "no call/no show" policy. Claimant thus exercised some control over his termination under the totality of the circumstances and his industrial injury did not contribute to a subsequent wage loss.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). Respondent asserts that Claimant is precluded from receiving TTD and TPD benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes"). Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and the wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing his assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondent must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

5. As found, Respondent has demonstrated by a preponderance of the evidence that Claimant committed a volitional act or exercised some control over his September 6, 2006 termination from employment. Claimant failed to contact Employer or report to work for scheduled shifts on September 4-6, 2006. Claimant testified that, when he left the emergency room on September 3, 2006, he called "Scott," and was directed not to return to work until after he had visited Employer's workers' compensation physician on Tuesday September 5, 2006. However, in the context of other testimony, Claimant's explanation for his September 4, 2006 absence is not credible. Coworker Ms. Smith credibly commented that Claimant asked her to tell his supervisors that he had called Employer on the morning of September 4, 2006 so that he would not receive a disciplinary action for failing to report to work or contact Employer. However, she refused. Moreover, Mr. Harris and Mr. Sierra persuasively noted that, on September 3, 2006 there was no other manager or trainee manager named "Scott" at Employer's facility. Finally, Claimant had been directed to return to work or contact Mr. Harris about his status after the emergency room visit but failed to follow Employer's instructions.

6. As found, Mr. Harris testified that all employees are trained that, if they are unable to report for a scheduled shift, they are required to contact their immediate supervisor. Mr. Sierra also commented that he provided all of his employees, including Claimant, with his telephone number so that they could contact him in the event they were unable to attend a scheduled work shift. Mr. Harris explained that, if an employee fails to report to work or contact Employer for three days, the employee is deemed to have abandoned his job. Based on the credible testimony of Mr. Harris and Mr. Sierra, Claimant was aware of Employer's "no call/no show" policy. Following Claimant's failure to contact Employer or report to work on Labor Day, he was scheduled to work on September 5, 2006 and September 6, 2006. However, Claimant failed to report to work or contact Employer on both days and was thus terminated for violating Employer's "no call/no show" policy. Claimant thus exercised some control over his termination under the totality of the circumstances and his industrial injury did not contribute to a subsequent wage loss.

ORDER

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

1. Claimant is not entitled to receive TPD or TTD benefits subsequent to September 6, 2006 because he was responsible for his termination from employment.

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

DATED: April 14, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-760-614

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 January 13, 2009 and March 20, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 1/13/09, Courtroom 3, beginning at 10:20 AM, and ending at 11:55 AM; 3/20/09, Courtroom 4, beginning at 8:32 AM, and ending at 11:30 AM).

At the conclusion of the last session of the hearing, the ALJ established a briefing schedule, briefs to be filed electronically. Claimant's opening brief was filed on April 1, 2009. Respondents' answer brief was filed on April 10, 2009. No timely reply brief was filed. The matter was deemed submitted for decision on April 16, 2009.

ISSUES

This is a fully contested alleged occupational disease claim. Claimant asserts that he suffered an onset of disability on, or about, January 3, 2008. The issues to be determined by this decision concern compensability; and, if compensable, medical benefits; temporary total disability (TTD) benefits from May 1, 2008 and continuing; off-set for short-term disability; and, Respondents' affirmative proposition of penalties against the Claimant for late reporting. The Claimant bears the burden of proof, by a preponderance of the evidence on all issues other than late reporting and offsets for which Respondents bear the burden by preponderant evidence.

FINDINGS OF FACT

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

1. The Employer hired the Claimant in November 2006. Claimant worked as a Customer Support Representative and would answer the phone, resolve customer issues, complete work orders, and place orders for new installs and services.

2. In August 2007, Claimant volunteered for a position called Leadership in Training (LIT). Mark Birkholz, the Customer Care Manager of the Employer, testified the LIT program was completely voluntary and was not required for employees to advance with the Employer. His testimony in this regard is undisputed. The LIT position entailed observing the customer service area, while standing and walking around to get information from customer service representatives. Once Claimant obtained information from customer service representatives, he was supposed to return to his desk and enter data.

3. Birkholz persuasively testified that an individual in the LIT program does not walk six to seven hours non-stop, contrary to Claimant's testimony. Birkholz stated that time is broken up between standing, sitting, and walking and that an individual receives his or her mandatory 15-minute breaks and half-hour lunches. Birkholz further testified that the LIT program has never been a 100 percent sedentary program. In rebuttal, the Claimant stated that staffing levels impacted a particular activity, with more walking coming with staff shortages. He also testified that he was assigned to walking in the lower level of Employer's office where he would be required to walk 600 to 800 feet to contact various representatives to answer staff queries. Because Birkholz has less of an interest in the outcome of this claim and because he was the customer care

manager at the time in question, the ALJ finds Birkholz's testimony in this regard more credible than Claimant's testimony.

4. Claimant never returned to work after April 10, 2008. Prior to leaving work on April 10, 2008, he was disciplined for inappropriate behavior towards a coworker. Claimant signed his Worker's Claim for Compensation (WCC) form on May 19, 2008. He stated that he did not fill out or submit the WCC form, only that he signed it. He listed his date of injury as January 3, 2008 and cause of injury as simply "walking."

5. Richard Torres, a human resources (HR) generalist with the Employer, became aware of Claimant's medical problems (**not** the alleged work-related nature thereof) when Claimant made his request for FMLA (Family Medical Leave Act) benefits.

6. According to Torres, he had spoken with Claimant on many occasions while at work, and not once did Claimant inform Torres that he had injured himself while working for the Employer. Claimant, on the other hand, stated that he mentioned the work-related nature of his back condition to Torres on many occasions. The ALJ resolves this conflict in the testimony in favor of Torres' testimony and against the Claimant's testimony. Torres first became aware that Claimant was claiming a workers' compensation injury or occupational disease in August of 2008, when he received a letter stating there was a claim for a work-related back injury in January 2008.

7. According to the Claimant, while working as a contractor in Iraq, he stepped onto a slippery platform, when he fell to the ground landing on his side and injuring his back. Claimant testified that the pain was so severe, his legs went numb and he lay on the ground for several hours. The ALJ finds that this injury set in motion a natural progression of continuing and escalating back problems through the present time.

8. Claimant filed a workers' compensation claim for an injury to his right ankle on or about 1999 and the injury from it resulted in a permanent limp. Claimant received permanent impairment benefits for the claim and he was supposed to be using a walker or crutches thereafter.

9. Claimant filed a workers' compensation claim for an injury to his back in 2000 at SAS Circuits while lifting a computer off a desk from a seated position.

10. At the time the Claimant began working for the Employer herein in November 2006, he had already undergone and received significant treatment for the back injury he suffered in 2004 while working as a contractor in Iraq. Claimant had received at least two neurosurgical consultations at Kaiser and underwent a series of SI joint injections immediately prior to his employment with the Employer, as well as during the first few months he worked with the Employer.

11. Claimant continued to experience pain in his back, while working for the Employer herein, and he filed an FMLA request in November 2007. His FMLA request

listed his medical condition as “cervical chronic back disease.” Claimant and his treating physician, John Schultz, M.D., of the Centeno-Schultz Clinic, indicated on the FMLA request that the medical condition began in 2004.

12. Claimant’s FMLA request was approved on November 19, 2007, and Claimant was approved for ten days off a month. Shortly thereafter, Claimant requested short-term disability (STD) benefits. Claimant’s STD benefits began January 10, 2008 and stopped February 19, 2008, when he returned to work. Claimant again left work on short-term disability on April 10, 2008. Claimant’s short-term disability benefits next ended June 25, 2008, after he was found to **not** be totally disabled.

13. The reports of John Schultz of the Centeno-Schultz Clinic show that by September 26, 2007, both Claimant’s neck pain and back pain had worsened. Claimant continued to work.

14. Claimant suffered back pain in 2006 and 2007, but he stated that he was able to perform his job with the help of medical treatment. He described his pain during that period as a “4”.

15. According to the Claimant, by January 2008 his back/neck pain had worsened to the point that he rated as high as “10”.

16. Claimant also began experiencing additional ankle pain late in 2007.

17. Employer records reflect that Dr. Schultz completed Claimant’s first FMLA request in late 2007, indicating that Claimant’s physical need for FMLA was related to a variety of serious health conditions including cervical and lumbar limitations. In his report dated December 19, 2007, Dr. Schultz stated “due to his condition he still has intermittent work place disability.” This statement does not establish a compensable aggravation of Claimant’s underlying condition at work. It may equally be construed to mean that the natural progression of Claimant’s underlying condition had gotten to this point.

18. Claimant’s back/neck pain continues. His ankle pain also continues. The ankle pain, however, is not as serious as the pain that he originally experienced to his ankle when he first suffered an accidental injury to his ankle approximately twelve years ago.

19. With regard to his low back, Claimant suffered two prior accidental injuries to his back. One occurred in 2004, while he was in the course and scope of employment for a contractor in Iraq. He underwent physical therapy and was ultimately released from treatment, however, according to the Claimant his pain continues.

20. Claimant suffered another accidental injury when lifting a server from a desk and placing it on the floor. This occurred when he was working for SAS Circuits. Again, he was released from treatment without an impairment rating.

21. The medical records reflect that on January 3, 2008, Gregory Hirons, M.D., excused Claimant from work between January 3, 2008 and January 17, 2008 "due to worsening back pain and other medical issues."

22. Dr. Hirons eventually released the Claimant to return to work full duty on February 19, 2008, with no restrictions.

23. According to the Claimant, when he first was taken off work in January 2008 he informed supervisor Bruce Roberts that he had low back problems as a result of the physical demands of his work in LIT, specifically walking and standing. At that juncture, according to the Claimant, Roberts did not refer him for medical care but offered to have an ambulance take him to the ER (Emergency Room). Claimant declined this offer due to his prior negative experience with ER care. There is no corroboration for this alleged conversation in the Employer's records and, if the Claimant's pain was as severe at the time as he said it was, Claimant's actions in declining to be taken to the ER detract from his credibility.

24. According to the Claimant, throughout January, February, March and April 2008, he spoke with various representatives of the Employer about his back/neck problems; and he stated to them that he believed that they arose as a result walking and standing for protracted periods of time. All Employer witnesses who testified at the hearing do not agree that they were told that Claimant's problems were related to his work for the Employer herein. The ALJ resolves this conflict in the testimony in favor of the Employer witnesses and against the Claimant's testimony in this regard.

25. Dr. Schultz stated that Claimant should be taken off work for a period of three to six months. Dr. Schultz was of the opinion that the Claimant would be unable to perform one, or more, essential functions of his job. This does not establish a compensable aggravation of Claimant's pre-existing condition. It is equally plausible that it establishes a natural progression of Claimant's condition.

26. Claimant has not worked since May 1, 2008.

27. Claimant completed a Workers' Claim for Compensation and filed it with the Division of Workers' Compensation on May 29, 2008. The Claim Form correctly lists the Employer's address. An Entry of Appearance, however, which was filed lists an erroneous Employers' address. After the filing of his Workers' Claim for Compensation, Employer did not refer Claimant for medical treatment. Respondents filed a Notice of Contest on August 18, 2008.

28. The records introduced at hearing, including the Workers' Claim for Compensation, the Application for Hearing and Notice to Set in July, and Notice of Hearing in July, all show that Respondents proper address was included on the various notices.

29. Following his alleged report of injury to Roberts, Claimant sought medical attention from his family doctor, Dr. Hirons, who referred him to Dr. Schultz. Dr. Schultz and Dr. Hirons continue treating Claimant.

30. Dr. Hirons is of the opinion that Claimant should avoid excessive walking, standing or sitting. He renders no opinion on causality.

31. According to the Claimant, when he applied for the LIT program the job did not require the level of walking that he claims was later required. Rather, according to the Claimant it was initially a sitting position because they had not yet introduced the "flags system" wherein the LIT representative went to the cubical of the employee responding to customer complaints. In this regard, the ALJ finds Birkholz's testimony (that the job was primarily a sitting job) more persuasive, convincing and credible than Claimant's testimony.

Medical Opinions on Causality

32. On October 1, 2008, Dr. Schultz stated the opinion that:

> Mr. Smith's employment and its inherent responsibility severely aggravate his neck and back pain. Mr. Smith is at risk for increasing he severity of his ongoing cervical and lumbar degeneration should he continue in his current position. I ask that you afford him all courtesies and restrictions so that he can minimize the frequent exacerbations that he suffers from his current position.

This is the only medical opinion that supports a compensable aggravation of Claimant's pre-existing condition, while Claimant was working for the Employer herein, in a clear-cut manner. The statement that Claimant's employment "and its inherent responsibility severely aggravate his neck and back pain" is a bald conclusory statement without any further explanation concerning the mechanics of the so-called work-related aggravation. Also, this opinion is inconsistent with Dr. Schultz's previous opinion in support of Claimant's FMLA application, as reflected in Finding No. 11 above. In this regard, the ALJ finds Dr. Fall's opinion, concerning a lack of causal relatedness between Claimant's present back condition and his employment with the Employer herein, more thorough, convincing and credible than Dr. Schultz's opinion in this regard.

33. Allison Fall, M.D., an Independent Medical Examiner (IME) retained by the Respondents, was of the opinion that Claimant's participation in the LIT program, specifically, walking, did **not** aggravate or exacerbate his back pain. Dr. Fall further was of the opinion that Claimant did **not** experience a symptomatic change in condition from the time he began participating in the LIT program to the time he alleged an onset of his occupational disease. The ALJ finds that this opinion is supported by the underlying medical records; and, it is convincing and credible.

34. Dr. Fall was of the opinion that Claimant's lack of concurrent reporting to his physicians that he suffered an increase in pain due to his change in work duties strongly supported the proposition that Claimant did not aggravate or exacerbate his previous injuries. Dr. Fall's opinion that simply walking would not cause an injury or an aggravation of a low back problem and that walking is a normal daily activity (ADL), which is an activity doctors recommend for patients with back pain is persuasive and credible.

35. Overall, the ALJ finds the opinions of Dr. Fall more persuasive and credible than the internally inconsistent opinions of Dr. Schultz. Her more detailed and thorough opinions support a natural progression of Claimant's underlying neck and back condition as opposed to a compensable aggravation. Indeed, Dr. Schultz's first opinion, in support of Claimant's FMLA application (Finding No. 11 above) supports a natural progression of Claimant's back injury since he was injured in Iraq in 2004.

36. Claimant alleges that walking at work for the Employer aggravated his lower back and upper back conditions and caused disability. He admits that he had a severe pre-existing disease process for which he was actively treating at the time of the alleged onset of the alleged occupational disease. Among other prior injuries, he suffered a crushed ankle that left him with a permanent limp, for which he testified he was "supposed to be on a walker or crutches;" a low back lifting injury with prior employer SAS Circuits; and, a 2004 slip and fall injury at a military installation in Iraq immediately after which he "couldn't move" and his legs went numb for several hours. Claimant actively treated for low back, shoulder and neck conditions continuously from 2004 through the alleged occupational disease claimed herein. His treatment shortly prior to the alleged occupational disease included MRIs of the back and neck, epidural steroid injections, and evaluation by two different Kaiser neurosurgeons. He also sought treatment from his primary care physician, Dr. Hirons, for complaints including chronic back pain, immediately prior to the alleged onset of the alleged occupational disease.

37. Claimant saw Dr. Schultz for a "new patient evaluation" on April 11, 2007. Dr. Schultz noted that Claimant, in 2004, had slipped and fallen on his buttocks, right shoulder, and head. Dr. Schultz recorded that Claimant had a three-year history of **constant** and **progressive** neck and bilateral shoulder pain. Dr. Schultz subsequently completed FMLA paperwork for Claimant indicating that Claimant's condition began in 2004. This is inconsistent with Dr. Schultz's subsequent opinion concerning causal relatedness to work with the Employer herein. Claimant first saw a counselor, Jane Robb, in December 2007, at which time he informed her that he had had continuous pain since the 2004 accident and that nothing had worked for his pain in four years. This contradicts Claimant's testimony that his work with the Employer significantly aggravated his back condition.

38. When Respondents' counsel questioned Claimant as to why the medical records were devoid of any mention of an increase in pain associated with the change in work duties with the Employer, Claimant did not have a persuasive explanation. This significantly detracts from Claimant's claimed occupational disease while working for the

Employer herein. Claimant admitted to telephoning Dr. Hirons' office and requesting that Dr. Hirons alter his "to whom it may concern" note to include walking as an activity that exacerbated his pain. Claimant also admitted to requesting that Dr. Schultz write a letter on his behalf. Moreover, Claimant testified that he requested the letters from Drs. Hirons and Schultz on the advice of someone ("that [I] was advised and I did."). The timing of the Claimant's initial allegations of job-induced worsening of symptoms and physicians' requested medico-legal conclusions detracts from the credibility of the Claimant's claim.

39. Claimant failed to concurrently notify and inform his Employer, or any of his treating physicians, that his work activities, specifically walking while engaged in the LIT program for two months, aggravated or worsened his pre-existing condition. Finally, he failed to prove, through the totality of the evidence, that the simple activity of walking was the cause of his aggravation or an onset of an occupational disease, while working for the Employer herein.

40. Claimant admittedly had great difficulty in recalling dates and circumstances surrounding his claim when testifying at hearing. Claimant's testimony (concerning an aggravation of symptoms when he worked in the LIT program) was not supported by the medical records that documented his severe pain complaints prior to the LIT program. Claimant testified he was in the LIT program for at least four months, when the employment records from the Employer document his involvement from only August 27 through October 20, 2007, which is slightly less than two months. The ALJ infers and finds that the Claimant, consciously or unconsciously, attempted to maximize the severity of his alleged exposure to an occupational disease while working for the Employer. This detracts from Claimant's overall credibility.

41. Claimant's testimony was directly contradicted by his actions when he applied for FMLA. Both Claimant and his doctor attributed the need for medical leave to his 2004 injury. The same can be said about Claimant's application for STD benefits. According toTorres he spoke with Claimant on May 16, 2008, regarding the fact that Claimant's STD benefits would be terminated in June 2008. It was only **after** the Claimant learned that his STD benefits would be terminated that Claimant signed a Worker's Claim for Compensation (WCC) form on May 19, 2008. Despite completing the WCC form, Claimant never once mentioned filing a worker's compensation claim in multiple conversations he had with Torres between May and August 2008.

42. The ALJ gives the medical records documenting Claimant's present-sense impressions and the concurrent opinions of his treating physicians than Claimant's unreliable testimony (as heretofore found) as to what caused his injuries.

43. Claimant alleges that walking at work aggravated his lower back and upper back conditions. The mere experience of symptoms at work does not necessarily mean that the employment aggravated or accelerated the pre-existing condition. The ALJ finds that the amount of walking required by Claimant to complete his job duties did not rise to the level where it would cause an aggravation of his conditions. Walking was

an activity Claimant engaged in during everyday life. The ALJ finds that any exacerbation of Claimant's back during the relevant times was caused by the natural progression of his chronic back problems and not to a greater extent by Claimant's exposure to walking at work.

44. According to the Claimant, since ceasing his work with the Employer, he has mainly sat in his recliner. Even with this sedentary activity of resting in a recliner for most of the time, Claimant stated that his condition has **continued to worsen**. This further supports a natural progression of Claimant's chronic back problems.

45. Claimant reported to Dr. Fall that he treated with Kaiser physicians prior to his employment with the Employer, and through the first 90 days of his employment with the Employer, he received physical therapy, ESIs, MRI (magnetic resonance imaging), scans of his lower- mid- and upper-back, as well as evaluations by two neurosurgeons. All this treatment occurred **prior** to Claimant's involvement for two months in the LIT program.

46. Dr. Fall testified at length that the medical records and Claimant's own actions during the time of his work in the LIT program were inconsistent with a determination that he had suffered either an aggravation or an onset of an occupational disease. The ALJ finds this testimony persuasive and credible.

47. The medical records document an increasing and escalating natural progression of Claimant's back problems over time; they do not document or support the proposition that Claimant experienced an aggravation or exacerbation of his pre-existing condition.

48. According to Dr. Fall, the Claimant's traumatic 2004 Iraq injury had become a chronic condition. Dr. Fall's physical examination revealed that Claimant had a lot of pain behaviors. He had Waddell's signs, which are indicative of other factors leading to Claimant's complaints of pain rather than organic pathology. This further supports the persuasiveness of Dr. Fall's opinion in this regard.

49. Although Claimant argues that his pre-existing back condition became disabling while he worked in the LIT program of the Employer, the ALJ finds his testimony, concerning the alleged walking as the alleged cause of his disability, unpersuasive and contradicted by his previous actions as heretofore found. Despite the time that Claimant discontinued working for the Employer, his work for the Employer did not cause him to become disabled. The natural progression of his chronic back condition caused him to become disabled.

50. Dr. Fall was of the opinion that simply walking would not cause an injury an aggravation of low back problems. She stated that walking is a normal daily activity and it is actually something doctors recommend for patients with back pain. Walking, which involves weight bearing, is one way that the discs receive nutrients through the blood supply. Dr. Fall's overall opinion was that Claimant's current medical condition

was more consistent with a chronic process including degeneration and that if Claimant hadn't been working for the Employer, his activities of daily living probably would have continued to create the problems he has experienced. Therefore, the ALJ finds that Claimant's continuing back problems amount to a natural progression of his chronic back problems set in motion in Iraq in 2004.

51. The Claimant has failed to prove, by a preponderance of the evidence, that he suffered a substantial permanent aggravation of his pre-existing occupation disease, to the extent that he suffered a new occupational disease while working for the Employer herein.

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 Employer's witnesses (Birkholz concerning the actual LIT job duties, and Torres concerning the fact that Claimant never told Torres that his back condition was connected to his work duties) are more credible than the Claimant because they have no interest in the outcome of the claim and because, among other things, Claimant's actions of requesting FMLA based on his "chronic" neck and back condition, against a backdrop of his previous workers' compensation claims, do not add up to a credible version of events, while Claimant was working for the Employer herein. For this reason, the ALJ does not find the Claimant's version of events credible. Also, as found, Dr. Fall's thorough opinion that merely walking is not a credible mechanism of aggravation of Claimant's pre-existing neck and back condition is more credible than Dr. Schultz's conclusory (and inconsistent with Dr. Schultz's previous opinion in support of Claimant's FMLA application) opinion that Claimant's condition is the "inherent responsibility" of Claimant's Employer herein.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to

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

c. The "aggravation" cases apply the "but for" test in holding a work-related aggravation compensable when it causes a non-disabling condition to become disabling. *See Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. 1990);*H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). As found, despite the time othe Claimant discontinued working for the Employer, his work for the Employer did not cause him to become disabled. The natural progression of his chronic back condition caused him to become disabled.

d. 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. Section 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). An occupational disease is compensable under the Workers' Compensation Act if suffered by an employee in the course and scope of employment. Section 8-41-301(1)(b), C.R.S.(2008); *Price v. Industrial Claim Appeals Office,* 919 P.2d 207 (Colo. 1996). Claimant must show a connection between the employment and the or occupational disease such that the disease has its origin in the employee's work-related functions, and 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). As found, Claimant failed to prove an occupational disease, resulting directly from his employment with the Employer herein, as opposed to equally resulting from a natural progression of his pre-existing injury, sustained in Iraq in 2004.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this_____day of April 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-570-397

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he is entitled to reopen his September 18, 2002 admitted Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S.

2. Whether Claimant has presented substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. Claimant works for Employer as a gym teacher, track coach and assistant football coach. On September 18, 2002 Claimant sustained an admitted industrial injury to his lower back and sacroiliac (SI) area after he slipped on a floor during the course and scope of his employment with Employer.

2. Employer referred Claimant to Authorized Treating Physician (ATP) John W. Dunkle, M.D. for medical treatment. Dr. Dunkle characterized Claimant's permanent injury as "chronic instability" of the SI joint. He explained that Claimant would have difficulty "maintaining the normal alignment between the pelvis bones on the left side in the posterior aspect, the sacrum and the iliac bones."

3. Claimant underwent chiropractic treatment and physical therapy to improve his alignment in the area of the SI joint. He could sometimes correct the alignment on his own and at other times required chiropractic treatment to restore the proper alignment.

4. On July 22, 2003 Dr. Dunkle placed Claimant at Maximum Medical Improvement (MMI). Dr. Dunkle commented that Claimant's "prognosis is for persistent intermittent discomfort from his low back with functional limitations being minimal, as long as the patient avoids aggravating activity." He commented that Claimant would "experience intermittent episodes of some slippage of the SI joint." Dr. Dunkle remarked that Claimant "would be better for a while doing well, functioning well and then unexpectedly he would do something and the SI joint would lose the normal alignment and go into painful alignment." Because Dr. Dunkle anticipated that Claimant would remain symptomatic, he recommended medical maintenance treatment for a period of two years.

5. On August 8, 2003 Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Dunkle's opinion. The FAL permitted Claimant to receive medical maintenance benefits through July 22, 2005.

6. A review of the medical records reveals that Claimant suffered from recurrent SI joint instability for the period February 2005 through August 2007. He received treatment from Dr. Dunkle and D. Brooks Conforti, D.O. to relieve his discomfort. Claimant consistently reported that his recurrent lower back pain had become exacerbated in the absence of additional trauma. Throughout the period Claimant remained at MMI and did not require any permanent work restrictions. Dr. Dunkle extended Claimant's medical maintenance treatment for an additional two years.

7. On May 1, 2008 Claimant returned to Dr. Dunkle for a onetime evaluation because his back had come out of alignment. Claimant recounted that he had been bending and felt the "bones move in his lower back." Dr. Dunkle characterized Claimant's medical history as "a previous work-related injury, with a chronic unstable SI joint." He explained,

> in terms of the incident that occurred most recently, bending over is not considered an injurious activity. The patient has had multiple flare ups of symptoms and loss of stability and increase in pain over the years. He has experienced symptoms at home and at work in the past. Bending over is not considered an injurious behavior. There was no accident or hazard, therefore, probable causality for the patient's underlying condition flare-up at work would not be present.

Dr. Dunkle concluded that the most likely explanation for Claimant's condition was his underlying, unstable SI joint. He therefore determined that Claimant's permanent condition remained the same.

8. Respondent subsequently terminated Claimant's medical treatment. Claimant thus filed a Petition to Reopen his claim on September 18, 2008.

9. Dr. Dunkle testified through an evidentiary deposition in this matter. He commented that Claimant's SI joint condition has not changed since he reached MMI on July 22, 2003. Dr. Dunkle explained that Claimant would continue to experience SI joint instability and flare ups on an intermittent basis. He stated that Claimant would "experience instability, loss of alignment with associated pain and functional limitation, and at times he would be able to correct that on his own and at times he would need the benefit of someone to manipulate the joint."

10. Dr. Dunkle also explained that he initially awarded Claimant medical maintenance benefits for a period of two years. He subsequently extended medical maintenance benefits for two more years. Dr. Dunkle acknowledged that he experienced confusion in attempting to understand the concept of maintenance care. Because he was unclear about "how long maintenance care should extend," he was under the impres-

sion that once a condition stabilizes, the patient should receive continuing care through his primary insurance company.

11. Claimant testified at the hearing in this matter. He explained that his SI joint comes out of alignment more frequently now than it did when he reached MMI. Claimant also reported that his pain is more intense now that it had been when he reached MMI. Claimant commented that activities including twisting, turning and stepping cause his back to come out of alignment. He explained that, when his back has come out of alignment, he has visited Dr. Dunkle. Dr. Dunkle has then referred him to Dr. Conforti for treatment. Claimant noted that, when Dr. Conforti has realigned his back, he has experienced immediate relief.

12. Claimant has established that it is more probably true than not that he has suffered a change in condition since he reached MMI on July 22, 2003. Dr. Dunkle testified that Claimant's condition has not changed since he reached MMI because he would continue to experience SI joint instability and flare ups on an intermittent basis. However, Dr. Dunkle extended Claimant's medical maintenance treatment for four years after Claimant reached MMI and acknowledged that he was confused about the concept of medical maintenance care and when it should be terminated. Moreover, Claimant credibly testified that his SI joint comes out of alignment more frequently now than it did when he reached MMI. Claimant also reported that his pain is more intense now that it had been when he reached MMI. Claimant has thus demonstrated that he is entitled to additional medical benefits that are causally connected to his compensable lower back injury. He has suffered a worsening of condition that justifies reopening his claim.

13. Claimant has produced substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition. Claimant commented that activities including twisting, turning and stepping cause his back to come out of alignment. He persuasively recounted that he has then obtained immediate pain relief after visiting Dr. Conforti for a realignment.

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

5. As found, Claimant has established by a preponderance of the evidence that he has suffered a change in condition since he reached MMI on July 22, 2003. Dr. Dunkle testified that Claimant's condition has not changed since he reached MMI because he would continue to experience SI joint instability and flare ups on an intermittent basis. However, Dr. Dunkle extended Claimant's medical maintenance treatment for four years after Claimant reached MMI and acknowledged that he was confused about the concept of medical maintenance care and when it should be terminated. Moreover, Claimant credibly testified that his SI joint comes out of alignment more frequently now than it did when he reached MMI. Claimant also reported that his pain is more intense now that it had been when he reached MMI. Claimant has thus demonstrated that he is entitled to additional medical benefits that are causally connected to his compensable lower back injury. He has suffered a worsening of condition that justifies reopening his claim.

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

ment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

7. As found, Claimant has produced substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition. Claimant commented that activities including twisting, turning and stepping cause his back to come out of alignment. He persuasively recounted that he has then obtained immediate pain relief after visiting Dr. Conforti for a realignment.

ORDER

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

1. Claimant's claim is reopened for the purpose of receiving medical maintenance benefits.

2. Claimant shall receive medical maintenance benefits that are reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition.

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

DATED: April 16, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-772-332

ISSUES

- Whether Claimant sustained a compensable injury or occupational disease to his low back;

- Whether Claimant is entitled to medical benefits;
- Whether Claimant is entitled to TTD; and
- Whether Claimant is responsible for termination of his employment.

FINDINGS OF FACT

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

1. Claimant worked for the employer as a plumber's apprentice. Claimant worked for the Employer from April 25, 2008 to October 3, 2008.

2. On Tuesday September 23, 2008, Claimant went to the North Suburban Hospital emergency room around 12:30 in the afternoon. Claimant called in sick that day. Claimant did not report any work related injury when calling in sick on September 23, 2008. Claimant admitted that he had not informed anyone with the Employer of a work related injury before seeking treatment at the emergency room on September 23, 2008.

3. At the emergency room, Claimant reported sharp low pain across his low back with pain in his right leg. He was having acute muscle spasm according to the emergency room provider.

4. When asked about the "onset" of his low back pain, Claimant told the emergency room providers that it began "two days ago." Two days prior to September 23, 2008 was Sunday, September 21, 2008. Claimant did not work on Sunday, September 21, 2008. The record also states that the patient notes possibility of an injury (possibly from work, sometime in the past). No further details regarding an injury are noted.

5. Claimant reported to emergency room providers on September 23, 2008 that he had a prior history of back injury and a prior history of back pain. Claimant noted he had similar symptoms once before, but they were milder. He noted this prior episode was 3 years ago. Claimant was released from the emergency room with a prescription for steroids and muscle relaxants. Claimant was "encouraged to establish himself with a PCP so that he could be referred to PT."

6. After visiting the emergency room, Claimant spoke with his supervisor, Garcia. Garcia asked Claimant whether his back problem was work related. Claimant admitted that he told Garcia that his back problem was not work related. Claimant explained that he did not report the injury as work-related because he thought it was just a muscle strain that would heal itself quickly. Claimant, however, testified that he had felt back pain while separating bathtub enclosures a couple of weeks prior to September 23, and that he had asked Garcia for additional help with performing those duties. Claimant did not explain to Garcia that he needed the extra help due to back pain.

7. Claimant testified that on Friday, September 19, 2008, his back was hurting, but he thought he would improve over the weekend. Claimant testified that over the weekend his pain worsened although he did nothing but sit on the couch watching television.

8. Claimant did not return to work following the September 23, 2009 emergency room visit per the work restrictions imposed by the emergency room providers.

9. On Monday, September 29, 2008, Claimant returned to the emergency room at North Suburban Hospital. Claimant again noted his prior history of back problems "from playing sports for years." Claimant's history of back pain was characterized by the emergency room providers as "Chronic Back Pain." Claimant reported the possibility of an injury from lifting, but what he was lifting was not noted. Claimant also reported that his symptoms had worsened while he remained off work for the week and that he now had pain radiating into his upper right leg. The medical record also states, "No history of recent trauma. Occurred at home." No mention of an injury at work is contained in this medical record.

10. The emergency room providers sent Claimant for a MRI of his lumbar spine on September 29, 2008. The MRI showed a disc herniation at L5-S1 on the left side and L4-5 protrusion on the right side which mildly indents the anterolateral thecal sac. The emergency room providers instructed Claimant to see a spinal surgeon for abnormalities seen on the MRI.

11. After his MRI, Claimant reported to his supervisor that he injured his back at work while separating bathtub enclosures. Claimant testified that it was not until he realized the severity of his back injury that he felt it due to his work activities.

12. On October 1, 2008, Claimant saw Dr. Jeffrey Hawke, the designated provider for the employer. Claimant reported to Dr. Hawke that he began feeling low back soreness two weeks prior to September 23, 2008 and provided a date of injury of September 10, 2008. Claimant reported that he felt soreness while separating the bathtub enclosures and when the pain increased after two weeks, he went to North Suburban. Claimant reported to Dr. Hawke that he felt no relief with ibuprofen and Flexeril prescribed at North Suburban. Claimant reported that he then "started feeling pressure" in his low back. Claimant reported that his previous low back injuries were only "minor muscle strains."

13. On September 23, 2003, Claimant went to St. Anthony's Hospital emergency room complaining of low back pain so severe that he could not walk. Claimant was provided with Dilaudid for the severe back pain. Claimant noted his back pain had been present for one year. Claimant reported that his back pain had never been this bad. Claimant had radiation of pain down both legs. Claimant returned to the St. Anthony's Hospital emergency room just two days later. Claimant returned with continuing low back pain and was given IV Dilaudid. Claimant was instructed to see an Orthopedist for his back pain.

14. Claimant went to the North Suburban Hospital's emergency room on September 4, 2006, for reasons unrelated to his back. Claimant, however, provided a history of "chronic lower back pain" to the emergency room staff.

15. Claimant was evaluated by Dr. Paz on January 22, 2009. When asked for a date of injury, Claimant said there is not a specific date of injury. Claimant described a slow progression of symptoms beginning the second week of September and evolving into pressure and burning in his legs. He attributed the pain to his work separating tub enclosures. When asked about any prior history of low back problems, Claimant reported a history of muscle spasms on two occasions during his life. Claimant did not report the episode that occurred in September 2003.

16. Claimant told Dr. Paz that his low back pain resulted from repetitive work with tub enclosures at work. Dr. Paz testified that the herniation seen on the MRI is acute and would have not been caused by repetitive or cumulative exposure to lifting. The herniation would have been sudden and caused immediate symptoms. Dr. Paz opined the cumulative exposure to lifting is inconsistent with an acute herniated disc.

17. Based on the foregoing, Claimant has not established by a preponderance of the evidence that he sustained an injury or an aggravation to a preexisting condition while in the course and scope of his employment with 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. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

2. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

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

4. As found, Claimant has not established that it is more probably true than not that he sustained an injury to his low back while working for Employer. It is essentially undisputed that Claimant has objective MRI findings, specifically an acute disc herniation at L5-S1 and stenosis. Claimant, however, has not established that these injuries occurred in the course and scope of his employment nor has he established that he aggravated any preexisting condition in the course and scope of his employment. Claimant undoubtedly performed strenuous work activities, but he never reported to his supervisor that he had back pain despite the severity of the pain levels Claimant described. In addition, Claimant testified that he had asked his supervisor for additional help with unloading bathtubs; however, there was no credible or persuasive evidence that Claimant concurrently explained to his supervisor that he needed the help because he had back pain. Claimant testified that his pain worsened over the weekend of September 20-21, 2008 although he also testified that he sat on the couch all weekend watching television. This worsening is inconsistent with relative rest. Finally, Claimant testified that he did not decide to pursue a workers' compensation claim until he learned that he had serious injuries. If Claimant's pain was as severe as he described, it follows that Claimant would have reported to his supervisor when he called in sick on Tuesday, September 23, 2008, that he felt he had a work-related back injury. Claimant's testimony lacked credibility.

5. In addition to inconsistencies in Claimant's testimony and reports to medical providers, Dr. Paz credibly opined that the herniation seen on the MRI is acute and would have not been caused by repetitive or cumulative exposure to lifting. The herniation would have been sudden and caused immediate symptoms. Claimant testified that his symptoms were gradual and worsened over a two week time period. Dr. Paz, however, opined the cumulative exposure to lifting is inconsistent with an acute herniated disc.

6. Because the Judge has determined that Claimant has not sustained a compensable work-related injury, the remaining issues need not be addressed.

ORDER

It is therefore ordered that:

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

DATED: April 16, 2009

Laura A. Broniak
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

WORKERS' COMPENSATION NO. WC 4-395-180

ISSUES

The issue for determination is liability for an examination and potential surgery by a physician in Genoa, Italy. Claimant withdrew the issue of reimbursement for a portion of the MRI costs that she paid.

FINDINGS OF FACT

1. On August 28, 1998, Claimant suffered an injury to her right shoulder. Insurer admitted liability for that injury. After a number of surgeries, Claimant was placed at maximum medical improvement (MMI) on May 15, 2003.
2. Dr. John Hughes provided a Division Independent Medical Evaluation (DIME) on October 31, 2003. He found that Claimant suffered permanent medical impairment in both shoulders and her left knee, related to the initial industrial injury. Dr. Hughes found that Claimant suffered from regional shoulder lymphedema, secondary to one of her surgeries. He addressed surgery for the lymphedema condition and concluded:

> I do not find a clear basis to proceed with surgery in her case and would in essence agree with the examining vascular surgeons that the risks of this type of surgery greatly outweigh the potential benefits. Indeed, Ms. Griffin appears to be doing quite well with massage therapy and like Dr. Castro, I believe that she might need to have this type of treatment over the long term.

3. Respondents filed a Final Admission of Liability based upon Dr. Hughes' DIME report on December 23, 2003. Medical benefits after MMI were admitted.
4. Carolla Cooker testified at the time of hearing. She is a Certified Massage Therapist and has treated Claimant frequently for her lymphedema condition. Her treatment gives Claimant temporary relief from her pain.
5. Since 2003, Claimant has received regular massage therapy to relieve her lymphedema condition. Insurer has paid for ongoing massage therapy for Claimant.
6. Claimant needs two to three manual lymphatic drainage (MLD) sessions per week to help maintain her lymphatic system. Otherwise Claimant's neck region and clavicular area is hard and very swollen and difficult to maintain. If only one treatment a week is performed due to schedule conflicts or illness, it is like starting all over. The swelling in the affected area covers Claimant's left neck, left scapula, left axilla, left shoulder and chest. The area when untreated becomes tight and full. The cost per session is $120.00.
7. Unless some other treatment is provided, Claimant will require MLD therapy for the rest of her life. Her life expectancy is 25.5 years. MLD treatment for three times a week, fifty-two weeks a year, for 25.5 years, will result in 3978 treatments. At $120.00 per treatment, the total cost will be $475,000.00.
8. Dr. Alan Synn, a vascular surgeon, evaluated Claimant on May 1, 2003. He issued a report on June 12, 2003, directed to Dr. Allen Rosenberg, with regard to treat-

ment for Claimant's lymphedema condition. Dr. Synn indicated in his letter to Dr. Rosenberg that he did research on Claimant's "very unusual clinical situation." He explained that a surgical exploration could be done "for the purposes of ligating the thoracic duct." Dr. Synn discouraged this treatment:

> However, I expect that it would be distinctly unlikely to find the thoracic duct and one would end up ligating the general region with potential injury to adjacent vascular or neurogenic structures.

9. Insurer authorized Claimant to obtain an evaluation with Dr. Marlys Witte in Tucson, Arizona in April of 2004. She discussed the possible benefit of surgical intervention for Claimant's lymphedema condition but indicated that this needed to be weighed against the operative risk and the likelihood of success of the procedure. She did not reach any opinions with regard to risk or likelihood of success.

10. At the request of Insurer, Claimant was examined by Dr. Synn again on June 19, 2008. In a report of that date, Dr. Synn noted that Claimant's condition was considerably similar to the condition he observed in 2003. Dr. Synn stated again that this was a very unusual condition and suggested that Claimant be examined by Dr. Peter Gloviczki at the Mayo Clinic.

11. Insurer asked Dr. Gloviczki to review the medical records concerning Claimant's lymphedema situation. He did so and issued a report dated August 19, 2008. He indicated that he would treat Claimant's condition "conservatively with physical therapy." He also stated that a plan to visit Dr. Corradino Campisi, who practices in Genoa, Italy, "is a good one" if Claimant wished to attempt a micro-vascular reconstruction for lymphatic reconstruction.

12. Insurer asked Dr. Campisi to review the medical records and answer questions. He did so in a handwritten response dated February 18, 2009. He recommended direct lymphography combined with CAT scan and MR imaging "to delineate the thoracic duct abnormality before a possible surgical approach." After this initial imaging, Dr. Campisi recommended, "if possible, thoracic duct microsurgical repair and/or, if necessary, multiple lymphatic-venous microsurgical shunts." Dr. Campisi further stated that these kind of surgical procedures "can represent remedial procedures for this lymphstasis but not for the pain."

13. Including the imaging, two to three weeks of pre- and post-operative treatment and a hospital stay, the cost for the evaluation and potential surgeries would be in the range of 33,000 to 35,000 Euros. The Administrative Law Judge takes administrative notice that 1 Euro converts to approximately $1.33, making the potential cost to Insurer an amount between $43,000 and $47,000.

14. Claimant wishes to see Dr. Campisi so that her lymphedema condition can be evaluated. She would like to avoid ongoing massage therapy, if possible. She understands that the surgery, if performed and if successful, will eliminate discomfort that she presently experiences if she does not have the therapy and alleviate the need for weekly therapy, but will do nothing to relieve the underlying pain.

CONCLUSIONS OF LAW

Insurer must provide medical benefits that are reasonable and necessary to cure and relieve the industrial injury. Section 8-42-101(1), C.R.S. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo.App. 1997). Insurer remains liable for such care after MMI. *See Grover v. Industrial Commission*, 759 P.2d 705, 711 (Colo. 1988). An injured worker is entitled to medical benefits after MMI where there is substantial evidence in the record to support a determination that future medical treatment will be reasonable and necessary "to relieve the effects of an [industrial] injury" or prevent further deterioration of the Claimant's condition. *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo.App. 1995); *Milco Constr. v. Cowan,* 860 P.2d 539 (Colo.App. 1992).

The injured worker has the burden of proof to establish her right to specific medical benefits. An Insurer's admission concerning compensability cannot be construed as a concession that all medical treatment that occurs after the injury is related to the injury. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo.App. 1990).

Claimant has established by a preponderance of the evidence that an examination and possible treatment by Dr. Campisi in Genoa, Italy, is reasonably needed to relieve her from the effects of the compensable injury. Insurer is liable for the costs of such care in amounts not to exceed the Division of Workers' Compensation fee schedule. Insurer will also be liable for the reasonable costs of transportation to Genoa, Italy and lodging while undergoing the authorized treatment.

ORDER

It is therefore ordered that:

1. Insurer is liable for the costs of the care that Claimant may receive from Dr. Campisi in Genoa, Italy, in amounts not to exceed the Division of Worker's Compensation fee schedule. Insurer is also liable for the reasonable costs of transportation to Genoa, Italy, and lodging while undergoing the authorized treatment.
2. All matters not determined herein are reserved for future determination.

DATED: *April 16, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-769-390

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 April 7, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 4/7/09, Courtroom r, beginning at 8:40 AM, and ending at 11:05 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. The same was filed on April 14, 2009. Claimant was given 3 working days, or until April 17, 2009, within which to file electronic objections. No timely objections were filed. The matter was deemed submitted for decision on April 20, 2009. The ALJ modified the proposed decision and, as modified, hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; if compensable Claimant's entitlement to temporary disability benefits; and, if compensable, Respondent's affirmative defense of responsibility for termination and, penalties versus the Claimant for late reporting of injury.

FINDINGS OF FACT

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

1. In 2008, the Employer operated a company that installed satellite dishes as a sub-contractor for Direct TV. As of March 13, 2009, another satellite company acquired the Employer. The Employer hired the Claimant on July 28, 2008 as a satellite technician trainee. Juan Loera is the trainer for the satellite technician trainees. Brian M. Crothers is the General Manager. Crothers interviewed Claimant for the trainee position. During that interview, he made it clear to the Claimant that she would have to demonstrate the ability to safely lift, load, unload and move ladders which could weigh up to 75 lbs. and extend up to 28'. He also made it clear that any permanent employment with the Employer was contingent upon the successful completion of all training. Part of the training process required trainees to show they could unload a ladder from a roof rack on a work van, balance and carry the ladder to a wall, set up the ladder against the wall, carry tools and a satellite dish up the ladder, and then reverse the process ending with reloading the ladder onto the work van's roof rack.

2. According to the Claimant, she injured her right shoulder, arm and neck on August 12, 2008 when she attempted to take a ladder down from the wall. She stated that she had struggled to put the ladder up against a wall, and that when she was taking it down to carry the ladder back to the work van, it fell, landing on and pulling her arm. Claimant said she felt excruciating pain in her shoulder, pain in her arm, numbness in her fingers and pain shooting into her shoulder. Loera testified that he took the ladder

down from the wall and carried it back to the work van. The two versions of events are contradictory. There is no explanation as to why Loera would affirmatively testify falsely. Indeed, Loera presented straightforwardly and consistently. In resolving this conflict in the testimony, the ALJ considers that the Claimant has an interest in the outcome of this case and Loera does not. Also, as further found below, there are inconsistencies in Claimant's actions and in her version of events. There are no inconsistencies in Loera's testimony.

3. After the alleged incident, the Claimant said she went inside to a classroom area to work on mounting satellite dishes to a wall.

4. Loera testified that the Claimant had difficulty handling the ladder during an initial class held the week of July 28, 2008. As such, when the trainees repeated the ladder exercise on August 12, 2008, he asked Claimant to go last, in part so Claimant could watch the other trainees handle the ladder and learn technique from them. Loera stated that the ladder exercise involved the trainee first lowering the work van's roof rack which is where the ladder was secured, lifting one end of the ladder off the rack and lowering it onto its side on the ground while the other end stayed in the roof rack, walking up under the side edge of the ladder to lift the one end off the rack and then walking along the ladder's side edge to get the ladder off the ground while balancing it on their shoulder. Loera said the Claimant had difficulty getting the ladder off the roof rack and eventually dropped the ladder to the ground. He was standing directly in front of the Claimant when this happened. He never saw the ladder strike the Claimant when it fell to the ground. The ALJ infers and finds that if the ladder had struck the Claimant, Loera would have seen this happen, yet he did not. Loera said the Claimant never reported an injury to him at this time, nor did she appear to be injured.

5. Claimant did not report to the Employer that she had injured herself. She testified she did not report the incident to Loera because she was afraid she would lose her job and she was embarrassed that she wasn't able to perform her job as well as the other trainees. Also, she was hoping the pain would simply go away. When her employment was terminated, her actions in not reporting this incident were inconsistent with her fear of losing her job. That night, when at home, she stated that she felt continued pain in her arm, along with pinching and aching and her arm was swelling up.

6. Later in the day on August 12, 2008, Loera met with Crothers and told him that two trainees, the Claimant and another, would not qualify as satellite technicians, as neither could safely handle the ladders. He recommended dismissing both trainees.

7. When the Claimant arrived at work on August 13, 2008, Crothers approached her and said he needed to see her. They went to Crothers' office, where he told her that as she couldn't perform the ladder portion of her training and they needed to let her go. Claimant testified she did not 'fight back' because she was surprised she was being let go. She also stated that she did not tell Crothers about the prior day's incident with the ladder, or that she was in pain from that incident, stating she was still hoping the pain would go away. The fact that she did not report the alleged work-related incident is inconsistent with her fear of losing her job. Claimant further said that

after she was terminated her shoulder and arm ached so bad she did not know what to do with it and she was still experiencing a lot of pain, yet she still was hoping the pain would go away.

8. Crothers testified that when he let the Claimant go, she told him that while she knew she couldn't handle the ladders, she wasn't going to quit, and would only leave when fired. She never told him that she had injured herself the day before, nor did she show him any bruises on her arms, or complain to him that she was in pain. Crothers stated the Claimant smiled and joked around and shook hands with him after he let her go. These actions of not reporting a work-related injury are inconsistent with Claimant's stated reason of not previously reporting the incident because she feared losing her job.

9. On August 18, 2008, the Claimant went to the Employer to pick up her check. She asked for Crothers, but he was not there. Claimant called on August 19, 2008 to let Crothers know she needed to file a claim (workers' compensation) over the ladder incident. She came in on August 20, 2008 to complete needed paperwork with Crothers. The Employer sent her to Rocky Mountain Urgent Care.

10. Crothers testified that the information in the Employers First Report of Injury that he completed about how the incident occurred and any injuries sustained was based solely on what the Claimant had told him.

11. Loera said that he spoke with the Claimant on August 18, 2008. He asked how she was doing and she said fine. She never told him that she had injured herself on August 12, nor did she show him any bruises on her arms, or complain to him that she was in any pain. Claimant said she never saw or spoke with Loera on August 18. In this regard, the ALJ finds Loera's testimony more credible than the Claimant's testimony.

12. As of August 21, 2008, Claimant testified her that her arm was aching, pinching, throbbing and had a pins and needles feeling.

13. Claimant reported to Rocky Mountain Urgent Care on August 20, 2008. Her history was recorded as "On Tue 8/12 trying to catch ladder (150#) – fell onto R upper arm forearm & left wrist Did start hurting until yesterday Some numbness." The ALJ notes that this history, to make sense, should read "On Tue 8/12 trying to catch ladder (150#) – fell onto R upper arm forearm & left wrist. Did **NOT** start hurting until yesterday-Some numbness." This history is inconsistent with Loera's observartions, which the ALJ finds more credible than Claimant's history.

14. On August 12, 2008, Hugh Macaulay, III, MD. saw the Claimant at Injury Care of Colorado. Claimant gave Dr. Macaulay's office a history that the injury occurred when she was moving a 24 – 28 foot ladder away from a wall when the ladder slipped and began to fall. It slid down her right bicep and hit her right forearm and left forearm. She then dropped the ladder and had to drag it back to the van and place it on top of the van. This history is inconsistent with Loera's version of events, which the ALJ finds

more credible. According to the Claimant, she did not know at the time how badly she had hurt her shoulder as the pain was not severe that evening. The next day, however, her pain had intensified. Approximately two days after her date of injury, her right arm felt numb globally. Again, the ALJ notes that in order to make sense the history should read "She did **NOT** know at the time how badly she'd hurt her shoulder as the pain was not severe that evening.

15. Dr. Macaulay was deposed on January 30, 2009. Regarding the Claimant's August 21st visit, he confirmed the Claimant stated she had told him that she didn't know exactly how badly she'd hurt her shoulder as the pain was not that severe that evening, but that the next day, the pain intensified and that about two days after the injury her right arm felt numb globally. Dr. Macaulay also testified that if the incident occurred as reported, he would expect the person involved to be aware of symptoms within a day, with bruising to appear within 3 days. This contradicts Claimant's recounting of not knowing how bad her alleged injury was and her actions at the time Crothers advised her of her termination from employment. At her second visit with Dr. Macaulay on August 28th, the Claimant complained for the first time about neck and back pain along with medial scapula pain. Dr. Macaulay also testified that Claimant's complaints about pain throughout the entire vertebral column didn't make any sense because such was not typically associated with a shoulder injury.

16. Claimant has failed to show that it is more probably true than not that she injured herself when she dropped a ladder on August 12, 2008. There is a disconnect between the histories given by the Claimant and the testimony of the Employer's witnesses. Claimant's version about why she failed to report her alleged injury until August 20, 2008 makes no sense in light of the fact that she knew that she had been terminated as of August 13, 2008. She certainly could have reported her injury on August 13th, immediately **after** she was terminated or on August 18th when she picked up her check and spoke with Loera, but she failed to do so. The ALJ finds the testimony of Loera and Crothers more credible than the Claimants testimony. Therefore, the Claimant has failed to prove, by a preponderance of the evidence, that she sustained a compensable injury on August 12, 2008, as alleged.

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, in analyzing the facts, the ALJ found Claimant's testimony unreliable and lacking credibility. The Employer witnesses were found to be credible and reliable. The aggregate testimony does not support compensability.

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this_____day of April 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-485-027 (Consolidated)

ISSUES

The issues to be determined by this decision are the following:

1. Whether Claimant has proven by a preponderance of evidence that she suffered compensable injuries with the Respondent-Employer in 2002 and 2006 (or instead whether Claimant's total body pain represents a non work-related pain/somatoform disorder).

2. Whether Claimant has proven by a preponderance of evidence a worsening of her 2004 injury with regard to her admitted de Quervain's tenosynovitis (and whether she is entitled to any additional medical care for the condition).

3. Whether Claimant has proven by a preponderance of evidence a worsening of her 2000 injury with regard to her low back condition.

FINDINGS OF FACT

1. Claimant works for the Respondent-Employer as a hair stylist. She is happy working with the Respondent-Employer and enjoys her job.

2. Claimant reported no problems with the Respondent-Employer despite her multiple workers' compensation claims. Claimant continues to work for the Respondent-Employer to date.

3. Claimant admitted that she had multiple symptoms (consistent with a somatoform disorder) dating back to at least April of 1990. These symptoms include the following: "Migraine headaches, nervousness, knots under left foot, ringing in ears." Claimant also reported blurred vision and neck pain as well dating back to at least 1990. Claimant admitted that she continued to have these medical problems and symptoms on an ongoing basis.

4. Claimant received consistent treatment from a chiropractor between 1990 and 2000 for total body pain. The medical records from the chiropractor detail treatment for total body pain including the following: neck pain, low back pain, thoracic pain, headaches, hand pain, foot pain and shoulder symptoms. Claimant continued to report this total body pain in the 8 to 10 years leading up to the first alleged work injury.

5. Claimant never alleged during the time of this treatment that this total body pain was work-related. Instead, Claimant reported these symptoms for almost 8 to 10 years before alleging a work-related injury against the Respondent-Employer.

6. Claimant reported her ongoing total body pain as a possible work-related occupational disease culminating in approximately September of 1998. Specifically, Claimant presented with the following presentation of total body symptoms:

> [Claimant] is a 38-year-old employee of [Respondent-Employer], who complains of spasms when cutting hair, sweeping hair, cleaning combs, pain in her neck, back, feet, shoulders, and hands when she is cutting hair, as well as headaches, dizzy spells, and pain at the sides of her hands with numbness in the arms, pain when she turns her head to the

> left, and sharp pain in the middle back and the lower back, and the feet hurt on the bottom always. They are popping, feel tight. Her feet hurt on the sides sometimes, and her shoulders feel real tight.

7. Claimant also reported pressure in the back of her head, which her eye doctor apparently told her was due to her diet.

8. Dr. Ruth Light examined Claimant on January 14, 1999 for this alleged occupational disease and opined that this total body pain was clearly not work-related, commenting:

> This patient with wide-spread myalgias had the onset of pain in mid September. She reports absolutely no change in her work pace, work site, work techniques in the job she had been performing . . .. Myalgias spare no portion of the body affecting the trunk, the entire back, and upper and lower extremities. This is not the pattern of a discrete injury but the pattern of a systemic disease.. . .. It is not work-related. She needs to go to her primary care physician for evaluation and treatment. I can only propose some of the diagnoses which need to be investigated, such as, thyroid disease, renal disease and other systemic problems.

9. Claimant never litigated this injury date.

10. Claimant is taking Synthroid for thyroid disease. Specifically, the following history regarding this condition is contained in the medical records:

> [Claimant] has a history of hypothyroidism which does increase the probability of a neural abnormality. She has recently gone up on her Synthroid dose. This is probably contributing [to her condition.]

11. Claimant again reported that her longstanding total body pain was work-related as a result of an alleged occupational disease culminating on September 23, 2000. Atlantic Mutual was the insurance company on the risk as of the date of this alleged work injury.

12. Respondent-Insurer-Atlantic referred Claimant for medical treatment with Dr. Sparr. During the first examination with Dr. Sparr on October 25, 2000, Claimant reported pain in her back, both feet, both shoulders and hands. She also detailed neck pain, headaches and pain in her upper extremities.

13. Claimant continued to report total body pain on an ongoing basis with this alleged work injury. Dr. Sparr ultimately released Claimant to MMI on March 21, 2001 with a 0% PPD rating. Dr. Sparr recommended further medical treatment and prescription medications as a result of the alleged work injury.

14. Atlantic Mutual filed a final admission of liability on August 30, 2001. The admission admitted to the 0% PPD rating provided by Dr. Sparr.

15. Claimant continued to treat with Dr. Sparr for total body pain from October 25, 2000 through November 3, 2006.

16. Claimant failed to report any significant improvement in her symptoms despite this longstanding medical treatment and a reduction of her hours at work. Claimant went from working 40 hours per week down to approximately 25 hours per week.

17. Claimant continued to report total body pain and alleged multiple occupational disease claims on the following dates: July 10, 2002; July 7, 2004; and July 1, 2006.
18. Hartford Insurance Company of the Midwest was the insurer on the risk for these alleged injury dates. Respondents filed notices of contest on the 2002 and 2006 injuries. These claims were denied because Claimant was simply presenting the same total body pain that had been present at least dating back to 1990.
19. Respondents denied all components of a total body claim for the 2004 injury as well. Respondents did, however, admit to a minor left de Quervain's tenosynovitis of the thumb and wrist.
20. Dr. Sparr ultimately placed Claimant at MMI for this limited thumb and wrist condition on May 31, 2006 with a 0% rating. Respondents subsequently filed a final admission of liability for this limited thumb condition on June 13, 2006. Claimant did not file an objection to this final admission of liability.
21. Respondents continued to deny any responsibility for Claimant's ongoing total body pain.
22. Respondents denied any responsibility for ongoing care for Claimant's total body pain. Claimant admitted that she has not been examined for her total body pain in over two years at the time of the hearing.
23. Claimant indicated at the hearing that she was attempting to reopen her admitted 2004 claim related to her left-sided de Quervain's tenosynovitis based on a worsening of condition. At the hearing, however, Claimant directly admitted that her condition had not worsened.
24. Claimant admitted that her symptoms in her left wrist and thumb rated as a 2.5 on a 0 to10-point scale at the time she was placed at MMI for her 2004 injury. Claimant admitted that her symptoms in her left wrist and thumb continued to currently rate as a 2.5 on a 0 to 10 scale at the time of the hearing.
25. Claimant admitted that her symptoms in her left wrist and thumb had not worsened. Specifically, she rated the current pain levels as the same as the pain levels she had when placed at MMI for the condition.

26. Dr. Brodie opined that Claimant did not require any additional medical care for her left wrist and thumb condition. Claimant failed to produce sufficient medical evidence or opinions to refute Dr. Brodie's opinion.

27. Claimant also requested to reopen her 2000 claim based on a worsening of condition with regard to her low back. At the hearing, however, Claimant directly admitted that her condition had not worsened.

28. Specifically, Claimant admitted that her symptoms in her low back rated as a 7.5 on a 0 to10-point scale at the time she was placed at MMI for her 2000 injury. On specific and direct questioning from her own attorney, Claimant admitted that her symptoms in her low back continued to currently rate as a 7.5 on a 0 to 10 scale at the time of the hearing.

29. Claimant admitted to her own attorney, therefore, that her symptoms in her low back had not worsened. Specifically, she rated the current pain levels as the same as the pain levels she had when placed at MMI for the condition.

30. Claimant Admits Symptoms Related to Stress and Tightness Through Her Shoulders, Neck and Jaw

31. Claimant admitted that her jaw pain results from stress and tightness through her shoulders, neck and into her jaw. Specifically, Claimant admitted that her symptoms seemed to worsen with tightness and stress.

32. These symptoms would reportedly start in the shoulders and neck and cause headaches and ultimately jaw pain. Claimant alleged that her jaw pain was work-related due to this stress.

33. Dr. Brodie is an occupational medicine expert, who first examined Claimant on December 8, 2004. Dr. Brodie initially gave Claimant the benefit of the doubt and diagnosed the possibility of multiple medical conditions related to Claimant's total body pain. Dr. Brodie also opined that Claimant had left de Quervain's tenosynovitis. As stated previously, respondents filed an admission to the alleged injury in 2004 based on this de Quervain's diagnosis.

34. Dr. Brodie examined Claimant again on November 12, 2007. At the time of this second evaluation, Claimant reported worsening symptoms in the following body parts: low back; neck; thoracic spine; shoulders; jaw (TMJ syndrome); bilateral ear pain; ringing in her ears; clicking in her jaw; headaches; hands and wrists and symptoms in her feet and toes. As a result, Claimant presented again with total body pain (the same type of pain she had been reporting dating back to at least 1990).

35. Dr. Brodie noted that Claimant presented with "multiquadrant global pain, variable presentation in terms of timing and pain." Dr. Brodie believed that Claimant's presentation of pain was non-organic.

36. Dr. Brodie also opined that Claimant had a "symptom mismatch." Dr. Brodie opined that Claimant did not have any significant objective symptoms to justify her physical complaints of pain:

> . . . that last explanation is the most consistent explanation for [Claimant] in that her symptoms aren't correlated or corroborated by any objective disease that can be clinically diagnosed or measured in any way.

37. Dr. Brodie opined that there is no medical literature to support the finding that Claimant suffered an overuse injury to her back, neck, jaw and shoulders as a result of

cutting hair. Dr. Brodie first explained that Claimant's job duties were not the type to cause an occupational disease:

> So the idea of good control in this case means that via her ability to self-modulate her body positioning during haircutting activities; shifting weight from one leg to another, taking micro breaks, lower her arms, raising her arms, less reaching, more reaching, change in the position of the person getting the haircut in this case, all of those control factors are substantial in terms of lower risk for developing occupational disease.. . So she is actually at lower relative risk to the population that might be considered at risk, which would put her at equal relative risk and, therefore, at no relative risk for occupational disease for her specific job.

38. Dr. Brodie also explained in detail that there was no known medical literature or studies to support the existence of an occupational disease as alleged by Claimant.

39. Dr. Brodie subsequently concluded that Claimant had a non work-related pain or somatoform disorder to account for her symptoms:

> The multi-quadrant, global, whole-body pain presentation with symptom mismatch, as I described earlier, without objective findings fits very nicely into how Dr. Moe has assessed this patient in terms of pain disorder and psychiatrically non-work-related etiology to her pain complaints.

40. Dr. Brodie did confirm that the only condition that he thought may be work-related was the left-sided de Quervain's tenosynovitis. However, Dr. Brodie opined that Claimant received the proper treatment for this condition prior to the claim closing and did not require any additional care for this injury.

41. Dr. Brodie also opined that Claimant had multiple predisposing factors for carpal tunnel syndrome including her hypothyroidism, age and her gender. Dr. Brodie agreed with Dr. Macaulay that Claimant's alleged mild carpal tunnel syndrome is not work-related. Specifically, Dr. Brodie provided the following opinions on this issue:

> There are, again, using the word component analysis to look for – or to analyze risk factors that would include awkward wrist posture or forceful, sustained grip and pinch, vibration, cold exposure, repetition – slightly lower in terms of risk but it's still listed as a risk factor – those parameters are not really present in [Claimant's] haircutting activities.
>
> And then when you couple that with the endocrine disorder, the hypothyroidism, which we know predisposes her to carpal tunnel syndrome as

> well as tendinopathies, and the then the advancing age with the female gender, though it becomes less – substantially less than 50 percent probable that she acquired carpal tunnel syndrome or, in this case, the median mononeuropathy from her haircutting, one crucial thing to qualify here is that carpal tunnel syndrome is a constellation of symptoms that also is not consistent with how she presented.
>
> She – she presents with pain in her arms, necks, and shoulders. That is not characteristic of carpal tunnel syndrome. Carpal tunnel syndrome is a constellation of pain, numbness, and tingling in the hands or wrist primarily at night, sometimes during activities. That isn't how [Claimnant] presents. So technically she shouldn't be diagnosed with carpal tunnel syndrome. She can only be – it can only be stated that the nerve connection study shows a mild sensory neuropathy of the median nerve, which by itself is highly consistent with simply one disorder, hypothyroidism.

42. Dr. Brodie concluded in his deposition that Claimant has a pain or somatoform disorder that is not work-related. Claimant presented with alleged physical symptoms that were actually being caused by an underlying non work-related psychological condition. This diagnosis was further confirmed by Claimant's total body pain without any significant objective findings.

43. Dr. Brodie reached his diagnosis and conclusions before Dr. Moe had performed his examination of Claimant. Dr. Brodie reached the pain or somatoform disorder independently even before Dr. Moe had an opportunity to examine Claimant.

44. Dr. Moe is a psychiatrist that examined and evaluated Claimant on February 28, 2008.

45. Dr. Moe had not reviewed Dr. Brodie's second IME report at the time of his evaluation. Specifically, Dr. Moe was not aware of Dr. Brodie's report until immediately prior to a recent hearing date. Dr. Moe was unaware that Dr. Brodie had already diagnosed Claimant with a pain/somatoform disorder at the time of his evaluation.

46. Dr. Moe also diagnosed Claimant with a pain/somatoform disorder. Dr. Moe opined that while Claimant's physical symptoms appear real to her, they were actually caused completely by an underlying non work-related psychological disorder. It was noted by Dr. Moe that the multiple findings below proved the diagnosis of a pain/somatoform disorder.

47. Claimant again presented with total body pain at the time of her examination by Dr. Moe. Specifically, Claimant presented with the following complaints at the time of the evaluation: low back pain, shoulder pain, neck pain, headaches, upper extremity pain, jaw symptoms, problems with her legs and dizziness. Dr. Moe testified that this presentation of symptoms is completely consistent with a pain/somatoform disorder.

48. Dr. Moe noted that Claimant had disparate and inconsistent symptoms without any discrete injury or objective findings: “In the specific case of Ms. Padilla, recurrent, but often quite disparate, physical complaints have emerged over the years in the absence of an identified acute injury and the in the absence of explanatory physical findings . . ..”

49. Dr. Moe further detailed the fact that Claimant’s symptoms were diffuse and varied: “In reviewing the complaints that at any time have been the focus of treatment, it is seen that they have a) been quite diffuse; and b) varied considerably without explanation over the years.” Dr. Moe noted that these diffuse and varied symptoms are also consistent with a pain/somatoform disorder.

50. Dr. Moe also clarified that Claimant’s job duties were not consistent with the development of an occupational disease:

> Her typical duties cannot be said to exceed what a large percentage of the working population faces daily. Moreover, her job would be expected to avail her to position changes, brief breaks, and a sense of control (in contrast to performing the same task for hours on end), all of which would retard, rather than promote the development of an overuse condition.

51. Claimant’s symptoms never improved with medical treatment.

52. Dr. Moe also noted that Claimant’s symptoms were more consistent with a symbolic than a physical cause.

53. Dr. Moe ultimately explained Claimant’s pain/somatoform disorder in detail as follows:

> My intent, in summarizing the data above, is not to suggest that [Claimant’s] symptoms are dissimulated. Though I do not believe her complaints are equivalent to those generated by demonstrable tissue damage, they are “real,” insofar they do cause her suffering. I do not believe that she is making claims that she does not believe – the symptoms as reported reflect her subjective reality. At the same time, the condition reflected in the data summarized above is different from the effects of a work injury. The pathology is not likely localized to the end organs identified by the patient to be the source of her pain. Instead, the disorder is in the brain – in the experiencing of physical sensation, in the subjective assessment of their severity and meaning, and in the myriad non-physical factors that influence a patient’s experience and reporting of symptoms. Thus is Pain Disorder, a condition not caused by injury or exposure to physical influences.

54. Dr. Moe summarized by noting that all of Claimant's symptoms and the evidence on this case pointed to only one conclusion: that is, that Claimant has a pain/ somatoform disorder. Dr. Moe opined that this could be the only diagnosis that could explain Claimant's diffuse and global pain without any significant objective findings.

55. Dr. Macaulay performed an IME with regard to Claimant's reported upper extremity symptoms on or about September 16, 2008.

56. In his report, Dr. Macaulay noted that Claimant's symptoms were inconsistent with the diagnosis of carpal tunnel syndrome. Dr. Macaulay also opined that Claimant's job duties were not consistent with causing this diagnosis. Finally, Dr. Macaulay noted that Claimant instead had findings consistent with her underlying thyroid disease. Dr. Macaulay agreed with Dr. Moe and Dr. Brodie that Claimant had not suffered a work-related condition and had a non work-related "pain disorder."

57. Dr. Macaulay's opinions were consistent with the opinions of Dr. Brodie on this condition. Specifically, Dr. Brodie also opined that Claimant's hand symptoms did not constitute carpal tunnel syndrome and instead were simply caused by the underlying thyroid disease.

58. Claimant has established by a preponderance of the evidence that she incurred $276.00 in expenses related to her independent medical evaluations requested by Respondent-Insurer Hartford. Respondent-Insurer Hartford shall pay Claimant said amount.

59. Claimant has failed to establish by a preponderance of the credible evidence that her claim in WC 4-485-027, with a date of injury of September 23, 2000, should be re-opened because of a worsening of her condition.

60. Claimant has failed to establish by a preponderance of the credible evidence that her claim in WC 4-631-428, with a date of injury of October 9, 2004, should be re-opened because of a worsening of her condition.

61. Claimant has failed to establish by a preponderance of the credible evidence that she suffered a work-related injury in her claim in WC 4-653-840, with a date of injury of July 10, 2002.

62. Claimant has failed to establish by a preponderance of the credible evidence that she suffered a work-related injury in her claim in WC 4-620-287, with a date of injury of July 7, 2004.

63. Claimant has failed to establish by a preponderance of the credible evidence that she suffers from an occupational disease related to her whole body pain symptoms.

64. Respondent-Insurer-Hartford required the Claimant attend several IMEs. Claimant attended each IME as required. Claimant provided her own transportation to each IME. Claimant requested reimbursement for the incidental mileage expense. Respondent-Insurer-Hartford reimbursed the Claimant for some but not all expenses. The non-reimbursed expenses arose out of the IMEs conducted by Drs. Macaulay (916/08, 224 miles), Moe (2/28/08, 228 miles) and Brodie (11/12/07, 238 miles). The Claimant is entitled to $276.00 (690 miles at .40 per mile) for the non-reimbursed expenses.

CONCLUSIONS OF LAW

An injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210 C.R.S. (2006). *See City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact or facts, more reasonably probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1977).

In order to prove the industrial injury was the proximate cause of the need for medical treatment and disability benefits 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 disability and the 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). The question of whether the Claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

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

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).

As determined above, the Claimant failed to prove it is more probably true than not that she sustained a compensable injury arising out of and in the course of his employment with the Respondent-Employer.

As determined above, the Claimant failed to prove it is more probably true than not that her condition has worsened.

The ALJ makes the conclusions above based upon Claimant's testimony, the testimony of the lay and medical witnesses, the medical histories provided to medical personnel by the Claimant, and the totality of circumstances.

Claimant has established by a preponderance of the evidence that she incurred $276.00 in expenses related to her independent medical evaluations requested by Respondent-Insurer-Hartford. Respondent-Insurer-Hartford shall pay Claimant said amount.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that she incurred $276.00 in expenses related to her independent medical evaluations requested by Respondent-Insurer Hartford. Respondent-Insurer Hartford shall pay Claimant said amount.
2. With the exception of the $276.00 in expenses in paragraph 4 above, Claimant's claims for benefits under the Workers' Compensation Act of Colorado are denied and dismissed.
3. Respondent-Insurer-Hartford shall pay statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.
4. Any and all issues not determined herein are reserved for future decision.

DATE: April 17, 2009
/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-711-171

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 12, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 3/12/09, Courtroom 3, beginning at 1:31 PM, and ending at 2:40 PM).

At the conclusion of the hearing, the ALJ established a briefing schedule, briefs to be filed electronically. Claimant's opening brief was filed on March 31, 2009. Respondents' answer brief was filed on April 15, 2009. On April 16, 2009, Claimant filed an unopposed motion for a three-day extension of time within which to file a reply brief. The motion was denied on April 20, 2009 because a reply brief would be superfluous since Claimant has prevailed in the above-captioned matter. Therefore, the matter was deemed submitted for decision on April 20, 2009.

ISSUE

The sole issue to be determined by this decision concerns whether Claimant's auto accident injury of December 14, 2006 arose out of and in the course and scope of his employment with the Employer herein.

FINDINGS OF FACT

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

Stipulations and Findings Thereon

1. Pinnacol should be permitted to withdraw the General Admission of Liability that it filed on January 30, 2007, prospectively. Pinnacol is hereby permited to do so

2. The automobile accident at issue in this matter aggravated Claimant's pre-existing seizure disorder. The ALJ so finds.

Claimant's Medical Situation

3. A report from David Reinhard, M.D., outlines Claimant's medical history. In summary, several years ago, Claimant battled cancer in his left eye and is now blind in that eye. In 2003, Claimant was diagnosed with a meningioma (benign brain tumor). Claimant underwent a right parietal occipital craniotomy in August of 2003 to extract that tumor. After the surgery, Claimant developed focal seizures that, in relevant part, manifest as "flashing lights." These 'flashing lights" appear in the lower left quadrant of his field of vision where he otherwise has no sight because of the blindness associated with the original cancer. On occasion, the simple focal seizures have progressed all the way to tonic/clonic and/or grand mal seizures.

4. The insurance carrier admits that the automobile accident at issue in this matter substantially and permanently aggravated Claimant's underlying seizure disorder. Claimant now suffers seizures more frequently and those seizures last longer.

Moreover, Claimant now may experience more advanced seizures without first having an episode of "flashing lights." Claimant has been treated with a variety of medications and was recently taking Lexapro, Dilantin, Topamax, Xanax and oxycodone. Prior to the accident in this claim, on occasion, Claimant had bouts of confusion after severe seizures. Some short-term memory loss had been noted, as well. As Dr. Reinhard noted in his report, roughly two to three hours after the accident, Claimant's wife began to notice changes in Claimant's mental status. At the present time, Claimant's problems with imbalance, concentration, multitasking and memory persist. Claimant has also experienced episodes of extreme emotional agitation associated with use of the medications prescribed to cope with his seizure disorder.

5. Following treatment for the meningioma, Claimant was hospitalized for grand mal seizures on a few occasions. None-the-less, Claimant's treating neurologist released Claimant to full duty in May of 2006 and Claimant did well until the automobile accident on December 14, 2006.

Description of Claimant's Employment Duties and Purposes

6. The Employer is located at on Osage Street, in Denver, Colorado. It sells petroleum delivery equipment (such as gas pumps) used by service stations and it also sells equipment used in car washes, and has a service department that services the equipment it sells as well as equipment that other companies have sold. The Employer charges its customers for the parts and service that its service technicians ("techs") provide. For local service calls, it charges its customers a flat "trip charge" in addition to parts and labor.

7. Claimant knew the owners of the Employer before they hired him. The Employer hired Claimant to start up their service department. At the time of the accident at issue in this matter, the Employer employed 5 or 6 full-time techs. The Employer provides each of its techs with a service truck that the techs drive home at night and to work in the morning. The Employer owns the trucks. Furthermore, the Employer pays to keep these trucks on the road, covering insurance, gas, maintenance and licenses. Each of the trucks in the Employer's fleet also markets the Employer in that its company name and logo, along with its phone number, is affixed to the trucks' exteriors. The Employer's fleet also advertises the names and/or company logos of the equipment and/or parts manufacturers that the Employer uses in the course of its business.

8. The trucks in the Employer's fleet are all stocked with parts that the Employer's techs use to provide service. Having parts available on the trucks expedites service, a benefit to the Employer's customers, which also directly benefits the Employer. The trucks also contain tools used by the techs to provide service. Some of those tools are owned by the techs and some of the tools are owned by the Employer. Having appropriate tools on the truck provides the Employer with the same benefit that having parts on the trucks does.

9. As a general rule, techs are not allowed to use their trucks for personal errands. Nonetheless, Claimant was never required to provide the Employer with information concerning the mileage used on his truck.

10. As with other techs, Claimant is sometimes on call 24 hours a day. Claimant does not remember whether he was on call at the time of the accident at issue in this case. At times, even when Claimant is not "on call," Claimant has been called in to perform service. Having techs with fully stocked trucks on call benefits the Employer because there are times when other techs cannot get to jobs in a timely manner.

11. Claimant was paid on an hourly basis and is paid overtime. To get paid, Claimant simply provided the Employer with a time sheet indicating the hours he worked that week.

12. As noted, the Employer's techs keep their trucks around the clock. The Employer conceded that, when its techs drive directly home after their last service call, the Employer pays them until they reach home.

13. The Employer's techs often drive directly to service calls, rather than to company headquarters, to start their day. When the techs drive directly from home to a service call, the Employer pays them from the time they leave their homes. In the event a tech drives to company headquarters before going out on a service call, the tech is ordinarily *not* paid until they leave company headquarters.

14. Fred Seymour, in general, agreed with Claimant's description of the Employer's business and that Claimant's testimony concerning the Employer's business was credible. At one point, Seymour stated that if an Employer serviceman drives back to company headquarters before driving home, the service technician is paid until he reaches company headquarters but is **not** paid for the time spent traveling from company headquarters to the service technician's home. Near the end of the hearing, the following colloquey occurred:

> ALJ Felter: If they stop on the way home at [the Employer] to pick up a part for the next day and then go on home they will be paid until they get home, right?
>
> Fred Seymour: Yes.

Furthermore, Fred Seymour "clarified" that whether the tech was paid in such circumstances depended on whether the trip to [the Employer] was related to a specific job, otherwise it would be inappropriate to charge the customer.

Claimant, in turn, testified that whether they are paid under such circumstances depends on whether they are driving back to company headquarters to pick up parts that they need to complete service calls the following day.

15. Employer drivers take the trucks home every night because, in relevant part, they can go directly from their homes to service calls in the morning. This benefits to the Employer's customers, who can get service performed earlier than they otherwise would have. This, in turn, benefits the Empl,oyer in a variety of ways. First, the ALJ infers and finds that this saves wear and tear on the trucks. Second, the ALJ infers and finds that Employer servicemen are able to complete more calls on average when they can drive directly from home to their first call rather than first driving into work. These factors provide a direct economic benefit to the Employer. The Employer gets more work out of its employees.

The December 14, 2006 Incident

16. On December 14, 2006, after his last service call was complete, Claimant decided to drive to the Employer's place of business before returning home for the evening. As best as he can recall (with admittedly impaired memory and cognition), Claimant believes that he had decided to return to the Employer's office to pick up a printer. The insurance carrier had admitted this claim when they believed that Claimant was driving directly home at the time of the accident. Respondents moved to withdraw their General Admission on this claim only when they learned that Claimant had elected to return to the Employer's premises after hours, first, before going home. There was no evidence offered by Respondents to dispute the Claimant's testimony that he decided to go to the Employer's place of business to pick up a printer. Claimant did not benefit in any way by stating that he detoured to the Employer's place of business that evening, instead of omitting this and simply indicating that he was going home after completing the offsite job. It was this information that caused the insurance carrier to challenge compensability. Under the circumstances, the Claimant's statement to this effect, which is against his own interests, is inherently reliable and the ALJ finds that it is more reasonably probable than not that Claimant detoured to the Employer's place of business to pick up a printer for work-related purposes. Either way, under the Employer's policies, the Claimant remained in the course and scope of employment at the time of the auto accident.

17. Fred Seymour testified that if a service tech drove from home to the Employer's place of business in the morning, he was not paid for his travel time. Similarly, Seymour testified that if a service tech drove home from the Employers place of business at the end of the day, he would not be paid for this travel time. Seymour stated that the service tech would only be paid for his travel to or from home if it was reasonable for such travel to be charged to the customer. There is no persuasive support in written policies for Seymour's exercise of discretion in this regard. Seymour stated that Claimant would not have been paid for his travel from the Employers place of business to his home. Indeed, the ALJ finds this self-serving statement of Seymour unsupported by the case law concerning course and scope of employment. The ALJ infers and finds that Seymour's testimony in this regard oversimplifies the intricate course of Claimant's travels on the night in question. It is strained to simply posit that Claimant would not be

paid for going home from the Employer's office, when the Claimant would be paid when going home from an offsite job. Even if the Claimant had attempted to deviate from his trip home (for which he would have been paid), he changed his mind about going to the Employer's offiuce and continued on his way home, taking an alternate route to avoid a traffic jam on I-25.

18. Having made the decision, Claimant drove his service truck onto Sixth Avenue ("6th") and then headed east to Interstate 25 (I-25). He exited 6th onto I-25 and headed north. Thereafter, Claimant exited I-25 onto Colfax Avenue (Colfax), heading east. He then turned right onto Osage, and headed south. The Employer's place of business is located at on Osage. As Claimant was approaching the Employer's place of business while traveling on Osage, he decided to go home, instead. According to the Claimant, it was late, after normal business hours, and he was tired and didn't feel like dealing with the alarm system. He turned around and headed north on Osage to Colfax. He turned left onto Colfax and headed west. Rather than get back on I-25, where there was a traffic jam because it was rush hour, Claimant decided to take an alternate route home. Thus, instead of getting back on I-25, he drove under the highway towards Federal Boulevard, where he intended to turn north to continue his journey home. He stated, using his best judgment, this would be the quickest way for him to get home. Therefore, Claimant never entered the Employer's headquarters. Respondents offered no evidence to dispute the Claimant's testimony in this regard. Therefore, the Claimant's testimony in this regard is credible, persuasive and undisputed.

19. If Claimant had not decided to go to the Employer's place of business, after hours, to pick up a printer, it is more likely than not that he would have continued north on I-25 towards home and he would have passed the Colfax exit. Had Claimant gotten back onto I-25 rather than heading under the interstate to Federal, Claimant would then have been driving the exact same path that he would otherwise have followed to get home.

20. As Claimant was approaching an intersection where the light was red, the lights from an oncoming vehicle were reflected by a crack in the windshield into Claimant's one "good" eye. He was startled and blinded. He ran into the back of another vehicle. There is no dispute that there was a crack in the windshield of the Employer service truck that Claimant was driving at the time of the accident. There was no evidence that contradicted Claimant's description of the automobile accident. Claimant's testimony concerning the accident and the event leading up to the accident is persuasive, credible and undisputed.

21. Claimant's employment "contract" with the Employer mandated daily, off-premises travel. As noted above, the Employer hired the Claimant to set up a service department so that the Employer could make money by selling equipment and by providing service on the equipment it sells as well as service on equipment that others sell. The benefits the Employer reaped from the Claimant's mandated service and use of the work truck are many. First, the Employer benefited by being able to provide service for the equipment it sells is, a selling point that increases its sales. Second, the Employer

charges for the services its techs provide. The Employer makes money from the service its employees provide on equipment that others have sold. The Employer also makes money on the parts its service technicians must install or replace when they provide service to either group of customers. Moreover, having techs travel in the Employer's fleet of trucks expedites service so that they can get to service calls earlier, allowing them to complete more calls a day and allowing customers to be serviced earlier in the day – and allowing them to stay later, as well. Additionally, having the techs drive trucks stocked with parts and tools allows them to complete jobs without the onus of running back and forth to the Employer's headquarters every time a part is needed. This, in turn, increases the number of calls that techs complete in a day. This makes money for the Employer. Moreover, as noted, the Employer's fleet of service trucks – replete with signage identifying the Employer, the products it sells and providing a contact telephone number – is a marketing tool... the trucks are traveling billboards, thus, a dual benefit is conferred on both the Employer and the employee. Finally, having techs take the trucks home with them renders the techs available to complete calls at any time of day or night, regardless of whether those techs happen to be on call. In short, there is no question as to whether Claimant's travel was contemplated by his employment contract and the travel, for all the reasons previously mentioned, not only conferred a "benefit" on the Employer, but was in fact an essential part of the Employer's business. This is evidenced by the fact that the Employer pays its employees while they drive their work trucks home. Also, travel home from a worksite, in an Employer truck, was at the express or implied request of the Employer.

Ultimate Fact

22. The Claimant has proven, by a preponderance of the evidence, that it is more reasonably probable than not that his injury of December 14, 2006 arose out of the course and scope of his employment for the Employer. Therefore, the Claimant has proven, by a preponderance of the evidence that he sustained a compensable injury on December 14, 2006.

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 was credible throughout and, in many instances, undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

b. Ordinarily, as a general proposition, employees who are injured while going to or coming from work are not entitled to workers' compensation benefits for the injuries they sustain. That proposition is known as "the going to and coming from" rule and is well settled. *See, for example*, *Industrial Commission v. Nissen's Estate*, 84 Colo. 19, 267 P. 791 (1928). "Travel status" – those traveling at the behest of the employer, for example – is an exception to the "going to" or "coming from" employment rule and employees on travel status are entitled to compensation for injuries that occur while they are traveling if the travel is at the express or implied request of the employer,[1] or if the travel confers a benefit on the employer beyond the sole fact of the employee's **arrival at** work.[2] As found, travel home from a worksite, in an Employer truck was at the express or implied request of the Employer and it conferred several benefits on the Employer. Nevertheless, an employee may sever the causal connection between employment and the trip if the employee is injured while on some purely personal errand: the theory being that the employee was no longer serving the employer's interest at the particular time his or her injury occurred. *See, for example, Silver Engineering Works, Inc*. v. Simmons, 180 Colo. 309, 505 P.2d 966 (1973) [employee on a prolonged business trip in Mexico drowned while on a weekend fishing and swimming trip]. Once the personal errand or deviation is completed, however, and the employee returns to the regular travel routine, continuous workers' compensation coverage resumes.[3] In the present case, Respondents argue that Claimant should not be compensated for his injury because, in effect, he stopped "working" when he headed to the Employer's premises to pick up work equipment on the night of his injury. Even under the "deviation" theory, Claimant started to go to the Employer's office, changed his mind, and resumed going home from the worksite (for which he would be paid) in a company truck.

c. The 'dual purpose" doctrine holds that an injury sustained while an employee is performing an act for the mutual benefit of the employer and the employee is usually compensable, even if performed off the employer's premesis on the employee's personal time. *Berry's Coffee Shop, Inc. v. Palomba, infra*; *Keystone International, Inc. v. Gale,* 33 Colo. App. 216, 518 P.2d 296 (1973). When the employee's activity confers some benefit to the employer, it **cannot** be considered to be purely personal, it may considered incident to the employee's work and "arising out of thecourse and scope of employment. *Deterts v. Times Publishing Co.,* 38 Colo. App. 48, 552 P.2d 1033 (1976); *Berry's Coffee Shop, Inc. v. Palomba, infra. Also see Security State Bank of Sterlking v. Propst,* 99 Colo. 67, 59 P.2d 798 (1936). As found, the fact that Claimant drove the Employer's truck home, with the company logo on the truck, plus the fact that Claimant drove from home to worksites with his equipment, conferred benefits on the Employer, among other things, creating greater efficiency and saving the Employer money. The ALJ concludes that driving the Employer vehicle to and from work, at least, conferred an equal benefit on the Employer herein.

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Claimant has sustained his burden with respect to "arising out of the Course and scope of employment" and with respect to compensability. As found, he sustained an aggravation of his pre-existing sezure disorder in the compensable auto accident of December 14, 2006.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents' previously filed General Admission is deemed withdrawn, prospectively.

B. Claimant sustained a compensable aggravation of his pre-existing seizure disorder in the work-related auto accident of December 14, 2006.

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

DATED this_____day of April 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-771-482

ISSUE

The following issue was raised for consideration at hearing.

I. Whether Claimant sustained a compensable injury on October 18, 2007?

PARTIES' STIPULATIONS

The following stipulations were agreed upon by the parties should the claim be determined compensable:

1. Claimant's average weekly wage is $558.97.

2. Temporary Total Disability benefits would be payable commencing September 29, 2008 and continuing until terminated by law.

3. Medical benefits are authorized commencing on September 12, 2008 with Workwell as the designated medical provider.

4. Claimant also stipulated at hearing that he is pursuing only a claim for a specific injury on October 18, 2007 and is not alleging any other specific injury or onset of an occupational disease during his employment with the Employer.

FINDINGS OF FACT

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

1. Claimant was employed by the Employer beginning on December 4, 2006. Claimant alleged he was injured on October 18, 2007 while lifting a box onto his shoulder.

2. Claimant acknowledged that he did not report the alleged injury to anyone on October 18, 2007 and that he continued working his normal duties that day and the remainder of October, November, and December 2007 without reporting any incident to the Employer.

3. The Employer's staff person who handles workers' compensation matters testified that upon Claimant's orientation in December 2006, he was provided with detailed instructions on how to report injuries to the Employer. A co-owner of the Employer credibly testified that the company had weekly safety meetings, which Claimant attended, where procedures for reporting injuries were discussed as well as means of preventing injuries.

4. Claimant was laid off due to a slowdown in work in January 2008. Claimant alleges he told the co-owner of the Employer and the Employer's staff person who handles workers' compensation matters about the alleged October 18, 2007 injury at the time he was laid off in January. Claimant maintains that the staff person who handles workers' compensation matters refused to fill out an accident form because "she was out of forms." During testimony, these employees were credible in their vehement denial of Claimant's contention about communications to them in January 2008 concerning the alleged injury.

5. On January 11, 2008, Claimant was evaluated by his family medical provider, Dr. Zachary Flake. In Dr. Flake's report, Claimant was noted to have a one-month history of

right shoulder pain that began as he was lifting a heavy box onto his right shoulder. There is no mention in Dr. Flake's report of the injury having occurred at work.

6. During testimony, Claimant acknowledged he was lifting boxes outside of work during this time period. On or about November 9, 2008, Claimant moved residences. Claimant testified that he personally packed his belongs, some in boxes, and moved all of his possessions between apartments in Loveland. Claimant testified that no one else helped him with the move.

7. Claimant returned to work at the Employer, on or about January 21, 2008, roughly 3 weeks after the layoff. Claimant testified he continued to work normal job duties and hours between his return to the Employer in January 2008 through August 2008. Claimant testified he did not report the alleged injury of October 18, 2007 during this time period.

8. Claimant returned to Dr. Flake on August 15, 2008 and reported eight months of pain following lifting a box at work.

9. On or about September 1, 2008, Claimant reported the alleged October 18, 2007 injury to the Employer. An accident investigation form was completed and the incident was reported to the Insurer. Claimant was provided medical care for the alleged incident through Dr. Margaret Irish at Workwell, one of the designated medical providers for the Employer.

10. Dr. Irish evaluated Claimant on September 18, 2008 and September 29, 2008. In the September 18, 2008 report, Claimant indicated the injury had occurred in September 2007, in the September 29, 2008 report, Claimant indicated the October 18, 2007 date. Dr. Irish opined "I am not sure that I can prove that this is work related." Despite questions regarding compensability, Dr. Irish assigned work restrictions effective September 12, 2008.

11. Claimant was laid off on September 29, 2008 due to a reduction in hours. The paperwork documenting the layoff was completed on September 30, 2008. Several other employees were laid off at the same, or a similar time. Claimant has not returned to work for the Employer since September 29, 2008.

CONCLUSIONS OF LAW

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

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 consider-

ing all of the evidence, that a fact is more probable than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). 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). Even where there is an acknowledged incident, which in this case there is not, 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).

Here, Claimant alleges a specific injury on October 18, 2007. Despite indicating he felt immediate pain at the time of the incident, Claimant failed to report the injury to his employer at the time of the incident or even within the weeks following. Claimant acknowledged that he had access to his supervisor on the date of the alleged incident yet said nothing about his shoulder. Testimony further established that Claimant had regular access to any number of the Respondents managers and Claimant could have made a report of the injury at any time. Yet, claimant did not report the injury, did not request medical treatment, and continued to work at his normal full duties for several months. The Employer's witnesses were more credible than the Claimant and they testified that neither Claimant or his co-workers approached them to report and injury nor was it reported that Claimant was having difficulty completing his essential job functions.

Accordingly, it is concluded that Claimant failed to sustain his burden of proof to prove a compensable injury occurring on October 18, 2007. Therefore the workers' compensation claim is denied and dismissed.

ORDER

It is therefore ordered that:

Claimant's claim be denied and dismissed

All matters not determined herein are reserved for future determination.

DATED: April 20, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-730-291

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 April 7, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 4/7/09, Courtroom 4, beginning at 2:45 PM, and ending at 4:00 PM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel, to be submitted electronically. The same was filed on April 15, 2009. Respondents were given 3 working days thereafter within which to file objections. No timely objections were filed. The ALJ has modified the proposed decision and, as modified, hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern: (1) re-opening; (2) if re-opened, the reasonable necessity and causal relatedness of the recommendation of John D. Papilion, M.D., for a repeat arthroscopy, synovectomy, and patellar chondroplasty of Claimant's right knee; and, (3) Claimant's entitlement, if any, to temporary total disability (TTD) benefits from December 4, 2008, and continuing until terminated pursuant to law.

FINDINGS OF FACT

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

1. On April 30, 2007, while working for the Employer, Claimant suffered an industrial injury to his right knee in the course and scope of his employment when he stepped on a pallet jack that slipped, twisting his right knee. Claimant underwent treatment following that injury with authorized treating physicians, Kirk Holmboe, D.O., at Concentra Medical Centers, and John D. Papilion, M.D., at Advanced Orthopedic and Sports Medicine Specialists, P.C.

2. On February 7, 2008, Dr. Holmboe released the Claimant at maximum medical improvement (MMI). In Dr. Holmboe's report of February 7, 2008, placing Claimant at MMI, he states:

> Patient is seen today for purpose of calculation of impairment rating and case closure. The patient was originally injured at work on 04/30/2007. He was walking and tripped over a pallet, twisted his right leg. He was evaluated the same day and was diagnosed with a knee sprain and given a brace. X-rays were negative. Because of ongoing pain he was sent for orthopedic evaluation and saw Dr. Mark Failin-

> ger. The patient underwent a course of therapy. He had an MRI that showed there was some patellar facet changes. No other structural damage was noted. He also had a CAT scan to rule out any loose bodies, of which he had none.
>
> The patient wanted a second opinion and was sent to Dr. John Papilion who felt that his symptoms were due to a probable symptomatic lateral plica and he recommended arthroscopic surgery. The patient underwent surgery in late September and began physical therapy. He progressed after the surgery had been done and was having fewer symptoms and increasing strength. The patient was eventually released by Dr. Papilion and is currently ready for release from care. Patient does note significant improvement. **The patient does still have some minor pain in the left anterolateral aspect of the knee (**emphasis supplied)**.**

3. On March 3, 2008, Respondents adopted Dr. Holmboe's impairment rating of 12% right lower extremity (RLE) and filed a Final Admission of Liability (FAL). Thereafter, Claimant objected to the March 3, 2008 FAL, but did not pursue a Division of Labor Independent Medical Evaluation (DIME). The FAL,among other things, admitted an average weekly wage (AWW) of $616.82, which yields a TTD rate of $411.21 per week.

4. Thereafter, Claimant's right knee swelled on two occasions prior to December 3, 2008, and on each occasion Dr. Papilion removed fluid from the knee.

5. On December 3, 2008, Claimant returned to Dr. Holmboe who made an assessment of:

> Patient is seen today for purpose of a one-time evaluation regarding his right knee. The patient had originally injured his knee in April 2007. He underwent arthroscopic surgery and was ultimately released from care on 02/07/2008. The patient had his knee drained on the last day he visited with Dr. Papilion. He underwent an Impairment assessment on the 7th of February and was released at MMI at that point. The patient states that since then he has continued to have intermittent difficulties with his knee, particularly swelling. He will have episodes of increasing and decreasing swelling. **He has actually visited with Dr. Papilion on 2 occasions since his release from draining his knee** (emphasis supplied)**.** The most recent episode occurred on 11/20/2008. The patient complains of a pressure sensation on the medial and lateral aspects of the knee. **He has some intermittent sharp pains in the anterolateral aspect of the knee and he notes some grinding with movement** (emphasis sup-

> plied). The patient has been exercising with Bali's. He takes ibuprofen periodically 400 mg 2 or 3 times a day. He does not find this particularly helpful. The patient is not working for PG Exhibits. He has been going to school. His health has not changed. **He has not reinjured the knee.**

6. On December 3, 2008, Dr. Holmboe concluded that:

> Status post arthroscopic partial meniscectomy and excision of lateral plica with synovitis.
>
> > PLAN: The patient continues to have inflammation of the knee for unclear reasons at this point. **I would like him to have his case reopened so that he can consult with Dr. Papilion and see what other treatment options would be recommended.** I did provide him today with etodolac 400 mg tablets to take 1 b.i.d. and suggested continued ice application.

7. Although Dr. Holmboe made the recommendation that Claimant's case be reopened, and indicated to Claimant that he should have etodolac 400 mg tablets to take one at bed time and ice to address the knee problems, he made no recommendation on whether Claimant should be restricted or not. The ALJ infers and finds that Dr. Holmboe was causally relating the change in condition and recommendation of reopening to the original, admitted injury. Also, Dr. Holmboe was more familiar than Dr. Brodie with Claimant's case. The ALJ finds Dr. Holmboe's opinion in this regard credible and it supports a change of condition warranting re-opening.

8. Following Dr. Holmboe's examination of December 3, 2008, Claimant was referred out to the original surgeon, Dr. Papilion. Dr. Papilion states in the first paragraph of his December 18, 2008, report:

> I saw the patient in follow-up today. He is actually well known to me from a previous arthroscopy patellar chondroplasty and lateral release for a work-related injury of 04/30/2007. He was actually placed at MMI. I have seen him back 2 separate times in my private office because of recurrent intermittent swelling in his right knee. He was initially released on 02/07/2008.

9. On the December 18, 2008, Dr. Papilion's assessment was:

> **Persistent and recurrent effusions** (emphasis supplied), status post arthroscopic patellar chondroplasty and lateral release, right knee.

> RECOMMENDATIONS: I would like to get magnetic resonance imaging on the patient's knee to assess his patellar tracking and chondral surface. We may consider hyaluronic acid injections with Synvisc.

The ALJ infers and finds that Dr. Papilion, the treating surgeon, was causally relating Claimant's change in condition to the original, admitted injury. Dr. Papilion is credible in this regard. Dr. Papilion was more familiar than Dr. Brodie with Claimant's case. Dr. Pepilion's opinion supports a change in condition warranting re-opening.

10. On December 18, 2008, Dr. Papilion stated in his office notes that Claimant was released at "regular duty," however, on the "Physician Activity Status Report Sheet" he provided that same day that Claimant was under "Restrictions of Primary Care Physician - Returning for follow-up visit."

11. On December 19, 2008, a day after meeting with Dr. Papilion, Claimant again met with Dr. Holmboe. At that visit, Dr. Holmboe wrote that Claimant's "anticipated date of MMI was January 19/2009" and placed Claimant on restrictions of "no prolonged standing and/or walking longer than tolerated." This supports a changed condition and re-opening.

12. Claimant again saw Dr. Holmboe on January 19, 2009. At that visit Dr. Holmboe's medical records reflect:

> I do have a memo from the referral office stating that no further treatment will be authorized at this point. I have informed the patient of this.

At this visit, Dr. Holmboe released the Claimant to a regular duty.

13. Thereafter, on February 25, 2009, Claimant saw Dr. Papilion. Dr. Pepilion states that Claimant has:

> [O]nce again had **recurrence of his effusion in his right knee, and when this does occur, he has increased pain in his limbs and has difficulty with ambulation** (emphasis supplied)**.**
>
> * * *
>
> He is obviously getting recurrent effusions either from irritation from chondral fragments sloughing off and/or synovitis. Nonetheless, he has had three aspirations and steroid injections, and his effusion has probably recurred. **At this point, I would recommend proceeding with an exam under anesthesia, repeat arthroscopy, synovectomy, and patellar chondroplasty** (emphasis supplied)**.** He is interested in

> pursuing this. We have had a thorough discussion regarding the risks and benefits. His questions were answered. We will set up this as an outpatient. We will await authorization. I will see him back for consent signing. **His work restrictions should limit kneeling and squatting** (emphasis supplied)**.**

14. Claimant's need for surgery is reasonably necessary, and a natural progression of his original admitted industrial injury to his right knee on April 30, 2007, which worsened after his placement at MMI on February 7, 2008. All treatment has addressed the left anterolateral aspect of the knee which was symptomatic at MMI and which condition has deteriorated.

15. Respondents retained the services of Matthew Brodie, M.D., to perform an independent medical examination (IME). Dr. Brodie concludes that Claimant's medical problems are a new injury and that Claimant "became disabled, relative to his disability status at MMI, at about 9 months post-MMI (which would place the beginning of disability in November 2008)." The ALJ finds that the opinions of Drs. Homboe and Papilion outweigh Dr. Brodie's opinion with respect to the causal relatedness of Claimant's change in condition and need for the treatment recommended by Dr. Papilion.

16. There is confusion between the authorized treating physicians as to whether Claimant was or was not on restrictions after December 3, 2008, because different physicians at different times have placed him on restrictions and, yet, Claimant's symptoms have remained consistently disabling since December 3, 2008. Matthew Brodie, M.D., Respondents' Independent Medical Examiner (IME) clarifies this with his opinion that Claimant has continued to be disabled at least since December 3, 2008. The ALJ finds Dr. Brodie's opinion concerning disability persuasive and credible.

17. Dr. Brodie's statement supports the December 19, 2009, finding of authorized treating physician, Dr. Holmboe and the February 25, 2009, finding of authorized treating physician, Dr. Papilion, placing Claimant under restrictions and finding that when Claimant's knee swells he has difficulty with ambulation. Dr. Brodie is not a treating physician, however, the ALJ places considerable weight on Dr. Brodie's disability statement to support an award of TTD benefits, and finds that his statement with regard to disability clarifies the multiple opinions authored by the authorized treating physicians. The ALJ, however, resolves the conflict in the causality opinions in favor of Drs. Holmboe and Papilion, the treating physicians, and against Dr. Brodie, the Respondents' IME examiner.

18. Claimant has not worked or earned wages since December 8, 2008. He is under medical restrictions and he has not been declared at MMI after his change of condition. Also, his testimony that he has not worked since at least December 3, 2008 is undisputed and credible. Therefore, the Claimant has been temporarily and totally

disabled since December 8, 2008. The ALJ finds that the change in Claimant's condition has caused a greater impact on his condition and disability.

19. Claimant has proven, by a preponderance of the evidence, that Claimant's condition has changed or worsened since he reached MMI, thus, warranting a reopening; that Dr. Papilion's recommendation for a repeat arthroscopy, synovectomy and patellar chondroplasty of the right knee is causally related to the admitted injury and reasonably necessary; and, that the Claimant has been temporarily and totally disabled since December 8, 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, Drs. Homboe's and Pepilion's opinions on causality are more persuasive and credible than Dr. Brodie's opinion in this regard because they have been more familiar with the Claimant's case and they have been the Claimant's treating physicians. The ALJ, however, finds Dr. Brodie's opinion concerning the Claimant's disability since at least December 3, 2008 more persuasive and credible because it clears up the confusion in Dr. Holmboe's and Papilion's contradictory, multiple releases to return to work after the change in condition. Also, as found, the Claimant's undisputed testimony that he has not worked since at least December 3, 2008 was credible. *See, Annotation, Comment: Credibility of Witness Giving Uncontradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App.

2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has sustained his burden with respect to reopening; additional medical benefits, as recommended by his treating physicians, after reopening; and, with respect to TTD benefits from December 4, 2008 and continuing.

c. Pursuant to Section 8-43-303(1), C.R.S. (2008), a claim may be re-opened based on a change of condition that occurs after MMI. *See El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993). As found, Claimant underwent a change of condition since he previously reached MMI on February 7, 2008.

d. It is proper to re-open a claim and award additional temporary disability benefits when a worsened medical condition has caused a greater impact on the Claimant's temporary work capacity than existed at MMI. *See City of Colorado Springs v. ICAO*, 954 P.2d 637 (Colo. App. 1997). As found, from the date of MMI Claimant's medical and functional condition has worsened. Based on this alone re-opening is warranted. Further, his restrictions have increased causing additional disability.

e. 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); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). As found, the medical treatment recommended by Drs. Holmboe and Papilion is causally related to the change in Claimant's condition since he previously reached MMI on February 7, 2008. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. Section 8-42-101 (1) (a), C.R.S. (2008). *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, all of the Claimant's recommended medical care and treatment for his right knee, as reflected in the evidence, is reasonably necessary.

f. The issue of whether medical treatment is necessitated by a compensable aggravation or a worsening of the claimant's pre-existing condition is one of fact for resolution by the ALJ based upon the evidentiary record. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). A decision in this regard should be upheld if the ALJ's factual determinations are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. (2008). An ALJ's factual findings must be supported by substantial evidence in the record. *Brownson-Rausin v. Industrial Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). As found, the ALJ resolved the conflicts in the evidence on the

causality issue in favor of the treating physicians, and the temporary disability issue in favor of IME Dr. Brodie. As found, Claimant's need for surgery is reasonably necessary, and a natural progression of his original admitted industrial injury to his right knee on April 30, 2007, which worsened after his placement at MMI on February 7, 2008. All treatment has addressed the left anterolateral aspect of the knee which was symptomatic at MMI and which condition has deteriorated.

g. To establish entitlement to temporary disability benefits, Claimant must prove that the industrial injury, or occupational disease, has caused a "disability," and that he suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanburg,* 898 P.2d 542, 546 (Colo. 1995). The term "disability," as used in workers' compensation cases, connotes two elements. The first element is "medical incapacity" evidenced by loss or reduction of bodily function. There is no statutory requirement that a claimant present medical opinion evidence from of an attending physician to establish his physical disability. *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, a claimant's testimony alone is sufficient to establish a temporary "disability." *Id.* As found, Dr. Brodie's opinion establishes Claimant's entitlement to TTD benefits from December 4, 2008 and continuing.

h. 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 a claimant from securing employment. Once the prerequisites for temporary partial disability (TPD) and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring, and there is no actual return to work), TPD and/or TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, Claimant has been experiencing a 100% temporary wage loss since December 4, 2008. Also, he has been unable to return to his usual job due to the effects of his April 30, 2007 injury. Consequently, Claimant is "disabled" under Section 8-42-105, C.R.S. (2008), and he is entitled to TTD benefits from that time forward. *Culver v. Ace Electric, supra*; *Hendricks v. Keebler Company,* W.C. No. 4-373-392 [Industrial Claim Appeals Office (ICAO), June 11, 1999].

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant's claim in W.C. No. 4-730-291 is hereby re-opened.

B. Respondents shall pay the costs of implementing the recommendation of John D. Papilion, M.D., on February 25, 2009, for a repeat arthroscopy synovectomy

and patellar chondroplasty of Claimant's right knee, subject to the Division of Workers' Compensation Medical Fee Schedule.

C. Respondents shall pay the Claimant temporary total disability benefits commencing December 4, 2008, at the admitted rate of $411.21 per week, or $58.74 per day from December 4, 2008 through April 7, 2009, both dates inclusive, a total of 124 days, in the aggregate amount of $7,284.29, which is payable retroactively and forthwith. From April 8, 2009 until terminated pursuant to law, Respondents shall continue to pay the Claimant temporary total disability benefits of $411.21 per week.

D. 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.

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

DATED this_____day of April 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-485-027 (Consolidated)

ISSUES

The issues to be determined by this decision are the following:

Whether Claimant has proven by a preponderance of evidence that she suffered compensable injuries with the Respondent-Employer in 2002 and 2006 (or instead whether Claimant's total body pain represents a non work-related pain/somatoform disorder).

Whether Claimant has proven by a preponderance of evidence a worsening of her 2004 injury with regard to her admitted de Quervain's tenosynovitis (and whether she is entitled to any additional medical care for the condition).

Whether Claimant has proven by a preponderance of evidence a worsening of her 2000 injury with regard to her low back condition.

Whether Claimant has proven by a preponderance of the evidence that she incurred reimbursable medical expenses relating to travel.

FINDINGS OF FACT

1. Claimant works for the Respondent-Employer as a hair stylist. She is happy working with the Respondent-Employer and enjoys her job.

2. Claimant reported no problems with the Respondent-Employer despite her multiple workers' compensation claims. Claimant continues to work for the Respondent-Employer to date.

3. Claimant admitted that she had multiple symptoms (consistent with a somatoform disorder) dating back to at least April of 1990. These symptoms include the following: "Migraine headaches, nervousness, knots under left foot, ringing in ears." Claimant also reported blurred vision and neck pain as well dating back to at least 1990. Claimant admitted that she continued to have these medical problems and symptoms on an ongoing basis.

4. Claimant received consistent treatment from a chiropractor between 1990 and 2000 for total body pain. The medical records from the chiropractor detail treatment for total body pain including the following: neck pain, low back pain, thoracic pain, headaches, hand pain, foot pain and shoulder symptoms. Claimant continued to report this total body pain in the 8 to 10 years leading up to the first alleged work injury.

5. Claimant never alleged during the time of this treatment that this total body pain was work-related. Instead, Claimant reported these symptoms for almost 8 to 10 years before alleging a work-related injury against the Respondent-Employer.

6. Claimant reported her ongoing total body pain as a possible work-related occupational disease culminating in approximately September of 1998. Specifically, Claimant presented with the following presentation of total body symptoms:

> [Claimant] is a 38-year-old employee of [Respondent-Employer], who complains of spasms when cutting hair, sweeping hair, cleaning combs, pain in her neck, back, feet, shoulders, and hands when she is cutting hair, as well as headaches, dizzy spells, and pain at the sides of her hands with numbness in the arms, pain when she turns her head to the left, and sharp pain in the middle back and the lower back, and the feet hurt on the bottom always. They are popping, feel tight. Her feet hurt on the sides sometimes, and her shoulders feel real tight.

7. Claimant also reported pressure in the back of her head, which her eye doctor apparently told her was due to her diet.

8. Dr. Ruth Light examined Claimant on January 14, 1999 for this alleged occupational disease and opined that this total body pain was clearly not work-related, commenting:

> This patient with wide-spread myalgias had the onset of pain in mid September. She reports absolutely no change in her work pace, work site, work techniques in the job she had been performing . . .. Myalgias spare no portion of the body affecting the trunk, the entire back, and upper and lower extremities. This is not the pattern of a discrete injury but the pattern of a systemic disease.. . .. It is not work-related. She needs to go to

> her primary care physician for evaluation and treatment. I can only propose some of the diagnoses which need to be investigated, such as, thyroid disease, renal disease and other systemic problems.

9. Claimant never litigated this injury date.

10. Claimant is taking Synthroid for thyroid disease. Specifically, the following history regarding this condition is contained in the medical records:

> [Claimant] has a history of hypothyroidism which does increase the probability of a neural abnormality. She has recently gone up on her Synthroid dose. This is probably contributing [to her condition.]

11. Claimant again reported that her longstanding total body pain was work-related as a result of an alleged occupational disease culminating on September 23, 2000. Atlantic Mutual was the insurance company on the risk as of the date of this alleged work injury.

12. Respondent-Insurer-Atlantic referred Claimant for medical treatment with Dr. Sparr. During the first examination with Dr. Sparr on October 25, 2000, Claimant reported pain in her back, both feet, both shoulders and hands. She also detailed neck pain, headaches and pain in her upper extremities.

13. Claimant continued to report total body pain on an ongoing basis with this alleged work injury. Dr. Sparr ultimately released Claimant to MMI on March 21, 2001 with a 0% PPD rating. Dr. Sparr recommended further medical treatment and prescription medications as a result of the alleged work injury.

14. Atlantic Mutual filed a final admission of liability on August 30, 2001. The admission admitted to the 0% PPD rating provided by Dr. Sparr.

15. Claimant continued to treat with Dr. Sparr for total body pain from October 25, 2000 through November 3, 2006.

16. Claimant failed to report any significant improvement in her symptoms despite this longstanding medical treatment and a reduction of her hours at work. Claimant went from working 40 hours per week down to approximately 25 hours per week.

17. Claimant continued to report total body pain and alleged multiple occupational disease claims on the following dates: July 10, 2002; July 7, 2004; and July 1, 2006.

18. Hartford Insurance Company of the Midwest was the insurer on the risk for these alleged injury dates. Respondents filed notices of contest on the 2002 and 2006 injuries. These claims were denied because Claimant was simply presenting the same total body pain that had been present at least dating back to 1990.

19. Respondents denied all components of a total body claim for the 2004 injury as well. Respondents did, however, admit to a minor left de Quervain's tenosynovitis of the thumb and wrist.

20. Dr. Sparr ultimately placed Claimant at MMI for this limited thumb and wrist condition on May 31, 2006 with a 0% rating. Respondents subsequently filed a final admission of liability for this limited thumb condition on June 13, 2006. Claimant did not file an objection to this final admission of liability.

21. Respondents continued to deny any responsibility for Claimant's ongoing total body pain.

22. Respondents denied any responsibility for ongoing care for Claimant's total body pain. Claimant admitted that she has not been examined for her total body pain in over two years at the time of the hearing.
23. Claimant indicated at the hearing that she was attempting to reopen her admitted 2004 claim related to her left-sided de Quervain's tenosynovitis based on a worsening of condition. At the hearing, however, Claimant directly admitted that her condition had not worsened.
24. Claimant admitted that her symptoms in her left wrist and thumb rated as a 2.5 on a 0 to10-point scale at the time she was placed at MMI for her 2004 injury. Claimant admitted that her symptoms in her left wrist and thumb continued to currently rate as a 2.5 on a 0 to 10 scale at the time of the hearing.
25. Claimant admitted that her symptoms in her left wrist and thumb had not worsened. Specifically, she rated the current pain levels as the same as the pain levels she had when placed at MMI for the condition.

26. Dr. Brodie opined that Claimant did not require any additional medical care for her left wrist and thumb condition. Claimant failed to produce sufficient medical evidence or opinions to refute Dr. Brodie's opinion.

27. Claimant also requested to reopen her 2000 claim based on a worsening of condition with regard to her low back. At the hearing, however, Claimant directly admitted that her condition had not worsened.

28. Specifically, Claimant admitted that her symptoms in her low back rated as a 7.5 on a 0 to10-point scale at the time she was placed at MMI for her 2000 injury. On specific and direct questioning from her own attorney, Claimant admitted that her symptoms in her low back continued to currently rate as a 7.5 on a 0 to 10 scale at the time of the hearing.

29. Claimant admitted to her own attorney, therefore, that her symptoms in her low back had not worsened. Specifically, she rated the current pain levels as the same as the pain levels she had when placed at MMI for the condition.

30. Claimant Admits Symptoms Related to Stress and Tightness Through Her Shoulders, Neck and Jaw

31. Claimant admitted that her jaw pain results from stress and tightness through her shoulders, neck and into her jaw. Specifically, Claimant admitted that her symptoms seemed to worsen with tightness and stress.

32. These symptoms would reportedly start in the shoulders and neck and cause headaches and ultimately jaw pain. Claimant alleged that her jaw pain was work-related due to this stress.

33. Dr. Brodie is an occupational medicine expert, who first examined Claimant on December 8, 2004. Dr. Brodie initially gave Claimant the benefit of the doubt and diag-

nosed the possibility of multiple medical conditions related to Claimant's total body pain. Dr. Brodie also opined that Claimant had left de Quervain's tenosynovitis. As stated previously, respondents filed an admission to the alleged injury in 2004 based on this de Quervain's diagnosis.

34. Dr. Brodie examined Claimant again on November 12, 2007. At the time of this second evaluation, Claimant reported worsening symptoms in the following body parts: low back; neck; thoracic spine; shoulders; jaw (TMJ syndrome); bilateral ear pain; ringing in her ears; clicking in her jaw; headaches; hands and wrists and symptoms in her feet and toes. As a result, Claimant presented again with total body pain (the same type of pain she had been reporting dating back to at least 1990).

35. Dr. Brodie noted that Claimant presented with "multiquadrant global pain, variable presentation in terms of timing and pain." Dr. Brodie believed that Claimant's presentation of pain was non-organic.

36. Dr. Brodie also opined that Claimant had a "symptom mismatch." Dr. Brodie opined that Claimant did not have any significant objective symptoms to justify her physical complaints of pain:

> . . . that last explanation is the most consistent explanation for [Claimant] in that her symptoms aren't correlated or corroborated by any objective disease that can be clinically diagnosed or measured in any way.

37. Dr. Brodie opined that there is no medical literature to support the finding that Claimant suffered an overuse injury to her back, neck, jaw and shoulders as a result of cutting hair. Dr. Brodie first explained that Claimant's job duties were not the type to cause an occupational disease:

> So the idea of good control in this case means that via her ability to self-modulate her body positioning during haircutting activities; shifting weight from one leg to another, taking micro breaks, lower her arms, raising her arms, less reaching, more reaching, change in the position of the person getting the haircut in this case, all of those control factors are substantial in terms of lower risk for developing occupational disease.. . So she is actually at lower relative risk to the population that might be considered at risk, which would put her at equal relative risk and, therefore, at no relative risk for occupational disease for her specific job.

38. Dr. Brodie also explained in detail that there was no known medical literature or studies to support the existence of an occupational disease as alleged by Claimant.

39. Dr. Brodie subsequently concluded that Claimant had a non work-related pain or somatoform disorder to account for her symptoms:

> The multi-quadrant, global, whole-body pain presentation with symptom mismatch, as I described earlier, without objective findings fits very nicely into how Dr. Moe has assessed this patient in terms of pain disorder and psychiatrically non-work-related etiology to her pain complaints.

40. Dr. Brodie did confirm that the only condition that he thought may be work-related was the left-sided de Quervain's tenosynovitis. However, Dr. Brodie opined that Claimant received the proper treatment for this condition prior to the claim closing and did not require any additional care for this injury.

41. Dr. Brodie also opined that Claimant had multiple predisposing factors for carpal tunnel syndrome including her hypothyroidism, age and her gender. Dr. Brodie agreed with Dr. Macaulay that Claimant's alleged mild carpal tunnel syndrome is not work-related. Specifically, Dr. Brodie provided the following opinions on this issue:

> There are, again, using the word component analysis to look for – or to analyze risk factors that would include awkward wrist posture or forceful, sustained grip and pinch, vibration, cold exposure, repetition – slightly lower in terms of risk but it's still listed as a risk factor – those parameters are not really present in [Claimant's] haircutting activities.
>
> And then when you couple that with the endocrine disorder, the hypothyroidism, which we know predisposes her to carpal tunnel syndrome as well as tendinopathies, and the then the advancing age with the female gender, though it becomes less – substantially less than 50 percent probable that she acquired carpal tunnel syndrome or, in this case, the median mononeuropathy from her haircutting, one crucial thing to qualify here is that carpal tunnel syndrome is a constellation of symptoms that also is not consistent with how she presented.
>
> She – she presents with pain in her arms, necks, and shoulders. That is not characteristic of carpal tunnel syndrome. Carpal tunnel syndrome is a constellation of pain, numbness, and tingling in the hands or wrist primarily at night, sometimes during activities. That isn't how [Claimnant] presents. So technically she shouldn't be diagnosed with carpal tunnel syndrome. She can only be – it can only be stated that the nerve connection study shows a mild sensory neuropathy of the median nerve, which by itself is highly consistent with simply one disorder, hypothyroidism.

42. Dr. Brodie concluded in his deposition that Claimant has a pain or somatoform disorder that is not work-related. Claimant presented with alleged physical symptoms

that were actually being caused by an underlying non work-related psychological condition. This diagnosis was further confirmed by Claimant's total body pain without any significant objective findings.

43. Dr. Brodie reached his diagnosis and conclusions before Dr. Moe had performed his examination of Claimant. Dr. Brodie reached the pain or somatoform disorder independently even before Dr. Moe had an opportunity to examine Claimant.

44. Dr. Moe is a psychiatrist that examined and evaluated Claimant on February 28, 2008.

45. Dr. Moe had not reviewed Dr. Brodie's second IME report at the time of his evaluation. Specifically, Dr. Moe was not aware of Dr. Brodie's report until immediately prior to a recent hearing date. Dr. Moe was unaware that Dr. Brodie had already diagnosed Claimant with a pain/somatoform disorder at the time of his evaluation.

46. Dr. Moe also diagnosed Claimant with a pain/somatoform disorder. Dr. Moe opined that while Claimant's physical symptoms appear real to her, they were actually caused completely by an underlying non work-related psychological disorder. It was noted by Dr. Moe that the multiple findings below proved the diagnosis of a pain/somatoform disorder.

47. Claimant again presented with total body pain at the time of her examination by Dr. Moe. Specifically, Claimant presented with the following complaints at the time of the evaluation: low back pain, shoulder pain, neck pain, headaches, upper extremity pain, jaw symptoms, problems with her legs and dizziness. Dr. Moe testified that this presentation of symptoms is completely consistent with a pain/somatoform disorder.

48. Dr. Moe noted that Claimant had disparate and inconsistent symptoms without any discrete injury or objective findings: "In the specific case of Ms. Padilla, recurrent, but often quite disparate, physical complaints have emerged over the years in the absence of an identified acute injury and the in the absence of explanatory physical findings . . .."

49. Dr. Moe further detailed the fact that Claimant's symptoms were diffuse and varied: "In reviewing the complaints that at any time have been the focus of treatment, it is seen that they have a) been quite diffuse; and b) varied considerably without explanation over the years." Dr. Moe noted that these diffuse and varied symptoms are also consistent with a pain/somatoform disorder.

50. Dr. Moe also clarified that Claimant's job duties were not consistent with the development of an occupational disease:

> Her typical duties cannot be said to exceed what a large percentage of the working population faces daily. Moreover, her job would be expected to avail her to position changes,

> brief breaks, and a sense of control (in contrast to performing the same task for hours on end), all of which would retard, rather than promote the development of an overuse condition.

51. Claimant's symptoms never improved with medical treatment.

52. Dr. Moe also noted that Claimant's symptoms were more consistent with a symbolic than a physical cause.

53. Dr. Moe ultimately explained Claimant's pain/somatoform disorder in detail as follows:

> My intent, in summarizing the data above, is not to suggest that [Claimant's] symptoms are dissimulated. Though I do not believe her complaints are equivalent to those generated by demonstrable tissue damage, they are "real," insofar they do cause her suffering. I do not believe that she is making claims that she does not believe – the symptoms as reported reflect her subjective reality. At the same time, the condition reflected in the data summarized above is different from the effects of a work injury. The pathology is not likely localized to the end organs identified by the patient to be the source of her pain. Instead, the disorder is in the brain – in the experiencing of physical sensation, in the subjective assessment of their severity and meaning, and in the myriad non-physical factors that influence a patient's experience and reporting of symptoms. Thus is Pain Disorder, a condition not caused by injury or exposure to physical influences.

54. Dr. Moe summarized by noting that all of Claimant's symptoms and the evidence on this case pointed to only one conclusion: that is, that Claimant has a pain/somatoform disorder. Dr. Moe opined that this could be the only diagnosis that could explain Claimant's diffuse and global pain without any significant objective findings.

55. Dr. Macaulay performed an IME with regard to Claimant's reported upper extremity symptoms on or about September 16, 2008.

56. In his report, Dr. Macaulay noted that Claimant's symptoms were inconsistent with the diagnosis of carpal tunnel syndrome. Dr. Macaulay also opined that Claimant's job duties were not consistent with causing this diagnosis. Finally, Dr. Macaulay noted that Claimant instead had findings consistent with her underlying thyroid disease. Dr. Macaulay agreed with Dr. Moe and Dr. Brodie that Claimant had not suffered a work-related condition and had a non work-related "pain disorder."

57. Dr. Macaulay's opinions were consistent with the opinions of Dr. Brodie on this condition. Specifically, Dr. Brodie also opined that Claimant's hand symptoms did not

constitute carpal tunnel syndrome and instead were simply caused by the underlying thyroid disease.

58. Claimant has established by a preponderance of the evidence that she incurred $276.00 in expenses related to her independent medical evaluations requested by Respondent-Insurer Hartford. Respondent-Insurer Hartford shall pay Claimant said amount.

59. Claimant has failed to establish by a preponderance of the credible evidence that her claim in WC 4-485-027, with a date of injury of September 23, 2000, should be re-opened because of a worsening of her condition.

60. Claimant has failed to establish by a preponderance of the credible evidence that her claim in WC 4-631-428, with a date of injury of October 9, 2004, should be re-opened because of a worsening of her condition.

61. Claimant has failed to establish by a preponderance of the credible evidence that she suffered a work-related injury in her claim in WC 4-653-840, with a date of injury of July 10, 2002.

62. Claimant has failed to establish by a preponderance of the credible evidence that she suffered a work-related injury in her claim in WC 4-620-287, with a date of injury of July 7, 2004.

63. Claimant has failed to establish by a preponderance of the credible evidence that she suffered a work-related injury in her claim in WC 4-690-768, with a date of injury of July 1, 2006.

64. Claimant has failed to establish by a preponderance of the credible evidence that she suffers from an occupational disease related to her whole body pain symptoms.

65. Respondent-Insurer-Hartford required the Claimant attend several IMEs. Claimant attended each IME as required. Claimant provided her own transportation to each IME. Claimant requested reimbursement for the incidental mileage expense. Respondent-Insurer-Hartford reimbursed the Claimant for some but not all expenses. The non-reimbursed expenses arose out of the IMEs conducted by Drs. Macaulay (916/08, 224 miles), Moe (2/28/08, 228 miles) and Brodie (11/12/07, 238 miles). The Claimant is entitled to $276.00 (690 miles at .40 per mile) for the non-reimbursed expenses.

CONCLUSIONS OF LAW

An injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210 C.R.S. (2006). *See City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact or facts, more reasonably probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1977).

In order to prove the industrial injury was the proximate cause of the need for medical treatment and disability benefits 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 disability and the 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). The question of whether the Claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

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

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).

As determined above, the Claimant failed to prove it is more probably true than not that she sustained a compensable injury arising out of and in the course of his employment with the Respondent-Employer.

As determined above, the Claimant failed to prove it is more probably true than not that her condition has worsened.

The ALJ makes the conclusions above based upon Claimant’s testimony, the testimony of the lay and medical witnesses, the medical histories provided to medical personnel by the Claimant, and the totality of circumstances.

Claimant has established by a preponderance of the evidence that she incurred $276.00 in expenses related to her independent medical evaluations requested by Respondent-Insurer-Hartford. Respondent-Insurer-Hartford shall pay Claimant said amount.

ORDER

It is therefore ordered that:

Claimant has established by a preponderance of the evidence that she incurred $276.00 in expenses related to her independent medical evaluations requested by Respondent-Insurer Hartford. Respondent-Insurer Hartford shall pay Claimant said amount.

With the exception of the $276.00 in expenses in paragraph 4 above, Claimant's claims for benefits under the Workers' Compensation Act of Colorado are denied and dismissed.

Respondent-Insurer-Hartford 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 decision.

DATE: April 21, 2009
/s/ original signed by:

Donald E. Walsh

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-486-447

ISSUES

The issues to be determined are authorized medical care providers and whether a prescription for a narcotic medication is reasonably needed to relieve Claimant from the effects of the compensable injury.

FINDINGS OF FACT

1. Ellen Price, D.O., is an authorized medical care provider on this claim.
2. Dr. Price, in the normal course of care for this injury, referred Claimant to Richard Stieg, M.D., and Centennial Rehabilitation Associates. At Centennial Rehabilitation Associates Claimant was treated by Dr. Boyd and Ms. Ouellette, in addition to Dr. Stieg
3. Dr. Price, in the normal course of care for this injury, referred Claimant to Dr. Kleinman.
4. Bradley D. Vilims, M.D., in his report of January 8, 2009, stated that Claimant was "a patient well known to me." Dr. Vilims is an authorized provider.
5. Claimant testified that all her doctors sent their notes to Dr. Wolkov, her family physician, so he would be aware of the treatment Claimant had been receiving.
6. On April 24, 2008, Dr. Stieg, at Centennial Rehabilitation Associates, examined Claimant. Dr. Stieg noted that Claimant had a physical dependency on opioid analgesics

7. On September 18, 2008, Dr. Vilims noted that Claimant has been managed on a chronic opioid program and that she came in for "an appropriately timed medication refill."

8. On October 2, 2008, Claimant was examined by Dr. Kleinman, a psychiatrist, who also reviewed Claimant's medical records. He noted that Claimant continued to be on substantial doses of pain medication that had not been effective in controlling her pain or improving her functioning.

9. On October 15, 2008, Dr. Stieg noted that Claimant had stated that Opana did not help her with pain, and he recommended that Claimant not take Opana.

10. The testimony of Dr. Stieg was received by a deposition. Dr. Stieg testified that Claimant told him that the Opana she was taking did not help her. He took her off Opana and prescribed Suboxone, which is a powerful pain killer and not addictive. Claimant stated to him that the Suboxone did nothing for her, and that she wanted her Opana back. However, Dr. Stieg did note increased functioning during the time Claimant was off Opana and on the Suboxone. Dr. Stieg testified credibly that Claimant did not make sound judgments about the effectiveness of her narcotic medications. Dr. Stieg testified that Claimant should not be prescribed narcotic medications. He testified credibly that Claimant should have all her prescriptions prescribed by one physician. Dr. Stieg has not examined Claimant since October 2008.

11. On October 30, 2008, Dr. Price examined Claimant and reviewed her recent history and treatment. Based largely on the comments of Dr. Stieg, Dr. Price stated, "I do not recommend any opioid analgesics for her pain. I think she does have a dependency issue and it would be best for her to utilize alternative techniques to manage the pain…".

12. On November 4, 2008, Claimant was examined by Dr. Wolkov. She complained of a great deal of pain. He stated that Claimant "has been on Opana ER 40 mg; *bid*. She has not taken it in awhile and is in severe pain and not functioning at all." Dr. Wolkov prescribed additional Opana. In a letter dated December 6, 2008, Dr. Wolkov recommended that Clamant have Opana to control her pain from her complex pain syndrome that was worsening.

13. On December 1, 2008, Dr. Burke, psychiatrist, stated that, "any untreated chronic pain that [Claimant] might be experiencing will likely make her depression worse, as is already happening."

14. On December 11, 2008, Dr. Vilims reviewed Claimant's recent medical records. He stated, "She will get the recommendation that she continue on narcotics." He also stated that Claimant would "get her docs from Denver to give me a call so we can hopefully make a good plan."

15. On February 25, 2009, Claimant was examined by Dr. Cebrain, who is not an authorized treating physician on this claim. Dr. Cebrain stated that, to maintain MMI, Claimant "needs to be on some level of opioid medication."

16. On January 8, 2009, Claimant had a follow-up appointment with Dr. Vilims. Dr. Vilims noted, "at this point she is currently not on any narcotic medications and is suffering quite a bit… Recommendations at this point are to try her with methadone…"

17. The opinion of Dr. Vilims is credible and persuasive. Claimant needed some narcotic medication as of January 8, 2009.

CONCLUSIONS OF LAW

1. An insurer is liable for medical treatment provided by an authorized medical care provider. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Section 8-43-404(5), C.R.S., affords the respondents the right to select the authorized treating physician. Thereafter, treatment that is rendered as a result of a referral in the "normal progression of authorized treatment" is compensable. *Greager v. Industrial Commission,* 701 P.2d 168 (Colo.App.1985).
2. Claimant has established by a preponderance of the evidence that Dr. Price, Centennial Rehabilitation Associates, Dr. Boyd, Ms. Ouelette, Dr. Kleinman, and Dr. Vilims, are authorized medical care providers on this claim.
3. Claimant testified that all her doctors sent their notes to Dr. Wolkov, her family physician, so he would be aware of the treatment Claimant had been receiving. That testimony does not establish that an authorized treating physician referred Claimant to Dr. Wolkov for treatment for this compensable injury. Claimant has not established that Dr. Wolkov is an authorized treating physician on this claim.
4. Determination of the authorization of the medical care providers listed above is necessary to determine liability for ongoing prescriptions of narcotic medications. Other physicians may also be authorized, however, the issue of authorization of other providers is not reached in this order.
5. An insurer is liable for medical treatment that is reasonably necessary to cure and relieve an injured worker from effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. An injured worker is entitled to medical care after maximum medical improvement if the treatment is reasonable and necessary to relieve effects of industrial injury or prevent deterioration of the worker's condition *Grover v. Industrial Commission,* 759 P.2d 705, 711 (Colo. 1988).
6. The opinion of Dr. Wolkov that Claimant needs Opana is not persuasive considering the credible and persuasive testimony of Dr. Stieg that Claimant had improved functioning with Suboxone and his recommendation that Claimant not take Opana. In any event, Dr. Wolkov is not an authorized treating physician, and Insurer would not be liable for the costs of his prescriptions even if his prescription was reasonably needed to relieve Claimant from the effects of the compensable injury.
7. Dr. Vilims, an authorized treating physician, has recommended methadone, a narcotic medication. His opinion is credible and persuasive. Claimant has established by a preponderance of the evidence that Dr. Vilims' prescription for methadone is reasonably needed to cure and relieve Claimant from the effects of the compensable injury. Insurer is liable for the costs of such prescription.
8. This order does not prevent Insurer from challenging any future prescriptions for narcotic medications or other care, and does not prevent Claimant from establishing that Opana or any other narcotic medication or course of treatment in the future may be reasonably needed.

ORDER

It is therefore ordered that insurer is liable for the costs of the methadone prescribed by Dr. Vilims.

All matters not determined herein are reserved for future determination.

DATED: *April 21, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-772-544

ISSUES

The following issues were raised for consideration at hearing.

1. Was Claimant an employee of Colorado State University when he was injured during his pre-employment/fitness for duty test?

2. Did Claimant's injury arise out of and within the course and scope of his alleged employment?

STIPULATED FACTS

At the beginning of the hearing, the parties entered the following stipulation of fact:

1. Claimant experienced a right shoulder injury on April 14, 2008 during the Worksteps/fitness for duty procedure at Poudre Valley Hospital.

2. Claimant was temporarily disabled from the date of his April 14, 2008 injury through November 14, 2008 maximum medical improvement (MMI) date.

3. During this period of temporary disability, Claimant received payment/lost wages directly from Poudre Valley Hospital. Although the final amount still needs to be confirmed, the parties stipulate that the Employer is entitled to an offset for the amount if the claim is found to be compensable.

4. The medical care Claimant received for his right shoulder between April 14, 2008 and November 14, 2008 MMI date was reasonable, necessary, and related to his April 14, 2008 injury.

5. Despite the fact that this claim was under a Notice of Contest, Respondent voluntarily paid for medical care with the authorized providers. At this point, the parties believe that there are no outstanding medical bills related to Claimant's treatment between the April 14, 2008 date of injury and the November 14, 2008 MMI opinion.

6. Claimant's authorized treating physician, Michael Holthouser, M.D., placed Claimant at MMI on November 14, 2008. If found to be compensable, the next step would be for Respondent to confirm Dr. Holthouser's opinion on permanent impairment and then file a Final Admission of Liability or a Notice and Proposal for a Division Independent Medical Evaluation (DIME) pursuant to the requirements of WCRP, Rule 6.

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. At the start of the hearing, counsel acknowledged that the controlling workers' compensation case on pre-employment physicals in Colorado is *Younger v. City of Denver,* 810 P.2d 647 (Colo. App. 1991). The issue for consideration under the *Younger* case, *supra*, is whether there was mutual agreement to create an employer-employee relationship that would justify an award of workers' compensation benefits.

2. Martinez has worked for the Employer 32 years, and has worked as a materials handler supervisor for 22 years.

3. As a materials handler supervisor, Martinez's primary responsibility is to supervise the utility crew. This includes coordinating and overseeing the hiring process of his crew.

4. Martinez speaks Spanish, and was able to communicate with Claimant in both English and Spanish. Martinez testified that he never had any difficulty communicating with Claimant in Spanish, Claimant's primary language.

5. Martinez credibly testified about the various steps in the Employer's employment application process, including the initial contact, the initial background check, the Worksteps program, the subsequent ("green card") meeting with the supervisor, the payroll process, and the final Homeland Security check.

6. Martinez further credibly testified about the Worksteps procedure, including the physical lifting requirements of the position Claimant was in the process of applying for when he was injured. One of the primary reasons an applicant must be able to successfully complete the Worksteps program is so that both the job candidate, as well as the Employer, feels comfortable that the applicant is physically able to perform the requirements of the position. This is not only for the safety of the applicant, but is also necessary for the safety of co-workers. Claimant did not successfully complete the Worksteps program.

7. Since Claimant was not able to successfully complete the Worksteps program, there was no way he could begin working for the Employer. Martinez's testimony on this issue directly contradicted Claimant's contention that he was essentially an employee of the Employer's when he took the Worksteps test. Martinez's testimony was more credible and persuasive than Claimant's.

8. Martinez testified extensively about the remaining steps in the employment process once the Worksteps program is completed successfully by an applicant. One of the most critical of the "post-Worksteps" requirements would have been the meeting between Claimant and the supervisor when the "green card" is filled out. This is when the supervisor (Martinez) and the job applicant discuss and agree on issues such as wages, work schedule, employment benefits, and start date. Following this meeting, the supervisor then fills out the official "green card" confirming the final employment information, which is then taken to the Employer's personnel department. Since Claimant did not successfully complete the Worksteps procedure, Claimant did not participate in a "green card" meeting with Martinez. Consequently, there was no agreement between the parties about wages, schedules, and start dates for the position Claimant was applying for when he was injured.

9. Martinez credibly testified about the payroll enrollment procedure, which is the final step in the application process and includes a number of additional requirements including the requirement that the applicant produce a valid picture ID, produce evidence of a valid bank account, and also requires proof that the applicant has a valid Social Security card. The final requirements are consistent with what is required by Federal Homeland Security law. The federal Homeland Security requirements are substantively different from the informal Social Security number request and background test performed by the Employer at the beginning of the job application process.

10. Martinez confirmed that, if Claimant successfully completed all other part of the Worksteps Program but did not successfully complete the Homeland Security requirements, he would not be able to start working for the Employer. There was no promise of employment, and a job for Claimant was in no way guaranteed to Claimant.

11. Martinez testified that neither he nor any other of the Employer's managers could have waived any part of the Homeland Security requirements for Claimant, regardless of the fact that Claimant was a former seasonal employee. Also, there was no way Claimant could have begun working for the Employer without successfully completing the Homeland Security check.

12. It is found that the testimony of Martinez was credible and persuasive. To the extent Claimant's testimony at hearing contradicted the testimony of Martinez, it is found that Martinez's testimony was more credible and more persuasive.

13. Young is Assistant Director of Housing and Dining Services at the Employer. Her job duties include customer services, departmental background investigations, and coordination of the Worksteps process

14. Young confirmed that the initial background check performed by the Employer, occurs early in the employment process, and is substantially different from the formal "Homeland Security" background investigation, which occurs at the end of the process when the payroll information is being completed.

15. Contrary to Claimant's assertion, Young credibly testified that a job applicant, such as Claimant, would not be able to begin working simply because he successfully completed the Worksteps program.

16. Young confirmed that a supervisor, like Martinez could not waive the final parts of the process, including the Homeland Security requirements.

17. Young testified that there were additional factors, which could influence whether Claimant began working for the employer even after completion of the entire application process, including budget issues, such as funding for the position for which Claimant applied.

18. Contrary to Claimant's suggestion that he thought he would be paid to participate in the Worksteps process, Young testified that this was not true, and that there was simply no way an applicant could receive wages from the Employer until completing the entire employment process, including enrollment in the Employer's payroll system.

19. The testimony of Young is found to be credible and persuasive. To the extent testimony from Claimant contradicted testimony by Young, it is found that Young's testimony is more persuasive and more credible.

CONCLUSIONS OF LAW

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

1. The purpose of the Workers' Compensation Act of Colorado (Act) is to ensure 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 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 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. The facts in a Workers' Compensation case must be interpreted neutrally, neither in favor or the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. 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. To be entitled to workers' compensation benefits, a person must satisfy the statutory criteria and definition of an employee set forth under the Act. *Denver Truck Exch. v. Perryman,* 134 Colo. 586, 595, 307 P.2d 805, 811 (1957); *Loffland Bros. Co. v. Industrial Comm'n,* 714 P.2d 509, 510 (Colo. App. 1985).

4. The definition of employee is found at Section 8-40-202(1)(a)(I)(A), C.R.S. "'Employee' means: Every person in the service of the state, . . . or of any public institution . . . under any appointment or contract of hire, express or implied."; subparagraph

(2)(a) of Section 8-40-202, C.R.S. provides that "any individual who performs services for pay for another shall be deemed to be an employee".

5. As found, the evidence in this case established that Claimant was not under a contract for hire, either express or implied, and was not performing services for pay when he was injured.

6. In order to be compensable, Claimant must show that, at the time of injury, he was "performing service arising out of and in the course of the employee's employment." Section 8-41-301(1)(b), C.R.S. An injury arises out of employment when it has its origin in an employee's work-related functions to be considered to be part of his service to the employer in connection with the contract of the employment. The "course of employment" requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relationship and during an activity that has some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

7. As found, the evidence established that Claimant was not within the time and place limits of any employment relationship when he was injured, and that the Worksteps procedure was not an activity, which had a connection to any job, related functions.

8. A contract of hire contemplates "mutuality of agreement and mutuality of obligation." *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384, 1387 (Colo. 1994). Although a contract of hire does not need to be a formalized commercial contract for purposes of workers' compensation, "what is essential is that Claimant proved that there was an expectation of remuneration for services performed." *Nava-Luna v. Summit Construction*, W.C. No. 4-667-524 (October 20, 2006) referring to *Rocky Mountain Dairy Products v. Pease,* 161 Colo. 216, 422 P.2d 630 (1967).

9. As found, the evidence established that there was no mutuality of agreement between Claimant and the Employer when he was injured. Although Claimant believed that he was going to start working if he passed the Worksteps, this expectation was not reasonable given the credible evidence, including the testimony of Young and Martinez, which established there were a number of additional steps Claimant needed to complete and satisfy before he could begin work for the Employer. As found, there was no agreement between the parties as to the exact date Claimant would begin working if he were hired, nor was there an agreement between the parties as to what Claimant's wages would be if he were hired by the Employer.

10. As found, the evidence established that there was no mutuality of obligation between Claimant and the Employer when he as injured. Even if Claimant had successfully completed the Worksteps test, neither Martinez nor Young were able to offer Claimant a job or have Claimant begin working until after all of the additional requirements were completed. Under the terms of contract law, the fact that Martinez could not have offered the job, nor could Claimant accept the job, confirms the fact that no valid express or implied employment contract existed when Claimant was injured.

ORDER

It is therefore ordered that:

1. Claimant is not entitled to workers' compensation benefits.

2. Claimant's claim for benefits under the Act is denied and dismissed.

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

DATED: April 21, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-664-737

ISSUES

Claimant seeks authorization for a consultation with either Dr. Bradley Vilims or Dr. Giancarlo Baralot to discuss a trial of a spinal cord stimulator also known as a dorsal column stimulator. Claimant also seeks authorization for the trial itself if either Dr. Vilims or Dr. Baralot believes he is a good candidate for the trial. Claimant is not currently seeking authorization for a permanent spinal cord stimulator. The parties agreed that the issue of whether Claimant is entitled to a permanent stimulator is specifically reserved for future determination.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his low back in August 2005.
2. Claimant initially underwent conservative treatment primarily with Dr. Stephen Lindenbaum. After an MRI of his lumbar spine in October 2005 revealed a herniated disc at L5-S1 with a free fragment, Dr. Lindenbaum referred Claimant to Dr. Jeffery Kleiner for a surgical consultation in November 2005.
3. Dr. Kleiner initially recommended an epidural steroid injection for both diagnostic purposes and to relieve Claimant's symptoms. Dr. Bradley Vilims performed the injection on November 30, 2005. Claimant reported significant pain relief, which only lasted a short period of time. Thus at Dr. Kleiner's request, Dr. Vilims performed a second epidural steroid injection on December 30, 2005.
4. On January 25, 2006, Claimant returned to Dr. Kleiner and reported that his symptoms had recurred after the injection on December 30, 2005. Dr. Kleiner discussed with Claimant the possibility of spinal fusion surgery, which Dr. Kleiner felt was ill advised at that time. Dr. Kleiner also discussed a discectomy at L5-S1, which Dr. Kleiner

felt might help Claimant's leg symptoms. Claimant elected to undergo the discectomy sometime in early February 2006.

5. On February 17, 2006, Claimant reported to Dr. Kleiner that his leg symptoms were relieved. Dr. Kleiner recommended that Claimant begin physical therapy in two weeks. Claimant started soon thereafter.

6. Claimant returned to Dr. Kleiner on March 29, 2006, and continued to report symptom relief in his legs, but complained of low back pain. Dr. Kleiner recommended a work hardening program to assist with conditioning and confidence and required Claimant to follow up with him in six weeks.

7. Dr. Kleiner noted in his June 8, 2006 medical record that Claimant's chief complaint is low back pain.

8. On August 2, 2006, Claimant continued to complain of low back pain to Dr. Kleiner. Dr. Kleiner felt, at that time, that a spinal fusion of three levels would represent an exchange of one set of symptoms for another. Dr. Kleiner noted that he would not advocate for surgical treatment at that point.

9. Dr. Kleiner referred Claimant for a second opinion with Dr. Barker following an evaluation of Claimant on September 7, 2006. Dr. Kleiner suggested the second opinion to determine if there were any alternatives that he may have overlooked that would help Claimant's condition.

10. According to Dr. Kleiner's October 11, 2006 treatment note, Dr. Barker recommended that Claimant proceed with the fusion of L3 through S1. Claimant agreed to proceed with the fusion.

11. January 8, 2007, Dr. Kleiner performed the surgical fusion of spine levels L3 through S1. Following the surgery, Claimant continued to have pain which Dr. Kleiner attributed to pseudoarthrosis related to the fusion surgery. Dr. Kleiner was concerned that Claimant's spine was not completely fused.

12. Claimant started seeing Dr. Kristin Mason on July 5, 2007. Following her initial evaluation, Dr. Mason referred Claimant to Dr. Ricardo Esparza for a pain psychology consultation. Dr. Mason had also noted that Claimant was scheduled to see Dr. David Wong for a second opinion regarding the failed fusion and whether Claimant should undergo a second fusion surgery.

13. In Dr. Mason's note dated July 19, 2007, she indicated that Dr. David Wong felt that Claimant the three level fusion redone. Claimant wanted Dr. Kleiner to perform the surgery and Dr. Mason agreed.

14. On September 20, 2007, Claimant underwent another fusion surgery performed by Dr. Kleiner. Claimant saw Dr. Mason on September 24, 2007, and reported that his pain symptoms had improved; however on October 15, 2007, Claimant reported to Dr. Mason that his pain had recurred.

15. Between October 15, 2007 and February 14, 2008, the medical records generally focus on medication management, sacroiliac joint pain and injections to treat it, and physical therapy. Throughout those records, Claimant continues to complain of pain primarily in the buttocks, iliac area and thighs.

16. On February 14, 2008, Dr. Kleiner first suggested consideration of the dorsal column stimulator if Claimant's symptoms failed to improve following a course of the medication Cymbalta. Again on March 13, 2008, Dr. Kleiner recommended that Claimant consult with a pain management professional for consideration of a dorsal column

stimulator. Dr. Kleiner referred Claimant to Dr. Vilims for the spinal cord stimulator consultation.

17. In her treatment note dated March 20, 2008, Dr. Mason opined that a spinal cord stimulator would be disastrous for Claimant. She feared complications given Claimant's prior poor surgical outcomes. Dr. Mason wanted Claimant see Dr. Ring regarding appropriateness of a spinal cord stimulator and wanted Claimant to be evaluated for a chronic pain management program.

18. On April 3, 2008, Claimant reported to Dr. Mason that he did not have much faith in Dr. Ring and apparently did not want to see him. Dr. Mason maintained her opinion that a spinal cord stimulator may not be of any benefit.

19. On April 3, 2008, Dr. Ring authored a report after performing a review of Claimant's medical records. Dr. Ring noted that Claimant had failed back syndrome which is one of the possible indications for spinal cord stimulation. In addition, Dr. Ring felt that Claimant should undergo an independent psychological evaluation before proceeding with the trial of the stimulator to rule out any possibility of underlying factors.

20. According to Dr. Mason's April 21, 2008 treatment note, Claimant was supposed to see Dr. Ring regarding the spinal cord stimulator, but had not. Dr. Mason still does not feel the stimulator will benefit Claimant.

21. On May 15, 2008, Claimant attended an appointment at Centennial Rehabilitation Associates to discuss the results of the pain management program evaluation performed on March 17, 2008 by Dr. William Boyd. Dr. Boyd opined that Claimant has a mood disorder and a pain disorder and might not be a good candidate for a spinal cord stimulator from a psychological perspective. Dr. Boyd told Claimant that treatment in the recommended pain management program might help him become a good candidate for implantable pain therapy from a psychological perspective.

22. As of June 12, 2008, Claimant had elected not to proceed with the spinal cord stimulator. Claimant instead wanted to proceed with exploration of the fusion to repair any pseudoarthrosis. In Dr. Kleiner's treatment record dated September 18, 2008, he noted that after a repeat CT scan, he felt that the fusion was solid and that further surgical intervention would not be indicated. Dr. Kleiner again suggested consideration of a spinal cord stimulator.

23. Claimant saw Dr. Mason on October 13, 2008. Dr. Mason's treatment notes reflect that Claimant again discussed the spinal cord stimulator with her. She noted that Claimant seemed to believe that Dr. Kleiner's recommendation for the stimulator was something different than what was recommended a few months earlier. Dr. Mason's notes indicate that Claimant had decided he did not want the stimulator, but now decided he would like to at least proceed with the consultation and the trial stimulator.

24. On October 16, 2008, Dr. Vilims sent a request for authorization to Insurer to allow a consultation with Claimant to discuss a spinal cord stimulator trial. The Insurer apparently denied the request for authorization which prompted the need for a hearing.

25. Claimant saw Dr. Kleiner on November 14, 2008. Dr. Kleiner again suggested that Claimant try a spinal cord stimulator. Dr. Kleiner opined that he believes that Claimant is a good candidate for the stimulator and specifically noted that, "The advantage of the device is that it can be trialed so that [Claimant] can see whether he has benefit before a formal implant is applied." Dr. Kleiner further noted that Claimant has had a great deal of time to contemplate whether the stimulator or at least whether the

trial would be beneficial. Finally, Dr. Kleiner opined that the stimulator would be the next most efficacious way of dealing with Claimant's residual symptoms.

26. Dr. Esparza noted on December 22, 2008, that Claimant understands Dr. Mason's opinion regarding risk of possible infection and a poor prognosis for improvement with the device. Dr. Esparza further noted that Claimant had concerns regarding the conflicting opinions between medical providers and that he wants to give improvement his best effort.

27. On January 26, 2009, Dr. Esparza opined that Claimant would not be a good candidate for the spinal cord stimulator due to Claimant's concrete logic, beliefs about improvement, inability to consistently use other pain management alternatives, inflexible beliefs with little ability to see other points of view, lack of trust in the professional intentions of others, denial or rationalization of consequences, intrusive periods reflecting anxiety and anger, a need to be restored at all costs and a sense of entitled victimization. Dr. Esparza also noted that Claimant stated he could survive if the procedure was not approved and it would not be the end of his life. He also noted that Claimant seems to have faith in his long term ability to adapt no matter what happens in the medical-legal arena.

28. In Dr. Mason's treatment note dated February 2, 2009, she states that Dr. Esparza agrees that Claimant is not a good candidate for a spinal cord stimulator.

29. Dr. Mason testified during hearing consistent with her previous opinion that Claimant is not a good candidate for a spinal cord stimulator. Dr. Mason believes that the risks of the stimulator outweigh any potential benefit and has witnessed patients who had little or no improvement with the device. Dr. Mason has strong concerns that Claimant will have a successful trial and an unsuccessful permanent implant. Dr. Mason, however, agreed that there is a possibility that Claimant would have some relief with the stimulator. Dr. Mason also agreed that if Claimant were allowed to try the stimulator, he would have the opportunity to determine whether it provided any relief, and would also have additional time to contemplate whether he would want the permanent implant.

30. The records in evidence do not indicate that Claimant ever underwent the independent psychological evaluation recommended by Dr. Ring on April 3, 2008.

31. Claimant's symptoms have not improved throughout the course of his treatment. Claimant strongly desires the opportunity to at least consult with either Dr. Vilims or Dr. Baralot to determine if either of those doctors even believes he is a good candidate for the trial stimulator. Claimant acknowledged that there are risks associated with the stimulator including increased pain and infection.

32. Based on the foregoing, Claimant has established by a preponderance of the evidence that a consultation with either Dr. Vilims or Dr. Baralot to discuss trial of the spinal cord stimulator is reasonable, necessary and related to his work injury. Claimant has further established that if either Dr. Vilims or Dr. Baralot feels the trial is appropriate, the trial itself is reasonable, necessary and related to his work injury.

CONCLUSIONS OF LAW

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

4. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Williams v. Industrial Commission*, 723 P.2d 749 (Colo. App. 1986).

5. As found, Claimant has established by a preponderance of the evidence that a consultation with either Dr. Vilims or Dr. Baralot to discuss trial of the spinal cord stimulator is reasonable, necessary and related to his work injury. Claimant has further established that if either Dr. Vilims or Dr. Baralot feels the trial is appropriate, the trial itself is reasonable, necessary and related to his work injury. While it is true that Dr. Mason believes there is a chance that Claimant may not have a good outcome with the permanent stimulator, the issue here is whether Claimant should have the opportunity to consult with Drs. Vilims or Baralot to discuss a trial of the stimulator and the trial itself. The opinion of Dr. Kleiner that Claimant should be permitted to try the stimulator to determine if there is any benefit is more persuasive than the opinion of Dr. Mason that Claimant should not even be permitted to try the stimulator. Dr. Mason agreed that the stimulator may improve Claimant's symptoms and that the trial would give Claimant the chance to determine if he felt the permanent implant would benefit him. The opinions of Dr. Esparza regarding Claimant's psychological fitness for the stimulator seem inconsis-

tent. Dr. Esparza opined that Claimant had unrealistic views about the potential positive effects of the stimulator yet noted that Claimant understood there was a chance for infection and a poor prognosis with the device. Dr. Esparza also notes that Claimant feared rejection or losing his hearing, but then noted that Claimant seems to have faith in his long term ability to adapt no matter what happens in the medical-legal arena. The opinions of Dr. Esparza are not particularly persuasive given the inconsistencies contained in his reports. Finally, Dr. Boyd's opinion is given little weight given the amount of time that has passed since he evaluated Claimant in addition to his opinion that Claimant "might" not be a good candidate. Dr. Boyd did not definitively opine that Claimant is not a good candidate for a trial of a spinal cord stimulator.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization to consult with Dr. Vilims or Dr. Baralot for a trial of a spinal cord stimulator is GRANTED. If either doctor believes that Claimant is a good candidate for the trial stimulator, Claimant is hereby authorized for such a trial.
2. All matters not determined herein are reserved for future determination.

DATED: April 22, 2009

Laura A. Broniak
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-777-941

ISSUES

The issues presented for determination at hearing were: compensability, including determination of an employer-employee relationship; average weekly wage, medical benefits, temporary total benefits from July 1, 2008 and continuing and Respondent's request for a reduction in compensation under Section 8-42-102, C.R.S. for Claimant's failure to timely report an injury.

FINDINGS OF FACT

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

1. On May 21, 2007, claimant worked for Labor Systems, a temporary work agency, and was assigned to work for the employer on that day. Claimant worked only 7.5 hours for the employer and was paid $52.50 for his time by Labor Systems at $7.00 an hour. Claimant's job duties on that day were to pick up debris and rocks and move dirt with a tractor.

2. After that day, Claimant asked Employer if he could do subcontract work for him. The employer informed claimant that he could only do so if he had his own workers' compensation and liability insurance coverage. Claimant never obtained the insurance coverage and, therefore, the employer never contracted with claimant to perform any subcontract work.

3. Conrad Holland is the owner of Jaz Con, LLC. The business of this company is doing excavation on construction sites primarily for new home construction. Employer uses both equipment operators and laborers to perform this work. All of the equipment operators are union members working through the Operating Engineers union Local 9. Employer also would typically have 2 or 3 full time non-union laborers who would perform street cleaning, snow removal around foundations and any other handlabor. The majority of these employees are hired by Employer through Labor Systems. The union equipment operators are provided with employment benefits through their union. Employer does not provide any other benefits to its laborers beyond payment for their hours worked.

4. When Conrad Holland met claimant for the first time on May 21, 2007 he enjoyed his company and they became friends as a result. Mr. Holland never paid claimant money for any services performed, though he did loan claimant money on several occasions as a friend. Mr. Holland saw Claimant as someone he could help and "not go to far out on a limb" because he trusted Claimant and didn't think he would disappear without paying Mr. Holland back.

5. Claimant was never an employee of Conrad Holland or Employer. The only time claimant performed any services for the Employer was when the employer requested temporary workers from Labor Systems on May 21, 2007.

6. Claimant alleges that following May 21, 2007, he began to work for the employer but was paid in cash and was never paid by check. Claimant claimed he earned $15 per hour and worked forty hours per week. He also claimed he was paid $200 per week as a gas allowance. Claimant claimed the employer employed him as a general laborer and that he performed mostly warranty work for the employer that included tamping around foundations, digging up window wells and running errands. Claimant later testified that amounts that Conrad Holland paid for tires for Claimant's pick-up truck were taken out of his checks from Employer. Claimant's testimony is inconsistent and not credible or persuasive.

7. In the spring of 2008, Conrad Holland's friendship with Claimant began to get strained as Claimant was continuing to complain of money problems and hardships. Mr. Holland credibly testified, and it is found, that his business had begun to slow down in early 2008 and that he was not able to help the claimant out any more with money. Claimant continued to contact Mr. Holland such that around July 4, 2008, Claimant came to Mr. Holland's house and would not leave. Mr. Holland was forced to call the local sheriff's department in an effort to get Claimant to leave. Mr. Holland requested

that the sheriff advise Claimant to stop contacting Mr. Holland. Even after this, Claimant continued to contact him several times before he eventually stopped.

8. Claimant produced no record documentation of his actual work for Employer or of the W-2 form that Claimant alleged that he filled out when he claims he was hired by Employer.

9. Claimant claims that on August 24, 2007, he was helping the Employer install a swimming pool for Tim McDougal. On that date he claims he was lifting a ground tamper by himself. Claimant alleged that while he was lifting the ground tamper out of his truck he strained his back. Claimant claimed he called the employer and the employer told him to take it easy the rest of the day.

10. The credible testimony of Conrad Holland established as a fact that Claimant never worked on the pool for Mr. McDougal. Mr. Holland did most of the work himself and had occasional help from some of his employees. A ground tamper was not used while working on that pool.

11. Mr. Holland never received a call from claimant regarding an alleged injury. The first time the Mr. Holland was made aware of the claimant's alleged injury was when he was contacted by a claims representative from the Insurer in December of 2008 after claimant filed his claim for compensation.

12. Claimant's testimony was he sustained an injury to his low back on August 24, 2007 while working for Employer is not found to be persuasive.

13. Claimant submitted as alleged evidence that he was an employee of the employer, two work orders from Labor Systems with his signature on them for the dates of December 12 and 14, 2007. Claimant testified that he signed these work orders because he supervised the temporary workers from Labor Systems on behalf of Employer. Claimant's testimony is not persuasive.

14. Conrad Holland credibly testified that he knew that claimant signed work orders for him on these two occasions. The Mr. Holland explained that claimant called him on these two dates and stated that he was at the development where these temporary workers were also working. Claimant told him the workers were leaving and he asked Mr. Holland if he wanted him to sign the work orders for him since he was not there. Mr. Holland told him to go ahead and sign them. Claimant was not, however, working for the employer when he signed the work orders. The ALJ finds that on these dates Claimant was volunteering his services to Employer and was not acting as an employee of Employer under a contract of hire, either express or implied.

15. As alleged evidence that claimant was employee of the Employer, Claimant submitted several bills that were paid on his behalf by Conrad Holland. (Claimant's Exs. 6, 7, 8, 9,10, and 13). These bills involved payment for maintenance performed on claimant's truck, an Express Toll pass, and dental work. Claimant testified that he assumed

the employer paid these bills in order keep Claimant working. Claimant's "assumption" that Mr. Holland was paying for these expenses as a benefit of his employment with Employer and to keep Claimant on the job conflicts with the persuasive evidence that Employer did not provide such benefits to its laborers and only provided benefits to its equipment operators through their union. The ALJ finds that Claimant's "assumption" regarding the payment of these bills is not persuasive to establish a contract of hire between Claimant and Employer. The ALJ finds that Conrad Holland paid these bills out of generosity to Claimant as a friend and not as part of any remuneration for work or expectation of work by Claimant under a contract of hire. The persuasive evidence further establishes that Mr. Holland expected and in fact did receive re-payment in cash from Claimant for at least a portion of the expenses paid.

16. The ALJ finds that Claimant has failed to prove the existence of a contract of hire between Claimant and Employer by a preponderance of the credible and persuasive evidence. The testimony of Conrad Holland is found to be more credible and persuasive than that of Claimant with regard to the existence of a contract of hire.

CONCLUSIONS OF LAW

17. 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).

18. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers compensation claim shall be decided on its merits. Section 8-43-201 (2008) C.R.S.

19. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

20. An employee under the coverage of the Colorado Worker's Compensation Act is defined under Section 8-40-202 (1)(b) which provides in pertinent part:

> "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…"

21. To be entitled to benefits under the Workers' Compensation Act, a person must in fact first be an employee under the statutory definition. *Denver Truck Exchange v. Perryman,* 134 Colo. 586, 307 P.2d 805 (1957). Whether an injured worker is an employee is a question of fact. *School Dist. No. 60 v. Indus. Comm'n,* 43 Colo. App. 38, 601 P.2d 651 (1979). Claimant bears the burden of proof to establish that he was an employee by showing the existence of a contract of hire. *Hall v. State Comp. Ins. Fund,* 154 Colo. 47, 387 P.2d 899 (1963). Where the evidence fails to disclose a contractual obligation then the employer-employee relationship does not exist and there is no contract of hire which would support a claim for benefits under the Act. *Hall,* supra. It is the contract of hire with the respondent employer that triggers coverage under the Act, and the reciprocal benefits and duties of the workers' compensation system flow to each party because of their entry into that contract of hire. *Blocker v. Express Personnel,* W.C. No. 4-662-069 (June 6, 2006).

22. A contract of hire is subject to the same rules as other contracts. *Denver Truck Exchange v. Perryman*, supra; *In the matter of the claim of Lewis Carr,* W.C. No. 4-658-458 (November 16, 2005). A contract of hire contemplates "mutuality of agreement and mutuality of obligation." *Aspen Highlands Skiing Corp. v. Apostolou,* 866 P.2d 1384, 1387 (Colo. 1994). However, for purposes of workers' compensation a "contract of hire" may be formed without strict adherence to the formalities surrounding commercial contracts. What is essential is that the Claimant prove there was an expectation of remuneration for services performed. *See Rocky Mountain Dairy Products v. Pease,* 161 Colo. 216, 422 P.2d 630 (1967). A "contract of hire" is created when there is a "meeting of the minds" which creates a mutual obligation between the worker and the employer. *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

23. Claimant's thoughts that he is performing services under a contract of hire do not require a finding of an implied contract of hire sufficient to create the necessary employer-employee relationship. *Carl Mike Noble v. Alternate Source and/or Yellow Freight,* W.C. No. 4-593-816 (March 24, 2004). The volunteering of services does not indicate the existence of a contract of hire. *Schaffer v. Minor and White, dba Summit Construction,* W.C. No. 4-674-302 (February 12, 2008).

24. As found, Claimant has failed to prove the existence of a contract of hire, either express or implied, between Claimant and Employer sufficient to entitle Claimant to benefits under the Worker's Compensation Act.

25. Claimant argues that Employer's position that after meeting Claimant for one day he embarked on a pattern of paying for car repairs, dental benefits and toll road passes merely as a friend is not reasonable or credible. Contrasted with this argument is Claimant's position that after working for Employer for one day through a temporary help agency doing clean-up type work consisting of moving dirt and rocks he was hired by Employer to do supervisory and warranty work. Claimant's argument that he was to be paid in cash and was allowed to keep track of his own hours, being paid when Mr. Holland would ask on an irregular basis if he needed money stands in contrast with the fact that Employer conducted its business utilizing workers through a labor union or through an established temporary help agency. The ALJ is not persuaded that Claimant was hired under a contract of hire by Employer that would be inconsistent and stand in contrast with Employer's other relationships with the workers it hired to perform the work of Employer's business.

26. While Claimant may have believed that he had been hired by Employer, that belief is not considered persuasive to establish a "meeting of the minds" and the necessary mutual obligations to the formation of a contract of hire. It is clear from Mr. Holland's credible testimony that he did not consider nor intend to make Claimant an employee of Employer. Claimant simply misunderstood the intentions of Conrad Holland in assisting Claimant as friend as some evidence of a contract of hire with Mr. Holland's company, the Employer here.

ORDER

It is therefore ordered that:

Claimant's claim for compensation for an August 24, 2007 injury, including any and all claims for medical benefits and temporary total benefits is denied and dismissed. Inasmuch as no compensation is awarded to Claimant, Respondent's request for a reduction in compensation based upon the alleged failure of Claimant to timely report the alleged injury under Section 8-42-102, C.R.S. is also denied and dismissed.

DATED: April 22, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-720-690

ISSUE

Whether Claimant has established by a preponderance of the evidence that Respondents improperly calculated an overpayment of Temporary Total Disability (TTD) benefits because of an incorrect date of Maximum Medical Improvement (MMI).

FINDINGS OF FACT

1. On March 20, 2007 Claimant suffered an admitted industrial injury to his left ankle during the course and scope of his employment with Employer.

2. Employer referred Claimant to Authorized Treating Physician (ATP) Sander J. Orent, M.D. for medical treatment. Claimant initially obtained physical therapy but conservative measures failed. He therefore underwent left ankle surgery with Dan Ocel, M.D. in September 2007. Dr. Orent remarked that Claimant's recovery proceeded "reasonably well" and placed him at MMI on November 1, 2007. However, Dr. Orent commented that he assigned Claimant the MMI date because "this appears to have been his last visit with Dr. Ocel, although he is not certain of the date."

3. On November 13, 2008 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Orent's MMI determination. The FAL thus acknowledged TTD benefits through November 1, 2007 in the amount of $22,556.67. However, Respondents actually paid Claimant TTD benefits through January 24, 2008 in the amount of $31,154.64. Respondents thus sought to recover an overpayment in the amount of $8,597.97. Because Claimant also received Permanent Partial Disability (PPD) benefits in the amount of $7,067.42, Respondents sought to recover the overpayment from the award of PPD benefits.

4. On November 25, 2008 Claimant filed an Application for hearing in this matter. He listed "alleged overpayment" as the sole issue for hearing.

5. Claimant explained at the hearing in this matter that Respondents had erroneously determined his MMI date and thus improperly calculated the amount of overpayment. He testified that November 1, 2007 was the incorrect MMI date, but did not present an alternative date. Nevertheless, in his responses to Respondents' interrogatories, he asserted an MMI date of January 15, 2008. Claimant thus acknowledged that Respondents were entitled to recover an overpayment. However, he asserted that the amount of recovery was less than Respondents had requested.

6. Dr. Orent testified at the hearing in this matter. He explained that Claimant had contacted him regarding the November 1, 2007 date of MMI. In response, Dr. Orent submitted a report on February 5, 2009 concluding that Claimant had "apparently" reached MMI when he last visited Dr. Ocel on January 15, 2008. Dr. Orent commented that he did not complete any additional reports regarding Claimant's date of MMI.

7. Dr. Orent testified that he contacted Dr. Ocel on the morning of the hearing in this matter to ascertain Claimant's correct date of MMI. He persuasively stated that

Dr. Ocel informed him that Claimant had last received treatment on December 27, 2007. Acknowledging that MMI is the time at which a patient no longer requires active treatment for an injury, Dr. Orent credibly determined that Claimant actually reached MMI on December 27, 2007. Dr. Orent thus renounced the November 1, 2007 and January 15, 2008 MMI dates as erroneous.

8. The record reveals that Dr. Orent has presented conflicting determinations regarding Claimant's date of MMI. He initially placed Claimant at MMI on November 1, 2007 and subsequently determined that Claimant had reached MMI on January 15, 2008. Dr. Orent explained that the preceding dates were apparently the last times that Claimant had received medical treatment from Dr. Ocel for his left ankle injury. At the hearing Dr. Orent proposed a third date of MMI because he confirmed with Dr. Ocel that Claimant's last date of treatment was December 27, 2007. Because Dr. Orent explained that MMI is the date on which a claimant no longer requires active treatment for an injury, he persuasively concluded that Claimant actually reached MMI on December 27, 2007.

9. Claimant has established that it is more probably true than not that Respondents improperly calculated an overpayment of TTD benefits because of an incorrect date of MMI. Respondents sought to recover an overpayment of TTD benefits in the amount of $8,597.97 because Claimant erroneously received TTD benefits from November 1, 2007 through January 24, 2008. Respondents thus deducted the overpayment from Claimant's award of PPD benefits. However, because Claimant reached MMI on December 27, 2007, Respondents overpayment is limited to the period December 28, 2007 through January 24, 2008. The amount of the overpayment shall be deducted from Claimant's PPD award.

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. An ATP's opinion regarding a claimant's physical ability to return to work is dispositive unless the opinion is subject to conflicting inferences. *In Re Purser*, W.C. No. 4-643-942 (ICAP, Apr. 4, 2007). When an ATP's opinion is subject to conflicting interpretations, the determination of whether a claimant has been medically released to regular employment is a question of fact for the ALJ. *Id.*; see *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002) (reasoning that an ALJ may resolve ambiguities in an ATP's finding of MMI without requiring the completion of a Division Independent Medical Examination). Because an ATP's determination of whether a claimant has reached MMI is a question of fact, an ALJ has discretion to resolve conflicts in the physician's report. *In Re Purser*, W.C. No. 4-643-942 (ICAP, Apr. 4, 2007); *see Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996) (determining that when the ATP issues conflicting opinions concerning MMI, the ALJ must resolve the conflict).

5. As found, the record reveals that Dr. Orent has presented conflicting determinations regarding Claimant's date of MMI. He initially placed Claimant at MMI on November 1, 2007 and subsequently determined that Claimant had reached MMI on January 15, 2008. Dr. Orent explained that the preceding dates were apparently the last times that Claimant had received medical treatment from Dr. Ocel for his left ankle injury. At the hearing Dr. Orent proposed a third date of MMI because he confirmed with Dr. Ocel that Claimant's last date of treatment was December 27, 2007. Because Dr. Orent explained that MMI is the date on which a claimant no longer requires active treatment for an injury, he persuasively concluded that Claimant actually reached MMI on December 27, 2007.

6. As found, Claimant has established by a preponderance of the evidence that Respondents improperly calculated an overpayment of TTD benefits because of an incorrect date of MMI. Respondents sought to recover an overpayment of TTD benefits in the amount of $8,597.97 because Claimant erroneously received TTD benefits from November 1, 2007 through January 24, 2008. Respondents thus deducted the overpayment from Claimant's award of PPD benefits. However, because Claimant reached MMI on December 27, 2007, Respondents overpayment is limited to the period December 28, 2007 through January 24, 2008. The amount of the overpayment shall be deducted from Claimant's PPD award.

ORDER

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

1. Because Claimant reached MMI on December 27, 2007 Respondents overpayment of TTD benefits is limited to the period December 28, 2007 through January 24, 2008. The amount of the overpayment shall be deducted from Claimant's award of PPD benefits.

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

DATED: April 22, 2009.

Peter J. Cannici
Administrative Law Judge

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

ISSUE

The issue for determination is the average weekly wage (AWW) for the period of disability commencing on November 4, 2008.

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on November 6, 2006. At a prior hearing in this matter on February 18, 2008, the parties stipulated that Claimant's AWW based upon the wages at Employer was $323.50. At the prior hearing, temporary total disability benefits were sought for the period from November 14, 2006, through April 23, 2007.
2. Claimant did not work from November 14, 2006, until April 23, 2007. On April 23, 2007, Claimant was released to regular duty. Claimant sought and obtained employment with a subsequent employer. Claimant earned, on average, more wages at the subsequent employer than she did with Employer.
3. On November 4, 2008, Claimant underwent surgery on her right shoulder. Insurer admitted liability for temporary total disability benefits commencing on that date. This is the first payment of temporary disability benefits on this claim.
4. Claimant began employment with the subsequent employer on May 14, 2007. After May 14, 2007, Claimant did not work at the subsequent employer for: (1) a three week period in January 2008 when Claimant was off-work to care for her child who had Chicken Pox; and (2) from June 11, 2008, through August 19, 2008, when Claimant was off-work for a foot surgery that is not related to this claim. These events represent an abnormal departure from work, and are not expected to reoccur.
5. Claimant's AWW for the period commencing on November 4, 2008, is fairly computed by calculation of average pay at the subsequent employer for the time she actually was working.

6. From May 14, 2007, to November 4, 2008, Claimant worked for the subsequent employer for 450 days. She earned $26,252.73, an average of $58.34 per day. Her average wage per week that she worked was $408.38.

CONCLUSIONS OF LAW

1. Respondents argue that Claimant is bound by the stipulation she reached as to the AWW at the February 2008 Hearing by operation of *res judicata* or issue preclusion.
2. The issue at that hearing is different than the issue to be determined at this hearing. At the February 13, 2008, hearing, the period of temporary disability benefits sought was November 2006 through April 2007, before this period of disability had began in November 2007. Claimant was released to regular duty in April 2007 and she has not claimed any disability after that release until November 2008.
3. The AWW that should be used for determining temporary disability benefits from November 4, 2008, ongoing was not litigated at the prior hearing.
4. An injured worker's AWW is to be based on his or her earnings at the time of injury. Section 8-42-102(2), C.R.S., However, the discretionary exception in Section 8-42-102(3), C.R.S. (2008), provides that the ALJ, in each particular case, may compute the average weekly wage in such a manner and by such method as will, in the opinion of the ALJ, fairly determine the employee's AWW. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008),
5. The ALJ may determine a claimant's TTD rate based upon earnings the claimant received on a date other than the date of injury. *Pizza Hut v. Industrial Claim Appeals Office,* 18 P.3d 867 (Colo.App. 2001); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo.App. 1993). Where an injured worker's earnings change, the AWW may be calculated based upon earnings during prior to a period of disability. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp.*, *supra*.
6. Here, Claimant was released to return to work and located employment with a subsequent employer. She earned more with the subsequent employer. She became temporarily and totally disabled again when she had surgery on November 4, 2007. Her average weekly wage fairly calculated based upon her earnings at that subsequent employer before this latest period of disability.
7. Claimant's AWW for her period of temporary disability commencing November 4, 2007, is fairly calculated to be $408.38. Insurer shall pay temporary disability benefits commencing November 4, 2007, based on an average weekly wage of $408.38.

ORDER

It is therefore ordered that Claimant's AWW for her period of temporary disability commencing November 4, 2007, is $408.38. Insurer shall pay temporary disability benefits commencing November 4, 2007, based on an average weekly wage of $408.38. 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: *April 23, 2009*

Bruce C. Friend, ALJ

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-764-836

ISSUES

1. Did Claimant prove by a preponderance of the evidence that she sustained an injury on May 5, 2008 arising out of and in the course of her employment with employer?

2. If Claimant did prove a compensable injury, is Claimant's treatment with Dr. Oren authorized?

3. If Claimant did prove a compensable injury, is Claimant entitled to temporary partial disability (TPD) and/or temporary total disability (TTD) benefits?

4. If Claimant did prove a compensable injury, have Respondents proven by a preponderance of the evidence that Claimant is responsible for her termination of employment pursuant to Section 8-42-103(1)(g), C.R.S. and Section 8-42-105(4), C.R.S.?

Prior to the hearing, the parties stipulated that if the claim is found compensable, Claimant's average weekly wage would be $306.26. Additionally, Respondents stipulated to the authorization of Drs. McLaughlin and Rooks for treatment of Claimant's condition.

FINDINGS OF FACT

1. Claimant is a sixty three year old female who was employed as a seamstress by employer. Claimant's job duties also included general office administration and phone duties. Claimant began her employment with employer in December, 2006 as an assistant to Ms. Waltrip, the owner.
2. Prior to Claimant's employment with her employer, Claimant had a history of arthritis, including arthritis in her right index finger and her hip. Claimant also had carpal tunnel surgery in 1975.
3. On May 5, 2008, Claimant was provided with a project of removing fabric from two cornice boards after the customer determined that they did not like the fabric originally used. The cornice boards were wooden frames that had batting and fabric over them that was secured by two types of staples. In removing the fabric, Claimant used a flathead screwdriver and pliers to remove the staples. The smaller staples were approximately ½" in length and the larger staples were approximately 1 ½" in length. Claimant testified that she worked on the project for approximately two hours and during that time, she removed approximately 135-150 smaller staples and over 10 heavy duty staples. Claimant testified that this project caused her hand to get tired and she couldn't get all of the staples removed. Claimant demonstrated that in attempting to

remove the staples she would grip the flathead screwdriver with her thumb on top of the screwdriver handle.

4. Claimant testified that after struggling to remove the staples she sought assistance from her co-worker, Mr. Brumley, who helped Claimant complete the project. Mr. Brumley testified that on May 5, 2008, he went to Claimant and asked if he could help her complete the project. Mr. Brumley further testified that after he offered his assistance to Claimant, Claimant oversaw his work on the cornice boards and Mr. Brumley completed the project with Claimant instructing him how to perform the project, as Mr. Brumley had never performed a project such as this before. Mr. Brumley testified that he used pliers to remove the large staples and occasionally the small staple when the small staples would break. Mr. Brumley testified that he removed a lot of staples and placed the number of staples at between 75 to 100. Mr. Brumley testified that he did not experience any problems removing the staples. Mr. Brumley testified that they completed putting the project back together either that day or the next day. Based on the fact that according to the testimony of both Mr. Brumley and Claimant that Mr. Brumley completed the task of removing the staples with only supervisory assistance from Claimant, the ALJ finds that it is more probably true than not that Claimant requested assistance from Mr. Brumley in removing the staples. Insofar as there is a conflict in the evidence with regard to this fact, the conflict is resolved in favor of Claimant.

5. Claimant testified that she developed pain in her right first finger and thumb while working on the cornice board. Claimant testified that the problems with her right thumb never completely subsided, but Claimant believed the problem to be related to her arthritis. Claimant testified that the catching in her thumb began 10 days to 2 weeks after the cornice board project. Claimant contacted her treating physician, Dr. Gieszl on June 9, 2008 with reports of pain in the knuckles of her right hand and requested a referral to an orthopedist. Claimant denied trauma to her right hand beyond the usual stress of her job as a seamstress. Dr. Gieszl referred Claimant to Dr. Oren for evaluation on June 10, 2008. Claimant's first appointment with Dr. Oren was scheduled for July 1, 2008.

6. Claimant testified that in June 2008, when her hands were continuing to give her problems, she requested that her hours be reduced in the hopes that the additional rest would allow the pain in her hands to resolve. Claimant also testified that she asked her supervisor, Ms. Waltrip, if she knew of a good orthopedic surgeon in June 2008 when she was continuing to have problems with her upper extremity.

7. Claimant continued working for her employer until June 25, 2008. Claimant's employer was aware of her preexisting arthritis problems and, in an effort to accommodate Claimant, referred the bigger seamstress projects to outside contractors. In June 2008, employer determined that they were having more success selling furniture and decided to expand the furniture aspect of their business. This decision involved moving the office and converting the workroom where Claimant would perform her job duties. Mr. Waltrip, co-owner for employer, testified that they informed Claimant in June 2008 that the business was going to change. Mr. Waltrip offered to keep Claimant on for a couple of weeks to help do inventory and employer would then use Claimant to perform her seamstress duties on a sub-contracting basis. In performing her duties on a sub-contracting basis, employer intended for Claimant to perform her seamstress duties out of her home. Mr. Waltrip testified that he never discussed laying off Claimant.

8. Claimant has a preexisting history of arthritis in her bilateral hands, hip and knee. Claimant also has a prior history of carpal tunnel release surgery in 1975 and has been diagnosed with hypothyroidism. Due to Claimant's preexisting arthritis, Claimant had previously been referred to a rheumatologist for treatment. Claimant's employer was aware of her preexisting arthritis in her hands because Claimant had complained of the arthritic symptoms at various times to her employer.

9. Claimant was evaluated by Dr. Oren on July 1, 2008. Claimant reported to Dr. Oren that she had a 6 week history of catching and snapping in her right thumb and reported having done a great deal of sewing lately. According to Dr. Oren's Patient Information form, filled out by Claimant on July 1, 2006, Claimant suffered an injury to her right thumb that her injury occurred at work while removing staples from cornice boards. Dr. Oren diagnosed Claimant with right trigger thumb and referred Claimant to Ms. Liak, an occupational therapist at Montrose Memorial Hospital for physical therapy. Claimant reported to Ms. Liak on July 1 and reported a history of removing over 100 staples from a board and complained that she was unable to brush teeth, write or open a door.

10. Ms. Waltrip, the President and co-owner of employer's business, testified that she was aware of Claimant's arthritis in her hands based on complaints from Claimant. Ms. Waltrip testified that because of Claimant's arthritis, Claimant could not finish the larger jobs quickly and those jobs were farmed out to sub-contractors. Ms. Waltrip allowed Claimant to take periodic breaks whenever Claimant felt a break was necessary. In June 2008, Claimant left a voice mail message for Ms. Waltrip indicating that she had changed her mind about helping inventory the store and was resigning her position. Claimant indicated in the message that she would drop off the key when she returned.

11. In the fall of 2007, Claimant earned "comp time" with her employer by working extra hours. Instead of being paid overtime for those hours worked, Claimant was allowed to accumulate "comp time" to be taken by Claimant in the future. Claimant's comp time would be paid to Claimant as though the hours were worked by Claimant, without Claimant actually working those hours. Ms. Waltrip allowed Claimant to account for her own "comp time" and when Claimant began using her "comp time", Ms. Waltrip believed the Claimant was taking advantage of the "comp time" arrangement. At the end of March 2008, Ms. Waltrip ended the "comp time" system and paid Claimant her remaining "comp time" to bring Claimant to a zero balance.

12. Ms. Waltrip testified that Claimant requested fewer hours in the Spring of 2008 in order to allow Claimant to travel with her husband. Ms. Waltrip denied that Claimant ever asked her if she was aware of a good orthopedic surgeon. The ALJ finds that Claimant's testimony of asking Ms. Waltrip if she knew of a good orthopedic surgeon is consistent with Claimant's medical records where she requested a referral from Dr. Gieszl to an orthopedist or rheumatologist. The ALJ finds that this it is more likely than not that this conversation took place prior to Claimant knowing of the compensable nature of her physical complaints, and the ALJ does not interpret this conversation as being one in which Claimant was reporting to employer the existence of a workers' compensation injury. The ALJ finds that this conversation is more likely than not one that would be remembered by Claimant rather than Ms. Waltrip. Insofar as there is a conflict in the evidence with regard to whether Claimant inquired with Ms. Waltrip if she knew of an orthopedic surgeon, the ALJ resolves this conflict in favor of Claimant.

13. Claimant first reported to Ms. Waltrip that she suffered a trigger thumb injury to her right thumb on July 10, 2008. Ms. Waltrip believed Claimant was alleging her arthritis was related to her work and had not had an employee report a work injury to her before. Ms. Waltrip was unaware of workers' compensation procedures, however, after discussing the injury with Claimant, Ms. Waltrip e-mailed her insurance company but did not refer Claimant for medical treatment.

14. Claimant returned to Dr. Oren on July 29, 2008 and reported that her employer was contesting the workers' compensation claim. Dr. Oren noted that the insurance carrier could send Claimant to their own physician and offered to make a copy of his prior dictation available. Dr. Oren recommended further hand therapy and ongoing conservative treatment. Claimant was next evaluated by Dr. Oren on September 23, 2008 and reported that the hand therapy was good, but did not relieve her catching/locking symptoms. Dr. Oren noted that Claimant wanted to wait to see what work comp was going to do and then make up her mind regarding having a trigger thumb release.

15. Claimant was referred by the insurer to Dr. McLaughlin for evaluation on October 31, 2008. Dr. McLaughlin noted that Claimant was accompanied by her husband and a case manager, Torrey Beil for the examination. Claimant provided an accident history to Dr. Beale of removing industrial staples with a screwdriver and pliers while trying to change a window dressing. Claimant denied a history of rheumatoid arthritis, trigger fingers or tenosynovitis to Dr. McLaughlin, and did report a history of right carpal tunnel surgery in 1975. Claimant reported to Dr. McLaughlin that Dr. Oren was recommending surgery. Dr. McLaughlin reviewed Dr. Oren's medical records from July 1, July 29 and September 23, 2008 and noted Claimant presented Dr. Oren with a similar history. Dr. McLaughlin opined that Claimant's trigger thumb was directly related to her work activity as described and recommended that Claimant proceed with the surgery recommended by Dr. Oren at the first available appointment.

16. Dr. Oren authored a letter on December 9, 2008 that noted his review of Dr. McLaughlin's October 31, 2008 report and requested authorization for a trigger thumb release be provided. The stamp on the December 9, 2008 letter indicates that the letter was sent by Claimant's counsel to the carrier on December 18, 2008.

17. Respondents referred Claimant for examination by Dr. Rooks on January 13, 2009. Dr. Rooks determined that Claimant's condition was "likely work related" and provided Claimant with an injection of Lidocaine into the right thumb.

18. Respondents referred Claimant to Dr. Bernton for another examination on March 2, 2009. Dr. Bernton obtained a history from Claimant, was provided with a job site evaluation and had the opportunity to examine the staples removed and purportedly the tools used to remove the staples. Dr. Bernton reviewed medical literature addressing the causes of trigger fingers, including possible non-occupational causes. Dr. Bernton also reviewed the medical treatment guidelines provided by the Division of Workers' Compensation regarding cumulative trauma disorder to provide a causation analysis. Dr. Bernton noted that one would anticipate that an acute episode would produce symptoms fairly immediately following her exposure. Dr. Bernton opined that Claimant's limited exposure on May 5, 2008 would not cause Claimant's trigger thumb.

19. Dr. Bernton testified at hearing in this matter and expanded on the opinions provided in his March 2, 2009 report. Dr. Bernton testified that it was his opinion that Claimant's age, gender and history of hypothyroidism, along with her preexisting arthri-

tis were risk factors which left Claimant predisposed to the development of a trigger finger or trigger thumb condition. Dr. Bernton opined that Claimant's gripping of the tool was not for a sufficient amount of time to likely cause her trigger thumb. Dr. Bernton opined that Claimant's trigger thumb was likely of idiopathic origin.

20. Dr. McLaughlin testified at the hearing in this matter on behalf of Claimant. Dr. McLaughlin testified that his evaluation of Claimant in October 2008 was arranged by Torrey Beil, who he identified as an agent for the insurer involved in this claim. Dr. McLaughlin respectfully disagreed with Dr. Bernton's opinions, and opined that while Claimant may have been predisposed to a trigger thumb developing, he believed Claimant's work led to her trigger thumb condition.

21. Respondents argue that Dr. Bernton's testimony should be given more weight than Dr. McLaughlin because Dr. Bernton had a complete medical history, job site evaluation and the opportunity to examine the tools used and staples removed and performed a significant medical literature review. The ALJ is not persuaded. Both Dr. Bernton and Dr. McLaughlin are Level II accredited physicians and both are familiar with the Cumulative Trauma Treatment Guidelines provided by the Division of Workers' Compensation. Respondents had a job site evaluation performed by Torrey Beil, the representative who retained Dr. McLaughlin, on February 10, 2009, after the examinations by Dr. McLaughlin and Dr. Rooks. Respondents had the opportunity to provide Drs. McLaughlin and Rooks with any information Respondents deemed relevant in association with the referral for treatment/evaluation prior to Claimant being seen by the physicians, but chose not to provide such information to the physicians. Respondents had the opportunity to provide the job site evaluation, or any other information, to both Dr. McLaughlin and Dr. Rooks to determine if such information altered their opinions in any way after the physicians examined Claimant, but chose to instead obtain a third opinion on the issue of causation. Respondents have the responsibility of providing the physicians chosen by Respondents to evaluate/treat an injured employee with evidence they believe is necessary for reaching a determination on issues Respondents deem relevant. The ALJ finds the testimony of Dr. McLaughlin to be more credible than that of Dr. Bernton. The ALJ credits the reports of Drs. Oren, McLaughlin and Rooks over the report of Dr. Bernton.

22. Respondents argue that if the claim is found compensable, the treatment from Dr. Oren should not be considered authorized. The ALJ is not persuaded. Claimant reported her injury to her employer on or about July 8, 2008. Respondents did not refer Claimant for medical treatment until Claimant's examination with Dr. McLaughlin on October 31, 2008. The ALJ finds that the right to select the authorized physician to treat Claimant's injuries passed to Claimant when Respondents did not refer Claimant for treatment in a timely manner after she reported her injury.

23. Respondents argue that Dr. Oren has not recommended surgery for Claimant, and therefore, it is premature to determine if surgery is appropriate treatment in this case. The ALJ is not persuaded. Dr. Oren noted on September 23, 2008 that Claimant was going to wait to determine if she wished to proceed with her trigger thumb release. Dr. Oren wrote a letter on December 9, 2008 that requested authorization to perform a trigger thumb release. The ALJ interprets these reports, along with the reports of Drs. McLaughlin and Rooks as proving that it is more probably true than not that Dr. Oren is recommending Claimant proceed with trigger thumb release surgery.

24. The ALJ finds the testimony of Claimant that she requested reduced time from her employer in May 2008 as a result of her problems with her upper extremities credible. Claimant's testimony is consistent with the wage records and medical records entered into evidence. While Respondents maintain that Claimant requested reduced hours in order to travel with her husband, the ALJ finds it is more probably true than not that Claimant's request for reduced hours coincided with her increase in pain on or about approximately May 15, 2008 as reported in the medical records and related in her testimony at hearing. The ALJ notes that Claimant worked approximately 27 hours the week of May 8 through May 14, 22 hours May 15 though May 21, then only worked 15 hours per week after May 21, 2008. Prior to Claimant's injury, Claimant regularly worker, or was scheduled to work, 25 to 30 hours per week.

25. The ALJ finds Claimant has proven a disability as a result of her trigger thumb as evidenced by the reduced hours worked after her injury. The ALJ credits Claimant's testimony that she was unaware of the compensable nature of her trigger thumb until her appointment with Dr. Oren on July 1, 2008. The ALJ finds Claimant reported her trigger thumb to her employer on or about July 8, 2008. The ALJ finds Claimant's employer did not immediately refer Claimant for medical treatment.

26. Claimant entered into evidence wage records documenting her claimed lost wages after her date of injury. According to these wage records, for the period ending after May 15, 2008, Claimant lost $698.97. This figure does not include the $9.26 allegedly lost by Claimant prior to May 15, 2008. The ALJ finds this evidence persuasive as to Claimant's temporary partial disability for this claim through June 25, 2008.

27. The ALJ further finds that Claimant's wage loss after June 25, 2008 is related to Claimant's industrial injury. The ALJ credits Claimant's testimony that she has been disabled as a result of the catching in her thumb. The ALJ finds that it is more probably true than not that Claimant has been unable to perform her prior work as a seamstress as a result of her disability related to her trigger thumb.

28. Respondents argue Claimant is precluded from receiving temporary disability benefits because she is responsible for her termination of employment. The ALJ is not persuaded. Employer advised Claimant that they would be moving the business in a new direction and intended to change her position from a part time employee to a subcontractor position. Employer invited Claimant to stay on for a couple of weeks during the transition period in order to help inventory the workroom. Claimant was not required to accept this offer of transition employment as the ALJ finds this offer represented a material change from her prior employment as a seamstress. The position offered by Respondents to Claimant for the two week transition period was performing inventory, which is a material alteration from her previous position as a seamstress. Therefore, the ALJ finds that Claimant was constructively terminated from her job as a seamstress as of June 25, 2008 by employer. Regardless, employer had already informed Claimant that they were eliminating her position, and Claimant's subsequent resignation does not represent a volitional act that resulted in her wage loss.

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, the ALJ finds the testimony of Dr. McLaughlin and the reports of Drs. Oren, Rooks and McLaughlin credible. The ALJ finds the testimony of Claimant regarding her work activities on May 5, 2008 and physical symptoms that manifested after those work activities to be credible. The ALJ finds that Claimant has proven by a preponderance of the evidence that her trigger thumb arose out of and in the course of her employment activities of May 5, 2008.

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), 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).

6. As found, the ALJ finds the testimony of Claimant's testimony that she requested reduced hours after suffering pain in her upper extremities after May 5, 2008. The ALJ finds that it is more probably true than not that her work-related injury contributed to some degree to a temporary wage loss after May 15, 2008. Therefore, Claimant is entitled to temporary partial disability benefits up to her last day of employment on June 25, 2008. As found, employer determined in June 2008 to materially alter Claimant's employment by making Claimant's position a subcontracting position. Claimant was not required to accept the alteration to her employment, including the offer by employer to have Claimant assist with the inventory during the transition process. The ALJ finds that employer effectively terminated Claimant's employment by virtue of the alteration of Claimant's position from a seamstress working on an hourly basis to that of a subcontractor. The ALJ finds that it is more probably true than not that Claimant's work-related injury contributed to some degree to her temporary total wage loss after June 25, 2008. As found, Claimant is entitled to temporary total disability benefits beginning June 26, 2008 and continuing until terminated by law.

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 reported her injury to her employer on or about July 8, 2008. Respondents questioned the compensable nature of Claimant's injuries, but did not refer Claimant for treatment until her appointment with Dr. McLaughlin on October 31, 2008. The ALJ finds that it was not reasonable for Respondents to wait almost four months to refer Claimant for receive medical treatment under these circumstances. As found, the ALJ determines that the right to select an authorized treating physician passed to Claimant. The ALJ finds that Claimant selected Dr. Oren as her authorized provider. All treatment received by Claimant through Dr. Oren after July 8, 2008 is therefore deemed authorized. Respondents have stipulated that Dr. McLaughlin and Dr. Rooks are also authorized to treat Claimant's injuries.

9. As found, the ALJ orders that treatment recommended by Dr. Oren, including possible trigger thumb release, is reasonable, necessary and related to Claimant's May 5, 2008 industrial injury.

10. 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 P3d 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. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). 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. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

11. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant committed a volitional act which led to her termination of employment. The ALJ finds that Claimant's employment was terminated by virtue of employer determining to eliminate Claimant's position seamstress working at the shop on an hourly basis. Claimant was not required to accept the new position offered by employer, nor was she required to stay with employer for the remaining two weeks to help inventory employer's shop. Therefore, Respondents affirmative defense that Claimant was responsible for her termination of employment is denied and dismissed.

ORDER

It is therefore ordered that:

1. Respondents are to pay Claimant temporary partial disability benefits in the amount of $465.98 ($698.97 times 2/3) for the period of May 15, 2008 through June 25, 2008.

2. Respondents are to pay Claimant temporary total disability benefits beginning June 26, 2008 and continuing until terminated by statute or rule.

3. Dr. Oren is authorized to treat Claimant for her industrial injury as of July 8, 2009.

4. Respondents are to pay for medical treatment from Dr. Oren that is reasonable, necessary and related to Claimant's industrial injury, including possible trigger thumb release surgery if elected by Claimant. The ALJ finds that the treatment on July 29, 2008 and September 23, 2008 is reasonable, necessary and related to Claimant's industrial injury.

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: _April 24, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-697-764

ISSUES

The issues set for hearing include whether Claimant's left shoulder and arm injury is compensable under the Colorado Workers' Compensation Act.

FINDINGS OF FACT

1. Claimant suffered an admitted injury to her right upper extremity as a result of repetitive trauma on November 1, 2005. Claimant was initially evaluated by Dr. Hanson on April 20, 2006. Claimant reported the slow onset of pain in the right upper shoulder while keyboarding at her desk. Claimant reported that these symptoms would come and go and she thought they would get better but had not. Claimant reported that her desk was not ergonomically correct, but had recently been lowered. Dr. Hanson recommended a right shoulder MRI, physical therapy, an ergonomic job site evaluation and prescribed Skelaxin.

2. Claimant returned to Dr. Hanson on May 2, 2006 with continued complaints of cervical spine and right shoulder pain. Dr. Hanson noted that Ms. Haight, an occupational therapist, performed an ergonomic evaluation of Claimant's work site which resulted in changes to Claimant's work station, including repositioning items on Claimant's desk, raising her chair and relocating her keyboard.

3. Claimant was next evaluated by Dr. Hanson on May 9, 2006 with reports of improvement since her last visit. Claimant also reported the presence of left dorsal forearm pain with an onset beginning that morning. When questioned by Dr. Hanson regarding the left forearm pain, Claimant reported she believed that it was related to using the left forearm (sic) in order to compensation for the right. For example, Claimant reported using her left hand for the telephone use and for keyboarding since her last visit. Claimant returned to Dr. Hanson on May 24, 2006 and reported that her left forearm pain had clinically resolved.

4. Claimant continued to receive conservative treatment for her right upper extremity injury under the auspices of Dr. Hanson who referred the Claimant to Dr. Failinger, an orthopedic surgeon on June 21, 2006. Dr. Failinger diagnosed Claimant with rotator cuff tendinitis and noted that x-rays revealed a severe type III acromion with a large osteophyte. Dr. Failinger recommended a cortisone injection and noted that Claimant would likely need surgical intervention in the form of a decompression at some point.

5. Claimant was next evaluated by Dr. Hanson on June 29, 2006. Dr. Hanson reported that Claimant had undergone18 therapy sessions which had helped her significantly. Dr. Hanson advised Claimant that at the next evaluation, if she did not want to pursue either an injection or surgery, she would be placed at maximum medical improvement ("MMI"). Dr. Hanson also noted that Claimant continued working modified duty. Claimant subsequently underwent a cortisone injection under the auspices of Dr. Failinger on August 9, 2006. Claimant reported to Dr. Hanson on August 15, 2006 that she missed two days of work after the cortisone injection because of increased pain that resulted in Claimant being unable to use her arm at all.

6. Claimant returned to Dr. Failinger on August 30, 2006 and reported that after her increased pain, her shoulder ended up definitely feeling better. Dr. Failinger recommended that Claimant proceed with surgery if she chose to at that time. On September 13, 2006, Claimant followed up with Dr. Hanson and advised that she did not wish to proceed with the surgery. Dr. Hanson placed Claimant at MMI with no permanent impairment and no work restrictions, noting that Claimant had been working without restrictions since August 15. Claimant reported continued pain with the right shoulder if she keyboarded for too long, but did not specify how many minutes of keyboarding might worsen her shoulder pain. Dr. Hanson recommended maintenance treatment in the form of medication refills and 2 maintenance visits with himself, and one maintenance visit with Dr. Failinger. Dr. Hanson further noted that Claimant should be allowed to reopen her case in the next six months if she decided to pursue surgery.

7. Claimant was involved in a motor vehicle accident ("MVA") on October 19, 2006. Claimant reported injuries to her neck and right shoulder immediately following the accident to the emergency room physicians. Claimant was provided with medications and discharged with instructions to avoid strenuous activity for three days and work for two days.

8. Claimant returned to Dr. Hanson on November 2, 2006 with complaints of her right shoulder gradually feeling worse since early October. Claimant denied any re-injury to her shoulder. Dr. Hanson noted some worsening of Claimant's right shoulder on objective findings and recommended another subacromial bursal injection. Dr. Hanson also provided Claimant the option of reopening her workers' compensation case if she wished to pursue the surgery previously recommended by Dr. Failinger. Claimant denied the injection and the surgical options at that time, and Dr. Hanson kept Claimant at MMI.

9. Claimant contacted Dr. Hanson on November 7, 2006 and reported that she was involved in a MVA on October 19 while on her way to work, and reported having cervical

spine pain since the day of the accident. Claimant also reported lumbar pain starting on November 4, 2006. Claimant reported to Dr. Hanson that she was unsure if the MVA aggravated her right shoulder problems. Dr. Hanson referred the Claimant to her family doctor for the back and neck pain. Claimant was evaluated by Kaiser Permanente for her MVA injuries on November 8, 2006. Claimant reported increasing back pain since the MVA. Claimant also reported that prior to the MVA, she was involved in a workers' compensation claim for her right shoulder. Claimant reported to Kaiser that she thinks the MVA may have exacerbated her right shoulder condition.

10. Claimant returned to Dr. Hanson on December 19, 2006 with continued complaints of right anterolateral shoulder pain that had not improved since her November 2, 2006 appointment. Claimant reported that she continued to work full duty buy had an increased work load demanding more keyboarding. Claimant also reported increased right ulnar forearm pain and right index finder pain if she pulls with the right arm. Dr. Hanson again outlined Claimant's treatment options and referred the Claimant back to Dr. Failinger for a repeat examination. Claimant was evaluated by Dr. Failinger on December 27, 2006. Dr. Failinger reported that Claimant was not doing well and wanted to push on with surgery. Dr. Failinger recommended a decompression and possible rotator cuff repair, but recommended Claimant get her medical clearance from her primary care physician ("PCP") regarding her hypertension prior to proceeding with the surgery.

11. Dr. Gillaspie, Claimant's PCP, evaluated Claimant on January 8, 2007. Claimant reported right shoulder pain for which surgery was planned. Claimant also reported an onset of left shoulder pain from using her left arm more often. Dr. Gillaspie contacted Dr. Hanson to determine if the injury was related to work given the likely cause was overuse from the original injury. Claimant eventually underwent surgery of her right shoulder on January 23, 2007 and began missing time from work. Dr. Failinger noted in the surgery that Claimant did not have a torn rotator cuff. Claimant was next evaluated by Dr. Hanson on February 6, 2007. Claimant reported to Dr. Hanson the presence of left lateral and anterior shoulder pain and left mid-biceps pain that started a few weeks ago. Dr. Hanson noted that his examination presented with findings suggesting impingement and ordered therapy to evaluate and treat the left shoulder. Dr. Hanson noted that if Claimant's symptoms did not improve with therapy, he would recommend an MRI of the left shoulder.

12. Dr. Hanson released the Claimant to return to work on March 1, 2007 with a four pound lifting restriction and limitations on typing of no more than 20 minutes with 20 minutes of rest. Claimant was reevaluated by Dr. Hanson on March 22, 2007 and reported that her left shoulder had improved, apparently since returning to work. Claimant also reported that her PCP was considering therapy for the left shoulder and the neck, and would possibly order the left shoulder MRI. Claimant returned to Dr. Hanson on April 6, 2007 with reports that her left shoulder symptoms were unchanged. Dr. Hanson noted positive Hawkins and Neer impingement signs on the right with positive Clancy, Hawkins, and Neer impingement signs on the left.

13. Dr. Hanson reevaluated Claimant on April 11, 2007. Claimant showed signs of functional improvement of her right shoulder. Dr. Hanson noted that while Claimant's left shoulder had been denied by the insurer, Claimant was pursuing treatment with her Kaiser Permanente physicians who were providing therapy and other appropriate treatment. Claimant apparently had a left shoulder x-ray performed by her PCP which was

reportedly negative. Claimant returned to Dr. Hanson on May 4, 2007 and reported improvement of her right shoulder symptoms with her physical therapy. Dr. Hanson noted that Claimant had cervical pain and left shoulder pain which were unrelated to her current workers' compensation claim.

14. Claimant returned to Dr. Failinger on July 16, 2007 and reported she had made some progress overall, but still had some pain and discomfort. Dr. Failinger offered Claimant a final cortisone injection, but Claimant did not like the reaction from the last injection and, therefore, rejected any further treatment in way of injections. Dr. Hanson noted that Claimant's recovery from her right shoulder surgery was slower than expected, but eventually placed the Claimant at MMI on August 23, 2007 with a 7% upper extremity impairment rating that converts to a 4% whole person rating.

15. Claimant underwent a Division IME with Dr. Reichardt on March 19, 2008. Claimant complained of an aching and burning pain in her neck with pain over both shoulders. Dr. Reichardt noted positive Hawkins, O'Brien's and Speed's tests bilaterally. Dr. Reichardt diagnosed Claimant with having: 1) right shoulder pain, the onset of which was associated with repetitive activity at work associated with ergonomic factors; 2) left shoulder pain with a mechanism of injury of compensatory overuse associated with right shoulder limitation; 3) neck pain – either related to non-work related motor vehicle accident injury, possible component of myofascial involvement associated with her shoulder injury; 4) hand numbness – unlikely related to her 11/01/05 injury. Dr. Reichardt opined that Claimant was at MMI for her right shoulder injury, and provided Claimant with an impairment rating of 11% of the upper extremity that converts to a 7% whole person impairment rating. Dr. Reichardt also opined that Claimant was not at MMI for her left shoulder injury, and recommended that Claimant have an MRI and 6-12 physical therapy visits to address an appropriate rehabilitation program for the shoulder, including a possible evaluation by an orthopedic surgeon. Dr. Reichardt also provided an impairment rating of 11% of the left upper extremity that, likewise, converted to a 7% whole person impairment rating.

16. Dr. Reichardt was deposed in connection with this claim on August 13, 2008. Upon questioning from Respondents counsel regarding Claimant's left upper extremity injury, Dr. Reichardt provided the following answers:

> Q: Why would her left become symptomatic?
>
> A: It's likely that it's related to the limitations that she had in her right shoulder.
>
> Q: Okay. And a limitation that she was working full duty on September 13th, 2006, right?
>
> A: That's correct.
>
> Q: Any report by her that I'm favoring my arm so heavily at that junction that I'm beginning to become symptomatic on my left?
>
> A: No.
>
> ….

Q: Did she have additional objective functional limitations on November of 2006 when she returned to Dr. Hanson?

(Pause.)

A: She had objective findings and limitations in her range of motion as well as positive provocative maneuvers. I don't see that she had – I don't see that there was documentation of a specific functional loss per se.

….

Q: She appears to be worse when she comes back in November, correct?

A: That's right.

Q: Were you, from your review of the records, assuming then that she was less functional or favoring her right arm more than she was at the time of discharge in September of 2006?

A: I would assume that she was less functional.

Q: Okay. And less functional in a compensatory-type injury, if you're less function with the affected extremity, then the theory is you necessarily start using the unaffected extremity more, causing it tom become symptomatic; is that right?

A: That's correct.

Q: Okay. Any complaints of that prior to her discharge in September of 2006.

A: No.

Q: Understanding that she had the automobile accident that you've already testified that was contributing to her exacerbation, is it a fair statement that to the extent she was limited in using the right extremity from the automobile accident, that contributed to her developing problems in the left?

A: Yes.

Q: And is your opinion supported by the fact that she does not report the onset of left extremity problems until January of 2007?

A: Yes.

Q: Do you have an opinion as to what the appropriate apportionment or assignment of liability would be between the workers' compensation injury and the automobile accident with regard to the left compensatory injury?

A: This is an area that legally perhaps I don't have a full understanding of what the proper usage of apportionment would be. From a medical standpoint, I would say that it would be reasonable to assign approximately 50 percent responsibility for each of those. There's not – there's not a basis to provide an apportionment of the impairment ratings based on the very specific guidelines that the Division gives us, but from a general medical standpoint as far as how much each contributed to a problem, I think it's reasonable to assess that apportionment.

Q: Okay. And I appreciate that answer, Doctor. And moving away from apportionment – let's make it easier – if I were to ask you how much of Ms. Ince's left shoulder or left extremity problems are causally related to the work injury, would that assignment still be 50 percent causally related to the work injury, 50 percent causally related to the contributing factor of the automobile accident?

A: Yes.

17. Claimant testified at the hearing that she has been employed as a insurance verifier for approximately 4 years. Claimant's job duties include constant use of the telephone and using her hands to dial, push keys and type. At the time of Claimant's initial injury to her right upper extremity, Claimant was working 10 hour shifts, four days per week. After Claimant began having problems with her right shoulder, her employer had an ergonomic evaluation of her work space and her phone, mouse pad and other items were switched from her right to her left side. Claimant testified at hearing that she began having problems with her left upper extremity shortly after her problems with her right shoulder developed. Claimant also testified that she developed the same problems in her left upper extremity that she had on her side. Specifically, Claimant testified that her left upper extremity started acting the way her right upper extremity had been acting right after the surgery. Claimant testified that she was involved in an MVA in October, 2006, but denied any injuries to her shoulders as a result of the MVA.

18. The ALJ finds that Claimant's right shoulder problems developed as a result of Claimant's ergonomically incorrect work station. Dr. Hanson had an occupational therapist evaluate the Claimant's work station in April, 2006, and adjustments were made to the work station to become more ergonomically correct. Claimant originally complained of some problems with her left forearm in early May, 2006; however those symptoms resolved with a short course of therapy.

19. Claimant was placed at MMI for the right shoulder condition in September, 2006 and released to return to work without restrictions. Claimant subsequently developed a worsening of her right upper extremity symptoms after being placed at MMI and eventually underwent surgery on her right shoulder on January 23, 2007.

20. Claimant first complained of symptoms in her left shoulder in early January, 2007. Claimant testified that the symptoms in her left shoulder were related to her employer moving her phone, mouse and other amenities from her right side to her left side after she developed problems with her right shoulder. The ALJ finds that Claimant

has failed to prove that it is more probably true than not that her left shoulder symptoms are related to overusing her left upper extremity. If Claimant's symptoms were related to changes in her work station, as testified to by Claimant, one would expect that Claimant's symptoms would have improved in the six weeks she was off following her right shoulder surgery. Instead, Claimant didn't report any improvement in her symptoms until after she returned to work.

21. Claimant's left shoulder problems did not develop until after her MVA on October 19, 2006. While Claimant alleged that these symptoms were related to overuse of her left upper extremity while compensating for her right upper extremity, the ALJ notes that Claimant was not under any work restrictions at the time her symptoms developed and did not improve when she was off of work. Additionally, Claimant's testimony that her left upper extremity complaints began after surgery on her right shoulder is not supported by the medical records. The ALJ therefore does not find Claimant's testimony with regard to the onset of her symptoms credible.

22. Based on the totality of the evidence, the ALJ finds that Claimant has failed to prove by a preponderance of the evidence that her left shoulder condition is a compensable component of the November 1, 2005 right shoulder injury.

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*.

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 failed to show by a preponderance of the evidence that her left shoulder condition is a compensable component of the November 1, 2005 right shoulder injury. The ALJ finds that Claimant did not prove by a preponderance of the evidence that her job duties caused, aggravated or accelerated her need for treatment of the left shoulder.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits for her left shoulder injury stemming from the November 1, 2006 accident is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED: __April 21, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-770-478

ISSUES

1. The issues for determination include compensability and payment of reasonable, necessary and related medical bills including whether the treating physicians were authorized.

FINDINGS OF FACT

1. Claimant was employed as a housekeeper with employer beginning on July 2, 2008. On August 25, 2008, Claimant arrived at work at approximately 7:30 a.m. Claimant testified that three co-employees had called in sick on this day and that the

temperature was 103 degrees outside. Claimant was working inside. Claimant testified the temperature in the kitchen was 90 degrees. Claimant took a break at approximately 11:30 a.m. for lunch and returned to work at noon to begin serving lunch. While serving lunch, Claimant noticed she was getting blurred vision and began drinking water. Claimant began feeling better and started serving entrees to the residents, but noticed she could only see the outlines of peoples faces. Claimant drank more water and eventually collapsed. Claimant testified that she had never collapsed before.

2. Claimant was taken by ambulance to the St. Mary's Hospital Emergency Room ("ER") where she was diagnosed as having a first time seizure. The ER physicians noted that Claimant did not fall to the floor. Claimant reported to the ER physicians that she was not feeling right this morning and complained of weakness. While at the ER, Claimant had a CT scan of her head that revealed a left sphenoid sinusitis. Tests showed claimant had a low potassium level and a slightly elevated glucose level. Claimant was discharged home with instructions to follow up with Dr. Gilman.

3. Claimant was evaluated by Dr. Gilman on September 3, 2008 and reported a history of a first generalized seizure occurring on August 25, 2008. Claimant told Dr. Gilman that she remembered that while she was working, she stood up and began developing blurred vision. She sat down and the blurred vision eventually resolved. When she stood back up, she again developed blurred vision and the next thing she knew, she awoke several hours later in the ER.

4. Claimant reported to Dr. Gilman that she was taking an average of 120 tablets of Fioricet every three moths and would take upwards of four to six tablets per day for treatment of intermittent migraines. Dr. Gilman suspected that Claimant might have had a withdrawal seizure from the barbiturate in the Fioricet due to the fact that she was taking excessive amounts of the drug before discontinuing it's use two or three weeks ago. Dr. Gilman recommended Claimant pursue an MRI scan and an EEG and provided Claimant with restrictions of no driving, working in high places, working with power tools, swimming alone or operating heavy equipment for a six-month period of time.

5. Claimant testified at hearing that Dr. Gilman's medical report did not accurately reflect her medication consumption. Claimant testified that prior to her injury she had experienced chronic migraine headaches, but had not taken her medication in 3 months, not the three weeks reported by Dr. Gilman.

6. Claimant subsequently reported to Dr. Kerry Beinlich for examination. Dr. Beinlich authored a letter on or about November 6, 2008 indicating that based upon the history and documentation, "I don't think it's clear that her incident was unrelated to work." Dr. Beinlich noted that Claimant was working in very hot conditions and developed some fuzziness of her vision followed by a period of time Claimant was amnestic to before Claimant awoke in the ER. Dr. Beinlich noted that it is common for people to have some jerky movements associated with a syncopal episode that may appear to a lay-person consistent with a seizure. Dr. Beinlich noted that she did not believe it could be said with any degree of certainty whether Claimant had a syncopal episode related

to work conditions or a seizure. Dr. Beinlich also noted that based on the history, Claimant's incident on August 25, 2008 sounded more like a syncopal episode.

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 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). Claimant must show that the injury was sustained in the course and scope of her employment and that the injury arose out of her 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).

3. In this case, based on the totality of the circumstances, the ALJ finds that Claimant has failed to prove by a preponderance of the evidence that she suffered an injury arising out of and in the course of her employment. The ALJ credits the reports from the ER and Dr. Gilman and finds that Claimant likely had a first time seizure on August 25, 2008. The ALJ finds that there is insufficient evidence to show that Claimant's employment caused, aggravated or accelerated her seizure. The ALJ notes that Dr. Beinlich found that it could not be said with any degree of certainty whether Claimant had a sei-

zure or a syncopal episode. The ALJ finds that the opinion of Dr. Beinlich does not establish that Claimant has met her burden of proving a compensable injury by a preponderance of the evidence.

ORDER

It is therefore ordered that:

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

DATED: _April 24, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-733-019

ISSUES

The issues determined herein are whether the surgical procedure requested by Dr. Marin to repair the scapholunate ligament tear is reasonable and necessary and related to the claim and the appropriate burden of proof.

FINDINGS OF FACT

1. On August 11, 2007 the Claimant was injured in an admitted industrial accident when an approximate 300-pound patient rolled over her left wrist.

2. The Claimant was referred to the providers at Centura Centers for Occupational Medicine and was followed primarily by Dr. Daniel Olson.

3. Dr. Olson placed the Claimant at maximum medical improvement on November 28, 2007. Dr. Olson noted in his impairment rating report of December 15, 2007 that x-rays were taken and evidently there was some concern about the scapholunate disruption. In addition, he noted the MRI scan showed confirmation of the tear as well as a tear of the TFCC. Dr. Olson noted that an orthopaedic opinion from Dr. Devanny was obtained as well as a second orthopaedic opinion from Dr. Hart. According to Dr. Olson, neither surgeon recommended any surgery. However, the Claimant continued to complain of symptoms and an EMG was obtained which did confirm mild to moderate level carpal tunnel syndrome on the left side. Dr. Olson concluded that the patient did not want surgery and therefore was being placed at maximum medical improvement and a 12% upper extremity scheduled impairment was provided.

4. The insurer filed a Final Admission of Liability consistent with Dr. Olson's opinion on May 8, 2008. The Claimant objected to the Final Admission of Liability and obtained a Division Independent Medical Examination that was performed by Dr. Jeffrey Jenks. Dr. Jeffrey Jenks opined that the Claimant was not at maximum medical improvement. Dr. Jenks noted that the Claimant wanted to proceed with surgery. Dr. Jenks felt the patient was therefore not at maximum medical improvement and referred her for a possible carpal tunnel release surgery. Dr. Jenks stated that he concurred with Drs. Devanny and Hart that the symptoms were not consistent with a scapholunate ligament tear. Dr. Jenks stated that he therefore agreed that the scapholunate ligament tear is likely not due to her work injury and not the source of her ongoing left wrist pain.

5. Dr. Daniel Olson referred the Claimant to Dr. Philip Marin to examine the patient on September 24, 2008. Dr. Marin reviewed x-rays and an MRI, which to his satisfaction demonstrated a scapholunate tear, TFCC tear, dorsal ganglions on the wrist, and some degeneration of both the scaphoid and lunate. Dr. Marin felt the Claimant was an excellent candidate for surgical intervention on the left upper extremity. Dr. Marin recommended an endoscopic carpal tunnel release, wrist arthroscopy with TFCC debridement, excision of the dorsal wrist ganglions, and repair of the scapholunate ligament with likely a capsulodesis of the scaphoid. Dr. Marin requested authorization to proceed with the surgery.

6. The insurer authorized the carpal tunnel surgery only and not the surgery to repair the scapholunate tear as was requested by Dr. Marin when he saw the Claimant after the Division Independent Medical Examination on September 24, 2008. The Claimant underwent the carpal tunnel release by Dr. Marin on October 2, 2008. The Claimant's symptoms did not improve.

7. Dr. Marin testified that the remaining symptoms are best treated by the surgical procedure that he had originally requested. His clinical studies, his reading of the MRI, and his training all indicate to him to a reasonable degree of certainty that the Claimant has the ligament tear, needs the surgery to avoid "catastrophic results," and presents clinically consistent with the injury. In his opinion, again to a medical certainty, the injury occurred at work on August 11, 2007 as described by the Claimant.

8. Dr. Jack Rook evaluated the Claimant. Dr. Rook agreed with Dr. Marin that the surgical procedure is reasonable and necessary to treat the industrial injury.

9. Dr. Daniel Olson has followed the Claimant since the onset of her injury at work. Although he does not profess to be a surgeon, he notes consistently that even after the carpal tunnel release surgery, the Claimant continued to have ongoing symptomotology including pain and swelling. He has referred the Claimant to Dr. Marin to complete his surgical recommendations.

10. Dr. Hart continues to opine that he does not believe that the Claimant requires the surgical procedure recommended by Dr. Marin because, in his opinion, there was no clinical evidence of any instability at the scapholunate interosseous. Dr. Hart testified

that he performed comprehensive testing of the Claimant but could not conclude that she had a tear of the scapholunate ligament and therefore did not believe the surgery was needed.

11. The Claimant has proven it is more probably true than not that the need for surgery proposed by Dr. Marin is causally related to the industrial injury of August 11, 2007. The testimony from Dr. Marin is credible and persuasive. The fact that the Claimant's symptomotology has not materially changed since the carpal tunnel release is supportive of Dr. Marin's opinion and, to the extent Dr. Olson agrees, to his opinion of relatedness.

CONCLUSIONS OF LAW

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

2. When determining credibility, the fact-finder shall consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Company 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).

3. 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 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). The question of whether the Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 716 P.2d

786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

4. As determined in Finding of Fact 11, the Claimant proved it is more probably true than not that the need for the surgery proposed by Dr. Marin is causally related to the industrial injury and reasonable and necessary. The Claimant has received continuous treatment since the injury. Drs. Marin and Rook as well as to some extent Dr. Olson have all opined that the need for surgery is related to the industrial injury. Dr. Marin's recommendation for surgery is corroborated by the opinion of the Claimant's long-time treating physician, Dr. Olson. While some other physicians have recommended against surgery, their opinions were not consistent with the Claimant's lack of improvement following the partial surgery to repair the carpal tunnel. The ALJ's determination that the surgery is reasonable and necessary is influenced by the Claimant's objective reports of ongoing symptomotology following the carpal tunnel surgery. Evidence and inferences not consistent with this conclusion are found to be not persuasive.

5. Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). When considering whether proposed medical treatment is reasonable and necessary, the ALJ may consider not only the relevant medical opinions, but also other circumstances including the Claimant's objective desire for the treatment, the Claimant's objective experience of pain, and the results of the Claimant's previous medical treatment. *Grigsby v. Denny's Restaurant*, W.C. No. 4-010-016 (ICAO June 29, 1995).

6. The ALJ rejects the respondents' assertion that Dr. Jenks' Division Independent Medical Examination opinion influences the burden of proof in this case. The Claimant is not challenging the Division Independent Medical Examiner's opinion regarding maximum medical improvement. In fact, the Claimant agrees with the Division Independent Medical Examiner when he opined that she was not at maximum medical improvement. The Claimant is not challenging an impairment rating. An impairment has not been provided because the Claimant is not at maximum medical improvement. The medical benefit issue is not tied to Dr. Jenks' rating because there is no rating. The Division Independent Medical Examination process has not been completed. Heightened burden of proof; namely, clear and convincing evidence only applies to an attempt to overcome a Division Independent Medical Examiner's opinion regarding maximum medical improvement or impairment. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The threshold question of whether the Claimant has sustained a compensable injury in the first instance is one of fact that the Administrative Law Judge must determine, if contested, under the preponderance of the evidence standard. *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The Division Independent Medical Examiner's opinion on this issue is not entitled to special or presumptive weight. *Leprino Foods Company v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005); *Faulkner*, supra.

ORDER

It is therefore ordered that:

1. The Respondents shall pay for the surgery recommended by Dr. Marin and all reasonable and necessary expenses ancillary to that procedure.

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

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

DATE: April 24, 2009
/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. WC 4-768-099 & 4-783-518

ISSUES

The issues for determination are:

A. In WC 4-768-099 (DOI 4/20/08): Medical benefits, including liability for the recommended surgery. The parties agreed that the average weekly wage for this claim is $810.00.
B. In WC 4-783-518 (DOI 8/8/2008): Compensability, medical benefits, and temporary total disability benefits. The parties stipulated to an average weekly wage of $774.43 in this claim.

FINDINGS OF FACT

1. Claimant works as the produce manager for Employer. Her job requires lifting up to fifty pounds daily, bending, and reaching.
2. Claimant had a low back strain six or seven years ago after lifting and twisting. The strain was treated with physical therapy and resolved. However, Claimant has continued to have intermittent episodic episodes of mild low back pain or "flares" that did not interfere with Claimant's work and did not require medical attention. Claimant did not have any radicular-type pain, weakness, numbness, tingling, or any bowel or bladder difficulties.
3. On April 20, 2008, as she was reaching down low and forward, Claimant suddenly experienced extreme pain across her low back. This is the subject of WC 4-768-099. Respondent has admitted liability for this claim.

4. Claimant was treated for the April 20, 2008, injury by Craig Anderson, M.D. X-rays taken on April 21, 2008, showed mild degenerative changes with minimal disc space narrowing at L3-4, with small anterior osteophytes. Dr. Anderson diagnosed a lumbar strain. He restricted Claimant to lifting no more than ten pounds, and limited her crawling, kneeling, squatting, climbing, and bending. On June 2, 2008, Dr. Anderson noted that Claimant had improved and no longer required any work restrictions.

5. Dr. Anderson referred Claimant to Thomas W. Vavrek, D.O., who first examined Claimant on May 30, 2008. Dr. Vavrek's assessment was lumbosacral strain with no radicular symptoms by history or exam, lumbago, myofascial pain, and somatic dysfunction. On June 16, 2008, Claimant stated that she had pain occasionally into the right buttock, which had decreased. Dr. Vavrek added right buttock pain/piriformis syndrome to his assessment. On June 27, 2008, Claimant stated that she continued to make steady improvement. On August 1, 2008, Claimant stated that she had had a flare or an aggravation of symptoms on an extended driving trip to California. Her lumbosacral pain was aggravated. On August 6, 2008, Claimant reported to Dr. Vavrek that over the previous weekend she had done an extended amount of heavy lifting and bending at work and on Monday had noticed a significant increase in lumbosacral pain that further increased as she continued to work that day. Dr. Vavrek noted no radicular symptoms, but increased pain complaints.

6. On August 8, 2008, Claimant sneezed at work while flexing forward. Claimant had a severe spasm in her low back and buttocks. This incident is the subject of WC 4-783-518. Respondent has denied liability.

7. An MRI was taken on August 11, 2008. The MRI showed a right paracentral disc extrusion at L5-S1 with marked deformity of the proximal S1 root sleeve.

8. Dr. Anderson, on an August 11, 2008, Interim Summary, stated that his assessment was that Claimant had a lumbar disk herniation at L5-S1 and right S1 radiculopathy. He directed Claimant to remain off work. He referred Claimant to Dr. Barry Ogdin for consideration of an epidural steroid injection. In his report of September 3, 2008, Dr. Anderson stated that his assessment was "work-related." He continued to treat Claimant. On October 8, 2008, he referred Claimant to Dr. Mike Rauzzino for a consultation.

9. Barry A. Ogin, M.D., first examined Claimant on August 13, 2008. He noted that Claimant had a large disc extrusion at L5-S1 with right S1 radiculopathy. He stated that those disc problems were causally related to her work activities. He recommended epidural steroid injections. Claimant received epidural steroid injections on August 18 and August 25, 2008. The two injections were helpful. She later had a third injection.

10. Michael Raussino, M.D., has examined Claimant and made treatment recommendations. On February 15, 2009, Dr. Raussino recommended a third injection and stated that surgery would be considered if her condition did not improve. In a report on February 16, 2009, Dr. Raussino recommended surgery.

11. John T. McBride, Jr., M.D., examined Claimant on November 24, 2008. Dr. McBride diagnosed at herniated nucleus pulposus at L5-S1 with S1 radiculopathy. Dr. McBride stated that the April 2008 injury caused damage to Claimant's L5-S1 disc, but did not herniate it. He stated that the sneezing episode on August 8, 2008, caused the extrusion of the disk, the nerve root pinching, and her SI radiculopathy. In a report of December 15, 2008, Dr. McBride stated that there is no indication that Claimant's disc was herniated prior to the August 8, 2008, sneeze. He stated that the herniation was

not due to her employment, but was due to the sneeze that happened to occur at work. In a report of February 16, 2009, Dr. McBride stated that Claimant had a strain from the injury on April 20, 2008, which significantly resolved prior to the sneezing episode on August 8, 2008. He stated that Claimant's herniated disc and S1 radiculopathy were not related to her employment. In a report dated March 5, 2009, Dr. McBride stated that Claimant responded from the April 20, 2008, injury as one would expect one to recover from a muscle strain or an aggravation of preexisting degenerative changes at L3-4, and there was not evidence of an L5-S1 injury until after the sneeze. He also noted that the sneeze could have occurred equally at home.

12. In his report of January 23, 2009, Dr. Anderson reviewed several medical reports from IME physicians and responded to inquiries from Respondent. Dr. Anderson stated that it is probable that Claimant's lumbar spine was stable and asymptomatic until the work injury of April 20, 2008. He stated that the work injury caused injury to the L5-S1 disk. He stated that the lumbar condition was still active on August 8, 2008. He stated that the injury put Claimant at risk for and was the etiology for the subsequent disk herniation resulting when she was flexed forward and sneezed. In his report of February 13, 2009, Dr. Anderson stated that he agreed with the recommendation for surgery and opined that the surgery is to treat the April 20, 2008, injury. He also stated that, "what happened on August 8 was the result of the April 20, 2008, injury to the L5-S1 disk." He described the August 8, 2008, worsening as the natural course of the April 20, 2008, injury. Dr. Anderson also stated that the heavy work performed the weekend of August 3 to 5, 2008, caused a substantial worsening, contributing to the need for surgical treatment.

13. Dr. Raussino, in his report of February 16, 2009, stated that there was significant injury to the disc at the time of the April 20, 2008, injury. He stated that what most likely happened was that Claimant sustained a significant injury to her disc with at least an annular tear at the time of the original injury in April 2008. He opined that:

> A simple sneeze in the absence of this underlying pathology would not have caused any overt injury; had she not sustained the work-related injury she would not have experienced progressive degeneration of disc which, in fact, progressed to radiculopathy.

14. Dr. Ogin, in his report of March 13, 2009, stated that Claimant's "disc herniation was a direct result of her work activities, both the initial injury in April 2008 as well as the subsequent work activities that caused the subsequent aggravation." He further stated that Claimant requires surgery for her work-related condition.

15. Dr. Anderson testified by telephone at the hearing. Dr. Anderson stated that Claimant had acute onset of low back pain on April 20, 2008. He stated that Claimant was still under active treatment when her pain increased on August 6, 2008, after heavy work activities. He testified that the April 20, 2008, injury damaged the L5-S1 disk and, in the natural course, resulted in the August 2008 disc injury. He stated that the recommended surgery was reasonably necessary to cure and relieve the Claimant from the effects of the April 20, 2008, compensable injury. He stated that Claimant had not recovered from the April 2008 compensable injury at the time of the sneeze on August 8, 2008. He stated that the natural process of a disc is an annular tear, then a bulge, then

extrusion of the disc material. He stated that it was not likely that a sneeze would cause a massive herniation in the absence of a prior injury to the disc. He stated that the recommended surgery is reasonably necessary to cure and relieve Claimant from the effects of April 20, 2008, injury. Dr. Anderson did admit that there was no objective evidence of a disc herniation prior to the sneeze; however, an MRI should be ordered if a patient does not improve. He testified that prior to August 8, 2008, his diagnoses was a strain, not a herniation; however, there was nothing to rule out a herniated disc.

16. Dr. McBride testified by a deposition taken on April 14, 2009. Dr. McBride testified that Claimant did not sustain an acute injury to her disc in April 2008; Claimant did have a preexisting degenerative disease at the L3-4 level and likely at other areas of her spine; Claimant had a history of back injuries; that Claimant sustained a soft tissue strain; and that there is no evidence of a injury to her disc. He testified that the symptoms from the April 20, 2008, episode were diffuse, were not specific to one disc, and that they were in line with a degenerative process or a strain of her lumbar spine. Dr. McBride again stated that the sneeze caused the herniated disc. Dr. McBride testified that one would expect increased back pain in a person with degenerative changes in the spine after a significant increase in work at a job that required lifting.

17. The opinions of Dr. Anderson, Dr. Raussino, and Dr. Ogin are credible and more persuasive than the contrary opinion of Dr. McBride.

18. It is found that Claimant injured her L5-S1 disc in the accident of April 20, 2008, her back pain increased after a weekend of heavy work prior to August 6, 2008, and that her disc herniated after a sneeze on August 8, 2008. It is found that the worsened pain from the heavy work and the disc herniation were the natural result of the April 20, 2008, injury. It is found that the recommended surgery is reasonably necessary to cure and relieve Claimant from the effects of the April 20, 2008, compensable injury.

CONCLUSIONS OF LAW

Respondent is liable for medical care that is reasonably needed to cure and relieve Claimant from the effects of a compensable injury. Section 8-42-101(1), C.R.S.

Claimant has established by a preponderance of the evidence that her treatment in August 2008 and thereafter was reasonably necessary to cure and relieve Claimant from the effects of the April 20, 2008, compensable injury. The increased symptoms in August 2008, and the herniation which occurred after a sneeze on August 8, 2008, were the natural progression of the injury she suffered on April 20, 2008. Her work in August 2008, and the sneeze were not efficient intervening events, and do not sever the casual relationship between the compensable injury of April 20, 2008, and her treatment in August 2008 and thereafter. Respondent is liable for the costs of Claimant's treatment in August 2008 and thereafter in WC 4-768-099.

Claimant has failed to establish that she sustained in industrial injury or occupational disease in August 2008. WC 4-783-518 is denied and dismissed. Respondent is not liable for compensation or benefits in WC 4-783-518.

ORDER

It is therefore ordered that:

1. Insurer is liable in WC 4-768-099 for medical benefits in August 2008 and thereafter, including the cost of the proposed surgery.
2. Issues not resolved in WC 4-768-099 are reserved.
3. WC 4-783-518 is denied and dismissed.

DATED: *April 24, 2009*

Bruce C. Friend, ALJ

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-741-897

ISSUES

1. Whether Respondents' Final Admission of Liability (FAL) was defective pursuant to §8-43-203(2)(b)(II), C.R.S. and W.C.R.P. Rule 5-5(A).

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. based on Respondents' defective FAL.

FINDINGS OF FACT

1. Claimant worked for Employer as a concrete laborer. On November 15, 2007 Claimant struck his back and head when he fell into a nine-foot hole.

2. Employer referred Claimant to Authorized Treating Physician (ATP) Miguel Castrejon, M.D. for medical treatment. Claimant's primary diagnosis was a compression fracture at T12 but he also suffered cervical, thoracic and lumbar strains.

3. In April 2006 Dr. Castrejon referred Claimant to a physical therapist for range of motion testing and a Functional Capacity Evaluation (FCE). The physical therapist issued a narrative report that included range of motion findings. However, the physical therapist did not complete separate rating worksheets.

4. On April 30, 2008 Dr. Castrejon determined that Claimant had reached Maximum Medical Improvement (MMI). He assigned Claimant a 19% whole person impairment rating. Dr. Castrejon issued an impairment evaluation report but did not complete any rating worksheets.

5. On June 30, 2008 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Castrejon's impairment determination. Respondents attached both Dr. Castrejon's rating report and the physical therapist's report. Because Claimant did not timely object to the FAL, his claim closed by operation of law.

6. On October 27, 2008 Claimant filed a Motion to Strike the FAL because Respondents failed to attach any ratings worksheets to the document. On November 5, 2008 Respondents filed an Objection to Claimant's Motion to Strike the FAL. Respondents asserted that they had attached all existing documents relevant to Dr. Castrejon's determination of Claimant's impairment rating. On November 13, 2008 Pre-hearing ALJ (PALJ) DeMarino entered an order denying Claimant's Motion to Strike the FAL. On December 8, 2008 Claimant filed an Application for hearing challenging PALJ DeMarino's order.

7. On March 23, 2009 the parties conducted a Pre-Hearing conference before ALJ Krumreich. The parties stipulated that all of the documents related to Claimant's impairment rating had been attached to the FAL. ALJ Krumreich characterized the stipulation as follows: "All documents in existence with regard to the determination of permanent impairment by the authorized treating physician were attached to the Final Admission of Liability filed by Respondents."

8. Claimant did not object, apply for a hearing on all ripe issues, or submit a Notice and Proposal for a DIME within 30 days of the filing of the June 30, 2008 FAL. Consequently, Claimant's claim closed by operation of law with regard to all issues on July 30, 2008.

9. Respondents complied with both §8-43-203(2)(b)(II) and W.C.R.P. Rule 5.5(A) in filing the June 30, 2008 FAL. Respondents attached the physical therapist's report, which included range of motion findings, to the FAL. The FAL also included Dr. Castrejon's impairment evaluation report. Neither the physical therapist nor Dr. Castrejon completed any rating worksheets. Moreover, the parties stipulated that all of the documents related to Claimant's impairment rating had been attached to the FAL. Respondents were only required to attach the medical information that was available and had been used in calculating Claimant's impairment rating. Claimant thus received all of the information about his impairment rating that was necessary for him to make an informed decision about whether to challenge the FAL.

10. Claimant has failed to establish that it is more probably true than not that Respondents violated either §8-43-203(2)(b)(II) or W.C.R.P. Rule 5.5(A) in filing the June 30, 2008 FAL. Respondents attached all of the information about Claimant's impairment rating that was available and necessary for him to make an informed decision about whether to challenge the FAL. Because Respondents did not violate any statute or rule in filing the June 30, 2008 FAL, Claimant has failed to demonstrate that he is entitled to recover penalties.

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 pre-

ponderance 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).

Sufficiency of FAL

4. Section 8-43-203(2)(b)(II), C.R.S. provides, in relevant part, that a claim "will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing, including the selection of an independent medical examiner pursuant to section 8-42-107.2." Once a claim has been closed it may only be reopened on the grounds stated in §8-43-303, C.R.S.; *see Peregroy v. Industrial Claim Appeals Office,* 87 P.3d 261, 263 (Colo. App. 2004).

5. As found, Claimant did not object, apply for a hearing on all ripe issues, or submit a Notice and Proposal for a DIME within 30 days of the filing of the June 30, 2008 FAL. Consequently, Claimant's claim closed by operation of law with regard to all issues on July 30, 2008.

6. Nevertheless, Claimant asserts that, because the June 30, 2008 FAL was defective, his claim remained open. Section 8-43-203(2)(b)(II), C.R.S. provides that when a FAL "is predicated upon medical reports, such reports shall accompany the final admission." One of the purposes of §8-43-203(2)(b)(II), C.R.S. is to provide a claimant with notice regarding the exact basis of admitted or denied liability so that he can make an informed decision about whether to challenge the FAL. *Silva v. Poudre School Dist.,* W.C. No. 4-651-643 (ICAP, Apr. 30, 2008).

7. W.C.R.P. Rule 5-5(A) also provides that when a FAL is predicated upon medical reports, the reports, along with the worksheets or other evaluation information associated with an impairment rating, shall accompany the FAL. Therefore, when a

medical report is not attached to a FAL, the FAL is insufficient to close the claim. *Avila v. Universal Forest Prod.*, W.C. No. 4-477-247 (ICAP Aug. 25, 2004).

8. As found, Respondents complied with both §8-43-203(2)(b)(II) and W.C.R.P. Rule 5.5(A) in filing the June 30, 2008 FAL. Respondents attached the physical therapist's report, which included range of motion findings, to the FAL. The FAL also included Dr. Castrejon's impairment evaluation report. Neither the physical therapist nor Dr. Castrejon completed any rating worksheets. Moreover, the parties stipulated that all of the documents related to Claimant's impairment rating had been attached to the FAL. Respondents were only required to attach the medical information that was available and had been used in calculating Claimant's impairment rating. Claimant thus received all of the information about his impairment rating that was necessary for him to make an informed decision about whether to challenge the FAL. *Compare McCotter v. U.S. West Communications, Inc.,* W.C. No. 4-430-792 (ICAP, Mar. 25, 2002) (concluding that, where the respondents failed to attach newly-issued Division Independent Medical Examination rating worksheets to the FAL, the FAL was defective and insufficient to close the claimant's claim).

Penalties

9. Section 8-43-304(1), C.R.S. is a general penalty provision under the Act that authorizes the imposition of penalties up to $500 per day where a party violates a statute, rule, or lawful order of an ALJ. *Holliday v. Bestop, Inc.,* 23 P.3d 700, 705, 706 (Colo. 2001). The term "order" as used in §8-43-304 includes a rule or regulation promulgated by the Director of the Division of Worker's Compensation. §8-40-201(15), C.R.S.; *see Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176, 177 (Colo. App. 2002).

10. The imposition of penalties under §8-43-304(1) requires a two-step analysis. *See In re Hailemichael,* W.C. No. 4-382-985 (ICAP Nov. 17, 2004). The ALJ must first determine whether the disputed conduct violated a provision of the Act or rule. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623, 624 (Colo. App. 1995). If a violation has occurred, penalties may only be imposed if the ALJ concludes that the violation was objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 907 P.2d 676, 678-79 (Colo. App. 1995). The reasonableness of an insurer's actions depends upon whether the action was predicated on a "rational argument based on law or fact." *In re Lamutt,* W.C. No. 4-282-825 (ICAP, Nov. 6, 1998).

11. As found, Claimant has failed to establish by a preponderance of the evidence that Respondents violated either §8-43-203(2)(b)(II) or W.C.R.P. Rule 5.5(A) in filing the June 30, 2008 FAL. Respondents attached all of the information about Claimant's impairment rating that was available and necessary for him to make an informed decision about whether to challenge the FAL. Because Respondents did not violate any statute or rule in filing the June 30, 2008 FAL, Claimant has failed to demonstrate that he is entitled to recover penalties.

ORDER

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

1. Claimant's claim closed by operation of law on July 30, 2008.

2. Claimant's request for penalties based on a defective FAL is denied.

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

DATED: April 24, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-720-290

ISSUES

The issue raised for consideration at hearing is whether Respondents overcame the Division Independent Medical Examiner's (DIME) opinion on Claimant's permanent medical impairment rating by clear and convincing evidence; and if so, what the Claimant's permanent partial disability is.

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 on February 4, 2007 when he fell at work.

2. Claimant was initially treated by Jonathan Block, D.O. at Concentra on February 6, 2007. Claimant reported that his initial dizziness from the fall had resolved, but he continued to suffer from headaches after his fall. Claimant also reported pain and decreased range of motion in his cervical spine and a mild low backache. No radicular symptoms or lower extremity symptoms was recorded at that time.

3. Claimant returned on February 9, 2007 and noted for the first time a click in his left hip with flexion.

4. On February 15, 2007, Claimant reported some improvement after physical therapy and was working regular duty at that time. It was noted that MMI was expected within 4-6 weeks.

5. On February 22, 2007, Claimant reported lost strength in his leg, most notably when he was braking "older" vehicles at work, and that driving the "older" buses aggravated his condition. Dr. Bloch recommended that he drive newer buses with easier pedals or that he be limited from driving older buses until a radicular process could be ruled out.

6. Claimant was referred to Dr. Mark Failinger for his hip condition. Dr. Failinger recommended physical therapy, a MRI and possible injections. Claimant continued to work his regular duties.

7. On March 20, 2007, Claimant underwent a right hip MRI that identified a small labral defect.

8. On April 5, 2007, Claimant reported he had not improved, but requested that he be returned to full duty.

9. On April 11, 2007, Dr. Bloch reported that Claimant continued to have headaches and that he was going to undergo an injection for his hip, but that his back symptoms improved and that his radicular symptoms resolved. Dr. Bloch recommended a head MRI to diagnose Claimant's continued headaches and referred Claimant to Dr. Hammerberg.

10. Dr. Hammerberg reviewed the MRI scan of Claimant's head and determined it was completely benign. Additionally, Dr. Bloch noted that Claimant's headaches were not typical of an acute or sub-acute injury.

11. By April 11, 2007, Claimant was returned to full duty and released from all restrictions. On May 16, 2007, Claimant improved but continued to have subjective complaints. Claimant wanted to proceed with injections to his hip and his back.

12. Dr. Failinger examined the Claimant on June 7, 2007 and noted that the diagnostic hip injection had provided no relief. Dr. Failinger did not recommend surgery for Claimant's hip condition given the failure of the injection.

13. Dr. Bloch referred Claimant to Dr. Scott Primack for further evaluation. Claimant had previously complained of his prior care to Dr. Failinger. Dr. Primack initially examined Claimant on June 19, 2007 and reviewed his medical history. Dr. Primack noted a possible disk bulge on the MRI films from July 3, 2007, however, Dr. Primack ultimately determined that an EMG/NCV study was needed for further evaluation.

14. Dr. Schakaraschwili performed an EMG of Claimant's lower extremities on June 25, 2007. The EMG findings were no evidence of acute or subacute denervation, with a slight delay in the S1 nerve testing.

15. Dr. Primack referred Claimant to Dr. James Ogsbury for surgical evaluation. Dr. Ogsbury examined Claimant on July 3, 2007. Dr. Ogsbury informed Claimant that he was not a surgical candidate due to the fact that there was no nerve root compression at any level, but especially none on his right side, which was the area of concern.

16. Claimant then presented to Dr. Primack on July 17, 2007 who noted as follows:

> Clinically, Mr. Buateng [sic] still has ongoing discomfort. He feels though he is unsafe to work. I feel as though he is safe to work. Thus, we are at somewhat of an impasse. I am willing to provide him with lumbar traction. He states that he will leave his job. I told him that if he leaves his job, that is his decision, but I do believe he is safe to do the essential functions of the job, given the data that I have.

17. In a letter dated September 15, 2007, Dr. Primack reported that Claimant was at MMI as of July 17, 2007, that he was cleared to work with no restrictions, and that there was no permanent residual impairment.

18. A Final Admission of Liability was filed on January 16, 2008. Claimant filed an Objection to the Final Admission of Liability and Notice and Proposal for a Division IME.

19. Claimant underwent a DIME on July 30, 2008 by Dr. Gregory Reichhardt.

20. Dr. Reichhardt agreed with Dr. Primack's finding of MMI on July 17, 2007.

21. Unlike Dr. Primack, Dr. Reichhardt determined that Claimant did suffer permanent impairment and found that Claimant's reduced range of motion and pain complaints equated to a 15% whole person impairment rating for the lumbar spine and 10% lower extremity rating for Claimant's hip, for a combined rating of 18% whole person impairment.

22. Unbeknownst to Dr. Reichhardt, Claimant saw two physicians in Virginia around the time of the DIME appointment, but records of those visits were not obtained by Respondents or provided to Dr. Reichhardt until after Dr. Reichhardt's examination of the Claimant.

23. Claimant saw Dr. Ratchford, his primary care physician in Virginia, on June 13, 2008, just forty-seven days prior to the DIME appointment. Claimant com-

plained of the same lumbar symptoms addressed by Dr. Reichhardt in the DIME. Dr. Ratchford found Claimant had full range of motion for flexion, extension, left lateral flexion and right lateral flexion with mild discomfort. This finding directly conflicts with the subsequent findings by Dr. Reichhardt on July 30, 2008.

24. Claimant saw a surgeon in Virginia, Dr. Siddiqui, on July 3, 2008, twenty-seven days prior to the DIME. Dr. Siddiqui's record for that examination reflected full range of motion of Claimant's lumbar spine and full range of motion of Claimant's hip without pain.

25. Furthermore, on August 21, 2008, twenty-two days after the DIME, Dr. Siddiqui again noted full range of motion of the lumbar spine and specifically noted full range of motion of Claimant's hip without any pain.

26. Dr. Reichhardt opined that Claimant had rigidity of the lumbar spine for six months, for which Dr. Reichhardt assigned a rating of 5% for a specific disorder under the AMA Guides. Dr. Reichhardt was unaware that Claimant had full range of motion of his lumbar spine a month and half before the DIME appointment, and full range of motion of his lumbar spine and hip with no evidence of pain fourteen days after the DIME appointment.

27. Dr. Reichhardt testified that Claimant's range of motion measurements were "effort dependent". Dr. Reichhardt agreed that his findings were inconsistent with those noted by Claimant's physicians in Virginia. He was not aware of those medical findings at the time of he conducted the DIME and wrote his report.

28. Dr. Reichhardt testified that the 15% permanent impairment rating would not be correct if the Claimant had demonstrated full range of motion during the DIME appointment.

29. Dr. Reichhardt also testified that the lower extremity rating provided for Claimant's hip would also be incorrect if he had full range of motion without pain.

30. Dr. Primack testified that as of the date of MMI on July 17, 2007, Claimant had no permanent impairment.

31. Dr. Primack testified that there was no basis for an impairment rating as Claimant's pain complaints were restricted to his right side and they did not correspond to the disk pathology on the left side.

32. Dr. Primack also credibly testified, and it is so found, that Dr. Reichhardt's impairment rating was incorrect under the AMA Guides based on the medical records provided by the physicians in Virginia. Dr. Primack testified that Dr. Reichhardt's measurements were likely incorrect due to the fact that Claimant exhibited full range of motion to his Virginia physicians 27 days prior to the DIME and 22 days after the DIME.

33. Dr. Primack further credibly testified, and it is so found, that Dr. Reichhardt's assignment of a rating for a specific disorder under Table 53 of the AMA Guides was incorrect. Dr. Primack testified that because Claimant's pain complaints were on his right side whereas the MRI showed some bulging on the left side, Claimant did not demonstrate pain and rigidity for six months consistent with the actual findings on the MRI. Thus, the specific disorder noted by Dr. Reichhardt was not supported by the MRI findings. Without a specific disorder, range of motion testing is not appropriate under the AMA Guides.

34. It is found that the evidence is clear and convincing that Dr. Reichhardt's impairment rating was not correct.

35. It is found that Claimant has sustained no permanent impairment as a result of his compensable injury.

CONCLUSIONS OF LAW

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

1. The purpose of the Workers' Compensation Act of Colorado (Act) is to ensure 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 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 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. The facts in a Workers' Compensation case must be interpreted neutrally, neither in favor or the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. 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. Section 8-42-107(8)(c), C.R.S., provides that the DIME physician's finding of medical impairment is binding unless overcome by clear and convincing evidence. "Clear and convincing" evidence has been defined as evidence which demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc., v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998).

4. A DIME must rate impairment in accordance with the provisions of the *AMA Guides, 3rd Edition Revised,* (*AMA Guides*). Sections 8-42-101(3.7) and 8-42-107(8)(c), C.R.S.; *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). The *AMA Guides* provide that, if an examiner's findings "are not consistent with those in the record, the step of determining the percentage of impairment is meaningless and should not be carried out until communication between the involved physicians or further clinical investigation resolves the disparity." *AMA Guides,* Section 2.1; *See, Goffinett v. Cocat, Inc.*, W.C. No. 4-677-750 (I.C.A.O. April 16, 2008); S*ee also Vasquez v. Safeway, Inc.*, W.C. No. 4-497-976 (I.C.A.O. Nov. 10, 2004).

5. A DIME's "deviation from the *AMA Guides* constitutes some evidence that the DIME physician's rating is incorrect." *Jaramillo v. Pillow Kingdom and Gen. Ins. Co. of Amer. d/b/a Safeco Ins.*, W.C. No. 4-457-028 (I.C.A.O. Sep. 10, 2002). Whether or not the DIME correctly applied the *AMA Guides* and whether a party overcomes the DIME is a question of fact for determination by the ALJ. Section 8-43-301(8), C.R.S.; *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (I.C.A.O. Aug. 18, 2004).

6. Here, it is true that the impairment rating issued by Dr. Reichhardt did note the Claimant's pain complaints existed for over 6 months in determining a "specific disorder" impairment, however, that pain was not associated with any objective findings related to the industrial injury as evidenced by the medical records.

7. Furthermore, Claimant's range of motion measurements that were obtained by Dr. Reichhardt were wholly inconsistent with range of motion measurements taken just prior to, and after the DIME by Claimant's physicians in Virginia.

8. The AMA Guides require not only that range of motion measurements be valid on the day of examination, but also that these measurements exhibit some degree of consistency and reliability when compared to ratings recorded by other physicians at other times. *Vasquez v. Safeway*, W. C. No. 4-497-976 (I.C.A.O. ,November 10, 2004)

9. Respondents have shown by clear and convincing evidence that the impairment rating for Claimant's lower back and right hip that was assessed by Dr. Reichhardt in the DIME is incorrect.

10. Dr. Primack's opinion that Claimant had no impairment at the time of MMI is credible and persuasive.

ORDER

It is therefore ordered that:

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

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

DATED: April 24, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-690-754

ISSUES

The issue determined herein is whether claimant's request for recalculation of the admitted permanent partial disability ("PPD") benefits is closed by final admission of liability ("FAL").

FINDINGS OF FACT

1. On June 14, 2006, claimant suffered an admitted industrial injury.
2. The parties did not file a copy of the general admission of liability, but they agree that respondents admitted liability for temporary total disability ("TTD") benefits at the rate of $180 per week based upon an average weekly wage of $270.
3. After the authorized treating physician determined that claimant was at maximum medical improvement ("MMI"), the insurer apparently filed a FAL terminating TTD as of May 8, 2007. The insurer admitted liability for PPD benefits for 34.8 weeks at the rate of $180 per week, for a total PPD amount of $6,264.
4. Dr. Jenks, the Division Independent Medical Examiner ("DIME"), determined that claimant was not yet at MMI.
5. The parties agreed that claimant was entitled to TTD benefits in the amount of $5,000 for the period May 9, 2007, through January 31, 2008. The insurer reinstated the $180 weekly TTD benefits February 1, 2008.
6. On May 29, 2008, Dr. Jenks determined that claimant was at MMI.
7. On August 4, 2008, the insurer filed a petition to modify the average weekly wage to $152.08. The petition had a certificate of mailing dated April 4, 2008, but the parties agreed that the petition was actually filed on August 4, 2008.
8. On September 3, 2008, the Division of Workers' Compensation Claims Management Unit approved the petition, noting that the modification was allowed as of the date of the petition, pursuant to WCRP 6-4.
9. On September 11, 2008, the insurer filed an amended FAL terminating TTD benefits after May 28, 2008. The FAL admitted for PPD benefits for 9.571 weeks at the rate of $180 per week for the period May 29, 2008 through August 3, 2008, and for 76.595 weeks at the rate of $101.39 per week for the period August 4, 2008 through

January 21, 2010. The FAL asserted credit for the previous payment of PPD benefits in the amount of $6,264, which were paid from May 9, 2007, through January 6, 2008.

10. Claimant did not file an objection to the September 11, 2008, amended FAL. The deadline for claimant's application for hearing to object to the September 11 FAL was October 11, 2008, or the next business day.

11. On June 23, 2008, claimant had applied for hearing on the issues of TTD benefits and average weekly wage. Hearing had been set for October 7, 2008. At a September 25, 2008, prehearing conference, claimant withdrew his June 23, 2008, application for hearing and the October 7 hearing was vacated.

12. On October 21, 2008, claimant applied for hearing on the issues of TTD, temporary partial disability ("TPD"), PPD, permanent total disability ("PTD"), and medical benefits, and average weekly wage.

13. On January 22, 2009, partial summary judgment was granted on respondents' motion, denying and dismissing the claims for additional TTD, TPD, PPD, and PTD benefits and the calculation of the average weekly wage. Because the amended FAL provided post-MMI medical benefits, the April 8, 2009 hearing was not vacated.

14. At the April 8, 2009, hearing, claimant did not proceed on any medical benefits and argued only that the insurer had miscalculated the amount of PPD benefits due to claimant.

CONCLUSIONS OF LAW

1. Respondents argue, as in their previous motion for summary judgment, that the amended FAL closed the claim for calculation of PPD benefits. Claimant argues that he is not required to file a timely objection to the FAL and an application for hearing to address only a miscalculation of benefits. He fails to cite any authority for that argument. Claimant appears to argue that the insurer's recitation of the benefit history in the FAL makes it liable for payment of PPD benefits at the rate of $180 per week for the period May 9, 2007, through January 6, 2008. The parties do not dispute, however, that the DIME subsequently determined that claimant had not been at MMI. Consequently, claimant was not entitled to PPD benefits during that period. Only after the DIME determined MMI was the insurer able to calculate the final award of PPD benefits. In that final calculation, the insurer correctly calculated the PPD benefits at the higher admitted TTD rate until the August 4, 2008, petition to modify the average weekly wage. The insurer then correctly calculated PPD benefits at the lower TTD rate for the balance of the period of the PPD payout. To the extent claimant argues that the insurer was not entitled to take credit for the full $6,264 in prematurely paid PPD benefits because the average weekly wage could be modified only effective August 4, 2008, that argument appears defective. Claimant was never entitled to PPD benefits before May 29, 2008, when he finally achieved MMI. The insurer, having necessarily paid the PPD benefits at the time, but then retroactively having been told to pay TTD benefits for that period, was entitled to take credit against the eventual correct determination of PPD benefits. Nevertheless, it is unnecessary to reach that issue.

2. The amended FAL closed the issue of calculation of PPD benefits. Claimant is not arguing that the FAL was correct and the insurer has to pay benefits in accordance with the FAL. Claimant is arguing that the FAL assertion of a credit for the previ-

ously paid PPD benefits was incorrect. Even if claimant happened to be correct about that issue, he was required to object to the FAL and file a timely application for hearing. He failed to do so. Because the issues were addressed in the FAL, they are closed. *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2004).

ORDER

It is therefore ordered that:

1. Claimant's request to recalculate the admitted PPD benefits is denied and dismissed.

DATED: April 27, 2009 /s/ original signed by:_____

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-681-099

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 January 26 and March 9, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 1/26/09, Courtroom 3, beginning at 8:37 AM, and ending at 5:12 PM; and, 3/9/09, Courtroom 4, beginning at 1:30 PM, and ending at 4:55 PM).

At the conclusion of the last session of the hearing, the ALJ established a briefing schedule, briefs to be filed electronically. After an extension of time, Claimant's opening brief was filed on April 13, 2009. Respondents' answer brief was filed on April 20, 2009. No timely reply brief was filed. The matter was deemed submitted for decision on April 28, 2009.

ISSUES

The issues to be determined by this decision concern permanent total disability (PTD); and, the causal relatedness of complex regional pain syndrome (CRPS) to Claimant's admitted right arm injury of November 17, 2005.

FINDINGS OF FACT

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

Preliminary

1. The Employer employed the Claimant as an operations counselor when she was injured during a four-day training period.

2. On November 17, 2005, Claimant was injured when a fellow employee forcefully handcuffed her during the course of training. Claimant's right shoulder was extended back while pressure points were applied to her right hand and triceps region. During her injury, Claimant's right shoulder was pinned to the floor by the weight of a co-employee's knee. The co-employee was practicing handcuffing procedures on her. Additionally, the Claimant's head was forceably turned to the right.

3. Claimant developed pain with associated swelling in the distal aspect of her right upper extremity, particularly along the radial aspect of the right wrist. Claimant subsequently developed paresthesia in the right index finger and thumb followed by pain symptomology which migrated proximally in the right upper extremity toward Claimant's shoulder and neck. Claimant is right-hand dominant.

4. Thereafter, the Claimant was referred to Bert Bergland, D.O., who provided conservative treatment. Because of Claimant's delayed recovery, however, she was referred to John W. Nelson, M.D., for pain management, and to Edwin Shockney, Ph.D., a clinical psychologist, for psychological support. Ultimately, Claimant was placed at maximum medical improvement (MMI) by Dr. Bergland, with a 21% impairment rating of the right upper extremity (RUE) and she was given permanent physical restrictions of no lifting to bench height, no lifting to shelf height and no carrying over 10 lbs., occasionally, 5 lbs., frequently; and, 2 lbs., constantly. Additionally, Claimant was precluded from pushing and pulling over 30 lbs., occasionally, 15 lbs., frequently, or, 6 lbs., constantly. Maintenance treatment was not recommended. Claimant's current treating physician has adopted these physical restrictions and they are now considered permanent.

5. Respondents ultimately filed a Final Admission of Liability (FAL), dated April 1, 2008, admitting for an average weekly wage (AWW) of $500; for temporary disability benefits through January 10, 2007; for medical benefits; and, for permanent partial disability benefits (PPD), based upon 10% whole person permanent medical impairment, with an MMI date of November 5, 2007, pursuant to the opinion of David L. Reinhard, M.D., the Claimant's authorized treating physician (ATP). Respondents admitted for maintenance medical care as recommended by Dr. Reinhard, including acupuncture, medications, follow up visits with Dr. Reinhard, six additional biofeedback sessions, and the purchase of an interferential stimulator unit, among other things.

Causal relatedness of Complex Regional Pain Syndrome (CRPS)

6. Claimant continued to experience severe pain and limb dysfunction. Thus, Dr. Nelson referred her for a quantitative sudomotor axon reflex test (QSART). QSART testing that was subsequently completed on March 23, 2006 revealed a laboratory score of four combined with a clinical score of one consistent with a "high probability for the presence of complex regional pain syndrome". George Schakaraschwili, M.D., at Colorado Rehabilitation and Occupational Medicine interpreted the test results. Dr. Schakaraschwili concluded that Claimant's symptoms were the result of CRPS and recommended a trial of stellate ganglion blocks as well as consideration of medication such as Lyrica, Neurontin, amitriptyline, and nortriptyline.

7. Following the QSART testing in March 2006, Claimant's claim was reopened in April 2006 to obtain the additional medical treatment recommended by Dr. Schakaraschwili. Claimant's response to treatment has been complicated by her sensitivity to those medications typically used to treat CRPS (Claimant is highly sensitive to pain medication, which cause significant adverse side effects including rashes/allergic response).

8. Because of the complicated nature of the case, coupled with Claimant's ongoing symptomology, Respondents sought an independent medical evaluation (IME) with Barton L. Goldman, M.D. Dr. Goldman evaluated Claimant on July 28, 2006. At that time, Claimant's subjective complaints were most consistent, according to Dr. Goldman's report, with the possibility of centralized CRPS. Dr. Goldman recommended additional diagnostic testing for CRPS to include triple phase bone scan, stress thermogram of the bilateral upper and lower extremities and repeat QSART testing. He also recommended a trial of three variable duration anesthetic sympathetic ganglion blocks of the RUE that could be staged and combined with right radial nerve peripheral blocks. Finally, he recommended an MRI (magnetic resonance imaging) of the head to rule out non-work related central neurologic conditions, such as multiple sclerosis, and other space occupying lesions which could explain Claimant's ongoing symptoms.

9. Claimant underwent high-resolution function infrared thermographic testing (Thermogram) on October 6, 2006, as performed by Dr. Timothy Conwell, D.C., which demonstrated "no detectable infrared evidence of CRPS in the lower extremities". Dr. Conwell's findings and chiropractic report, however, suggested that Claimant's results were "suspicious" for Raynaud's Phenomenon as an incidental finding. Similarly, the thermogram performed by Dr. Conwell on October 6, 2006 of the upper extremity showed no detectable evidence of CRPS, but the findings were suspicious for Raynaud's Phenomenon, according to chiropractic Dr. Conwell. There has been **no** work up for the presence of Raynaud's Phenomenon despite the recommendation of her treating physician, as it has been suggested that this condition is non-work related and Claimant cannot afford to undertake such testing.

10. On November 10, 2006, Dr. Goldman provided an addendum to his original IME report wherein he noted that he had received copies of the Claimant's stress

thermography reports. Dr. Goldman, in his November 10, 2006 addendum, recommended that Claimant continue with additional diagnostic workup, specifically completion of a triple-phase bone scan, a repeat QSART test and a sympathetic blockade.

11. Claimant's triple-phase bone scan was performed on December 5, 2006 and was read as being negative for CRPS. Followup QSART testing was completed on December 18, 2006 and the results consisted of a laboratory score of five, combined with a clinical score of two, which was, according to diagnostic assessment "consistent with a high probability for the presence of complex regional pain syndrome". Dr. Schakaraschwili felt that the interpretation of Claimant's QSART testing was complicated by the "observation during infrared stress thermography of physiologic responses consistent with Raynaud's Phenomenon." Despite the confounding factor caused by the results of stress thermography testing, Dr. Schakaraschwili concluded that there continues to be a "possibility of complex regional pain syndrome affecting the right upper extremity". The ALJ finds that Dr. Schakaraschwili's opinion is high persuasive and credible; and, the totality of his opinions amount to an opinion to a reasonable degree of probability that Claimant suffers from CRPS.

12. On January 9, 2007, Dr. Goldman received additional medical records including the Claimant's additional diagnostic testing (repeat QSART and triple-phase bone scan) at which time Dr. Goldman ultimately defined Claimant's work-related condition and residual symptomology as being related problems to CRPS Type II, involving the right radial sensory nerve.

13. Given the complex nature of Claimant's medical condition and the difficulty in providing effective treatment for her, Claimant was allowed to change physicians to Dr. Reinhard.

14. Throughout Dr. Reinhard's medical treatment notes, he consistently provides an assessment of right upper extremity CRPS, Type I, and he has documented the improvement Claimant has had with regard to her condition in response to stellate ganglion blocks performed by Floyd Ring, M.D.

15. Dr. Ring has provided a diagnosis of **probable** CRPS Type II.

16. Respondents argue that Claimant does not have CRPS as supported by the testimony of Allison Fall, M.D., who is of the opinion that Claimant suffers from right superficial radial sensory neuritis and complaints of chronic pain. According to Dr. Fall, Claimant does not fulfill the criteria for a diagnosis of CRPS under the Worker's Compensation Treatment Guidelines. In support of her opinion, Dr. Fall specifically stated that there must be findings of vasomotor or sudomotor changes and two positive responses to diagnostic tests. Dr. Fall does not consider Claimant's response to sympathetic blocks as a positive test in this case. Thus, according to Dr. Fall, Claimant's testing results do not meet the criteria set forth in the Worker's Compensation Treatment Guidelines. Dr. Fall, however, on cross-examination, conceded that making the diagno-

sis of CRPS is largely clinical in nature and that there are problems with false negatives concerning the diagnostic tests cited in the Medical Treatment Guidelines.

17. Respondents argue that Claimant's ongoing symptomology is a result of Raynaud's Phenomenon rather than CRPS. Beyond the suspicions that Claimant may suffer from Raynaud's Phenomenon as opined by chiropractic Dr. Conwell and touched upon by Dr. Goldman and Dr. Schakaraschwili, no persuasive medical evidence establishes a working diagnosis of Raynaud's Phenomenon for the Claimant.

18. The Complex Regional Pain Syndrome/Reflex Sympathetic Dystrophy Medical Treatment Guidelines effective January 1, 2006, were admitted into evidence and provide for a distinction between CRPS-I and CRPS-II. Based upon the totality of the medical records, including those of Drs. Schakaraschwili, Goldman, Ring and Reinhard, Claimant has probable CRPS (either Type I or Type II), the cause of which is directly traceable to her admitted industrial injury of November 17, 2005. The weight of the medical evidence in this case is persuasive that Claimant has CRPS. The testimony of Dr. Fall, who evaluated the Claimant on one occasion and who has not been involved in any of the treatment provided to Claimant, is far less persuasive than the balance of the medical record evidence generated by Claimant's treating providers, especially Drs. Reinhard and Ring. Claimant, to a reasonable degree of medical probability, suffers from CRPS. The Medical Treatment Guidelines, while instructive are overridden by clinical judgment, as conceded by Dr. Fall. The ALJ, therefore, finds that Claimant suffers from CRPS (type I or type II), and her CRPS is directly and proximately caused by her admitted industrial injury of November 17, 2005.

Permanent Total Disability

19. Although the Claimant attempted to return to work with her condition (modified duty), she was not able to perform the full spectrum of her job duties and/or otherwise maintain/sustain employment over time due to the ongoing symptoms caused by her medical condition. She was terminated from her position with the Employer. She is currently unemployed.

20. According to the Claimant, she takes cognitively impairing narcotic-based pain medication (Dilaudid), sparingly given her allergic response, but the need to take such medications averages two to three times per week. According to the Claimant, she suffers cognitive side effects from her pain medications that affect her concentration/focus.

21. On February 3, 2006, Edwin Shockney, Ph.D., saw the Claimant for a behavioral health examination. Claimant underwent a PSPI (Psychosocial Pain Inventory), which resulted in a score of 32. Dr. Shockney was of the opinion that this result was consistent with **collateral stressors** (non-work related) that have a high probability of contributing to mental/emotional/physical symptoms. Dr. Shockney further reported that Claimant's stress was attributed to issues not related to her work injury, including

Claimant's report that she and her husband were separated "because he couldn't deal with [their young] child's ADHD."

22. On July 11, 2006, Claimant underwent a Functional Capacity Evaluation (FCE) performed by Eric Cleland, P.T. The FCE report indicated many of the test results were "invalid" due to "very poor effort."

23. Surveillance videotape of Claimant was obtained which demonstrated Claimant to be involved in activities with her son. Specifically, the tape reveals Claimant to be assisting with running a popcorn sales stand as part of her son's activity with the Boy Scouts. Based on the videotape, viewed by the ALJ, the ALJ infers and finds that Claimant is not as debilitated as she portrays herself.

24. Claimant's inconsistent statements about her pain, functioning, and medical condition, and her inconsistent presentation in video surveillance, indicate that she is not a reliable source of information upon which to base a determination that she is permanently and totally disabled.

25. Dr. Reinhard, Claimant's ATP, reviewed the surveillance tape and stated the opinion, based upon the videotape, that the activities demonstrated by Claimant in the videotape do not exceed the restrictions he has provided to her in any way. Dr. Fall also reviewed the surveillance videotapes. In a report dated November 10, 2008, she expressed the opinion that Claimant's presentation on video surveillance, particularly surveillance taken on September 14, 2008, demonstrated a "significant inconsistency in how she [Claimant] presented to me and <u>what she reported to me</u> as compared to the surveillance video." Dr. Fall was of the opinion that Claimant did not seem to have any restrictions with regard to her right hand.

26. Claimant has been involved with vocational rehabilitation on a number of occasions previously and has a history of requiring special education/remedial classes. Evidence, contained in admitted exhibits, establishes that results from testing performed during vocational rehabilitation indicate Claimant has limitations in the areas of mechanical reasoning, verbal reasoning, numerical ability, language usage, and perceptual speed and accuracy.

27. Results of a Wechsler Intelligence Scale battery completed while Claimant was in high school reveal a Full Scale IQ score of 82, resulting in the development of an individual education plan and a recommendation that Claimant continue with vocational exploration activities given her limited intellectual capacity. The ALJ finds that despite Claimant's so called learning disabilities, she has demonstrated in the past that she was capable of employment and the ALJ finds that she is presently capable of employment as further found below.

28. Psychological evaluation completed by Robert Jerkatis of the Department of Rehabilitation Services in 1999 yielded clinical impressions according to DSM IV Codes of:

"Reading Disorder, Code 632;
"Disorder of Mathematics, Code 632; and
"Disorder of Written Expression, Code 632".

29. Claimant has applied for a position as a bank teller and requested accommodation in this position. Specifically, Claimant requested voice-activated software given the physical restrictions involving her RUE. Claimant is attempting to further her education in the hopes of working in the ministry, but must complete a bachelor's degree before seeking employment.

30. Dr. Reinhard agreed with the decision of Social Security ALJ William Musseman that Claimant is not permanently totally disabled based upon the permanent physical restrictions he assigned to Claimant. On April 3, 2008, Claimant attended a hearing before ALJ William Musseman of Social Security Administration (SSA), seeking disability benefits based almost entirely on impairments which she alleged were due to her November 17, 2005 work injury. On July 31, 2008, ALJ Musseman denied Claimant's Application for Social Security Disability (SSDI) benefits. ALJ Musseman found that Claimant's testimony regarding, "the intensity, persistence and limiting effects of [her] symptoms" were "not credible." Although, ALJ Musselman's decision has no binding legal effect herein, the ALJ takes administrative notice of the fact that the test for SSDI benefits is much less stringent than the Colorado test for PTD benefits. The SSDI test is "incapable of suitable, gainful employment." The Colorado PTD test is "incapable of earning any wage in the job market on a reasonably sustainable basis."

Vocational Opinions

31. Patrick Renfro, Respondents' vocational expert, is of the opinion that Claimant retains the physical capacity to work and that jobs exist in sufficient numbers that Claimant can perform. Thus, Renfro is of the opinion that Claimant is not permanently totally disabled. Renfro is of the opinion that Claimant would be able to perform the positions of a receptionist, a front desk coordinator, a ticket taker/ticket seller, an appointment setter, a telephone operator, an administrative support personnel worker, an admissions clerk, a gate guard, a portrait studio clerk, a cashier, a security guard, and work in "retail sales". After a brief internet search for jobs near Parker, Colorado (where the Claimant lives), conducted on or about January 20, 2008, Renfro able to identify approximately 164 receptionist positions, 117 administrative assistant positions, 420 retail sales positions, and 66 security guard openings. Renfro is of the opinion that Claimant's age and education level is to her advantage in her job search, and Claimant has transferable skills in security, corrections, law enforcement, retail, holistic medicine, and photography. According to Renfro, the Claimant is able to drive as seen in surveillance video. Claimant testified that she is able to use a computer, and she is familiar with voice-activated software and using a computer to conduct a job search. The ALJ finds Renfro's opinion that Claimant is capable of earning wages is persuasive and more credible than Fitzgibbons' opinion in this regard. Renfro's opinion is more consis-

tent with the totality of the evidence, especially the evidence concerning her transferable skills.

32. Renfro stated that the employment opportunities identified in his report are broken down into three categories: (1) jobs which Claimant can perform based on her own self-reported (subjective) work restrictions; (2) jobs which Claimant can perform based on restrictions assigned by her ATP, Dr. Reinhard; and, (3) jobs which Claimant could perform assuming restrictions assigned by Dr. Fall. Pursuant to Renfro's testimony and report, Claimant could perform five categories of jobs based on her own subjective description of her limitations, including: receptionist, front desk coordinator, ticket taker/seller, appointment setter and telephone operator. The ALJ finds Renfro's opinion in this regard highly persuasive a more credible that the opinion of Michael Fitzgibbons, Claimant's vocational expert.

33. Michael Fitzgibbons is of the opinion that Claimant's current limitations would preclude her from returning to work without professional vocational rehabilitation intervention in an effort to evaluate if Claimant's chronic pain and functional limitations could be overcome. According to Fitzgibbons, Claimant does not possess the current physical/mental capacity to earn a wage without further vocational rehabilitation. According to Fitzgibbons, Claimant may be able to obtain a job, but could not maintain employment given the combination of her medical conditions, her physical restrictions, her current symptoms, her exertional capacity, her mental capacity and her intellectual functioning. Indeed, the ALJ infers and finds that, according to Fitzgibbons, Claimant would be capable of earning wages once Fitzgibbons non-specific course of vocational rehabilitation was completed. The ALJ finds that Fitzgibbons opinion that Claimant cannot maintain employment without vocational assistance is speculative, without a persuasive explanation and unpersuasive as a whole.

34. Fitzgibbons conceded that, despite any potential learning difficulties Claimant had prior to her work injury, she overcame them and graduated from high school, and successfully completed post-secondary vocational training and classes. Fitzgibbons testified, "She (Claimant) has the potential to be able to learn new skills because she was able to demonstrate that after high school."

35. The ALJ resolves the conflict in the vocational opinions in favor of Renfro's ultimate opinion of employability, and against Fitzgibbons' opinion that Claimant is only employable with vocational assistance.

Ultimate Findings

36. Claimant has proven, by a preponderance of the evidence, that her complex regional pain syndrome (CRPS) is causally related to the admitted compensable injury of November 17, 2005.

37. Based upon the totality of the evidence, the ALJ finds that it is more reasonably probable that Claimant is capable of earning wages in the competitive job

market, on a reasonably sustainable basis. Therefore, the Claimant has failed to prove, by a preponderance of the evidence, that she is permanently and totally disabled.

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, Patrick Renfro's opinion that Claimant is capable of earning wages is persuasive and more credible than Fitzgibbons' opinion in this regard. Renfro's opinion is more consistent with the totality of the evidence, especially the evidence concerning Claimant's transferable skills. Fitzgibbons' opinion is unpersuasive. The conflict in the vocational opinions was resolved in favor of Renfro's ultimate opinion that Claimant is employable, and against Fitzgibbons' ultimate opinion that Claimant is only employable if she receives vocational assistance.

b. 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). 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 causal relatedness of her complex regional pain syndrome to the admitted industrial injury of November 17, 2005. She failed to sustain her burden with respect to permanent total disability.

c. An employee is permanently and totally disabled if she is unable to earn any wages in the same or other employment. Section 8-40-201(16.5)(a) C.R.S. (2008). In determining whether a claimant is permanently and totally disabled, an ALJ may consider the claimant's "human factors," including the claimant's age, work history, general physical condition, education, and prior training and experience. *Weld County School District RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998*); Joslin's Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The test for permanent total disability is whether employment exists that is reasonably available to the claimant under her particular circumstances. *Id.* This means whether employment is available in the competitive job market, which a claimant can perform on a reasonably sustainable basis. With regard to establishing entitlement to permanent total disability benefits, Claimant must demonstrate she is, " . . . unable to earn **any** wages in the same or other employment." (emphasis supplied). The Court of Appeals has defined "any wages," as any wages "greater than zero." *See McKinney v. Industrial Claim Appeals Office,* 894. P.2d 42 (Colo. App.1995). As found, Claimant's invalid FCE results, inconsistent statements about her pain, functioning, and medical condition, and her inconsistent presentation in video surveillance, indicate she is not a reliable source of information upon which to base a determination she is permanently and totally disabled. As further found, Patrick Renfro's persuasive testimony that Claimant is capable of earning wages in the competitive job market demonstrate that Claimant is not permanently and totally disabled, despite Claimant's so called learning disabilities. Indeed, as found, even Claimant's vocational expert, Michael Fitzgibbons conceded that Claimant demonstrated the ability to graduate from high school, participate in a vocational school and be employable thereafter.

d. 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 complex regional pain syndrome is causally related to her admitted, compensable injury of November 17, 2005.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all of the costs for treatment of the Claimant's complex regional pain syndrome, pursuant to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all claims for permanent total disability benefits are hereby denied and dismissed.

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

DATED this_____day of April 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
|STATE OF COLORADO

WORKERS' COMPENSATION NO. 4-744-046

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in this matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 15, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 4/15/09, Courtroom 4, beginning at 1:35 PM, and ending at 3:07 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. The same was filed on April 22, 2009. Respondent filed objections to the proposed decision on April 23, 2009. After a consideration of the proposal and the objections thereto, the ALJ modified the proposed decision and, as modified, hereby issues the following decision.

ISSUES

The sole issue to be determined by this decision concerns is whether the recommendation of the authorized treating physician (ATP), Bharat M. Desai, M.D., for lumbar/sacrum surgery is reasonably necessary and causally related to Claimant's admitted injury of October 15, 2007.

FINDINGS OF FACT

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

1. This matter was previously heard before this ALJ on April 29, 2008. At that time Claimant was determined to have suffered an October 15, 2007, injury within the course and scope of her employment and awarded her temporary total disability benefits. She continues receiving these benefits.

2. Additionally, Claimant was awarded medical benefits reasonably necessary to cure and relieve the effects of her industrial injury. Her authorized treating physicians at that time were John Wiezneski, M.D., Greg Sarin, D.O., and Todd W. Peters,

M.D. Claimant was subsequently sent to Douglas E. Hemler, M.D., who, in time, referred her for treatment and evaluation with orthopedic surgeon Bharat Desai, M.D.

3. Claimant underwent an MRI (magnetic resonance imaging) on December 7, 2007. The MRI found that Claimant was suffering from **mild** facet arthropathy at L5-S1. Subsequent to this she underwent an MRI on October 15, 2008. This showed that Claimant was suffering from **moderate** to **severe** left side facet arthropathy at L5-S1.

4. On August 28, 2008, Claimant underwent a diagnostic left sacroiliac joint injection under fluoroscopic guidance with Dr. Hemler. The result was a resolution of sacroiliac joint pain and showed evidence of concordance from the injection indicating "recurrent instability and slippage of the SI joint despite the fixators appearing to be relatively stable and intact.

5. Thereafter, Dr. Hemler referred the Claimant to Dr. Desai. On December 1, 2008, Dr. Desai rendered an opinion that the Claimant had an incomplete fusion of the left SI joint at the articular level. He therefore proposed the structural remedy of surgery to help with her pain. It was his opinion that the Claimant's need for surgery was causally related to her work related fall.

6. Dr. Hemler evaluated the Claimant again on December 17, 2008. At that time, Dr. Hemler agreed with the treatment plan recommended by Dr. Desai, although he recognized that it remains unclear how much pain control would result.

7. Dr. Hemler again saw Claimant on February 18, 2009. In his report of that date he acknowledged that Claimant had suffered pre-existing SI joint problems arising from two surgeries in the late 1990's. He stated, however, "the history regarding an aggravation of a pre-existing condition in this patient appears to be medically reasonable to this examiner. Given the history presented by the patient and the records I have reviewed from Dr. Paulson the fall appears to be well documented." The ALJ finds that Dr. Hemler, in fact, rendered an opinion on causal relatedness to a reasonable degree of probability.

8. Prior to Claimant's injury of October 15, 2007, she was working full duty for Employer without limitations as a receiving clerk, a physically demanding job. As found in the Findings of Fact following the April 29, 2008, hearing, Claimant initially suffered an injury while she was pushing grocery carts, and then suffered an exacerbation of the natural progression thereof on November 20, 2007, while lifting pallets. Her condition had not changed since October 15, 2007.

9. Additionally, after her SI joint surgeries and prior to her October 2007 injury, Claimant had numerous jobs of a physical nature including waiting tables, lawn mowing and directing the department of recreation of Granby.

10. Since Claimant's fall in October 2007, her left SI joint area has continued to deteriorate. She began using crutches sometime after her fall. By early March 2009

she needed to use crutches consistently otherwise she would fall because her left leg could not sustain her standing.

11. Franklin Shih, M.D., testified by telephone on behalf of Respondents. His opinion was premised on his interpretation of the medical records concerning Claimant's reporting on her past history. He believed that Claimant had understated the extent of her SI joint problems prior to her fall of October 15, 2007. At the same time, he agreed that there was no recommendation prior to her October 2007 fall that Claimant undergo SI joint surgery. He further agreed that Claimant's subjective complaints could support a determination that the surgery recommended by Dr. Desai was reasonably necessary.

12. As of the date of her injury, Claimant was not under any disability where performing the essential functions of her job. The ALJ finds the Claimant consistent, credible and straight-forward.

13. The ALJ finds the opinions of Dr. Hemler and Dr. Desai more credible and convincing than the opinion of Dr. Shih because they are based on a more thorough familiarity with the Claimant's medical case and less of a focus on perceived inconsistencies in Claimant's histories. Their opinions establish the causal relatedness of the surgery recommended by Dr. Desai.

14. Claimant has proven, by a preponderance of the evidence, that the surgery recommended by Dr. Desai is reasonably necessary and causally related to the admitted injury of October 15, 2007.

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 opinions of Dr. Hemler and Dr. Desai are more persuasive than Dr. Shih's opinion because they are based on more familiarity with Claimant's medical situation. Also, as foundf, the Claimant was credible.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has sustained her burden of proof on causal relatedness and the reasonable necessity of the surgery recommended by Dr. Desai.

c. 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 admitted injury of October 15, 2007. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. Section 8-42-101 (1) (a), C.R.S. (2008). *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990);*Snyder v. Industrial Claim Appeals Office*, *supra*; *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). As found, all of the Claimant's medical care and treatment, as reflected in the evidence, was and is reasonably necessary.

d. Pain is a typical symptom for the aggravation of a pre-existing condition. Claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not an underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo 400, 210 P.2d 448 (1949). As found, Claimant's pain is causally related to the admitted compensable injury herein. As found, the Claimant had a pre-existing L5/S1 dysfunction and underwent two surgeries for this condition in the late 1990's. At the time of her injury on October 15, 2007, however, she was working full duty without disability. Subsequently, her ability to function has steadily decreased, warranting surgical intervention as recommended by Dr. Desai. As found, the need for this intervention is related to her injury of October 15, 2007.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondent shall pay all the costs of the surgery recommended by Bharat Desai, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this _____ day of April 2009.

EDWIN L. FELTER
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-772-800

ISSUES

The following issues were raised for consideration at hearing.

Did Claimant prove by a preponderance of the evidence that she sustained an industrial injury on September 21, 2008?

If the claim is found compensable, what is Claimant's average weekly wage?

If the Claimant is found compensable, what injuries were sustained by Claimant?

FINDINGS OF FACT

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

1. Claimant was hired by the Employer on August 11, 2008 as a grooming assistant. Her hourly wage was $7.02 per hour.

2. Claimant worked for the Employer from August 11, 2008 until September 21, 2008, when she alleged an industrial accident. During this period of time that Claimant worked for the Employer, wage records indicate that her average weekly wage was $178.01. During her period of employment, the Claimant lost numerous days from work due to non-work related medical problems and problems with her children.

3. Claimant's supervisor, Mayne, counseled Claimant orally on numerous occasions during the six weeks that she was working in regards to customer complaints, tardiness and lost time. Two days prior to the alleged accident, Mayne advised Claimant that if she lost any more time from work she was going to be terminated. Claimant denies having this discussion with Mayne. The ALJ finds the testimony of Mayne to be credible.

4. Claimant alleges that on September 21, 2008 she was involved in an industrial accident while refilling shampoo bottles. She indicated that she was pulling a bottle off the shelf when she injured herself. There were no witnesses to the alleged accident. The form that the Claimant herself filled out on the day after the accident indicated that "my wrist was hurt so I tried to pull the 5 gallon shampoo contained down with one hand and it jerked on my back and twisted my back." Claimant alleged in her testimony that she used two hands to pull down the bottle.

5. Claimant alleged at the time of hearing that she had previously injured her wrist during her employment with the Employer and that it was injured and bruised. However, she claimed that she did not report this alleged wrist injury to anyone at the Employer. Her testimony at the time of hearing was inconsistent in that she first indicated that her wrist was "fine" at the time of the "second alleged accident". However, she later indicated that she was still having problems with this. However, she admitted that she did not seek medical care or report this alleged wrist injury to her Employer.

6. Claimant completed her shift after the alleged accident on September 21, 2008 and indicated that she mentioned the accident to another manager, Grace. However, she did not advise Grace that her injury required medical are nor did she request medical care. On September 22, 2008, Claimant contacted the Employer to report the injury and was told to come in and report this to Mayne and fill out the paperwork.

7. Claimant met with Mayne at the store on September 22, 2008 and Claimant was provided with the list of authorized medical providers. Mayne indicated that Claimant advised him that she was attempting to pull the bottle off the shelf with one hand and that she injured her back. According to Mayne, Claimant "appeared to be in pain" and indicated she injured her low back. She did not indicate that she injured her shoulder or was unable to move her arm.

8. After reporting the injury to Mayne, Claimant was seen in the emergency room at Exempla Good Samaritan. The notes indicate that Claimant "felt twisting and pop in back, sharp lower back radiating toward/felt numbness in both legs." The pain diagram filled out by Claimant at the hospital also indicated mid and low back pain with no indication of inability to move the right arm. The diagnosis given at the hospital was "low back pain with no neurological symptoms."

9. Claimant was then seen by Clifton Etienne, M.D. on September 23, 2008 and advised Dr. Etienne that she "pulled R shoulder and has back pain at work on 9/21/08." Dr. Etienne's examination indicated that Claimant had "normal ROM of C spines…" He diagnosed "back pain." No mention was made of Claimant's inability to move her arm or that she had to keep her arm close to her body.

10. Due to Claimant's low back pain, Dr. Etienne referred Claimant to Michael E. Janssen, D.O. who evaluated her on October 3, 2008. Dr. Janssen noted that Claimant had back problems going back to 2005 and had undergone an MRI in September of 2008

prior to the alleged industrial accident. The history given to Dr. Janssen by Claimant was that she had been lifting a five gallon bucket and had a twisting maneuver and "then again felt back pain as well as leg pain, nondermatomal in nature." Dr. Janssen indicated that he performed both a cervical spine examination and shoulder examination. He found full and unrestricted motion in the cervical spine area. In addition, he found full motion of Claimant's shoulders adductors. His findings as to the shoulder were "negative impingement sign, no rotator cuff pathology." According to Dr. Janssen's examination, "the shoulders are level. There is no evidence of winging of the scapular or defect."

11 Dr. Janssen indicated that although there was an alleged occupational- related injury from a lifting incident there was "no anatomical evidence." He stated that, in his opinion, "There are clearly no anatomical findings to support the ongoing subjective complaints." He found that she had a "high suspicion for non-physiological findings" and that her "subjective symptoms far outweigh objective clinical and radiograph findings." There was no indication by Dr. Janssen that the Claimant had a shoulder injury, frozen shoulder, or inability to move her arm away from her body.

12. Claimant continued under the care of Dr. Etienne who again referred to her "severe low back pain" in September of 2008, with no mention of her shoulder. He issued a "To Whom It May Concern" letter on October 9, 2008 indicating he was treating her for her low back pain. However, on October 10, 2008, he indicated she reported to him that she had shoulder and right arm pain. Dr. Etienne referred Claimant for physical therapy for her low back pain.

13. On February 12, 2009, Dr. Etienne issued a report stating that Claimant's back pain "seems to have resolved." However, he indicated that she was having shoulder pain but had not yet reached a "definitive diagnosis". Dr. Etienne stated that "without a definitive diagnosis I cannot ascertain an injury during that last day of her job."

14. Dr. Etienne referred Claimant to Terry Wintory, D.O. for her right shoulder complaints. When Dr. Wintory saw Claimant on November 26, 2008 she advised Dr. Wintory that she is unable to move the arm. He noted that when he extended his hand to shake her hand she would not move her right arm from her side. However, he noted that she has "full elbow active range of motion. After quite of bit of coaxing, I was able to get the patient to start moving her arms." Dr. Wintory recommended a shoulder arthrogram but Claimant was "unable to tolerate" this and therefore never had the testing done. In Dr. Wintory's last note of December 17, 2008 he indicated "she is under no restriction from this office."

15. Claimant alleges that she has been unable to move her right arm away from her body since the date of the accident and that she has advised all medical providers of her inability to move her arm. She alleges that, when she reported the injury to Mr. Mayne, she couldn't move her shoulder at all. According to Claimant, when she saw Dr. Janssen, he did not even "touch her." Brief testimony was also presented from Claimant's mother, Mary Atkins, who attended the appointment with Dr. Janssen. Ms. Atkins did not indicate that Dr. Janssen did not "touch" the Claimant but simply indicated that he did not "manipu-

late" the shoulder. The ALJ does not find Claimant's testimony to be credible that she has been unable to move her arm since the date of injury and was unable to move her arm as of the date of the appointment with Dr. Janssen. The ALJ finds that Dr. Janssen did in fact perform the examination as set forth in his report and that, at the time of his examination, there was no evidence of shoulder impingement or rotator cuff pathology.

16. Prior to the alleged industrial accident, Claimant had been seen in the emergency room on September 7, 2008 with various medical problems. She had been complaining of headaches and nausea and neck stiffness but indicated this was "now aggravating her lower back which is more of a chronic problem." At the time of hearing, Claimant denied having any chronic low back pain.

17. Although Claimant had been assigned to a treating physician, Dr. Etienne, who first saw her on September 23, 2008, Claimant returned to a different emergency room on September 24, 2008. At that time she went North Suburban Medical Center complaining of upper, mid and low back pain. There is no indication in the records of a right shoulder injury or Claimant's inability to move her arm. Those records indicate that an examination was performed that showed "painless ROM" in regards to the neck and that all "extremities exhibit normal ROM." Diagnostic studies were performed of the thoracic spine and the low back. There were no diagnostic studies ordered or recommended for the Claimant's alleged right shoulder injury.

18. The ALJ finds that the Claimant has failed to sustain her burden of proof in showing that she sustained a compensable injury on September 21, 2008. The ALJ does not find Claimant's testimony to be credible and finds numerous inconsistencies between the Claimant's testimony, the testimony of Mayne and the medical records. Claimant alleges that she had a prior wrist injury, which was severe enough to cause bruising and pain but claims she never reported this to the employer. She changed her testimony as to whether she was still having problems with this at the time of the new alleged accident. She indicated that she was using both of her hands to lift the shampoo bottle at the time the accident occurred. However, this conflicts with her own written statement and with the statement that she gave to Mayne.

19. In addition, the ALJ does not find Claimant's testimony to be credible as to the body parts that she allegedly injured. Records indicate that less than two weeks prior to this alleged accident she advised physicians at the emergency room at Boulder Community Hospital that she had "chronic" low back pain. When Claimant was seen by a spinal specialist, Dr. Janssen, less than two weeks after the accident, he could find no "anatomical" evidence or findings to support her complaints. He specifically stated "I cannot find clinical reasons to support her inability to work and her activities at this time."

20. In addition, Claimant's testimony in regards to her right shoulder injury is not supported by any of the medical records, which have been submitted into evidence. Although Claimant alleges that from the time she injured herself on September 21, 2008, she was totally unable to move her arm, this is not reflected in the records. According to Claimant she did not seek medical care on the date of accident because she thought it

would go away and she would get better. This would be inconsistent with the Claimant's allegation that she was unable to move her arm at all on the date of the accident. In addition, if Claimant had been unable to move her arm and already had a "frozen" shoulder as early as September 21, 2008, this would have been reflected in the medical records. Not only is this not indicated in the medical records, when Claimant was seen at the emergency room on September 22, 2008, she does not even indicate a shoulder problem in her pain diagram. When she was seen at North Suburban Medical Center on September 24, 2008, three days after the accident, there is no mention of her inability to move her arm and the physician specifically indicates that Claimant had "painless" range of motion of the neck and that all of her extremities "exhibit normal ROM."

21. The ALJ also places great weight on the report of Dr. Janssen who saw Claimant on October 3, 2008. The ALJ does not find Claimant's testimony credible that Dr. Janssen never touched her. The ALJ does not find that the doctor would have falsified his records when he set forth in his report all of his complete findings on examination which included a finding that Claimant had negative impingement signs and no rotator cuff pathology of the shoulder.

CONCLUSIONS OF LAW

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

1. The purpose of the Workers' Compensation Act of Colorado (Act) Section 8-40-101, et seq. C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment. Section 8-41-301(1), C.R.S.; *See City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interests. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJs factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. In this case, the ALJ finds that Claimant has failed to sustain her burden of proof in showing by a preponderance of the evidence that she injured her low back and right shoulder on September 21, 2008. The ALJ does not find the Claimant's testimony credible as to how the accident occurred or what body parts were injured.

4. There were no witnesses to this alleged accident. Claimant's testimony in regards to exactly how the accident occurred is inconsistent with her own written statement and what she reported to Mayne. In addition, although she is now alleging that she has been unable to use her right arm or move her arm away from her body as of September 21, 2008 and continuing, this is not consistent with the medical records. The weight of the medical evidence, including the emergency room records from both Exempla Good Samaritan and North Suburban Medical Center, indicate that the Claimant was not complaining of a severe injury to her right shoulder and her inability to use her arm or move her arm away from her body. In addition, the ALJ places great weight on the opinion of Dr. Janssen. The ALJ does not find Claimant's testimony credible that Dr. Janssen did not examine her. Claimant's mother simply indicated that Dr. Janssen did not "manipulate" the shoulder but she did not confirm her daughter's testimony that Dr. Janssen did not "touch her." The ALJ finds the opinion of Dr. Janssen to be credible in that Claimant not only had a negative impingement sign and no rotator cuff pathology of the right shoulder, but that there was also no anatomical findings to support her allegations of a low back injury.

5. The ALJ finds that Claimant was in fact aware from her conversations with Mayne that she was going to be terminated by the Employer due to missing so much time from work. The employment records submitted by the Employer clearly show extensive lost time from work in Claimant's short period of employment. The ALJ does not find the Claimant's testimony credible that she would only have been warned of tardiness and absenteeism by Mayne on one occasion. The ALJ places more weight on the testimony of Mayne than that given by Claimant. Therefore, the ALJ finds the testimony of Mayne to be credible.

6. Taking into consideration all of the testimony and the evidence in the record, the ALJ does not find Claimant's testimony credible. She has failed to sustain her burden of proof in showing that she sustained compensable industrial injuries on September 21, 2008.

ORDER

It is therefore ordered that:

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

All matters not determined herein are reserved for future determination.

DATED: April 27, 2009

Margot W. Jones

Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-772-111

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 February 19 and April 17, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 2/19/09, Courtroom 4, beginning at 8:36 AM, and ending at 9:36 AM; and, 4/17/09, Courtroom 3, beginning at 8:33 AM, and ending at 9:30 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. Respondent was given 3 working days thereafter within which to submit electronic objections. The proposed decision was filed on April 22, 2009. Objections thereto were filed on April 27, 2009. After a consideration of the proposal and the objections thereto, the ALJ has modified the proposed decision and, as modified, hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; if compensable, medical benefits (authorization, causal relatedness and reasonably necessary); average weekly wage (AWW); temporary total disability (TTD) benefits; and, Respondent raised the affirmative proposition of penalties versus the Claimant for late reporting of injury.

Claimant has the burden of proof, by a preponderance of the evidence, on all issues other than "late reporting," in which case Respondent has the burden by preponderant evidence.

FINDINGS OF FACT

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

1. Claimant began his employment for the Employer herein on June 22, 2007. He attended a physical examination by his primary care physician Michelle Mang, M.D. on July 2, 2007, and he was not diagnosed with hernias.

2. On September 16, 2008, while working for the Employer, Claimant engaged in heavy lifting in the form of transporting doors. He conducted heavy lifting by unloading approximately six or seven doors from a flatbed truck. The Claimant presented in a straightforward and credible manner. He candidly testified that he does not know what caused his hernias or when they developed, however, the totality of the circumstantial evidence excludes any cause of disability from the hernias other than Claimant's heavy lifting at work. His testimony concerning the lifting incident is undisputed. He was not impeached. Therefore, the ALJ finds the Claimant credible and the ALJ finds that the lifting incident happened exactly as the Claimant said it did.

3. Claimant did not work for anyone but the Employer from June 22, 2007 to September 19, 2008.

4. On September 18, 2008, Claimant left his employment and has not returned to work. On September 22, 2008, during a physical examination, Dr. Mang, Claimant's primary care physician, diagnosed the Claimant with multiple hernias. On September 23, 2008, the Claimant reported the hernias as a work related injury to his Employer and was discharged from work until further notice.

5. On October 3, 2008, the Employer referred the Claimant to Lon Noel, M.D., who then referred the Claimant to Gerald Kirshenbaum, M.D., for a surgical evaluation. Dr. Kirshenbaum became the Claimant's authorized treating physician (surgeon) (ATP). The Claimant was diagnosed with multiple hernias, and Dr. Kirshenbaum recommended surgical intervention.

6. Dr. Kirshenbaum's evidentiary deposition was taken on March 10, 2009. During the deposition, Dr. Kirshenbaum expressed the opinion, that assuming the Claimant conducted heavy lifting on September 16, 2008, by unloading approximately six or seven doors from a flatbed truck while working for his Employer, that he was comfortable stating within a reasonable degree of medical probability that the hernias are, in fact, related to the incident Claimant described on this date. The ALJ finds Dr. Kirshenbaum's opinion persuasive, credible and essentially undisputed by any other medical opinion.

7. Although Respondent argues that Claimant's hernias amounted to an unexplained idiopathic event, the totality of the circumstantial lay evidence, and the medical evidence establishes that it is more reasonably probable than not that Claimant's heavy lifting at work on September 16, 2008 aggravated his asymptomatic hernias and caused disabling medical restrictions.

8. Claimant has not returned to work or received any wages since leaving his employment with the Employer on September 18, 2008. Further, Claimant has not been released to return to work nor has he been declared to be at maximum medical improvement (MMI). Consequently, the Claimant has been TTD since September 19, 2008.

9. At the commencement of the February session of the hearing, the parties stipulated that the Claimant's AWW was $367.18, and the ALJ so finds. This AWW yields a TTD rate of $244.78 per week, or $34.97 per day.

10. Respondent has proven, by a preponderance of the evidence, that Claimant did not report his hernias to his Employer until September 23, 2008. Consequently, TTD benefits begin on September 23, 2008. The period from September 23, 2008 through the last session of the hearing, April 17, 2009, both dates inclusive, totals 206 days.

11. Claimant has proven, by a preponderance of the evidence that he sustained a compensable and disabling aggravation of his preexisting hernias on September 16, 2008, while lifting doors at work. He has further proven that his medical care by Dr. Kirshenbaum was authorized, causally related to the September 16 lifting incident and reasonably necessary to cure and relieve the effects of Claimant's hernias. He has also proven that his AWW is $367.18, thus, yielding a TTD rate of $244.78 per week, or $34.97 per day; that he has been TTD since September 19, 2008, however, because of the daily penalty of one day's indemnity benefits for late reporting, he is entitled to TTD benefits from September 23, 2008 through April 17, 2009, both dates inclusive, a total of 206 days, in the aggregate amount of $7,203.82. Additionally, he is entitled to TTD benefits of $244.78 per week from April 18, 2009 and continuing until termination, or modification, of benefits is permitted law.

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 medical opinion of Dr. Kirshenbaum is un-contradicted. *See, Annotation, Comment: Credibility of Witness Giv-*

ing 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.
Also, as found, the Claimant's testimony was credible and essentially un-contradicted. Therefore, the combination of circumstantial lay and medical evidence establishes the September 16, 2008 lifting incident at work as the cause of the aggravation and disabling effects of Claimant's hernias.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has sustained his burden with respect to compensability; medical benefits; AWW; and, TTD since September 19, 2008 and continuing. Respondent has sustained its burden with respect to late reporting from September 18, 2008 through September 23, 2008.

c. Section 8-43-102 (1) (a), C.R.S. (2008), provides a penalty of one day's compensation for each day's failure of an employee to report a work-related injury. As found, Claimant did not report a work-related injury to his Employer until September 23, 2008. Therefore, he should be penalized from September 19, 2008 through September 23, 2008.

d. As found, Respondent argued that Claimant failed to prove a work-related cause for the aggravation and disabling effects of his hernias. As also found, the totality of the circumstantial evidence excludes any other reasonable explanation for the aggravation and disabling effects of Claimant's hernias. The Claimant did not suffer an idiopathic event and, therefore, the holding in *Gates Rubber Co. v. Industrial Com'n of State of Colo.,* 705 P.2d 6 (Colo. App. 1985), is distinguishable and does not apply herein.

e. Pursuant to Section 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, when the Claimant reported

work-related hernias on September 23, 2008, the Employer referred him to Dr. Kirshenbaum, who became the Claimant's ATP.

f. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the aggravation of his back hernias on September 16, 2008. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. Section 8-42-101 (1) (a), C.R.S. (2005). *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.

g. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S. (2008); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973, (ICAO, December 18, 2000). As found, the Claimant has not been released to return to work and the Employer discharged the Claimant from work on September 23, 2008, until further notice

h. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, and there is no actual return to work), TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). 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). As found, Claimant has not earned wages since September 19, 2008; he has not been released to return to work; and, he has not been declared to be at MMI. Therefore, he has been TTD since September 19, 2008.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondent shall pay the costs of all reasonably necessary and causally related medical care provided for and prescribed by the authorized treating physicians Lon Noel, M.D., Gerald Kirshenbaum, M.D. and all referrals from these providers, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Claimant is penalized one-day's indemnity benefits for late reporting of his injury to his Employer from September 19, 2008 through September 23, 2008, exclusive.

C. Respondent shall pay Claimant temporary total disability benefits of $244.78 per week, or from September 23, 2008 through April 17, 2008, both dates inclusive, a total of 206 days, amount of $7,203.82, which is payable retroactively and forthwith. Respondent shall continue paying the Claimant temporary total disability benefits of $244.78 per week from April !7, 2008 and continuing until terminated pursuant to statute or further order.

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

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

DATED this_____day of April 2009.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-709-613

ISSUES

Claimant applied for hearing on the issue of compensability, medical benefits, temporary total disability, average weekly wage and disfigurement.

FINDINGS OF FACT

1. Claimant has been employed as a packer with employer since June 1999. Claimant testified that on May 30, 2006, she reached under her workstation with her left leg and used the anterior portion of her leg to push a stack of boxes to the right. Claimant felt pain in her leg and reported the incident to her supervisor, Mr. Moran, who referred her to the company nurse, Ms. Romero. Ms. Romero was preparing to leave the building and requested Claimant return the following week. Claimant was out of town on business the following week, but spoke to Ms. Romero upon her return. Ms. Romero referred the Claimant to Dr. Robert Maisel for treatment.

2. Dr. Maisel evaluated Claimant on June 26, 2006. Dr. Maisel had previously evaluated the Claimant for low back pain in 2004 and for a right shoulder injury earlier in the 2006 calendar year. Claimant reported to Dr. Maisel that she had no known injury, but was repetitively lifting boxes that brought about her onset of pain.

Claimant complained of pain that traveled down a path in the back of her leg to her left ankle and complained of pain behind her knee. Dr. Maisel recommended a magnetic resonance image ("MRI") of the low back and provided the Claimant with prescription medications and work restrictions of no lifting over 20 pounds.

3. Claimant returned to Dr. Maisel on July 3, 2006 with continued complaints of soreness in her back, especially with long shifts. Dr. Maisel continued Claimant on modified duty. The MRI on July 23, 2006 showed degenerative changes at L3 through S1 with left sided disk protrusion at the L3-4 level, extending into the lateral recess. Dr. Maisel concluded these findings could cause left L4 nerve root entrapment that would be consistent with Claimant's radicular discomfort. Based upon the findings of the MRI, Dr. Maisel recommended a referral to Dr. Baer.

4. Dr. Baer evaluated Claimant on July 27, 2006. Dr. Baer had the Claimant fill in a Pain Self Evaluation form in conjunction with his evaluation. According to the Pain Self Evaluation form, Claimant noticed pain starting on her left buttocks that went down her left leg. The pain was purportedly caused by "a lot of lifting heavy boxes." Dr. Baer reported that Claimant had a gradual onset of low back pain with pain down the posterior and anterior part of the thigh and into the calf region. Dr. Baer recommended continued conservative care and suggested that if her symptoms worsen, she could consider an epidural steroid injection.

5. Claimant returned to Dr. Maisel on August 1, 2006 and reported doing much better. Dr. Maisel recommended continued conservative care and continued her medications. Upon returning to Dr. Maisel on August 21, 2006, Claimant reported continuing improvement in her symptoms. At that point, Dr. Maisel began tapering her medications and noted that Claimant was approaching maximum medical improvement ("MMI").

6. On September 1, 2006, Claimant returned to Dr. Maisel and reported some moderate pain in her back and left leg. Dr. Maisel provided Claimant with a splint for her left leg, and recommended Claimant discontinue regular use of her vicodin. On her next evaluation with Dr. Maisel on October 11, 2006, Claimant continued to report problems with her left leg and knee since her initial incident. Dr. Maisel noted that the leg pain that appeared to be radicular had abated and the isolated pain that Claimant was now complaining of was probably an internal derangement of the knee itself.

7. Claimant filed a Workers' Claim for Compensation on October 12, 2006 that indicated that her left knee got irritated while working on restrictions because she was walking more than usual. Claimant listed the date of injury on her Workers' Claim for Compensation as May 30, 2006. Claimant returned to Dr. Maisel on October 16, 2006 with continued knee complaints. Claimant reported to Dr. Maisel at the October 16 appointment that increased walking while on light duty led to her increased knee pain. Dr. Maisel noted that it was unclear if Claimant was injured in the original accident of May 30, 2006 or whether this was another problem. Dr. Maisel eventually referred the Claimant for an MRI of her left knee.

8. Claimant returned to Dr. Maisel on November 17, 2006 after her left knee MRI. Dr. Maisel reported the MRI showed medial mensical deformity consistent with a tear or previous partial menisectomy. Dr. Maisel recommended an orthopedic consultation to review the MRI. Prior to any orthopedic consultation, Claimant was referred by Respondents to Dr. Roth for examination. Dr. Roth evaluated Claimant on November 27, 2006. Dr. Roth noted that Claimant's notion of the workers' compensation claim was based on the fact that she is on her feet all day. Dr. Roth also noted that Claimant reported scooting boxes on her conveyor belt with her knee. Dr. Roth further noted that Claimant's impression of her discomfort was that it emanated from her knee, as opposed to radiation of her low back symptoms. Dr. Roth determined that Claimant was at MMI for her low back and recommended against further treatment.

9. Claimant was next evaluated by Dr. Potzler on December 18, 2006. Dr. Potzler noted that Claimant was to be evaluated for her back injury and was advised that her knee pain was pre-existing and not caused by her back injury. Dr. Potzler released the Claimant to return to normal duties with no restrictions.

10. Claimant then sought treatment with Dr. Simonich beginning on September 25, 2007. Claimant reported to Dr. Simonich that she had a work related injury 1 ½ years ago while kicking a box with her left knee as it went into a valgus moment. Dr. Simonich noted that Claimant's left knee showed end stage degenerative joint disease ("DJD") with deformity and moderate to severe medial compartment degenerative changes with medial femoral compartment ("MFC") osteophyte formation. Dr. Simonich recommended a course of conservative therapy and provided Claimant with a prescription for Celebrex. By January 8, 2008, however, Dr. Simonich determined that Claimant would be a good candidate for partial knee replacement surgery.

11. Claimant underwent partial knee replacement surgery under the auspices of Dr. Simonich on February 18, 2008. Following the surgery, Dr. Simonich noted that Claimant progressed slowly through rehabilitation secondary to post operative complaints of pain. On April 1, 2008, Claimant complained to Dr. Simonich of intermittent crunching pain over the lateral knee that she only experienced at night when lying in bed rolling over to her left side. The pain was not reproducible, and Dr. Simonich recommended Claimant continue with her quad strengthening.

12. Claimant eventually sought a second opinion with Dr. Xenos. Dr. Xenos apparently believed Claimant's pain could be secondary to arthritis in the tibiofemoral compartment. Dr. Simonich noted on May 13, 2008 that Claimant's arthritis was minimal based upon his evaluation at the time of surgery, and didn't believe her pain to be related to arthritis. Dr. Simonich instead speculated that Claimant's pain was being caused by a neuroma of the infra patellar branch of the saphenous nerve. Dr. Simonich noted that Claimant's pain was exactly what it was when she externally rotated her foot and tried to push a box, but Dr. Simonich also found it hard to believe you could get a neuroma in continuity from placing a valgus moment on the knee. Dr. Simonich also noted that he didn't believe the neuroma was post surgical in nature, but was not sure how it could be attributed to the mechanism of injury Claimant described. Dr. Simonich

then provided Claimant with a subcutaneous injection over the infrapatellar branch of the saphenous nerve. This injection provided Claimant with 100% relief for a couple of hours.

13. Claimant returned to Dr. Simonich on May 22, 2008 and, based upon her reports of relief with the injection, Dr. Simonich recommended a transsection of the infrapatellar branch of the saphenous nerve. The surgery was scheduled for June 25, 2008. Claimant also reported that she wanted to reopen her workers' compensation case as she felt this was directly related to her injury.

14. Dr. Simonich evaluated Claimant after her June 25 surgery on July 3, 2008. Claimant reported good symptom relief after the surgery initially, but reported having developed similar pain with hypersensitivity of the skin. Claimant returned to Dr. Simonich on July 17, 2008 and reported 100% pain relief. Dr. Simonich noted that Claimant reported doing initially well, and then sounded like she wasn't doing so well before presenting with 100% relief. Dr. Simonich noted that secondary gain could have played a part in Claimant's sudden recovery.

15. Claimant was referred for an independent medical examination ("IME") with Dr. David Richman on September 16, 2008. Dr. Richman reviewed Claimant's past medical records and performed a physical examination. Claimant provided a history to Dr. Richman of pushing a stack of empty boxes that were lying flattened, stacked up above her knee to the right side using her left leg. Claimant reporting swinging her left leg in an adducted motion to try to push the stack to the right and having a sudden onset of inner knee pain. In response to written questions, Dr. Richman opined that Claimant suffered a work-related injury to the saphenous nerve, which is a relatively rare isolated injury, but developed into a saphenous neuralgia that required surgical treatment by Dr. Simonich. Dr. Richman also acknowledged that Claimant suffered from non-work related patellofemoral degenerative joint disease and a preexisting low back strain that Dr. Richman classified as non-work related. Dr. Richman determined that the treatment provided by Dr. Simonich was directly related to the saphenous nerve injury in the medial knee, which occurred at the time of her work-related event.

16. Claimant was returned by Respondents to Dr. Roth on September 2, 2008. Dr. Roth reviewed Claimant's updated medical records and performed a physical examination. Dr. Roth concluded that Claimant did suffer from degenerative problems with her left knee and previously developed a saphenous nerve neuroma that Dr. Roth opined was not related to her work-related event of May 30, 2006. Dr. Roth concluded that pushing boxes with her left foot does not provide an opportunity for direct trauma to the saphenous nerve, and without a cogent mechanism of injury, Dr. Roth could not conclude that her saphenous nerve neuroma was work-related. Dr. Roth concluded that the neuroma was idiopathic and idiosyncratic in its appearance.

17. The ALJ finds the opinions of Dr. Simonich and Dr. Roth more persuasive than those of Dr. Richman. Claimant's original accident history as provided to Dr. Maisel was of a low back injury from repetitive lifting of boxes. Claimant's Workers' Claim for Compensation filled out on October 12, 2006 alleges, for the first time, an in-

jury to Claimant's knee, as opposed to radicular symptoms from her back injury. The cause of this injury was purportedly Claimant's increased walking after being put on work restrictions. Claimant alleged that her knee injury as of October 12, 2006 was from repetitive motion. Claimant did not report a possible trauma to her knee until her IME with Dr. Roth on November 27, 2006 when she noted that she used her knee to scoot boxes onto the conveyer belt. Dr. Simonich, Claimant's own treating physician, indicated that he did not know how her neuroma could be attributed to the mechanism of injury as described by Claimant. Dr. Simonich also noted that Claimant did not report significant improvement following the excision of the neuroma until July 17, 2008. This delay in relief following the surgery and sudden resolution of symptoms led Dr. Simonich to contemplate whether secondary gain could be an issue.

18. The ALJ credits the accident history provided by Claimant to her treating physicians, Dr. Maisel and Dr. Baer, following her alleged injury that related to an incident in which she was lifting boxes, and her accident history provided in the October 12, 2006 Workers' Claim for Compensation as more persuasive as to how Claimant believed her injury occurred over her testimony at hearing.

19. Claimant did not show it more probably true than not that she sustained an injury to her left knee arising out of and in the course of her employment with employer on May 30, 2006.

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*.

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, the ALJ credits the testimony of Dr. Simonich and Dr. Roth over the testimony of Dr. Richman. The ALJ finds that Claimant has failed to prove by a preponderance of the evidence that her saphenous nerve neuroma was caused by her work activities on May 30, 2006. As found, the ALJ credits the reports of Claimant's injury as set forth in the medical records of Dr. Maisel, Dr. Baer and her Workers' Claim for Compensation dated October 12, 2006 over her testimony at hearing with regard to the incident of May 30, 2006. Claimant did not prove by a preponderance of the evidence that she suffered an injury to her left knee arising out of and in the course of her employment with employer.

5. Because the ALJ is denying Claimant's claim for workers' compensation benefits, the ALJ does not need to decide the other issues.

ORDER

It is therefore ordered that:

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

DATED: April 16, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-774-216

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he suffered a compensable injury on October 1, 2008.

2. Whether Claimant has proven by a preponderance of the evidence that the medical treatment he received after his industrial injury was reasonable and necessary to cure and relieve the effects of the industrial injury.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits for the period of October 2, 2008 through October 8, 2008.

4. The parties stipulated to an average weekly wage of $1,012.01 prior to hearing. The parties also stipulated that if the claim is compensable, and Claimant is entitled to temporary total disability, the period of temporary disability benefits is limited for the purposes of this order to October 2, 2008 through October 8, 2008.

FINDINGS OF FACT

1. Claimant was employed as a machinery operator for Respondent-employer. On October 1, 2008, claimant was operating a roller when his foreman gave him a new vest with the employer's insignia at approximately 2:00 p.m. The roller Claimant was operating consists of two seats set approximately five feet off the ground with seat belts on each seat and roll over protection on top of the roller. The employee operating the roller will sit with their feet in a bucket on top of the roller and operate the roller from side to side. In order to get on and off the roller, the Claimant testified he would use a three-point rule. The three-point rule ensures that the Claimant has at least one hand and two feet or two hands and one foot on the roller and handles at all times. After receiving the vest from his supervisor, Claimant testified he rolled a bit more before deciding to put the vest in his truck so he wouldn't drop the vest and roll over it. Claimant testified he took his roller over to where his car was parked, but does not remember anything else until he was back on his roller later that afternoon.

2. Claimant was found on his back on the ground next to his roller by his co-worker, Mr. Martinez. Mr. Martinez noticed Claimant's hard hat lying next to him about five feet away. Mr. Martinez also noticed Claimant's radio lying approximately ten feet away. Mr. Martinez helped Claimant to his feet and asked what happened. Claimant replied that the wind must have been blowing. Mr. Martinez testified that when he helped Claimant up, he noticed that the roller was in neutral with the brake on and running. Approximately a half hour later, Claimant flagged down Mr. Martinez and asked what had happened. Mr. Martinez reported that he had found Claimant lying on the ground, to which Claimant replied that he did not remember anything. The ALJ finds the testimony of Mr. Martinez to be credible.

3. At the end of the shift, Mr. Martinez recommended to Claimant that he report his injury to Claimant's supervisor, Mr. Parlett. Mr. Parlett reported that Claimant advised him that he put his vest and lunchbox in his truck and was returning to his roller when he passed out. Claimant also reported to Mr. Parlett that he didn't recall the specifics of his fall. Mr. Parlett observed that Claimant's bottom lip was cut as a result of the fall and Claimant complained of a headache. Mr. Parlett testified that he referred Claimant to a physician, however, Mr. Parlett did not establish to who the Claimant was

referred to for medical treatment on October 1, 2008. Nor did Respondents establish that employer's referral of Claimant for treatment complied with Section 8-43-404(5), C.R.S. as amended for injuries occurring after January 1, 2008.

4. Claimant contacted Dr. Harry Keefe on October 2, 2008 and reported a loss of consciousness with a fall the day before. Claimant reported a significant headache. Dr. Keefe referred Claimant to the Parkview Hospital Emergency Room ("ER"). Claimant reported to the ER that he had been operating heavy machinery when he got off and walked to his truck and fell to the ground. Claimant reported he had hit the back of his head, but admitted having poor memory of the event. Claimant complained of headaches and right shoulder pain on palpation. Claimant was referred for a CT scan of the head that showed no significant abnormality and an ECG that was reported as abnormal. The ER physicians also noted Claimant had a feint bruise to his scalp on the back of his head.

5. Claimant returned to Dr. Keefe on October 7, 2008 with continued complaints of neck and mid back pain. Claimant reported that following the accident, he continued to feel nauseated and foggy with an occipital headache that evening. Claimant reported to Dr. Keefe that he had talked to his employer regarding a workers' compensation physician, and was referred to his primary care physician. Dr. Keefe ordered x-rays of the cervical thoracic and lumbar spine and a magnetic resonance image ("MRI") of the brain. Claimant underwent x-rays at Parkview Hospital on October 7, 2008. The x-rays showed degenerative changes at all three levels. Claimant underwent the MRI of the brain on October 9, 2008. The MRI revealed a slight prominence of the subarachnoid spaces of the cerebral convexities, but was otherwise negative.

6. Claimant was referred to Concentra Medical Center (Concentra) for evaluation on October 21, 2008 by his employer. Claimant complained of neck pain, headache and difficulty with his short term memory. Claimant was diagnosed with a contusion of his lumbar region, contusion of the thorax, and a cervical strain. Claimant again underwent x-rays of his lumbar spine, that revealed no acute changes. Claimant was released to return to work without restrictions.

7. Claimant returned to Concentra on October 28, 2008. Claimant continued to complain of pain in his back and stiffness in his neck along with problems with his memory. Claimant was diagnosed with cervical strain, contusion of the lumbar region, contusion of the thorax and post concussion syndrome. Claimant was referred for physical therapy two times per week for 2-3 weeks.

8. Claimant returned to Concentra on November 12, 2008. Claimant reported only slow improvement of his symptoms and complaints of right buttock pain. Dr. Daniel Peterson reported Claimant continued to experience post concussion symptoms including head aches and a feeling of being fuzzy headed. Claimant was next evaluated at Concentra by Dr. Peterson on November 26, 2008. Claimant reported some slight improvement with his physical therapy. Claimant reported to Dr. Peterson that he was 10% better, however Dr. Peterson noted that Claimant was clearly more than 10% improved. Claimant reported the back of his head was still sore. Dr. Peterson noted

that Claimant had face/scalp contusions that were still slightly sore. Claimant was next evaluated at Concentra on December 18, 2008. Claimant reported that he no longer had headaches, but still could not recall the day that the injury occurred. Claimant was released to regular activity, but not released from care.

9. Claimant returned to Dr. Keefe on December 22, 2008 with continued complaints of neck pain, headaches, right low back pain and right hip pain. Dr. Keefe noted that whatever knocked Claimant unconscious struck him on the head, knocked him to the ground and subsequently loosened his two lower incisors so much that the fell out a few days later. On physical examination, Dr. Keefe noted that examination of Claimant's back showed paraspinous spasm in the low back with limited range of motion to flexion and extension. Dr. Keefe also that Claimant's neurologic exam was remarkable for difficulty with memory. The ALJ finds the reports of Dr. Keefe credible.

10. Claimant has a prior medical history of low back problems, cervical pain, right hip pain and hypertension. Claimant's preexisting back injuries relate to a prior workers' compensation claim Claimant had with a date of injury of June 14, 2006. Claimant received a 19% whole person impairment rating as a result of that injury. Claimant was prescribed Benicar for his hypertension. One of the side effects of Benicar is possible fainting. Claimant had not experienced any fainting episodes prior to October 1, 2008.

11. The ALJ finds that the Claimant has proven by a preponderance of the credible evidence that the Claimant fell off of his roller to the ground when he lost consciousness. Mr. Martinez testified that he found the Claimant lying next to his roller with his hard hat five feet away and his radio five feet further away. The ALJ finds that this evidence implies that the Claimant fell in such a way that his radio was thrown further than his hard hat, which is not consistent with a fall from ground level directly to the ground. Additionally, according to the testimony of each witness, Claimant had a bloody lip following the fall. Claimant was found lying on his back and the medical records document a bruise on the back of Claimant's head. This evidence shows it is more likely probable than not that when Claimant fell he struck his lip on his roller causing the bloody lip before striking the back of his head on the ground. The ALJ finds that the fall from the roller approximately five feet off the ground represents a special hazard of employment. Therefore, Claimant has proven that he suffered a compensable injury arising out of and in the course of his employment on October 1, 2008.

12. Claimant reported his injury to his supervisor, Mr. Parlett, on October 1, 2008. Claimant reported to the emergency room where he was evaluated on October 2, 2008. While Mr. Parlett testified that he referred Claimant for treatment on October 1, 2008, Claimant was not seen by Concentra until October 21, 2008, almost three weeks after Claimant's injury and almost two weeks after Claimant returned to work for the employer after missing 7 days as a result of the injury. As such, the ALJ finds that the right to select the treating physician has passed to Claimant.

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). 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. An employee's temporary total disability, temporary partial disability, or medical benefits shall not be reduced based on a previous disability. Section 8-42-104(3), C.R.S. 2008.

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. Respondents argue that Claimant's injury is not compensable as the injury was precipitated by a pre-existing condition brought by the claimant to the workplace. The ALJ is not persuaded. An otherwise compensable injury does not cease to arise out of employment because it is partially attributable to a pre-existing physical infirmity of the employee. *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992). Rather, an injury which results from the concurrence of a preexisting condition and a special hazard of employment is compensable. *H&H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Thus, even if the direct cause of the accident is a preexisting idiopathic disease or condition, the resulting disability is com-

pensable if the conditions or circumstances of employment have contributed to the accident or to the injuries sustained by the employment. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). To be an employment hazard for this purpose, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered.

5. As found, Claimant has proven that he suffered an injury arising out of and in the course of his employment when he fell from his roller to the ground. As found, the roller represented a special hazard of employment as it placed the Claimant nearly five feet off of the ground. As found, the Claimant's injuries, including the injury to Claimant's lip and mouth and the concussion, were a result of Claimant hitting his face and head on the roller and ground when he lost consciousness. Therefore, the roller is a special hazard of employment and Claimant's fall is compensable, even though the loss of consciousness was unrelated to Claimant's employment. *See Ramsdell v. Horn, supra.* (a fall from scaffolding after a seizure was compensable even though Claimant's seizure disorder was a pre-existing condition unrelated to Claimant's employment).

6. 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).

7. In this case, Claimant was injured on October 1, 2008. Claimant continued to work after his injury and reported his injury to his supervisor at the end of the day. Claimant reported to the emergency room on October 2, 2008 after his symptoms did not subside. The parties agreed at the hearing that Claimant did not return to work until October 9, 2008. The ALJ finds that the Claimant established that the effects of the injury precluded Claimant from returning to work until October 9, 2008. Therefore, Claimant is entitled to TTD benefits from October 2, 2008 through October 8, 2008.

8. 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.

9. As found, Claimant reported his injury to his supervisor, Mr. Parlett, on October 1, 2008. Mr. Parlett testified he referred the Claimant for medical treatment, but the testimony of Mr. Parlett does not establish that Claimant's referral was in compliance with Section 8-43-404(5), C.R.S. Claimant reported to the emergency room where he was evaluated on October 2, 2008. Claimant began losing time from work beginning October 2, 2008, however, the employer did not make a referral for the Claimant to be treated by Concentra until October 21, 2008, almost three weeks after Claimant's injury and almost two weeks after Claimant returned to work for the employer after missing 7 days as a result of the injury. As such, the ALJ finds that the right to select the treating physician has passed to Claimant and Dr. Keefe is deemed authorized.

10. The ALJ finds that Claimant's treatment with Dr. Keefe on October 7, 2008, October 9, 2008 and December 22, 2008 was reasonable, necessary and related to cure and relieve the Claimant from the effects of the industrial injury. The ALJ finds that Claimant's treatment with Parkview ER on October 2, 2008 was reasonable, necessary and related to cure and relieve the Claimant from the effects of the industrial injury.

ORDER

It is therefore ordered that:

1. Respondents are to pay Claimant temporary total disability benefits from October 2, 2008 through October 8, 2008, subject to the statutory waiting period.

2. Respondents are to pay for treatment from Dr. Keefe and his referrals that is reasonable, necessary and related to the industrial injury. Respondents are to pay for Claimant's treatment from Concentra that is reasonable, necessary and related to the industrial injury.

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: April 20, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-763-058

ISSUE

Whether ALJ Krumreich's December 5, 2008 Order properly concluded that Claimant was not indigent pursuant to WCRP 11-11(A).

FINDINGS OF FACT

1. On June 27, 2008 Claimant suffered an admitted industrial injury to his lower back during the course and scope of his employment with Employer. Claimant reached Maximum Medical Improvement (MMI) and Respondents filed a Final Admission of Liability (FAL) on September 19, 2008. Claimant timely objected to the FAL and sought a Division Independent Medical Examination (DIME).

2. On October 13, 2008 Claimant filed an Application for Indigent Determination. The Application stated that Claimant had $1,568.00 in assets. Claimant's assets consisted of $68.00 in checking and cash on hand as well as $1,500.00 in equity from his primary residence. Claimant had purchased his home for $80,000 approximately two years earlier and owed $78,500.00 on the home at the time of the Application for Indigent Determination. Claimant also noted that he had income of $1,200.00 and expenses of $1,275.00.

3. On October 27, 2008 ALJ Krumreich entered an Order concluding that Claimant was not indigent pursuant to WCRP 11-11(A). He determined that Claimant's liquid assets of $1,568.00 exceeded the $1,500.00 indigency limit. ALJ Krumreich also commented that Claimant had not presented any "extraordinary circumstances."

4. On November 10, 2008 Claimant filed a Motion for Reconsideration of Indigent Determination. Claimant asserted that, because his monthly expenses exceeded his $1,200.00 monthly income, he was not credit-worthy. He also explained that he had no means to pay back a loan against his home or vehicles without "compromising his family's ability to provide shelter, food, clothing and transportation." Claimant thus concluded that he lacked liquid assets that could be readily converted into cash without jeopardizing his ability to maintain a home. He did not explicitly request a hearing on the matter.

5. On December 5, 2008 ALJ Krumreich issued an Order denying Claimant's Motion for Reconsideration. He stated that Claimant's liquid assets of $1,568.00 exceeded the $1,500.00 limit. ALJ Krumreich also noted that Claimant failed to present

any extraordinary circumstances. He therefore determined that Claimant was not indigent pursuant to WCRP 11-11.

6. Claimant did not file a petition to review ALJ Krumreich's denial of the Motion for Reconsideration. Instead, Claimant filed an Application for Hearing and Notice to Set with the Office of Administrative Courts. He sought to challenge ALJ Krumreich's Order denying the Motion for Reconsideration.

7. Claimant testified at the hearing in this matter. He stated that he sought to obtain a loan against the equity in his home or to refinance his home. However, he was unable to obtain a loan or refinance his home because the price of the home had fallen below the original $80,000 purchase price.

8. The Director of the Division of Workers' Compensation has established a procedure through WCRP 11-11(A) to allow claimants to obtain a DIME in the event that they are indigent. WCRP 11-11(A) grants the ALJ who received the Application for Indigent Determination the discretion to determine whether a hearing is warranted. In denying Claimant's Motion for Reconsideration, ALJ Krumreich complied with the procedure established in WCRP 11-11(A). Claimant did not explicitly request a hearing and ALJ Krumreich resolved the matter without the necessity of a hearing. WCRP 11-11(A) does not contemplate review of an ALJ's Order by another ALJ if a party is dissatisfied with the outcome. Instead, the appropriate mechanism for appeal is to file a petition to review within 20 days from the date of the certificate of mailing on the order. Claimant did not file a petition to review but instead filed an Application for Hearing and Notice to Set with the Office of Administrative Courts. However, nothing in the Act or Rules permits a claimant to elect to have the denial of an indigency determination resolved by a second ALJ. Accordingly, the undersigned ALJ lacks authority to consider ALJ Krumreich's December 5, 2008 Order denying Claimant's Motion for Reconsideration.

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. WCRP 11-11(A) governs the procedure for assessing a Claimant's indigency after he has applied for a DIME. WCRP 11-11(A)(5) provides, in relevant part,

> Within twenty (20) days after the Application for Indigent Determination (IME) is filed, an administrative law judge shall issue an order based on the written submissions determining whether or not the claimant is indigent for purposes of paying for the IME. A hearing will be held only if the administrative law judge determines that one is necessary because a timely submitted response raises genuine issues of disputed material fact that must be resolved. In the event no response is filed but an administrative law judge determines there is a lack of sufficient information in the Application for Indigent Determination (IME), the administrative law judge may hold a hearing to obtain additional information.

5. An order is final unless the dissatisfied party files a petition to review within 20 days from the date of the certificate of mailing on the order. §8-43-301(2), C.R.S. The statutory time limit governing appellate review of workers' compensation decisions is jurisdictional. *Walmart Stores, Inc. v. Industrial Claim Appeals Office,* 24 P.3d 1 (Colo. App. 2000).

6. As found, the Director of the Division of Workers' Compensation has established a procedure through WCRP 11-11(A) to allow claimants to obtain a DIME in the event that they are indigent. *See In Re Olson,* W.C. No. 4-681-948 (ICAP, Oct. 3, 2007). WCRP 11-11(A) grants the ALJ who received the Application for Indigent Determination the discretion to determine whether a hearing is warranted. In denying Claimant's Motion for Reconsideration, ALJ Krumreich complied with the procedure established in WCRP 11-11(A). Claimant did not explicitly request a hearing and ALJ Krumreich resolved the matter without the necessity of a hearing. WCRP 11-11(A) does not contemplate review of an ALJ's Order by another ALJ if a party is dissatisfied with the outcome. Instead, the appropriate mechanism for appeal is to file a petition to review within 20 days from the date of the certificate of mailing on the order. Claimant did not file a petition to review but instead filed an Application for Hearing and Notice to Set with the Office of Administrative Courts. However, nothing in the Act or Rules permits a claimant to elect to have the denial of an indigency determination resolved by a second ALJ. Accordingly, the undersigned ALJ lacks authority to consider ALJ Krumreich's December 5, 2008 Order denying Claimant's Motion for Reconsideration.

ORDER

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

The undersigned ALJ lacks authority to consider ALJ Krumreich's December 5, 2008 Order denying Claimant's Motion for Reconsideration.

DATED: April 28, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-777-145

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?

FINDINGS OF FACT

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

1. Employer operates a school district. Claimant is a 53-year-old female who worked for employer as a custodian. On October 6, 2008, claimant was walking down a flight of stairs to unlock a classroom door for a teacher when she injured her right knee.

2. Claimant was holding onto the handrail while she was walking down the stairs. Claimant is uncertain whether her foot gave out or whether she missed a step. Claimant started to fall on the stairs but she was able to save herself from falling by holding onto the rail. Claimant nonetheless hit her right knee on the stairway wall. While claimant is uncertain why she started to fall on the steps, nothing about the stairs themselves caused her to fall. Claimant also represented in answers to interrogatories that she stepped wrong and fell.

3. Employer referred claimant to Donna Brogmus, M.D., who examined her right knee on October 7, 2008. Claimant reported to Dr. Brogmus that she was walking down steps when her right foot twisted such that she hit her right knee on the lateral cement wall. Claimant reported to Dr. Brogmus that she contused her right knee in the winter of 2007 when she fell on ice. Claimant told Dr. Brogmus that she heard her knee pop when she fell on the ice and that her right knee occasionally felt like it might give way. Dr. Brogmus referred claimant for physical therapy at McKee Medical Center.

4. When interviewed by insurer, claimant denied any pre-existing right knee problems. While claimant described a prior left-knee injury at King Soopers, her medical records contradict this and instead describe a prior right-knee injury. According to the medical records, claimant complained of right knee pain in August of 2003, while working in the bakery at King Soopers. There, claimant's job involved squatting and kneeling, but she reported no discrete or specific injury from work activity. Claimant instead reported three weeks of pain along the inner aspect of her right knee. Jennifer A. Roller, M.D., diagnosed patellar/quadriceps tendonitis and prescribed a patellar stabilizing knee brace to help claimant calm her knee down. Dr. Roller also prescribed medication, physical therapy, and strengthening, and she told claimant to apply ice to her knee four times per day.

5. At her initial evaluation on October 9, 2008, claimant told the physical therapist she was walking down the stairs, pivoted right, and felt her right knee give out. The therapist noted that claimant was using a neoprene knee-brace and that her gait pattern was within normal limits. The therapist instructed claimant in a strengthening program, including strengthening for quadriceps and hamstrings.

6. Dr. Brogmus referred claimant to Orthopedic Surgeon Douglas Beard, M.D., who evaluated her right knee on November 7, 2008. Claimant reported to Dr. Beard that she sustained a twisting injury to her right knee. Dr. Beard referred claimant for a magnetic resonance imaging (MRI) scan of her right knee, which revealed a complex tear of the medical meniscus. Dr. Beard performed arthroscopic surgery (a partial medial meniscectomy) on December 10, 2008.

7. At respondents' request, Allison Fall, M.D., conducted an independent medical examination of claimant on January 29, 2009. Claimant reported to Dr. Fall that she was going down stairs when either her foot gave out or she skipped a step. Claimant was uncertain what happened. Claimant told Dr. Fall that she started to fall, grabbed onto the handrail, and hit the outside of her right knee on the wall. Dr. Fall noted that claimant was uncertain what occurred when she was walking down the stairs. Claimant speculated to Dr. Fall that something happened: possibly she missed a step or her foot gave out.

8. Dr. Fall testified as an expert in Physical Medicine and Rehabilitation. Dr. Fall opined that there was no work-related mechanism of injury that would cause a complex tear of the right medical meniscus. According to Dr. Fall, walking down the stairs is not a work-related mechanism of injury that would cause a meniscus tear. Dr. Fall further opined that claimant's description of hitting the lateral aspect of her knee on a wall is medically insufficient to cause a meniscus tear. Crediting Dr. Fall's medical opinion, walking down stairs is a normal activity of daily living and is not an activity specifically related to claimant's job duties. Dr. Fall opined that claimant's meniscus tear and her subsequent medical treatment, including surgery, are unrelated to any work-related activity or hazard of claimant's employment.

9. Claimant failed to show it more probably true than not that the tear she sustained in her right meniscus arose out of the conditions and circumstances under which she normally performs her job functions. Claimant failed to show it more probably true than not that her right knee injury arose out of a work-related activity or hazard of her employment. The mechanism of claimant's injury instead involved a normal activity of daily living -- walking down a flight of stairs. Stairs like those at employer are ubiquitous and

are not a hazard of claimant's employment. In addition, it is more probably true that the right knee condition that claimant developed while walking down the stairs at employer is alike unexplained and unassociated with the circumstances of her employment.

CONCLUSIONS OF LAW

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

Claimant argues she has proven by a preponderance of the evidence that she sustained an injury arising out of the course and scope of her employment. The Judge disagrees.

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*. 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 compensable injury is one that "arises out of" and "in the course of" employment. *See* § 8-41-301(1)(b), *supra*; *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). An injury arises out of employment only if it 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 the employment. *Price v. Industrial Claims Appeals Office,* 919 P.2d 207 (Colo. 1996). The essence of the test is whether the conduct originated in the work-related duties or responsibilities so as to be considered part of the service to the employer in connection with the contract of employment. *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). Ultimately, as noted, resolution of this issue is one of fact to be determined by the ALJ based on an examination of the totality of the circumstances. *Lori's Family Dining Inc. v. Industrial Claims Appeals Office*, 907 P.2d 715 (Colo. App. 1995); *See, also, Rice v. Dayton Hudson Corporation* W. C. No. 4-386-678 (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 pre-existing idiopathic condition).

Here, the Judge found claimant failed to show it more probably true than not that the tear she sustained in her right meniscus arose out of either the conditions and circumstances under which she normally performs her job functions or a work-related activity or hazard of her employment. Claimant thus failed to prove by a preponderance of the evidence that she sustained an injury arising out of the course and scope of her employment.

The Judge found that the mechanism of claimant's injury involved a normal activity of daily living -- walking down a flight of stairs. Stairs like those at employer are ubiquitous and are not a hazard of claimant's employment. The Judge further found it more probably true that the right knee condition claimant developed while walking down the stairs at employer is unexplained and unassociated with the circumstances of her employment.

The Judge concludes claimant's claim for 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 benefits under the Act is denied and dismissed.

DATED: _April 28, 2009__

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-764-288

ISSUES

The sole issue determined herein is temporary total disability ("TTD") benefits.

FINDINGS OF FACT

1. Employer is a manufacturing company that manufactures fiberglass molds. Claimant was hired as a production worker for Employer on August 5, 2007. Claimant's regular job required that he roll fiberglass with resin that weighed up to 45 pounds. The finished molds were very heavy and required four people to lift.

2. Between his date of hire and his date of injury, Claimant received reprimands from Employer on at least two occasions. The December 6, 2007 reprimand

was a verbal reprimand for not calling in an absence. The May 28, 2008 reprimand was a written reprimand for talking rather than working.

3. Claimant was injured at work on July 2, 2008, when he was removing a fiberglass cloth from a box on a lower pallet, and the top pallet fell on him, pushing him into a cutting table.

4. Claimant was treated at High Plains Medical Center on July 2, 2008. Claimant was complaining of injuries to his left side and low back. Claimant was taken off of work for the next two days, and he was scheduled to return for treatment on July 7, 2008.

5. Claimant received follow-up medical care from Renee Weakley, FNP-C at High Plains Medical Center on July 7, 2008, July 14, 2008, and July 21, 2008. Claimant's pain complaints during that time period focused on his abdomen and low back. Claimant was treated during that period with medications, and Claimant was provided work restrictions of no lifting, reaching, crawling, kneeling, squatting, or climbing.

6. On July 22, 2008, Insurer filed a General Admission of Liability for TTD benefits from July 3, 2008 and ongoing.

7. On August 4, 2008, N.P. Weakley noted that Claimant was being seen for left side pain and follow-up for a left abdominal contusion. She restricted Claimant to no lifting greater than 10 pounds and no reaching, overhead lifting, crawling, kneeling, or squatting.

8. Claimant did not work at all between his date of injury and approximately August 6, 2008. Claimant then returned to work in a modified position consistent with the restrictions. The modified job involved making smaller molds, sweeping, and picking up trash.

9. On August 7, 2008, Mr. Rodriguez, claimant's supervisor, requested Claimant to perform work that was within Claimant's 10 pound lifting restriction. Claimant continued to refuse to work, and Claimant told Mr. Rodriguez that if he didn't like it, he should send Claimant home. Mr. Rodriguez did send Claimant home, and on that date, Claimant was given a reprimand for refusing to work within his restrictions, and he was suspended for three days.

10. On August 14, 2008, N.P. Weakley approved a written offer of modified employment position. The position included applying resin and rolling out air bubbles, light janitorial duties (sweeping with a floor broom and picking up the trash and putting it in a dumpster), and light grounds work. The position was within Claimant's work restrictions.

11. Even before being formally offered the position, Claimant performed the modified duty position. On August 18, 2008, Claimant complained to N.P. Weakley that

sweeping was aggravating his back. She did not restrict Claimant from sweeping, but instead, indicated that Claimant should be permitted a 10 minute break every hour to rest.

12. On August 21, 2008, Employer sent the modified employment offer to Claimant via certified mail. Claimant worked the modified duty position until September 2, 2008, without any indication of further problems or the need for further restrictions.

13. On September 2, 2008, Claimant notified N.P. Weakley that his left side was feeling better. On that date, N.P. Weakley released Claimant to full duty work without restrictions and she instructed Claimant to follow-up in one week to see how full-time status was working out.

14. On September 8, 2008, Claimant reported to N.P. Weakley that he had returned to full duty work with no problems. N.P. Weakley determined that claimant was at maximum medical improvement ("MMI") and she released him to return to full duty work without restrictions.

15. On September 8, 2008, Insurer filed a General Admission of Liability for TTD benefits from July 3, 2008 until August 10, 2008, and temporary partial disability ("TPD") benefits from August 11, 2008 until August 28, 2008. The admission indicated that TPD benefits were terminated secondary to the modified job offer.

16. Between September 8, 2008 and September 23, 2008, Claimant did not return for further medical care and he did no report any worsening of condition to Employer.

17. Between September 8, 2008 and September 23, 2008, Claimant continued to work full duty, without restrictions. Claimant testified that after he was released to full duty, he returned to his regular position for a brief period of time, but then his position was changed. According to Claimant, he was unable to perform his regular position as fast as he was able to work prior to his injury, and some of the fiberglass molds he was working on would dry up, apparently ruining the molds. Claimant testified that this frustrated Mr. Rodriguez, who then assigned Claimant to cut fiberglass and sweep and pick up trash.

18. During this period from September 8 through September 23, 2008, Claimant and Mr. Rodriguez argued several times. Claimant admitted that he felt the jobs assigned to him were the "dirty jobs", and being reassigned to these job duties made Claimant angry. He told Mr. Rodriguez he would not do the dirty work. Claimant was on full duty at the time and there are no documented medical reasons why Claimant could not perform the work assigned to him during that period.

19. During this period, Employer was desperate for workers and Claimant's performance of job duties such as cutting fiberglass, sweeping, and trash collection allowed the other production employees to be more productive. Employer was not look-

ing to terminate Claimant, or any other workers, due to Employer's desperate need for workers.

20. On September 23, 2008, Claimant had another confrontation with Mr. Rodriguez. Claimant admitted that he was "taking his time" and had been slow in getting dressed and getting to his work station after clocking in. Claimant told a coworker that he was going to be late on September 24, 2008, and he was going to see what his supervisor was going to do about it. Mr. Rodriguez reprimanded claimant. Claimant informed Mr. Rodriguez that he would be late for work on September 24, 2008, to take his children to the bus stop. Mr. Rodriguez warned Claimant not to come in late or he would be sent right back home.

21. On September 24, 2008, Claimant came into work five to ten minutes late. Mr. Rodriguez asked Claimant why he was late again, and Claimant indicated that he just couldn't get to work on time, and if Mr. Rodriguez didn't like it, he should fire him. Claimant admitted that he asked Mr. Rodriguez to fire him, because he felt Mr. Rodriguez had it out for him. Mr. Rodriguez discussed the situation with operations manager, Mr. Thurner. Based on claimant's continuous insubordination towards his supervisor and his request to be fired, Mr. Thurner decided to take Claimant up on his demand and terminate the employment.

22. On September 25, 2008, Employer prepared a termination report that indicated Claimant was terminated for continuously poor work attitude, willful neglect of company rules, and insubordination to his supervisor. There is ample evidence that Claimant was insubordinate to his supervisor, that Claimant had a poor work attitude because he did not like to do the dirty jobs, and that Claimant did neglect company rules, such as arriving to work on time. Based on these circumstances, Claimant was responsible for his termination. Although claimant might have had a reasonable excuse to arrive a few minutes late on occasion due to his children's bus schedule, Mr. Thurner was credible that the real reason for the termination was that claimant was "pushing buttons" to get fired and that this had a deleterious effect on the morale of the entire workforce. Claimant engaged in volitional conduct and was responsible for his termination.

23. Claimant took a new position with Double D Construction on October 6, 2008, installing guard rails on highways. Claimant performed some physical labor during that employment period, including lifting posts up to 30 pounds, filling dirt in holes, and tamping the dirt.

24. Claimant obtained no medical treatment from September 8 to October 31, 2008.

25. On October 31, 2008, claimant sought treatment from Dr. Soto. Claimant indicated that he had lower midline back pain that was worse with movement since his work injury. Dr. Soto completed a physician's report of a workers' compensation injury on July 2, 2008. Dr. Soto diagnosed low back pain and referred claimant for a magnetic

resonance image, medications, and physical therapy. Dr. Soto imposed a restriction only against lifting over 20 pounds.

26. Claimant took his restrictions to Double D Construction, who terminated his employment due to the restrictions. Dr. Soto did not provide any restrictions to kneeling, crawling, squatting or climbing.

27. The restrictions outlined by Dr. Soto would have prevented Claimant from working the position he worked for Employer on his date of injury, but they would not prevent claimant from performing the modified duty position previously offered by Employer and performed by claimant.

28. On December 6, 2008, Dr. Soto reevaluated claimant and released him to return to full duty work with no restrictions.

29. On January 30, 2009, Dr. Soto reevaluated Claimant and released him to return to work with restrictions of 30 pounds lifting, repetitive lifting, carrying, pushing, and pulling. Dr. Soto did not provide any restrictions to kneeling, crawling, squatting or climbing.

30. Mr. Thurner, operations manager of Employer, testified credibly that Employer would have been willing to offer Claimant modified employment within his post job termination work restrictions but for Claimant being terminated for cause. Employer had accommodated other injured employees in the past, including employees with more severe restrictions than Claimant has been under during this claim. Mr. Thurner confirmed that the job duties outlined in the August 21, 2008 modified offer letter to Claimant were still available as of the date of the hearing.

31. The previous modified position offered and accepted by Claimant in August 2008 was well within the restrictions subsequently outlined by Dr. Soto on October 31, 2008, and January 30, 2009.

32. Claimant has not proven by a preponderance of the evidence that he worsened after his termination from employment, as a natural consequence of the admitted work injury. Dr. Soto completed the workers' compensation form, but did not comment on the causation of any worsening. Dr. Soto did not analyze claimant's construction work during October 2008. Given Dr. Soto's inconsistent pattern of imposing and removing restrictions, the imposition of restrictions does not indicate that claimant probably suffered a worsening of condition after his termination of employment. Furthermore, the evidence does not indicate that any worsening, if it occurred, was due to the work injury rather than the intervening construction labor. Consequently, claimant has failed to prove that his wage loss after October 31, 2008, is due to the work injury rather than due to his termination from employment.

CONCLUSIONS OF LAW

1. Consequently, claimant is “disabled” within the meaning of section 8-42-105, C.R.S. and is entitled to TTD benefits only 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. 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 responsible for his termination of employment.

3. *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004) held that section 8-42-105(4), C.R.S. was not a permanent bar to receipt of TTD benefits and such benefits could be awarded if claimant’s worsened condition caused the wage loss. As found, claimant has failed to prove that his wage loss after October 31, 2008, is due to the work injury rather than due to his termination from employment.

ORDER

It is therefore ordered that:

1. Claimant’s claim for TTD benefits commencing October 31, 2008, is denied and dismissed.

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

DATED: April 29, 2009 Martin D. Stuber

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS’ COMPENSATION NO. WC 4-759-034

ISSUES

¬ Did claimant prove by a preponderance of the evidence that he sustained an injury arising out of the course and scope of his employment?
¬ Did claimant prove by a preponderance of the evidence that he is entitled to medical benefits, temporary disability benefits, permanent disability benefits and an award for disfigurement?

FINDINGS OF FACT

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

1. Employer operates a warehouse business. On January 14, 2009, OAC served a Notice of Hearing (NOH) upon insurer, addressed as follows: Dee Dee Gutierrez, Employers Compensation Insurance Company, P.O. Box 35000, Reno, NV 89511. The NOH was legally sufficient notice. Neither employer nor insurer appeared at hearing.
2. Claimant has worked some 4 years for employer as a warehouseman. In April of 2008, employer paid claimant an hourly wage of $13.00. Claimant worked full time for employer. Claimant's average weekly wage (AWW) is $520.00.
3. Claimant's date of birth is July 19, 1979; his age at the time of hearing was 29 years. Claimant's testimony was credible and persuasive. Crediting his testimony, claimant felt a pull in the muscles of his lower back while unloading boxes of product from cargo containers on April 15, 2008. Claimant finished his shift on April 15th, thinking his back strain was not serious.
4. Claimant's lower back symptoms worsened during the evening of April 15th while he was at home. By the morning of April 16th, claimant's symptoms had worsened. Claimant telephoned his supervisor on the morning of April 16th to report his injury.
5. Claimant's lower back symptoms continued to worsen until April 18th, when he sought treatment at the Emergency Department of Exempla Good Samaritan Medical Center (ER), where Kelli D. Jones, M.D., examined him. On physical examination, Dr. Jones found an obvious, right-sided musculoskeletal spasm of the paraspinous muscles of the L3 through L5 levels of claimant's lumbar spine. Dr. Jones administered intravenous narcotic pain medications and discharged claimant home.
6. Claimant's symptoms returned after the narcotic pain medication wore off. The following morning, on April 19, 2008, claimant called an ambulance and was transported by to the Emergency Department of St. Anthony Hospital North, where Physicians Assistant Paul Young, PA-C, evaluated him. PA-C Young administered additional intravenous narcotic pain medications and discharged claimant home.
7. Later, on April 19th, claimant sought chiropractic treatment to relieve his symptoms. The chiropractor referred claimant to Avista Hospital for a magnetic resonance imaging (MRI) scan of the thoracic and lumbar regions of his spine. The MRI revealed myositis of the paraspinous muscles. A neurosurgeon evaluated claimant and transferred him to Boulder Community Hospital on April 19th.
8. At Boulder Community Hospital, claimant underwent a procedure to drain the abscess. On April 22, 2008, claimant underwent surgical debridement of the abscess and resection of several paraspinal muscles on the right side. Claimant's wound was left

open and packed daily until he was discharged on May 7, 2008. Todd Turner, M.D., provided treatment of claimant's infectious disease at Boulder Community Hospital and during outpatient treatment after May 7th.

9. As a result of the surgical debridement procedure, claimant sustained disfigurement consisting of an elliptical scar some 10 inches long by 2 inches wide over his lumbar spine. The scarring is permanent, serious, and normally exposed to public view.

10. Dr. Turner testified as an expert in treating infectious disease. Crediting Dr. Turner's testimony, the Judge finds as follows: Claimant had a transient infection of Strep in his bloodstream. When claimant pulled his muscle at work, he damaged the muscle tissue, leaving the muscle devitalized and susceptible to infection. The Step in claimant's bloodstream seeded the site of the damaged muscle and infected the muscle tissue. Claimant developed pyomyositis, which is a severe form of Strep infection at the situs of his devitalized paraspinal muscles. Crediting Dr. Turner's causation analysis, claimant showed it more probably true than not that his injury at employer on April 15, 2008, proximately caused the development of pyomyositis and necessitated medical treatment of the Strep infection.

11. Crediting Dr. Turner's testimony, claimant's treatment and diagnostic testing by medical providers at the ER, at St. Anthony North, at Avista, at Boulder Community Hospital, and through outpatient care was reasonable and necessary to cure and relieve the effects of claimant's injury.

12. Claimant showed it more probably true than not that his injury proximately caused his total wage loss from April 16, 2008, through June 20, 2008. As a result of the effects of the injury, claimant was unable to perform his regular work from April 16, 2008, through June 20, 2008.

13. Claimant showed it more probably true than not that his injury proximately caused his partial wage loss from June 21, 2008, through September 19, 2008. The Judge credits claimant's testimony in finding claimant sustained a partial wage loss due to hours missed from work to attend medical appointments from June 21st through September 19, 2008.

14. At the request of claimant's attorney, Tony Euser, D.O., performed an Impairment Rating Exam on March 9, 2009. Dr. Euser rated claimant's permanent medical impairment at 20% of the whole person according to the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* (AMA Guides).

CONCLUSIONS OF LAW

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

A. Compensability:

Claimant argues he has proven by a preponderance of the evidence that he sustained an injury arising out of the course and scope of his employment on April 15, 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 by a preponderance of the evidence that his injury arose out of the course and scope of his employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

The Act distinguishes between the terms "accident" and "injury." The term "accident" refers to an unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), *supra*. By contrast, an "injury" refers to the physical trauma caused by the accident. Thus, an "accident" is the cause and an "injury" the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable injury. A compensable industrial accident is one, which results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

Here, the Judge found claimant showed it more probably true than not that his injury at employer on April 15, 2008, proximately caused the development of pyomyositis and necessitated medical treatment of the Strep infection. Claimant thus proved by a preponderance of the evidence that he sustained a compensable injury.

As found, claimant had a transient infection of Strep in his bloodstream. When claimant pulled his muscle at work, he damaged the muscle tissue, leaving the muscle devitalized and susceptible to infection. The Step in claimant's bloodstream seeded the site of the damaged muscle and infected the muscle tissue. Claimant developed pyo-

myositis, which is a severe form of Strep infection at the situs of his devitalized paraspinal muscles.

The Judge concludes that insurer should provide claimant benefits under the Act for his compensable injury on April 15, 2008.

B. Medical Benefits:

Claimant argues he has proven by a preponderance of the evidence that he is entitled to an award of medical benefits. The Judge agrees.

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.

Respondents thus 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).

The Judge credited Dr. Turner's testimony in finding claimant's treatment and diagnostic testing by medical providers at the ER, at St. Anthony North, at Avista, at Boulder Community Hospital, and through outpatient care was reasonable and necessary to cure and relieve the effects of his injury at employer.

The Judge concludes insurer should pay for treatment and diagnostic testing provided by medical providers at the ER, at St. Anthony North, at Avista, at Boulder Community Hospital, and through outpatient care.

C. Temporary Disability Benefits:

Claimant argues he has proven by a preponderance of the evidence that he is entitled to temporary disability benefits. The Judge agrees.

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 8-42-103(1), *supra*, requires a claimant seeking temporary partial disability (TPD) benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Thus, if the injury in part contributes to the wage loss, TPD benefits must continue until one of the elements of §8-42-106(2), *supra*, is satisfied. *Champion Auto Body v. Industrial Claim Appeals Office*, *supra.*

The Judge found that claimant showed it more probably true than not that his injury proximately caused his total wage loss from April 16, 2008, through June 20, 2008, and his partial wage loss from June 21, 2008, through September 19, 2008. The Judge credited claimant's testimony in finding that, as a result of the effects of the injury, claimant was unable to perform his regular work from April 16, 2008, through June 20, 2008, and that he sustained a partial wage loss due to hours missed from work to attend medical appointments from June 21st through September 19, 2008.

The Judge concludes insurer should pay claimant TTD benefits from April 16, 2008, through June 20, 2008, based upon an AWW of $520.00. Insurer should pay claimant TPD benefits from June 21, 2008, through September 19, 2008.

D. Permanent Partial Disability (PPD) Benefits:

Claimant argues he has proven by a preponderance of the evidence that he is entitled to permanent partial disability (PPD) benefits. The Judge agrees.

Section 8-42-107(8)(c), *supra*, provides that, once claimant reaches maximum medical improvement (MMI), the treating physician shall determine permanent medical impairment in accordance with the AMA Guides. The treating physician thus makes the initial determination of MMI and degree of impairment. *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo.App. 1995).

The Judge found that Dr. Euser rated claimant's permanent medical impairment at 20% of the whole person according to the AMA Guides. The Judge concludes that insurer should pay claimant PPD benefits based upon Dr. Euser's rating of 20% of the whole person.

E. Disfigurement Award:

Claimant argues he has proven by a preponderance of the evidence that he is entitled to an award for disfigurement. The Judge agrees.

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.

ORDER

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

1. Insurer shall provide claimant benefits under the Act for his compensable injury on April 15, 2008.

2. Insurer shall pay, pursuant to fee schedule, for treatment and diagnostic testing provided by medical providers at the ER, at St. Anthony North, at Avista, at Boulder Community Hospital, and through outpatient care.

3. Insurer shall pay claimant TTD benefits from April 16, 2008, through June 20, 2008, based upon an AWW of $520.00.

4. Insurer shall pay claimant TPD benefits from June 21, 2008, through September 19, 2008.

5. Insurer shall pay claimant PPD benefits based upon Dr. Euser's rating of 20% of the whole person.

6. Insurer shall pay claimant disfigurement benefits in the amount of $4,000, payable in one lump sum.

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

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

DATED: _April 29, 2009_

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-779-418

ISSUE

The issue presented for determination at hearing was the relatedness of the recommendation by authorized treating physician, John Papilion, M.D., for a total right knee arthroplasty. The parties agreed at hearing that the recommendation for the total right knee arthroplasty was reasonable and necessary, however, the Respondent disputes the relatedness of the recommended surgery.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is a credible witness and her testimony is persuasive and consistent with the medical records in the case.

2. Claimant's date of birth is May 21, 1939, and at hearing was sixty-nine years old.

3. Claimant has been employed by Employer since August or September of 2005 in different positions including cashier and shelf stocker. Claimant worked since her date of hire forty hours a week with no limitations or restrictions, and has had no problems bending, kneeling, and performing her job.

4. This claim is under a "General Admission of Liability" for medical benefits only filed on January 9, 2009. The Employer has accommodated Claimant's work restrictions since her admitted injury of March 28, 2008, and Claimant has not yet missed any time from work.

5. On March 28, 2008, while at work in the course and scope of her employment, Claimant legs were caught in an extension cord as a member of the cleaning crew pulled a power cord for a vacuum encircling Claimant's legs and causing her to fall. Claimant landed on both knees, but testified that she landed harder on her right knee, and on both hands.

6. Claimant first attempted to just deal with her right knee pain but when she discovered it would not go away she went to the Respondent's authorized treating physician Dr. John Gray at Concentra Medical Center for an examination on April 1, 2008. At that examination, Claimant was evaluated and placed on restrictions of "no lifting, pushing or pulling, or carrying more than ten pounds. No stairs or ladders. No kneeling or deep squatting."

7. At the follow-up visit with Dr. Gray on April 18, 2008, Claimant was kept on restrictions of:

   1. No climbing.

   2. Avoid kneeling and crawling.

8. Dr. Gray referred Claimant to Michael Hewitt, M.D. Dr. Hewitt on May 19, 2008, evaluated Claimant and made an assessment of:

> Advanced right knee degenerative arthritis with exacerbation.

9. The next day, on May 20, 2008, Dr. Gray mades the assessment of:

> Exacerbation of pre-existing advanced degenerative joint disease of the right knee.

10. Claimant was eventually referred to John Papilion, M.D., by Concentra Medical Facilities and at the first visit on July 28, 2008, Dr. Papilion stated that he hoped that he could bring Claimant's right knee condition "back to baseline." Eventually Dr. Papilion could not return Claimant to baseline and he recommended a total right knee replacement.

11. Claimant testified that prior to her fall of March 28, 2008, she had never been on restrictions for her right knee. Following the March 28, 2008, injury, Claimant has been and remains on temporary restrictions, Claimant has undergone physical therapy, and Claimant has had three Synvisc injections to her right knee.

12. It was when the third injection was performed by authorized treating physician, Dr. Papilion, that he opined:

> Ultimately, she may succumb to total knee arthroplasty if this [the synvisc injection] fails.

13. After the third injection was performed, and its benefits evaluated, Dr. Papilion made a recommendation for a right total knee arthroplasty. In his report Dr. Papilion states:

> It is my opinion that [Claimant] definitely had underlying degenerative arthritis that was relatively quiescent. I believe the work related incident greatly exacerbated her symptoms.

14. That recommendation for surgery by Dr. Papilion has been denied by Respondent and is the subject of this hearing.

15. Respondent retained William Shaw, M.D., who opined that Claimant's recommended total right knee arthroplasty was reasonable and necessary, but was not related to Claimant's fall of March 28, 2008.

16. Dr. Shaw based his opinion that Claimant's need for right knee replacement was not necessitated by her fall because "she was on active care for the right

knee" and Claimant had "extensive [previous] treatment on the right knee." Dr. Shaw's testimony is not supported by Claimant's medical records.

17. Claimant's medical treatment since 1995, has all been through Kaiser Permanente. A review of those medical records shows no active or extensive treatment on Claimant's right knee.

18. In fact, the records for the dates between August 27, 1995, through February 19, 2009, only reflect treatment to Claimant's right knee on August 27, 1995, when Claimant injured the right knee and suffered trauma. No where else in the records prior to an exam by Susan Peterson, M.D., on May 29, 2007, is there even reference to knee treatment. In fact, in the medical record of May 29, 2007, Dr. Susan Peterson at Kaiser Permanente discusses Claimant's pain complaints with regard to her left knee.

19. Notably, Claimant's physician at Kaiser Permanente, Michael Miller, M.D., on December 22, 2008, discusses the fall Claimant had on March 28, 2008. He states:

> 03/28/08 tripped over an extension cord at work at Target and fell onto R knee Has persistent pain since and has had multiple treatments including xrays, steriod and synvisc injections through workmans' comp They are refusing surgery because of pre-existing djd

20. After addressing the fall, Dr. Miller discusses the Kaiser Permanente medical records. In spite of Dr. Shaw's contrary testimony, Dr. Miller's findings with regard to any prior knee treatment or complaints are as follows:

> We reviewed [Claimant's] KP record.
> Xrays 1995, 1997 documenting L knee djd
> 5/07 had eval. For L knee pain which included B knee xrays showing R knee djd
> 8/1/07 attended rheum knee djd class

21. Notably, even Kaiser Permanente's own review of its complete medical record performed by Dr. Miller on December 22, 2008, reflects there is no treatment or care rendered by any treating physician to Claimant's right knee prior to her admitted fall of 2008.

22. The record is unrefutted that Claimant had restrictions after her fall on March 28, 2008, which were issued on April 1, 2008, and never had restrictions with regard to her right knee prior to that time.

23. The record is unrefutted that prior to Claimant's fall on March 28, 2008, no recommendation had been made by any medical provider that Claimant's right knee be replaced.

24. In fact, as the time of hearing there has never been and no recommendation currently exists that Claimant's left knee be replaced.

25. Dr. Shaw opines in his report of January 30, 2009, that Claimant's condition has stabilized and resolved, however, Claimant remains on restrictions, which were not present prior to her admitted March 28, 2008, fall. Dr. Shaw placed emphasis upon the fact that Claimant's pathology pre-existed the work injury, however, conceded that Claimant did not have the pain complaints that Claimant currently has and has had since her fall of March 28, 2008.

26. In spite of Dr. Shaw's testimony, there is little, if any, support in the complete records from Kaiser Permanente that Claimant had any "active treatment" or "extensive treatment" on her right knee prior to her fall of March 28, 2008. Dr. Shaw states that Claimant's "failure to report her previous right knee problems" affects her credibility. This statement is circuitous, in that Claimant did not have any treatment or problems with her right knee, had worked at Employer since 2005, and first required treatment after her fall of March 28, 2008. Claimant did not "fail to report" a condition for which she has received no treatment.

27. Claimant is entitled to reasonable, necessary, and related medical benefits to cure and relieve her of the effects of her work place injury of March 28, 2008. The evidence establishes through Claimant's testimony and the medical records that she substantially and permanently aggravated the condition of her right knee by the March 28, 2008, admitted work place injury and the Claimant was referred to Dr. John Papilion who recommends a right knee total arthroplasty. It is found that Dr. Papilion's recommendation for the right knee total arthroplasty is related to the March 28, 2008 work injury.

29. Any determination concerning other issues is premature at this time, as a matter of fact.

CONCLUSIONS OF LAW

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

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers. These Findings of Fact only concern evidence dispositive of the issues involved. Not every piece of evidence which would lead to a conflicting conclusion is included. Evidence contrary to the findings was rejected as not persuasive. *Magnetic Engineering, Incorporated v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

2. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

3. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits and compensability 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. 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.

5. Respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101 (1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office,* 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a casual relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the Claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The ALJ's factual determination must be supported by substantial evidence and plausible interferences drawn from the record.

6. Further, the respondent is 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), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Pain is a typical symptom for the aggravation of a pre-existing condition. The claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949).

7. The issue of whether medical treatment is necessitated by a compensable aggravation or a worsening of the claimant's pre-existing condition is one of fact for resolution by the ALJ based upon the evidentiary record. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The ALJ's factual determinations if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence means standard requires that the evidence is reviewed in the light most favorable to the prevailing party, and the ALJ's assessment of the sufficiency and probative weight of the evidence is given difference. *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 2003).

8. The record is clear that Claimant had minimal, if any, limitations and pain complaints to her right knee prior to the admitted industrial accident suffered on March 28, 2008. The surgery recommended by Dr. John Papilion to replace the right knee had not been made prior to the fall of March 28, 2008, and was a direct and natural result of the symptoms caused by the fall.

9. The testimony and medical reports of Dr. William Shaw have been considered and his conclusion rejected, as the medical records do not support that Claimant was either in active or extensive medical treatment with regard to her right knee. In fact, the treatment records for the left knee involve less than five visits over a period of approximately fourteen years.

ORDER

It is therefore ordered that:

1. Claimant has satisfied her burden of proving by a preponderance of the evidence that the need for total right knee arthroplasty is found to be reasonable, necessary, and related to Claimant's injury of March 28, 2008

2. Respondent is liable for the total right knee arthroplasty recommended by John Papilion, M.D., who is an authorized treating physician, to cure and relieve Claimant from the affects of the industrial injury dated March 28, 2008.

3. Any issues not determined in this decision are reserved for future determination.

DATED: April 29, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-701-019

ISSUES

¬ Did claimant prove by a preponderance of the evidence that another surgery to revise/salvage the January 9, 2007, fusion-surgery is reasonable and necessary to cure and relieve the effects of his work-related injury?

¬ Did claimant prove by a preponderance of the evidence that treatment of his Non-Hodgkins Lymphoma disease is reasonable and necessary to cure and relieve the effects of his work-related injury?

FINDINGS OF FACT

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

Employer operated a custom homebuilder business. Claimant's date of birth is December 1, 1971; his age at the time of hearing was 37 years. Claimant worked for employer as a punch-list-man, performing warranty work and associated minor repairs. Claimant sustained an admitted injury on September 5, 2006, while moving an armoire to fix a squeaky floor.

The following history of claimant's injury and initial symptoms is based upon the medical records: While moving the armoire, claimant noted a strain to his upper back, with soreness and burning around the right scapular region. The burning sensation spread to his right arm some 30 to 45 minutes later. Claimant thought he might be experiencing a heart attack. Some 2-3 hours after the incident, claimant experienced a similar numb sensation in his right leg. Because he had 2 prior workers' compensation claims while working for employer, claimant waited until Saturday, September 8, 2006, to report his injury to employer.

J. Tashof Bernton, M.D., is the authorized treating physician providing primary care for claimant's injury. At respondents' request, Henry J. Roth, M.D., performed an independent medical examination (IME) of claimant on November 28, 2006, and on November 24, 2008. On January 9, 2007, Neurosurgeon John Oro, M.D., performed surgery upon claimant's cervical spine: A 3-level decompression and fusion with mechanical fixation at the C4-5, C5-6, and C6-7 levels. Orthopedic Spine Surgeon Henry S. Fabian, Jr., M.D., initially evaluated claimant on September 15, 2008, and later recommended a revision/salvage surgery of the 3-level fusion site. JoAnne Virgilio, M.D., treats claimant's Non-Hodgkins Lymphoma disease, which physicians discovered in the fall of 2008. By report of October 20, 2008, Neurosurgeon James Ogsbury, M.D., performed a record review of claimant's treatment in response to Dr. Fabian's surgical recommendation. At claimant's request, Orthopedic Surgeon Brian E.H. Reiss, M.D., performed an IME of claimant on November 26, 2008, to give his opinion regarding the reasonableness of another surgery.

Prior to the January 9, 2007, surgery, claimant underwent a psychological assessment by Suzanne Kenneally, PsyD., to determine whether claimant was a surgical candidate. Dr. Kenneally evaluated claimant and had him undergo psychological testing on October 11, 2006. Psychological testing suggested a diagnosis of Bipolar disorder, manic phase, which Dr. Kenneally felt was consistent with claimant's presentation. Dr. Kenneally wrote:

> Of note, despite [claimant's] report of being scheduled for tri-level back surgery in the near future, he was able to sit comfortably for 90 minutes with no observable pain behavior.

****

> There was evidence on testing of [claimant's] translation of psychological distress into functional deficits and heightened pain sensitivity and symptom report. [Claimant] should be **considered a very poor surgical risk** ….

(Emphasis added). Dr. Kenneally recommended that all physicians obtain objective confirmation before believing claimant's subjective pain symptoms and complaints. In light of Dr. Kenneally's findings and his own examination findings, Dr. Roth recommended against the January 9, 2007, surgery.

The January 9, 2007, surgery by Dr. Oro involved removal of disk material and decompression of the spinal cord and nerve roots at those levels. Although claimant testified that his symptoms initially improved following surgery, the Judge credits the medical record in finding claimant's testimony unreliable. In spite of surgery, claimant continued to complain of substantially the same unchanged, vague, and diffuse symptoms. Claimant's chronic, 14-year history of smoking cigarettes has complicated his recovery.

In September of 2008, Dr. Fabian referred claimant for additional magnetic resonance imaging (MRI) scanning of his cervical spine, which showed a growth representing a finding of Non-Hodgkins Lymphoma. Dr. Fabian referred claimant to his personal care physician for treatment of the lymphoma. Dr. Virgilio is treating the lymphoma disease.

Dr. Fabian diagnosed pseudarthrosis (false joint) of the levels surgically treated by Dr. Oro. In response to a letter from claimant's counsel in October of 2008, Dr. Fabian wrote that he recommended a posterior cervical fusion of the C3 through C6 levels. It is clear from his testimony that Dr. Fabian recommends what he terms surgical salvage or revision of the fusion at the same levels Dr. Oro attempted to fuse. Dr. Fabian theorizes that he can produce a better result than Dr. Oro, with resulting solid fusion, by using autograft bone material from claimant's body. Dr. Fabian explained that, because claimant is a chronic smoker, autograft bone material is more likely to graft into a fusion because claimant's body is less likely to reject it.

Dr. Fabian explained that smoking adversely affects the ability of the body to develop bone material to form a solid fusion:

> The problem with smoking is that the active ingredient … is nicotine. That is a know agonist of the disease to veins and arteries which causes them to constrict.

****

> The problem with fusions is that there's a process of new genesis or angiogenesis.

****

> That's a process where you place bone graft someplace new, venules and capillaries need to grow into that site to support it with oxygen, proteins, and water. [If nicotine blocks] angiogenesis in an attempted procedure of … bone grafting, it will not heal ….
>
> So there have been studies that have shown that this ingredient of nicotine adversely affects our body to grow bone.

Dr. Fabian explained why he believes claimant's fusion surgery resulted in pseudarthrosis:

> I'm of the opinion that **aside from his smoking**, the lack of autograft, that the lymphoma adversely affected the potential for him to heal his anterior fusion.

Dr. Fabian agreed with the other physicians that claimant's lymphoma is totally unrelated to his work injury and must be treated before he has a reasonable chance of a successful revision surgery. Dr. Fabian stated that revision surgery is not an immediate need in claimant's case and that the priority should be resolving his lymphoma.

In his October 20, 2008, report, Dr. Ogsbury disagrees with Dr. Fabian's surgical recommendation. According to Dr. Ogsbury, most examining physicians describe claimant's complaints primarily as axial (mainly involving neck and shoulder pain), as opposed to radicular pain that might otherwise indicate spinal cord or nerve caused pain. Dr. Ogsbury noted that Dr. Oro initially suspected that claimant's post-surgical pain generator might be the level below the fusion (C7-T1), but diskogram and CT evaluations ruled out that level as a pain generator. Dr. Ogsbury found no evidence of neurologic abnormality. Dr. Ogsbury opined:

> [G]iven that two excellent spine surgeons have strongly differed as to the nature of further surgery and given that an excellent pain manager [Dr. Bernton] has recommended that no further surgery be performed at all; given the low odds he estimated for the surgery, it is my impression that I would have to agree with [Dr. Bernton] that the chances of further surgery at this point are not very great.

Dr. Ogsbury remained unconvinced that claimant's pain generator involved the 3-level fusion site.

Based upon his view of claimant's development of symptoms after the fusion surgery by Dr. Oro, Dr. Fabian stated that claimant's history of symptoms after surgery fit a classic pattern for patients who develop pseudarthrosis:

> [Claimant has] followed the typical pattern of someone who had partial or fairly good response to the cervical fusion over the first three to five months and the started developing a recurrence of symptoms.

Dr. Fabian stated that typical recurrence of symptoms involves increasing axial pain focused in the neck itself, referred pain into the upper shoulder girdle, or numbness in the same pattern distribution as before the surgery. Crediting Dr. Roth's testimony, Dr. Fabian's view of claimant's symptoms post-surgery is contrary to the weight of the medical records.

Dr. Fabian agreed that he would not recommend surgical revision of a pseudarthrosis where the patient is asymptomatic or experiencing a low level of symptoms. Dr. Fabian explained the basis for his surgical recommendation:

> [F]or lack **of any other imaging studies pointing to anything else**, the clinical history and the timing of such, I would say that this patient is a very high likelihood that his **pain generation was coming at least to some extent from a pseudarthrosis**.

The Judge finds equivocal Dr. Fabian's statement that there's a high likelihood that "to some extent" the pseudarthrosis is a pain generator. This statement is more speculative than probable. When weighed against the medical opinions of other treating and examining physicians, the Judge is unpersuaded by Dr. Fabian's testimony that the psuedarthrosis might be claimant's pain generator.

Dr. Fabian stated that he relies upon clinical history and exam findings rather than imaging studies to determine stability of the vertebral segments following fusion surgery:

> [W]e talk about views in flexion and extension in plain radiographs. We talk about MRIs and seeing consolidation through the vertebral bodies. We talk about CT scans. All of these modalities are notoriously inaccurate for determining pseudarthrosis. We have no consensus in the spine community as how to determine these things. We go basically by clinical history and clinical exam findings more than anything else.

Dr. Fabian does not expect the revision surgery to improve claimant's symptoms such that he is pain-free. Dr. Fabian instead anticipates a good result for claimant would be to relieve his pain by 30% to 50%. Dr. Fabian explained:

> I think [claimant] is going to require just based on all the other issues he's dealing with and the psychosocial overlay issues, he's going to need some component of chronic pain management going forward. And it may take him quite some time to dramatically reduce his narcotic load. He may … need to be on a pain contract at least for a year to 18 month (sic) as part of his rehab from any proposed operation.

Dr. Fabian expects the revision surgery to relieve claimant's mechanical pain from the pseudarthrosis and to improve his function. When weighed against the medical opinions of other treating and examining physicians, the Judge is unpersuaded that Dr. Fabian's belief that he can relieve claimant's pain by 30% to 50% is either medically probable or reasonable.

At respondents' request, Radiologist Charles Seibert, M.D., performed an extensive review of claimant's medical records and numerous imaging studies to give his opinion whether the fusion surgery succeeded in stabilizing motion of the vertebral segments. Dr. Seibert reviewed numerous dynamic radiographs, CT scans, and MRI scans of claimant's cervical spine, including post-operative MRI scans taken on February 27, 2007, April 10, 2007, and September 23, 2008.

Crediting Dr. Seibert's opinion, the goal of claimant's surgery was to prevent abnormal motion of the involved vertebral segments by promoting bone growth to bridge the spaces between the vertebrae. Dr. Seibert thus defines "fusion" as:

> [N]o evidence of abnormal motion, no radiographic lucency, and there is evidence of … bony bridging over the intended fusion operative site.

Crediting Dr. Seibert's medical opinion, the surgery resulted in a pseudarthrosis, lacking the desired formation of a bony fusion. The surgery however produced a fibrous union, meaning that it resulted in stability of the involved vertebral segments, where there is no radiographic evidence of abnormal motion of the segments. Dr. Seibert reported:

> [T]here is only minimal motion at two levels, C4-5 and C6-7, but, the third level, C5-6, appears "stable." Also, as shown on the postoperative MRIs, there is no impingement on the cord or nerve root elements; additionally, **a pain generator has not been identified in the cervical spine and the mere presence of non-union with minimal motion is not necessarily an indication that the non-union is a pain generator nor … an indication for additional surgery** ….

(Emphasis added). Dr. Seibert was unable to appreciate from the imaging studies any apparent cause of the pseudarthrosis, such as hardware failure. Dr. Seibert however noted that smoking is one of the commonly quoted factors adversely affecting fusion. As found, claimant was a habitual cigarette smoker before and after the January 9, 2007, fusion surgery. Dr. Seibert's medical opinion here was credible and persuasive.

Dr. Reiss testified: Many patients who develop a pseudarthrosis following surgery are asymptomatic. Absent reasonably specific symptoms identifying the pseudarthrosis as the pain generator, surgical revision of the fusion site is contraindicated under the medical treatment guidelines promulgated by the director of the Division of Workers' Compensation. Dr. Reiss noted that claimant had the same vague and changing symptoms after his surgery that he had before the surgery. Dr. Reiss stated that claimant's vague, diffuse symptoms fail to reasonably identify the pseudarthrosis as the pain generator or source of claimant's symptoms.

Dr. Reiss further explained his opinion that the pseudarthrosis likely is not the pain generator:

> [I]f you look at the surgery that he had done, which was a three-level fusion, that surgery is unlikely to resolve axial neck pain ….
>
> So I believe one of his major diagnoses prior to surgery was a lot of axial pain, myofascial pain, neck pain – not nerve pain, but neck pain – that I would definitely predict would not be made better by three-level fusion in the vast majority of people.
>
> So the fact that he still had that **pain after the surgery** he had done is expected … and **would be related to his original pain complaints, not to a pseudarthrosis** which has not occurred yet.

(Emphasis added).

Dr. Reiss noted that, following his injury, claimant reported subjective symptomatology that was more widespread and diffuse than imaging studies objectively supported. Dr. Reiss further noted that, prior to surgery, claimant had a questionable psychological status and widespread symptoms that failed to fit the objective pattern. Dr. Reiss noted that claimant's symptomatology following the January 9, 2007, fusion surgery should have been limited to neck pain from the surgery; instead, claimant complained of diffuse pain similar to his preoperative pain, but more intense. Dr. Reiss opined:

> I would have to agree that [claimant] is a **very poor surgical candidate** … and I would not suggest any further surgical intervention and this would be taking into account the various physician's opinions, his imaging studies, his history given to me, his physical examination, and the various reports.

(Emphasis added). Dr. Reiss further explained the basis for his recommendation against surgery:

> [H]e is a poor surgical candidate … from the standpoint of his diffuse symptomatology and his psychological profile …. He had a poor response to his surgery. He has had widespread pain ever since, not easily explained by his findings and I think most of his pain is myofascial and indeed **his nonunion** at C6-C7 **is only a possibility, not a probability**, and the **pain pattern does not appear to fit** with the presentation of a **nonunion pain, which should have presented late and not immediately after his surgical intervention** ….

(Emphasis added).

Indeed, Dr. Reiss doubted the veracity of claimant's pain complaints; he wrote:

> Certainly here in front of me today, [claimant] did not appear in any significant pain yet he rated his pain at 7/10. He looked like he was functioning well ….

Both Dr. Fabian and Dr. Reiss are spine surgeons. Dr. Reiss read the transcript of the deposition of Dr. Fabian in preparing for his testimony. Dr. Reiss also reviewed the report of Dr. Seibert. Dr. Reiss explained his opinion that claimant's pseudarthrosis is stable:

> You can have a solid, stable fusion with just a few points of bone growth from one bony elements (sic) to another.
>
> ****
>
> But if you get some bone growth and there is enough contact between the two surfaces, either through implants of some sort of scar tissue then the two could be considered fused and stable and won't have any movement.
>
> And I like to consider it analogous to items that are spot welded together.
>
> ****
>
> So, in [claimant's] situation, there certainly isn't any gross movement. And there may be a very stable pseudarthrosis, if not a solid fusion, at two of the three levels.

Dr. Reiss stated that even solid fusions allow some bending movement of the spine.

Dr. Reiss stated that Dr. Oro initially performed the fusion surgery to relieve symptoms suggesting nerve root irritation at the C6 level from foraminal narrowing. Dr. Reiss stated that post-surgical imaging studies show no residual evidence of spinal cord or nerve irritation at the fusion site requiring any surgical correction. When asked whether Dr. Oro's surgery relieved claimant's C6 nerve root symptoms, Dr. Reiss stated:

> Possibly. There is a note or two that says he had less numbness in the C6 distribution. But his symptoms were so variable … that certainly one could claim almost anything as far as his upper extremities.

When asked what symptoms claimant reported were resolved by Dr. Oro's surgery, Dr. Reiss stated:

> Unfortunately, [claimant's] statements to me were somewhat less than totally clear. When asked about different things, he found it very difficult to stay on topic. And he was very evasive in a lot of the answers as far as that. So I never got a very clear picture … whether or not [surgery] really helped him at all.

> My impression, after asking [claimant] several times … was that there was not any clear difference in his pain pattern [before or after surgery].

The above history Dr. Reiss got from claimant is contrary to the history Dr. Fabian relied upon in attributing claimant's current symptoms to the pseudarthrosis. Crediting Dr. Roth's review of claimant's medical records, the surgery by Dr. Oro resulted in no change in claimant's symptoms. This finding undermines Dr. Fabian's opinion concerning the likely cause of claimant's pain complaints.

Crediting Dr. Reiss's medical opinion, it is medically improbable that claimant's symptoms following Dr. Oro's surgery are caused by pseudarthrosis. Dr. Reiss testified:

> I think [claimant's] symptoms actually showed up within three or four weeks of his surgery. And that, indeed, would not be the typical history of a nonunion, especially considering the vaguity of his symptoms and how well it resembles the pre-operative symptoms.

Dr. Reiss explained that the procedures Dr. Oro used to stabilize claimant's cervical spine would not have allowed sufficient motion of the vertebral segments to be a pain generator. Dr. Reiss explained:

> [I]f you have fairly good bone, as one would assume a young male would have, then the screws are very solidly fixed to the bone. And they are solidly fixed to the plate. And the interbody devices are impacted in place very securely.
>
> And so you would have to wear away or crush down the bone, which takes time.
>
> ****
>
> In my experience, it is usually more than three or four months before it shows up, unless you have a little old lady with extremely soft bone.

Dr. Reiss's medical opinion here was credible, persuasive, and consistent with medical opinions of Dr. Seibert, Dr. Roth, Dr. Goldman, and Dr. Ogsbury.

Because claimant's complaints after surgery mirrored those from before, Dr. Reiss opined it unreasonable to assume it medically probable that another surgery would alleviate claimant's pain complaints. Dr. Reiss stated:

> [T]he cause of [claimant's] pain was very nebulous and poorly defined [before surgery] and continues to be nebulous and poorly defined. But is unlikely to be due to the pseudarthrosis because the pain is poorly defined, difficult to localize, unclear what its source is, however you want to define it. That is the kind of pain he had before, and that is the kind of pain he has now.

Indeed, like Dr. Roth, Dr. Reiss would have recommended against the first surgery because of claimant's diffuse complaints; he stated:

> I do believe that his pain syndrome that he presented with prior to surgery is virtually the same as the pain syndrome he is presenting with now.
>
> And **prior to** surgery, I would have to say that **it would have been unlikely that those symptomatologies would be helped by the surgery**. And, at this point, any further surgery is equally unlikely to change his pain syndrome.

(Emphasis added). Dr. Reiss's medical opinion here was credible, persuasive, and consistent with medical opinions of Dr. Seibert, Dr. Roth, Dr. Goldman, and Dr. Ogsbury.

The Judge credits the testimony of Dr. Reiss and Dr. Roth in finding unreliable claimant's testimony concerning his pain generator. The Judge finds that, because the fixation installed during surgery prevents motion of the vertebral segments, the typical course of developing symptoms resulting from pseudarthrosis requires a period of months after surgery to develop. The decompression portion of the surgery should have resolved any complaints attributable to nerve pathology, such as nerve pain or radiculopathy. The medical opinions of Dr. Reiss and Dr. Roth were persuasive and amply supported by claimant's medical records showing him complaining of the same pre-operative pain within weeks of the surgery performed by Dr. Oro. Claimant's development of symptoms after Dr. Oro's surgery thus fails to fit this profile for attributing his complaints to pseudarthrosis.

Claimant failed to show it more probably true than not that the revision surgery recommended by Dr. Fabian is reasonable and necessary to cure and relieve the effects of his injury. Claimant failed to show it more probably true that his pseudarthrosis is a pain generator. The Judge credits the testimony of Dr. Reiss and Dr. Roth in finding it unlikely claimant's pseudarthrosis is a pain generator.

Claimant further failed to show it more probably true than not that the revision surgery recommended by Dr. Fabian is reasonably necessary in light of the following findings: The Judge credits the testimony of Dr. Reiss and Dr. Roth in finding that claimant psychologically is not a surgical candidate and was unlikely to benefit from the first surgery performed by Dr. Oro. Claimant similarly is unlikely to benefit from the surgery recommended by Dr. Fabian. The warning signs of psychological failure were present before and after Dr. Oro's surgery: Vague, diffuse, complaints of symptoms that are inconsistent with objective findings. In light of claimant's psychological profile, the Judge found no persuasive medical evidence showing that claimant's pseudarthrosis is a pain generator. The Judge has credited the testimony of Dr. Reiss and Dr. Roth in finding it improbable that revision surgery likely will resolve or reduce claimant's complaints.

Finally, claimant failed to show it more probably true than not that the revision surgery recommended by Dr. Fabian is reasonably necessary because claimant is a chronic smoker. Claimant's smoking likely reduces his body's ability to form or promote

new bone growth. Crediting Dr. Fabian's opinion, claimant's smoking adversely affected his ability to optimally heal from Dr. Oro's surgical intervention by forming a solid bony fusion. Claimant's smoking remains an adverse factor for any fusion surgery. The Judge credits the testimony of Dr. Reiss and Dr. Roth in finding claimant's pseudarthrosis nonetheless is a fibrous union that is sufficiently stable to prevent abnormal motion. Thus, even with claimant's chronic smoking habit, Dr. Oro's surgery was successful in preventing abnormal motion of claimant's cervical spine.

Claimant failed to show it more probably true than not that treatment of his lymphoma disease is reasonable and necessary to cure and relieve the effects of his injury. The testimony of Dr. **Virgilio**, Dr. Reiss, Dr. Fabian, and Dr. Roth supports a finding that claimant's lymphoma disease developed independently and is unrelated to his work injury or treatment for the injury. The Judge further credits the testimony of Dr. **Virgilio**, Dr. Reiss, Dr. Fabian, and Dr. Roth in finding that claimant easily can proceed with treatment for the lymphoma without impacting treatment for his work injury.

CONCLUSIONS OF LAW

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

Claimant argues he has prove by a preponderance of the evidence that Dr. Fabian's recommendation of revision surgery is reasonable and necessary to cure and relieve the effects of his work-related injury. Claimant further argues he has prove by a preponderance of the evidence that treatment of his Non-Hodgkins Lymphoma disease is reasonable and necessary. The Judge disagrees with both of claimant's arguments.

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).

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.

Respondents thus 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).

Here, the Judge found claimant failed to show it more probably true than not that the revision surgery recommended by Dr. Fabian is reasonable and necessary to cure and relieve the effects of his injury. The Judge further found claimant failed to show it more probably true than not that treatment of his lymphoma disease is reasonable and necessary to cure and relieve the effects of his injury. Claimant thus failed to prove by a preponderance of the evidence that insurer should pay for either for surgery recommended by Dr. Fabian or for treatment provided by Dr. **Virgilio** for his lymphoma disease.

The Judge concludes that claimant's request for an award of medical benefits requiring insurer to pay for revision surgery recommended by Dr. Fabian should be denied and dismissed. The Judge further concludes that claimant's request for an award of medical benefits requiring insurer to pay for treatment ~~provided by Dr. Vigilio~~ for his lymphoma disease**, including treatment provided by Dr. Virgilio,** should be denied and dismissed.

ORDER

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

1. Claimant's request for an award of medical benefits requiring insurer to pay for revision surgery recommended by Dr. Fabian is denied and dismissed.

2. Claimant's request for an award of medical benefits requiring insurer to pay for treatment provided by Dr. **Virgilio** for his lymphoma disease is denied and dismissed.

3. **Claimant's request for an award of medical benefits requiring insurer to pay for any treatment for his lymphoma disease is denied and dismissed.**

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

DATED: __April 29, 2009

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-761-162

ISSUES

The issue to be determined is the average weekly wage (AWW) to be used to calculate the permanent partial disability (PPD) benefits.

FINDINGS OF FACT

The parties stipulated and it is found:

1. The Claimant sustained an admitted work injury on May 21, 2008.

2. The Respondents originally admitted to an average weekly wage (AWW) of $263.80. This was later revised to $264.12.

3. The Claimant, in correspondence to the insurer, contested the calculation of AWW/TTD, and requested information or documentation for the stated amount. The parties were not able to reach an agreement on the AWW at that time and Claimant determined it was necessary to pursue hearing on the issue.

4. On December 31, 2008 the Claimant applied for hearing on the issues of AWW and temporary total disability (TTD) benefits from May 21, 2008 ongoing.

5. A hearing was scheduled on the Claimant's application for April 10, 2009.

6. On January 20, 2009 the Respondents filed a final admission of liability (FAL) admitting to an AWW of $264.12, TTD benefits from May 22, 2008 through January 12, 2009 and permanent partial disability (PPD) benefits based on an 11% whole person impairment rating.

7. The Claimant did not object to the final admission of liability.

8. Prior to the April 10, 2009 hearing, the parties stipulated to an AWW of $400 and the corresponding increase to TTD benefits for the period of May 22, 2008 through January 12, 2009.

9. During negotiations regarding average weekly wage and TTD benefits, the Claimant raised the issue of increasing the Claimant's PPD benefit based on an in-

crease in AWW. The Respondents counter argument was that the PPD issue closed by way of the January 20, 2009 FAL. The Claimant asserted that the issue of AWW/TTD was already raised and Claimant's failure to object to the admission was not a waiver of its right to have the same determined AWW/TTD calculation used for purpose of the formula for PPD.

10. The Respondents agreed to allow the Claimant to add the issue of PPD benefits for the April 10, 2009 hearing with the understanding that by agreeing to add the issue the Respondents were not waiving the argument that PPD benefits remained closed by way of the FAL. The agreement to add the issue was to avoid delay in having the issue heard, but the issue does not relate back to the December 31, 2008 application for hearing.

11. At a status conference before ALJ Bruce C. Friend on April 8, 2009, the parties agreed that the issue of PPD benefits could be adjudicated without an evidentiary hearing. ALJ Friend ordered the parties to submit position statements/briefs by April 24, 2009.

12. If an 11% whole person impairment rating is calculated using an average weekly wage of $400, the Claimant would be entitled to an additional $4,065.68 in PPD benefits.

CONCLUSIONS OF LAW

Section 8-43-203(2)(b)(II), C.R.S., provides as follows:

> An admission of liability for final payment of compensation shall include a statement that this is the final admission by the workers' compensation insurance carrier in the case, that the claimant may contest this admission if the claimant feels entitled to more compensation, to whom the claimant should provide written objection, and notice to the claimant that the case will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing.

The failure to file a written objection to an FAL or an application for hearing within thirty days of the FAL closes the claim on all admitted issues. *Dyrkopp v. Industrial Claim Appeals Office*, 30 P.3d 821 (Colo.App. 2001). However, the filing of an application for hearing alone may serve as a written contest for the purposes of Section 8-43-203(2)(b)(II), C.R.S. *See Lehmann v. Aurora Public Schools,* W.C. No. 4-426-778 (ICAO, March 19, 2001).

At the time the FAL was filed, Claimant had an application for hearing pending on the issue of AWW. Respondents accepted Claimant's December 31, 2008, application

for hearing on the issue of AWW as adequate and sufficient written notice that Clamant disputed and continued to object to that issue following the FAL. *See Respondents' Posiiton Statement,* pages 3-4. There was no application pending on the issue of PPD. The issue as to the permanent impairment rating was closed by the FAL. However, the issue of AWW remained. AWW affects the dollar amount of the permanent partial disability award. Section 8-42-107(8)(d), C.R.S. Since the issue of AWW remained, the issue of the dollar amount of the permanent partial disability award also necessarily remained. That issue was not foreclosed by the FAL under the circumstances present in this claim.

The parties have stipulated to an AWW of $400.00. Insurer is liable for permanent partial disability benefits based on the AWW of $400.00. Insurer may credit any previous payments of permanent partial disability benefits. Insurer shall pay interest at the rate of eight percent per annum on any benefits not paid when due.

ORDER

It is therefore ordered that Insurer shall pay Claimant permanent partial disability benefits based on an AWW of $400.00. Insurer shall pay Claimant interest on any benefits not paid when due.

DATED: *April 30, 2009*

Bruce C. Friend, ALJ

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-773-953

ISSUES

The issues determined herein are compensability, average weekly wage, authorized medical benefits, temporary disability benefits and Claimant's request for penalties for Respondents' violations of C.R.S. 8-43-101, 18-43-203 and W.C.R.P. 5-2.

FINDINGS OF FACT

1. Claimant was involved in a motorcycle accident in 1983. He suffered a crush injury to his left foot resulting in a partial amputation of the heel pad and a skin graft being placed directly over the bone.
2. Over the next twenty-five years, Claimant had residual symptoms, including stiffness and soreness in his foot and ankle. These symptoms increased with activity, particularly after a long shift at work. Despite these problems, Claimant was able to perform heavy work, mostly in the construction industry.
3. In July of 2004, Claimant obtained a position with the Respondent-Employer working in the oil fields in Trinidad. His primary duties consisted of operating and main-

taining the various types of heavy machinery associated with the oil wells. His job required heavy lifting, as well as frequent standing and walking in rough conditions. He usually worked twelve hour shifts

4. In addition to the soreness and stiffness, Claimant had occasional cuts to the skin graft area. Until 2005, however, the problems with the graft area were minimal and did not require any medical intervention or cause any disability.

5. In 2005, when he was showering after work, Claimant noticed a cut on his heel. He was unable to pinpoint an exact cause for the cut but he suspected that he had gotten a rock in his boot. This cut was significant and he obtained medical treatment from Dr. Russell De Groote. Claimant consequently missed several weeks from work. The cut healed completely after approximately ten weeks, and Claimant was able to return to work without restrictions. He did not need surgery or any other medical treatment at that time.

6. On May 31, 2008, Claimant volunteered to work an extended shift. At the beginning of the shift, his skin graft was intact without any cuts, ulcers or abrasions. His job duties required significant walking over rough terrain. He worked a total of 42 hours between May 31 and June 1, 2008.

7. After about twenty hours, Claimant began to suffer an increasing discomfort in his foot. After about thirty hours, Claimant removed his boot and discovered an open cut on his skin graft.

8. Dr. De Groote stated in his report that he would not expect Claimant's skin graft to break down without some type of intervening cause. It is Dr. De Groote's opinion that Claimant's work activities on May 31 and June 1, 2008 aggravated or accelerated his pre-existing condition. Dr. De Groote is the physician most familiar with Claimant's condition both before and after the date of injury and his medical evidence is persuasive.

9. Dr. Arnold's opinion to the contrary is not consistent with the factual or medical evidence in the record. It is not persuasive.

10. It is more likely than not that Claimant suffered an aggravation of his pre-existing foot injury that was caused by his work duties on May 31 and June 1, 2008.

11. The conditions of employment were the direct cause of the injury. Under these circumstances, the "special hazard" rule does not apply.

12. Claimant had the next day off and returned to work on June 3, 2008. He attempted to perform his duties but was unable to do so because of the condition of his foot. He reported the injury to his immediate supervisor and was directed to the onsite clinic.

13. The nurse practitioner, Candice Ferguson, examined Claimant and referred him to Dr. Russell De Groote. When the injury did not heal, Dr. De Groote referred Claimant to Dr. Kessler for a surgical evaluation. Dr. Kessler in turn referred him to Dr. Wade Smith who called in Dr. Kagan Ozer to perform surgery. These providers are all authorized.

14. Ms. Ferguson also completed a Physician's Report of Workers' Compensation injury and submitted it to Claimant's senior supervisor on June 3, 2009. The Respondent-Employer had written notice of the injury and Claimant's physical restrictions on June 3, 2008. The Respondent-Insurer had notice of the lost time claim no later than October 24, 2008 when it received the Application for Hearing as evidenced by its date stamped copy.

15. The Respondent-Employer was unable to accommodate Claimant's physical restrictions. He has not worked since the date of injury. Respondents have stipulated that Claimant is entitled to temporary disability from June 3, 2008 forward.
16. Respondents have further stipulated that Claimant is entitled to the maximum disability rate. The maximum disability rate for the date of injury is $753.41.
17. Respondents should have filed a First Report of Injury no later than June 15, 2008. They have not done so to date. Respondents are and continue to be in violation of CRS 8-43-101 and W.C.R.P. 5-2.
18. Respondents should have filed an admission or denial of the claim no later than July 5, 2008. The Notice of Contest was not filed until February 18, 2009. Respondents were in violation C.R.S. 18-43-203 and W.C.R.P. 5-2 for a period of 248 days.
19. The Respondents' failure to file a First Report of Injury and failure to file an admission or denial of the claim until February 18, 2009 was not objectively reasonable.

CONCLUSIONS OF LAW

1. Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a Workers' Compensation case are not interpreted liberally in favor of either Claimant or Respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). 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). As found, it is more likely than not that Claimant suffered an aggravation of his pre-existing foot injury that was caused by his work duties on May 31 and June 1, 2008.

2. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). 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). 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, Candice Ferguson, Dr. Russell De Groote, Dr. Charles Kessler, Dr. Wade Smith, and. Kagan Ozer are authorized providers.

3. 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). Respondents have stipulated the Claimant is entitled to temporary total disability benefits from the date of injury forward.

4. C.R.S 8-34-101 requires employers to notify the Division of Workers' Compensation within 10 days of knowledge that an employee has suffered an injury that results in lost time in excess of more than three shifts or calendar days using the forms prescribed by the Division. W.C.R.P. 5-2 has a similar requirement but specifies the notification shall be in the form of a First Report of Injury. The Rule also requires such a report to be made within 10 days of notice or knowledge of a claim for benefit that has been denied for any reason. As found, Respondents were required to file the first report of injury by June 15, 2008 and have failed to do so to date.

5. Section 8-43-304(1), C.R.S., 2008, states that an insurer or self-insured employer who "violates any provision" of Articles 40 to 47 of Title 8 "shall . . . be punished by a fine of not more than $500.00 per day for each such offense". Section 8-43-304(1) also requires punishment when an insurer or self-insured employer "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 or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than five hundred dollars per day for each such offense, seventy-five percent payable to the aggrieved party and twenty-five percent to the subsequent injury fund created in section 8-46-101". In *Diversified Veterans Corporation Center v. Hewuse,* 942 P.2d. 1312 (Colo. App. 1997), the Court of Appeals determined that failure to comply with the Workers' Compensation Rules of Procedure has been determined to constitute a failure to perform a "duty lawfully enjoined" within the meaning of section 8-43-304(1). Thus, the Respondents' violation of the Rules of Procedure fall under §8-43-304(1).

6. Before penalties may be imposed under §8-43-304(1), a two-step process must be met. First, the ALJ must determine whether the disputed conduct constituted a violation of the Act, of a duty lawfully enjoined, or of an order. If the Administrative Law Judge concludes that there is such violation, the ALJ may impose penalties if he also finds that the Respondents' actions were objectively unreasonable. *Allison v. Indus. Claim Appeals Office,* 916 P.2d 623 (Colo. App. 1995). As found, Respondents are and continue to be in violation of CRS 8-43-101 and W.C.R.P. 5-2 and their actions were not objectively reasonable. The violation began on June 15, 2008 and is continuing.

7. C.R.S. 8-43-203 and W.C.R.P. 5-2 requires the employer or the insurance carrier to file an admission or a denial of the claim within 20 days of the date the first report of injury should have been filed with the Division. Failure to do so may result in a penalty of one day's compensation for each day's failure to notify. As found, Respondents vio-

lated these provisions and their actions were not objectively reasonable. The violation began July 5, 2008 and ended February 18, 2009.

ORDER

It is therefore ordered that:

1. The insurer shall pay for all of Claimant's reasonably necessary medical treatment from authorized providers, including Candice Ferguson, Dr. Russell De Groote, Dr. Charles Kessler, Dr. Wade Smith, and Dr. Kagan Ozer
2. Respondents shall pay to Claimant TTD benefits at the rate of $753.41 per week from June 3, 2008 until terminated by law.
3. Respondents shall pay a penalty in the amount of $4,000 of which $3,000.00 shall be payable to the Claimant and $1,000.00 shall be payable to the subsequent injury fund.
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: April 30, 2009
/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-700-651

ISSUES

The issue for determination is Claimant's Petition to Reopen. Insurer has admitted liability for the proposed surgery. The issue concerns whether the surgery is to be provided as maintenance care or as care reasonably needed after a worsening of condition.

FINDINGS OF FACT

1. Claimant sustained a compensable injury on September 22, 2006. Claimant was treated for the injury. The treatment did not include surgery. Claimant reached maximum medical improvement on November 27, 2008.
2. At the time of MMI, Claimant rated his pain with activity at 8 or 9 out of 10. Claimant's pain is currently at 8 out of 10. Claimant testified that his pain is a little bit worse now, and that it is not any better (Hearing recording at 9:22 a.m.).
3. Dr. Sandell, who is not a treating physician, examined Claimant on June 13, 2008. He stated that Claimant may need surgery at some point in the future, and that

the surgery would be directly related to the compensable injury. Dr. Sandell characterized the potential surgery as part of maintenance treatment.

4. Timothy S. O'Brien, M.D., has examined Claimant. He stated that Claimant suffers from a Lisfranc injury. In his report of March 19, 2008, Dr. O'Brien stated that Lisfranc injuries always result in progressive posttraumatic degenerative arthritis. Dr. O'Brien has recommended surgery. Claimant elected to proceed with the surgery and signed the consent forms for the surgery on August 7, 2008. In a letter dated December 23, 2008, Dr. O'Brien stated that Claimant's foot is worse, both objectively and subjectively.

5. Paul A. Stone, D.P.M., a treating physician, reviewed reports from Dr. O'Brien. In his report of February 11, 2009, he stated that the recommended surgery was reasonable. He stated that the goal of the surgery was intended to improve Claimant's condition, that the goal of the surgery was not to keep Claimant at his present level of function, but to improve his function. Later, Dr. Stone compared the film studies of May 31, 2007, with the MRI of November 14, 2007. In his report of March 26, 2009, he stated that the scans were not conclusive and did not show a worsening of condition. He further stated that the files were of "dubious quality." Dr. Stone, at his deposition, did state that it is likely that Claimant would be off work for six to eight weeks after the surgery.

6. The testimony of Claimant and Dr. O'Brien that Claimant's condition has worsened is credible and persuasive. The testimony of Dr. Stone that the surgery is intended to improve Claimant's condition, and not merely maintain it, is credible and persuasive.

CONCLUSIONS OF LAW

A claimant is entitled to medical benefits after maximum medical improvement if the future medical treatment will be reasonable and necessary to relieve effects of industrial injury or prevent deterioration of a claimant's condition. *Grover v. Industrial Commission,* 759 P.2d 705, 711 (Colo. 1988).

A claim may be reopened if a claimant's condition has worsened. Section 8-43-303(1), C.R.S. (2008). To reopen a claim, the claimant must prove a worsening of his condition that is causally related to the industrial injury. Moreover, the worsened condition must warrant further benefits. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo.App. 2002); *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo.App. 2000). The determination whether to reopen a claim is discretionary with the ALJ.

Insurer has admitted that it is liable for the proposed surgery pursuant to *Grover.* Claimant alleges that his condition has worsened, and that the claim should be reopened for additional medical benefits and possible disability benefits.

After considering the conflicting evidence, it is found that Claimant's condition has worsened, that the worsened condition is causally related to the compensable injury, and that additional medical benefits are warranted. It is also found that should Claimant have the surgery, it is likely that he will be temporarily disabled for a period of time. Claimant has established by a preponderance of the evidence that the claim

should be reopened and that the proposed surgery is reasonably needed to relieve Claimant from the effects of the compensable injury.

The claim is reopened. Section 8-43-303(1), C.R.S. Insurer is liable for the medical care rendered by authorized providers that is reasonably needed to relieve Claimant from the effects of the compensable injury. Section 8-42-101(1), C.R.S. Temporary disability benefits, and other issues not determined by this order are reserved.

ORDER

It is therefore ordered that the claim is reopened and that Insurer is liable for additional medical care.

All matters not determined herein are reserved for future determination.

DATED: *April 30, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-770-641

ISSUES

Prior to commencement of the hearing, the parties stipulated that the issues for determination had mostly been resolved except for compensability. The parties entered into stipulations whereby they agreed that if the claim was found compensable, Dr. Kenneth Finn would be the primary authorized treating physician in substitution for Dr. Julian Venegas as of March 5, 2009, that the average weekly wage is $570.50 per week, that the claim only involves injury to the lumbar/sacral region and does not involve injury to the cervical spine, and that if compensable, Dr. Venegas and all of his referrals would be considered authorized and reasonable and necessary including treatment the Claimant has received from the providers at CCOM, Dr. Foltz, Dr. Gertz, Dr. Finn, Pueblo Imaging, St. Thomas More Hospital, and TLC Rehabilitation. The stipulations were accepted by the undersigned ALJ at hearing. The parties further stated that if found compensable that they would endeavor to resolve the temporary disability issues.

FINDINGS OF FACT

1. On June 11, 2008, the Claimant was an employee of the Respondent-Employer, employed as a Certified Nursing Assistant. She had been so employed by the

Respondent-Employer for approximately two years prior to that date. Included in her job duties was the transferring of patients from wheelchairs to beds.

2. On June 11, 2008 the Claimant was working a shift running from 6:00 a.m. to 2:00 p.m. At approximately noon, the Claimant noticed the onset of pain while transferring patients from wheelchairs to their beds. By the end of her shift, the Claimant was experiencing incredible pain in her back. After leaving work, she called her personal physician, Dr. Dillon, and was seen later that day. She received a shot of Toradol. The Claimant was not scheduled to work on June 12, 2008 or June 13, 2008. Her next scheduled work day was June 14, 2008.

3. Dr. Dillon's note of June 11, 2008 confirms that he saw the Claimant for acute back pain. In the discussion section of his note, Dr. Dillon noted that the Claimant works as a CNA, does a lot of heavy lifting, and that there was a possible specific incident with lifting a very large patient. He also noted that this was the second time her back pain had been aggravated in the last year.

4. The Claimant placed a phone call to the Director of Nursing, Becky Nichols, before her next scheduled shift and told her that she was experiencing pain in her lower back and also told her what had happened on June 11, 2008. The Claimant denies that she told Ms. Nichols that she had not suffered a work-related injury.

5. Call Off from Scheduled Shift records from the respondent-employer show that the Claimant called on June 13, 2008 and indicated that she was having significant back pain. The Call Off from Scheduled Shift record from June 14, 2008 showed that the Claimant had called off at approximately 6:15 p.m. indicating that she had a back injury.

6. The Claimant's back pain continued to get worse and she had associated leg pain with weakness and tingling. She made a series of telephone calls to her employer notifying them of her back condition. The employment records document that she spoke with two nurses. On June 13, 2008 the Claimant notified LPN Jackie Perkins that she would not be coming to work on June 15, 2008 due to a "back injury." On June 13, 2008 the Claimant notified Nurse Wood that she would not be in to work due to her "back hurting very much!!" Employment records also reflect a third telephone conversation with Rebecca Nichols, Director of Nursing. According to the statement dated June 13, 2008 and confirmed by Ms. Nichols, the Claimant confirmed severe back pain but, according to Ms. Nichols', she denied that this was work-related. According to Ms. Nichols in that telephone conversation, the Claimant stated that she was not sure how she had hurt her back. Ms. Nichols further indicated that she did not bother to review the statements from Ms. Perkins and Ms. Wood or talk to the witness that was later identified by the Claimant in the Incident Report that the Claimant completed three days later on June 16, 2008.

7. On June 16, 2008 the Claimant came back to work to complete the paperwork. She completed the paperwork under the direction of Ms. Nichols. In the report the Claimant stated that the injury occurred at work on June 11, 2008 at approximately noon

while transferring patients from wheelchairs to bed including “extra heavy patients.” According to Ms. Nichols, even at this point she did not believe the Claimant was claiming a work-related injury, only an injury.

8. On June 16, 2008, the Claimant came to the facility and met with Ms. Nichols. At that time, the Claimant filled out an Associate Incident Report form. On the form, the Claimant indicated that on June 11, 2008 at approximately 12:00 a.m. she was transferring patients from their wheelchairs to their beds and that she injured her lower back. On this same day of June 16, 2008 an Employer’s First Report of Injury form was completed by Annie Maloney, administrator for respondent-employer, documenting that notice was provided to the employer on that date that the employee had injured her low back due to transferring a patients from wheelchair to bed. The following day a letter was sent to the Claimant from Annie Maloney confirming that the respondent-employer had received notice that she had received an injury as a result of a work-related incident.

9. On June 16, 2008 Respondent-Employer referred the Claimant to the designated providers at CCOM. She came under the care of Dr. Julian Venegas and P.A. Steve Quakenbush. The medical records from CCOM commencing June 16, 2008 and continuing through December 29, 2008 document that in the opinions of the providers at CCOM, the Claimant sustained a lumbar region injury on June 11, 2008 while performing her duties at work. The initial history given to Dr. Venegas on June 16, 2008 provides that the patient sustained injury while transferring patients from chairs to beds on June 11, 2008. Dr. Venegas concluded that the objective findings were consistent with the stated history and a work-related mechanism of injury. Dr. Venegas issued work restrictions to include maximum lifting of 5 pounds, no repetitive lifting, 5 pounds carrying and pushing, no crawling, kneeling, squatting or climbing.

10. The Claimant was returned to work with restrictions and provided light duty. Subsequently, Dr. Venegas reduced her hours due to her condition to four hours per day. Pain levels remained high. On August 11, 2008 Dr. Venegas referred the Claimant to a pain specialist. She was referred to Dr. Foltz and to Dr. Gertz. Restrictions from the primary authorized treating physicians have continued through the present.

11. The Claimant was referred for independent medical examinations with Dr. Michael Dallenbach and with Dr. John Aschberger. The initial exam was by Dr. Aschberger at respondents’ request. In his report, Dr. Aschberger acknowledges that the Claimant gave a history, which included having had previous treatment with Dr. Robert Dillon for back problems. This was prior to the industrial injury. After taking the history from the Claimant and reviewing the medical records he had, it was Dr. Aschberger’s opinion that the Claimant suffered from lumbosacral strain with findings of lumbosacral dysfunction and restriction. He felt that the radiculopathy was possibly related to a piriformis syndrome with muscular tightness resulting in a sciatic-type presentation. He further went on to opine that the injuries were work-related secondary to the events of June 11, 2008. He felt that Ms. Lehman was not at maximum medical improvement and made specific recommendations for care.

12. Dr. Dallenbach performed his independent medical examination on December 4, 2008. Dr. Dallenbach also concluded that the Claimant's lumbosacral condition was work-related. Again, the Claimant freely discussed her prior history of having periodic treatment for back pain. In his report, Dr. Dallenbach states on Page 4 that according to her history,

> "Toni states she has been having low back pain about the first part of June 2008. She is unable to describe any particular mechanism of injury other than noting, 'my job is just very physical.' Her back pain persisted on a very low level at that point in time she described as an achy feeling, 'sort of like the kind you get after you have been working hard in which goes away the next day.' Her pain was intermittent and not significant. It did not lead to any functional limitations nor did she utilize any medication. She denied any radiation or radicular component to the pain. However, June 11, 2008 she was transferring a patient from a wheelchair to a bed in such a way that while standing to the side of the patient bent at her knees and she was also bent slightly at her lumbar spine and twisted from left to right. Though she did not experience a sudden increase in her pain over the course of the remainder of her shift, however, her pain increased such that by the end of her shift it was quite intense and she was experiencing numbness and tingling in her left lower extremity."

This history both immediately prior to June 11, 2008 as to what occurred on June 11, 2008 is entirely consistent with the testimony from the Claimant. Being aware of the immediate prior problems, Dr. Venegas still felt and rendered an opinion that the fact of prior back discomfort in the past did not affect his conclusion that she sustained a work-related injury involving her back on June 11, 2008. Therefore, the medical records are overall consistent with a finding of compensability for this claim.

13. At hearing Dr. Aschberger changed his opinion. Dr. Aschberger changed his opinion based upon two primary factors. The first factor was testimony provided by the Claimant at hearing as paraphrased by respondents' counsel. However, during further cross-examination Dr. Aschberger was under the apparent assumption that the Claimant testified that she had a gradual worsening during the two to three weeks leading up to June 11, 2008 whereas her actual testimony was that there was no gradual worsening, there was just some discomfort which was controlled by Tylenol during the two to three weeks leading up to the industrial injury.

14. The second basis for the change in opinion from Dr. Aschberger was the apparent receipt of additional prior medical records. He referred to the prior medical records from Dr. Dillon. He also referred to a post-injury physical therapy note dated July 20, 2008. The physical therapy note simply indicates that the Claimant has had chronic low back pain. This is a fact acknowledged by all of the providers and the Claimant. What appears to have been significant to Dr. Aschberger to cause him to do an about-face on his opinion were the prior medical records from Dr. Dillon.

15. Dr. Aschberger acknowledged that the medical records during the 12 months prior to the industrial injury do not refer to a back problem other than in July of 2007. Dr. Aschberger acknowledged that the medical records from Dr. Dillon generated in November of 2007 and January of 2008 indicate either no back problem or, that the back problem from July of 2007 had resolved. Dr. Aschberger further conceded that the fact that the Claimant had been prescribed Vicodin during periods of time where she was not complaining of any back problems leads to the reasonable conclusion that the Vicodin was being offered for some other condition.

16. The Claimant testified credibly that prior to June 11, 2008 her prior back condition did not prevent her from performing, on a day-to-day basis, her heavy physical requirements of being a CNA.

17. The ALJ finds that the medical records and the opinions expressed therein from the treating physicians and Dr. Dallenbach to be more persuasive than the testimony provided by Dr. Aschberger.

18. The credible evidence of record is consistent with an injury having occurred at work on June 11, 2008, and notice being provided by Claimant. The ALJ finds the Claimant to be more credible than other witnesses. The Claimant has proven it is more probably true than not that she sustained a work-related injury to her low back/sacral region on June 11, 2008 while performing her duties as a CNA for respondent-employer.

19. Claimant's injury of June 11, 2008 arose out of and in the course of her employment with the respondent-employer and is compensable.

CONCLUSIONS OF LAW

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

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

2. When determining credibility, the fact-finder shall consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonable-

ness 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 Company 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).

3. 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 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). The question of whether the Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 716 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

4. As determined in Finding of Fact 18, the Claimant proved it is more probably true than not that she sustained a compensable injury and that the medical care that she has received from the providers at CCOM, Dr. Foltz, Dr. Gertz, Dr. Finn, Pueblo Imaging, St. Thomas More Hospital, and TLC Rehabilitation are related, reasonable and necessary, and authorized.

5. Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). When considering whether proposed medical treatment is reasonable and necessary, the ALJ may consider not only the relevant medical opinions, but also other circumstances including the Claimant's objective desire for the treatment, the Claimant's objective experience of pain, and the results of the Claimant's previous medical treatment. *Grigsby v. Denny's Restaurant*, W.C. No. 4-010-016 (ICAO June 29, 1995).

6. 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 which, to some degree, is the result of the industrial disability. Section 8-42-103(1), C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" as used in Workers' Compensation cases, connotes two elements. The first element is "medical incapacity" evidenced by loss or restriction of bodily function. See *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The second element is loss of wage earning capacity. *Barnes v. Anheuser-Bush Sales Co. of Colorado*, W.C. No. 4-548-535 (February 24, 2004). The Claimant has proven that it is more likely than not that she

has been disabled and that her disability is a direct result of her industrial injury. The Claimant has been disabled, totally or partially, since the date of injury and is entitled to temporary disability benefits from that date through the present with respondents receiving credit for the partial wages she has earned since the date of injury. The parties have agreed to meet in good faith to resolve the time periods for temporary partial and temporary total disability.

ORDER

It is therefore ordered that:

1. The Claimant sustained a compensable work-related injury to her low back/sacral region on June 11, 2008, which arose out of and in the course of her employment with the Respondent-Employer and is therefore compensable.

2. Respondents shall pay for the medical care provided by the providers at CCOM, Dr. Foltz, Dr. Gertz, Dr. Finn, Pueblo Imaging, St. Thomas More Hospital, and TLC Rehabilitation. Dr. Kenneth Finn is the primary authorized treating physician in substitution for Dr. Julian Venegas as of March 5, 2009.

3. The average weekly wage is $570.50 per week. Respondents shall pay temporary disability benefits, whether they be temporary total or temporary partial, commencing June 11, 2008 and continuing. The parties shall meet in good faith to determine the appropriate temporary disability amounts owed the Claimant.

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

DATE: April 30, 2009
/s/ original signed by:

Donald E. Walsh
Administrative Law Judge