

ISSUES

- I. Whether Respondent overcame the DIME physician's opinion on permanent impairment.
- II. Determination of Claimant's permanent impairment rating.
- III. Whether Claimant proved by a preponderance of the evidence he is entitled to medical maintenance benefits.
- IV. Whether Respondent provided by a preponderance of the evidence they are entitled to an overpayment in the amount of \$13,126.42 for payment of temporary total disability ("TTD") benefits.

PROCEDURAL HISTORY

Hearing in this matter took place on September 18, 2018. On October 2, 2018, Claimant filed an Opposed Motion to Allow DIME Doctor to Review Hearing Transcript, requesting that Dr. Gray be permitted to review the hearing transcript prior to his post-hearing deposition scheduled for October 9, 2018. Claimant argued Dr. Gray should have the opportunity to review the hearing transcript in order to have a better understanding of Claimant's horse riding activities as they related to his determinations. On October 3, 2016, Respondent filed an Objection to Claimant's Opposed Motion to Allow DIME Doctor to Review Hearing Transcript, arguing the DIME doctor should not be provided the transcript because it would require him to make liability assessments, credibility assessment and resolve issues of fact. On October 4, 2018, Claimant filed a response to Respondent's objection, reiterating his request. The motion, response and reply were not forwarded to the ALJ Cayce until October 15, 2016. ALJ Cayce subsequently denied the motion as moot, as the deposition had already taken place. No further motions were received regarding the matter.

FINDINGS OF FACT

1. Claimant is a 46 year old right-hand-dominant male who worked for Employer as a traffic technician.
2. On February 2, 2015, Claimant sustained an admitted industrial injury when he slipped on a street sign covered with snow and fell on his left side. Claimant testified at hearing his initial symptoms were sore ribs, left-sided neck pain and left arm pain.
3. Claimant presented to Robert Broghammer, M.D. on February 5, 2015 with complaints of pain in the anterior left shoulder and across his chest and left flank. No

complaints of neck pain were noted. Dr. Broghammer assessed Claimant with left shoulder and upper flank pain and pectoral strain. Claimant began physical therapy and working modified duty.

4. On March 13, 2015, Claimant underwent a left shoulder MRI which revealed a supraspinatus small anteromedial footplate tear 2 x 4 x 3 mm, a small spur of the acromion, and mildly thickened capsule.

5. On April 7, 2015, Claimant reported shoulder pain with reaching out and forward flexion. Dr. Broghammer noted, “[Claimant] is asking if he can begin riding his horse again. He had previously called the clinic to discuss this with Anisha, our case manager, that he is not cleared to ride or participate in equestrian activities because of his shoulder problem.” Dr. Broghammer continued Claimant’s restrictions, limiting reaching overhead and away from the body.

6. On April 21, 2015, Claimant presented to Steven E. Horan, M.D. for an orthopedic evaluation. Claimant reported 7/10 pain in his left shoulder and neck stiffness. Claimant reported being unable to sleep on his left shoulder, with flexion and abduction being “really, really difficult for him,” but also reported that his symptoms did not really interfere with his activities of daily living. Dr. Horan reviewed Claimant’s MRI, noting it “clearly showed four-point type tear where the insertion of the supraspinatus has clearly peeled off the humeral head.” He assessed Claimant with a rotator cuff tear and recommended surgery.

7. Claimant’s care was subsequently transferred from Dr. Broghammer to William H. Miller, M.D. Claimant presented to Dr. Miller on April 24, 2015 with complaints of decreased shoulder range of motion and left trapezius pain. Dr. Miller noted, “[Claimant] is an avid horse rider, but has not done this since the injury.” His continued restrictions between April 24, 2015 and September 9, 2015 were no use of the left arm. On physical exam, Dr. Miller noted markedly decreased left shoulder range of motion with cervical motion preserved, and diffuse tenderness about the shoulder girdle. He assessed Claimant with a partial rotator cuff tear.

8. Claimant testified at hearing he is an avid horse rider, having ridden horses since the age of six. Claimant and his son own three horses. Claimant testified he finds horse riding to be a major stress reliever, and rides approximately once per week. Claimant testified he returned to riding horses approximately one to two months after the initial work injury despite being aware he was not released by his physicians to do so at the time. Claimant testified that manipulating his well-trained horses is not physically demanding for him due to his experience, and that he has never fallen off of a horse. At hearing, Claimant demonstrated the positioning of his arms while riding a horse, holding both arms at his sides at 90-degree angles.

9. Claimant further testified he has competed in rodeo competitions since the age of 10 or 11. Claimant’s primary event is team calf roping, which involves two participants, a heeler and a header. Claimant participates as the heeler. The header is responsible for roping the calf around the head and turning the calf, while the heeler is responsible for

roping the calf's hind feet. Claimant testified he rides approximately 20 miles per hour during the team roping competitions. Claimant testified calf roping is not physically demanding and does not require exertion of his left arm, as he relies on the horse's movement.

10. At hearing, Claimant acknowledged participating in a team roping event in the Commissioner's Classic Team Roping Hall of Fame on August 8, 2015. Claimant identified himself in two photographs taken at the event, both showing Claimant on a horse using both arms to rope a calf.

11. There is no indication in the record Claimant's treating physicians were aware Claimant had returned to participating in rodeo activities at the time.

12. On August 24, 2015, Dr. Horan performed an extensive arthroscopic debridement and mini open rotator cuff repair with partial accompanying acromionectomy on Claimant. Claimant subsequently participated in post-operative physical therapy. Claimant continued to experience symptoms.

13. On January 6, 2016, Dr. Horan opined Claimant was suffering from adhesive capsulitis and recommended manipulation under anesthesia, which Claimant underwent on January 28, 2016.

14. On April 28, 2016, a record from Medical Massage of the Rockies noted complaints of left shoulder and neck pain. Under objective findings, the record notes Claimant "is still point tender but improving slightly around clavicle, moderate pressure to all areas with light stretching to the neck."

15. Claimant subsequently transferred care from Dr. Horan to orthopedic surgeon David J. Schneider, M.D. Claimant first presented to Dr. Schneider on May 2, 2016 with complaints of stiffness, pain and instability. Dr. Schneider noted that an April 21, 2016 left shoulder MRI revealed labral tearing with high-grade tearing of the anterior posterior bands of the inferior glenohumeral ligament. He assessed Claimant with shoulder instability and pain and suspected Claimant was suffering from an infection. He recommended Claimant undergo blood work and a left shoulder arthroscopy.

16. On May 4, 2016, Dr. Miller assessed Claimant with a partial tear of the left rotator cuff and adhesive capsulitis.

17. On May 17, 2016, Dr. Schneider performed a left shoulder arthroscopic synovectomy, multiple deep culture and manipulation under anesthesia. Claimant was placed on restrictions of no pushing, pulling, lifting, reaching, or overhead work with his left arm.

18. On June 2, 2016, Sonali Hemachandra, M.D. examined Claimant's left shoulder and noted, "obvious muscle wasting about the trapezius and upper arm, and "exquisite tenderness and palpation all over the shoulder joint." Claimant was diagnosed with a P. Acnes infection and treated with antibiotics.

19. In July 2016, Dr. Miller placed Claimant on restrictions of five pounds reaching overhead and away from the body with his left upper extremity.

20. Claimant's name is referenced in a July 22, 2016 newspaper article in the White Mountain Independent regarding the results of a Pikes Peak or Bust Rodeo in Colorado Springs, Colorado that took place on July 13-16, 2016. Claimant's name is listed with another individual under the team roping category. Claimant testified he knows the individual listed and has participated in team roping competitions with that individual on other occasions; however, Claimant contends he did not participate in any rodeo competition in 2016 and believes the article is incorrect.

21. Claimant engaged in physical therapy throughout the remainder of 2016, as well as treatment that provided "ongoing transient relief." On September 9, 2016, a Medical Massage of the Rockies note documents complaints of pain in Claimant's left shoulder and neck. The record states under objective findings "all neck muscles hypertonic, also medial scapula muscles hypertonic. Mod. to deep massage in all areas with stretching the neck."

22. On March 2, 2017, L. Barton Goldman, M.D. saw Claimant upon the referral of Dr. Miller for evaluation of possible chronic regional pain syndrome ("CRPS"). Dr. Goldman opined Claimant did not have CRPS, but suggested Claimant might benefit from a round of trigger point injections.

23. On May 18, 2017, Allison M. Fall, M.D performed an Independent Medical Examination ("IME") at the request of Respondent. On examination, Dr. Fall noted unrestricted cervical range of motion per her visual inspection and no significant hypertonicity in the left upper trapezius or cervical paraspinals. She noted the following left shoulder range of motion measurements: 90 degrees of flexion, 35 degrees of extension, 80 degrees of abduction, 45 degrees of adduction, 50 degrees of internal rotation, and 50 degrees of external rotation. Dr. Fall opined Claimant reached maximum medical improvement ("MMI") as of May 18, 2017. She recommended follow-up with physicians pertaining to any infection, but did not find any indication for ongoing chiropractic or other treatment. Dr. Fall's report states the impairment rating was calculated on an accompanying worksheet, which was not introduced as evidence.

24. On July 26, 2017, Dr. Miller released Claimant to ride horses and assigned permanent restrictions of no lifting or carrying over 30 pounds and no reaching overhead or away for his body over five pounds.

25. Dr. Schneider placed Claimant at MMI on July 31, 2017, noting Claimant's continued low level of pain was his "new normal."

26. Dr. Miller placed Claimant at MMI on August 30, 2017. Claimant reported ongoing pain, stiffness, headaches, cramps, and a "new complaint" of neck pain. Dr. Miller noted Claimant did not have prior cervical complaints. Dr. Miller documented that Claimant had transient relief from his chiropractic treatment, with no functional gains

after more than 20 sessions. He further noted trigger point injections were being considered, while no follow-up was warranted for any infection.

27. Dr. Miller performed an impairment evaluation on September 20, 2017. Claimant reported ongoing discomfort and decreased motion in the left shoulder, and left-sided neck pain. Dr. Miller noted the neck pain was first voiced by Claimant to him on August 30, 2017, and there were no prior cervical complaints. On examination, Dr. Miller noted grossly intact cervical motion with discomfort. Left upper extremity range of motion measurements were as follows: 90 degrees of flexion, 30 degrees of extension, 70 degrees of abduction, 30 degrees of adduction, 0 degrees of internal rotation, and 90 degrees of external rotation. Dr. Miller assessed 15% upper extremity impairment after subtracting the contralateral shoulder impairment (4%) for purposes of normalization. He released Claimant with permanent work restrictions and recommended 25 sessions of ongoing chiropractic care, a six-month pool pass, trigger point injections, and a visit with Dr. Schneider as maintenance treatment.

28. Respondent filed a Final Admission of Liability ("FAL") on November 7, 2017 admitting for Dr. Miller's 15% upper extremity rating and reasonable, necessary and related post-MMI medical treatment. The FAL notes an overpayment of \$9,341.26.

29. Claimant filed an Objection to the Admission and a Notice and Proposal to Select an Independent Medical Examiner on November 22, 2017.

30. Stephen Gray, M.D. performed a DIME on March 5, 2018. Claimant reported constant pain in his left shoulder radiating into his neck and occipital area, as well as numbness, tingling and weakness in the left upper extremity. Regarding his medical record review, Dr. Gray noted multiple medical records contained reports of neck stiffness, neck pain, left trapezius pain, and headaches as early as April 24, 2015. On examination of Claimant's neck, Dr. Gray noted diffuse tenderness over the entire left side of the neck up to the occiput, over the scalenes, and essentially over the entire trapezius muscle area with no trigger points. On examination of the left shoulder, Dr. Gray noted tenderness and pain throughout the left shoulder region, with no significant evidence of muscle atrophy in the left shoulder girdle area. Cervical range of motion measurements, as taken with double inclinometers, were as follows: flexion 63 degrees, extension 53 degrees, right lateral flexion 61 degrees, left lateral flexion 61 degrees, right rotation 86 degrees, and left rotation 87 degrees. Left shoulder range of motion measurements, as taken with a goniometer, were as follows: 70 degrees flexion, 28 degrees extension, 46 degrees adduction, 75 degrees abduction, 11 degrees internal rotation, and 75 degrees external rotation.

31. Dr. Gray opined Claimant reached MMI on July 31, 2017 with permanent restrictions. Dr. Gray assigned 13% left upper extremity impairment (8% whole person) for range of motion limitations after subtracting for the contralateral impairment (5%) for purposes of normalization. Dr. Gray opined Claimant's impairment should be considered on a whole person basis "due to the significant involvement of shared musculoskeletal structures proximal to the glenohumeral joint." He recommended an isolated cervical range of motion impairment as there was no direct injury to the neck.

He assigned 2% whole person impairment due to cervical spine range of motion loss, secondary to the left shoulder injury.

32. As maintenance care, Dr. Gray recommended Claimant be afforded “quarterly follow-up visits with a Level II Accredited physician.” He also recommended four injections per year, two to four limited courses of physical therapy or manipulative therapy, and yearly follow-up visits with his surgeon.

33. Respondent filed an Application for Hearing on April 18, 2018, which became the subject of the hearing held on September 18, 2018.

34. On June 27, 2018, Claimant returned to Dr. Miller with complaints of progressive bilateral upper extremity paresthesias radiating into his arms and fingers. Dr. Miller again noted Claimant reported new symptoms of neck pain to him on August 30, 2017, had no prior cervical complaints, and did not have complaints of paresthesias into the upper extremities at that time. He referred Claimant for a cervical spine MRI.

35. On July 3, 2018, Dr. Fall reviewed additional records including, *inter alia*, Dr. Gray’s DIME report, photos of Claimant’s August 8, 2015 rodeo competition, and the newspaper article regarding the July 2016 rodeo competition. Dr. Fall opined Claimant’s rodeo activities were significant and raised the question as to the etiology of Claimant’s worsening symptoms. Dr. Fall opined Dr. Gray’s 2% cervical impairment rating was in error, noting Dr. Gray was not aware of Claimant’s rodeo activity, his bilateral rotation was greater than normal, and his cervical motion limitation was more likely related to underlying degenerative changes and a history of rodeo activity than a separate shoulder injury. She opined that recommendations for a pool pass, ongoing chiropractic treatment, and a cervical MRI were not reasonable, necessary or related to the work injury.

36. On July 18, 2018, Dr. Miller issued a letter clarifying the basis for his recommendation of a cervical MRI. Dr. Miller opined Claimant’s cervical symptoms were not related to the February 2015 work injury, and explained that his request for a cervical MRI was not meant as maintenance care. He further explained that the purpose of the cervical MRI was to assess Claimant’s cervical complaints, and additional evaluation and treatment for Claimant’s cervical symptoms should occur outside of the workers’ compensation system.

37. Dr. Fall performed a follow-up IME on August 8, 2018. Claimant reported soreness in both arms, neck and shoulders, spasms, and weakness. Dr. Fall spoke with Claimant regarding his participation in rodeo competitions. Claimant reported to Dr. Fall he participated in one rodeo competition after his work injury, but no others after his first surgery. On examination, Dr. Fall noted increased pain behaviors with self-limited range of motion measurements. Left shoulder active range of motion measurements were as follows: flexion 85 degrees, extension 30 degrees, abduction 70 degrees, adduction 40 degrees, internal rotation 40 degrees, and external rotation 50 degrees. Dr. Fall noted there was no crepitus, muscular wasting in the thoracic area, trigger points, or spasming. Claimant reported pain in the bilateral upper trapezii. Dr. Fall noted cervical

range of motion “upon casual observation” did not appear restricted. Dr. Fall continued to opine Claimant reached MMI as of May 18, 2017 with the same impairment rating she assessed on that date. She opined Claimant’s functional deficit as related to his initial work injury was only to the shoulder and not proximal to the shoulder. Dr. Fall again opined Claimant’s cervical symptoms were not causally related to the mechanism of injury and Claimant is not entitled to maintenance treatment.

38. Dr. Fall testified at hearing as a Level II accredited expert in physical medicine and rehabilitation. Dr. Hall testified consistent with her IME reports. Dr. Fall agreed with Dr. Gray’s date of MMI. Regarding cervical impairment, Dr. Fall explained that, in circumstances where there is significant enough involvement of the soft tissues of the neck, an impairment for loss of range of motion can be imposed without a Table 53 rating, pursuant to the AMA Guides. She continued to opine, however, that Dr. Gray erred in assigning 2% cervical impairment in Claimant’s case, as neck pain was not documented until August 30, 2017. Dr. Fall stated Claimant’s rodeo activities could have an effect on his spine, although she is unable to say within a reasonable degree of medical probability that Claimant’s participation in the rodeo caused problems to his cervical spine. She testified there was not any loss of function proximal to the glenohumeral joint, and Claimant’s functional limitation was limited to the shoulder. She stated Claimant did not achieve functional gains or benefit from his treatment, as Claimant’s complaints are now worsening and widespread. Dr. Fall testified further treatment is not reasonable, necessary or related to Claimant’s work injury.

39. Dr. Gray testified by post-hearing deposition. Dr. Gray testified as a Level II accredited expert in occupational medicine. Dr. Gray initially testified consistent with his DIME report. However, on cross-examination, Dr. Gray changed his opinion on impairment upon being shown photographs of Claimant engaged in team calf roping on August 8, 2015 and the July 2016 newspaper article. Dr. Gray stated he had not before seen the photographs and Claimant had not informed him of his involvement in rodeo activity. He testified he was surprised Claimant would engage in team roping activities after surgery was deemed necessary and approved, and team roping activity would not be indicated if surgery was necessary. Dr. Gray further testified it surprised him Claimant would engage in team roping activity after undergoing revision of the shoulder surgery on May 17, 2016. He testified such activity would not be medically indicated.

40. Respondent’s counsel informed Dr. Gray of Claimant’s description of the team roping activity at hearing, stating:

And [Claimant] himself testified that in team roping, which is the activity that he was engaged in, there is one person who is working on the – there is a header and heeler. One person is working on the head of the cow and gets it out, and then the heeler tries to rope the back. And he testified that he was riding about 20 miles per hour, he was roping the calf with one arm, and he was holding on to the horn of the saddle with the other.

[Dep. Transcript pp. 16:18-25, 17:1]

41. Dr. Gray stated he could not determine the structural impact of Claimant's rodeo activity on the whole person and surrounding structures. However, he repeatedly testified his opinion on impairment had now changed with the knowledge of Claimant's participation in rodeo activities:

A: And – but I'll just give you right up front that knowing what I know now, even if only part of it is true, I would say that if I had that I probably wouldn't have gone the extra mile on the impairment rating.

Q: So you would not assess the 2 percent?

A: I would – I would correct that back and probably take that away, right, because there are too many unknowns here.

[Dep. Transcript p. 19:15-23]

* * *

Q: I think you also indicated that you thought the 2 percent was appropriate because of his post surgery activity. Would seeing these photos change your mind about post surgery activity?

A: Absolutely.

[Dep. Transcript p. 20:17-21]

* * *

Q: But you would retract the 2 percent cervical rating?

A: Yeah, I think I would. I don't think that is far. I don't think that was – that is not fair considering all the knowledge I've gained.

[Dep. Transcript p. 23:7-11]

42. On re-direct, Claimant's counsel informed Dr. Gray of Claimant's testimony that Claimant has been participating in calf-roping since he was a child, purported to be very comfortable participating in the activity, and mainly uses his right upper extremity when doing so. Claimant's counsel further informed Dr. Gray of Claimant's testimony that he did not participate in rodeo activities in 2016 and that the July 2016 newspaper article is incorrect. In response, Dr. Gray testified,

A: ...even if he didn't do the activity in 2016, I think that the activity that he did in 2015 confounds the issues very significantly. And the end result of that, either way, is going to be my not feeling so strongly about the 2 percent.

Because, you know, knowing that he is going on doing that sort of activity, not just that he is taking the risk, but the fact that that activity is going to cause micro tears and certainly not – not recommended by the doctors, it is still going to – I’m not going to – even without the 2016 stuff, I am not going to change my now new opinion that the 2 percent was kind of going overboard, not knowing all of the facts.

[Dep. Transcript p. 25:9-22]

Dr. Gray further testified that Claimant “has had pretty had pretty extreme activities before and after his surgeries, and I just think that that – I would not have gone down that road with the 2 percent if I had known that.” [Dep. Transcript p. 25:9-22]. Dr. Gray opined Claimant was not entitled to a whole person rating.

43. Dr. Gray stated he no longer felt strongly that Claimant should receive injections as maintenance care, but continued to opine ongoing maintenance care was appropriate in the form of pain medications and annual visits with Claimant’s surgeons.

44. Helen Sullivan works as the adjuster on Claimant’s claim. She testified at hearing Claimant continued to be paid temporary total disability (“TTD”) benefits after being placed at MMI at August 30, 2017 because no impairment rating had been issued at the time. Ms. Sullivan testified that, although an impairment rating was subsequently issued by Dr. Miller on September 20, 2017, Respondent did not receive the impairment rating report until on or around October 25, 2017, and that during such time Claimant continued to be paid TTD benefits. Per the FAL, Ms. Sullivan calculated an overpayment of \$9,341.26 of TTD benefits between the time Claimant placed at MMI and when Respondent received the impairment rating report. She further testified that, based on the MMI date assigned by DIME physician Dr. Gray, an additional overpayment of \$3,784.79 exists for TTD paid for the 31 days between July 31, 2017 and August 30, 2017. Respondent contends it is entitled to a total overpayment of \$13,126.42.

45. Ms. Sullivan further testified that, as of August 2018, Claimant completed 25 sessions of chiropractic care. She stated when Dr. Miller recommended Claimant undergo a neck MRI, she requested a Rule 16 review and denied additional medical maintenance care.

46. Claimant testified he continues to experience headaches, weakness in his arm, and spasms and twitching on the left side of his neck into his shoulder. Claimant further testified he felt relief as a result of the chiropractic treatment.

47. The ALJ finds that Dr. Gray changed his DIME opinion on impairment originally expressed in his March 5, 2018 DIME report. Per his testimony under oath at his post-hearing deposition, Dr. Gray’s revised opinion on impairment is that Claimant sustained 13% upper extremity impairment, with no whole person impairment.

48. On the issue of scheduled impairment, the ALJ credits the opinion of Dr. Gray over that of Dr. Miller, and finds the preponderant evidence establishes Claimant sustained 13% scheduled upper extremity impairment.

49. The ALJ credits the opinions of Drs. Miller, Fall and Gray over the testimony of Claimant and finds Claimant did not sustain functional impairment beyond the shoulder. Claimant failed to provide by a preponderance of the evidence he is entitled to conversion of his scheduled impairment to whole person impairment.

50. Respondent has established it is more probably true than not it is entitled to recover an overpayment in the amount of \$13,126.45, as Claimant received such amount in TTD benefits after being placed at MMI.

51. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or

none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

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

Overcoming the DIME on Permanent Impairment

The DIME physician's findings include his or her subsequent opinions, as well as his or her initial report. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328, 330 (Colo. App. 2005). If a DIME physician issues conflicting or ambiguous opinions concerning MMI or impairment, it is the ALJ's province to determine the Division IME's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Rainwater v. Sutphin*, WC 4-815 042-04 (ICAO September 9, 2014).

While a DIME physician's opinion on MMI and non-scheduled impairment must be overcome by clear and convincing evidence, no statutory or presumptive weight is given to a DIME physician's opinion on a scheduled impairment rating. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000). A party disputing the impairment rating of a scheduled injury bears the burden of proof by a preponderance of the evidence. *Maestas v. American Furniture Warehouse*, W.C. No. 4-662-369 (June 5, 2007); *Ortiz v. Ingersoll-Rand Co.*, W.C. No. 4-981-218-04 (January 25, 2018). 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 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. Also see *Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001).

Dr. Gray initially opined Claimant sustained 13% left upper extremity impairment and 2% cervical whole person impairment. Upon being presented with evidence of Claimant's participation in rodeo activities in 2015 and 2016, Dr. Gray subsequently revised his opinion in post-hearing deposition testimony. Dr. Gray testified that, even if Claimant did not participate in rodeo activities in 2016 as claimed, the 2015 activities alone sufficed to "confound" the issues and serve as a basis for retraction of the 2% whole person impairment he initially assessed. Dr. Gray was unambiguous regarding his revised opinion on impairment. As found, Dr. Gray's true opinion is that Claimant is solely entitled to 13% upper extremity impairment with no whole person impairment.

Claimant argues that, despite Dr. Gray's revised opinion, a 2% whole person impairment for the cervical spine is appropriate. Claimant contends he was unduly prejudiced by Respondent's presentation of pictures and articles regarding Claimant's 2015 and 2016 rodeo activities to Dr. Gray during the post-hearing deposition. Claimant

purports Dr. Gray had no context for Claimant's involvement in the rodeo and would have been in a better position to fairly assess the role calf-roping played in Claimant's injury had Dr. Gray read the hearing transcript. The ALJ disagrees Claimant was unduly prejudiced under the circumstances. Claimant identified himself in pictures showing Claimant during the actual competition. Respondent's counsel explained Claimant participated in team roping as a heeler, and what that entailed, based on Claimant's description at hearing. Claimant's counsel informed Dr. Gray of Claimant's extensive experience riding horses, and also apprised him of Claimant's contention that calf roping does not require much use of his right arm and that he did not participate in rodeo activities in 2016. Dr. Gray specifically stated that, even if Claimant did not participate in rodeo activities in 2016 as alleged, Claimant's participation in 2015 confounded the issues enough to cause him to retract the 2% cervical impairment. Dr. Gray was provided sufficient context for Claimant's involvement in rodeo activities during the deposition.

The ALJ is most persuaded by Dr. Gray's opinion on impairment. The preponderant evidence establishes Claimant sustained 13% upper extremity impairment.

Conversion of Scheduled Impairment to Whole Person Impairment

Section 8-42-107(2)(a), C.R.S., provides for scheduled compensation based on "loss of an arm at the shoulder." The claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether the claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs*, W.C. No. 4-536-198 (ICAO June 20, 2005).

As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra*. Pain and discomfort that limit the claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs, supra*; *Vargas v. Excel Corp.*, W.C. No. 4-551-161 (ICAO April 21, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora*, W.C. No. 4-452-408 (ICAO October 9, 2002).

Claimant failed to prove by a preponderance of the evidence he is entitled to conversion of his scheduled upper extremity impairment to whole person impairment. Dr. Miller and Dr. Fall credibly opined Claimant's cervical complaints are unrelated to

the work injury. Dr. Fall credibly explained Claimant's functional deficit is limited to the shoulder. While Dr. Gray initially opined Claimant's impairment should be considered on a whole person basis, he subsequently changed his opinion, concluding Claimant is solely entitled to a scheduled impairment. Despite Claimant's testimony as to his purported pain and functional limitations, based on the totality of the evidence, Claimant did not sustain any functional impairment not listed on the schedule of disabilities.

Medical Maintenance Benefits

Respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995).

Dr. Miller opined maintenance treatment in the form of ongoing chiropractic sessions, a pool pass, trigger point injections, and a follow up with Dr. Schneider is appropriate. Although Dr. Gray changed his opinion regarding the reasonableness and necessity of trigger point injections, he continued to opine maintenance treatment in the form of follow-up with surgeons and medication is reasonable, necessary and related to Claimant's work injury. Based on the totality of the credible and persuasive evidence, future medical treatment is reasonably necessary to relieve Claimant of the effects of the work injury or prevent further deterioration of his condition. Respondent retains the right to challenge the compensability, reasonableness, and necessity of specific treatments requested by Claimant.

Overpayment

Section 8-40-201(15.5), C.R.S, defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." The Court in *Simpson* found Section 8-40-201(15.5) provides for three categories of possible overpayment: overpayments created when a claimant receives money that exceeds the amount that should have been paid, overpayments created when a claimant receives money claimant was not entitled to receive, and overpayments created when a claimant receives money that results in duplicate benefits because of offsets that reduce disability or death benefits. *Simpson v. ICAO*, 219 P.3d 354, 358 (Colo. App. 2009).

Section 8-42-105(3), C.R.S. provides that TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending

physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

As found, Respondent established by a preponderance of the evidence it is entitled to recover an overpayment in the amount of \$13,126.45. The DIME physician, Dr. Gray, opined Claimant reached MMI as of July 31, 2017. Accordingly, Claimant was no longer entitled to receive TTD benefits as of that date. Between July 31, 2017 and when Respondent received Dr. Miller's impairment rating and filed a FAL, Claimant received a total of \$13,126.45 in TTD benefits to which he was not entitled. As such, Respondent are entitled to recover an overpayment from Claimant for that amount.

ORDER

It is therefore ordered that:

1. Claimant is entitled to a 13% upper extremity rating.
2. Claimant's request for conversion of the award of scheduled impairment benefits to whole person permanent physical impairment benefits is denied and dismissed.
3. Respondent shall pay for reasonable, necessary and related medical maintenance care.
4. Respondent is entitled to recover an overpayment from Claimant in the amount of \$13,126.45.
5. All matters not determined herein are reserved for future determination.

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

DATED: February 1, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

PROCEDURAL STATUS

A Prehearing Conference Order was issued by PALJ Harr on January 12, 2017. PALJ Harr granted Respondents' Motion to Add the Issue of Overcoming/Striking the Determination of DIME physician, Dr. Lindenbaum, based upon the allegations that Claimant violated WCRP 11. Claimant's Objection to adding the issue of overcoming the DIME physician as unripe, as closed, and as it outside the jurisdiction of an Administrative Law Judge was also added as an issue for determination at hearing. Claimant's request that his objection be treated as an attempt to have the issue struck as unripe pursuant to 8-43-211(3) was granted and preserved for future adjudication.

On August 11, 2017, Respondents filed a Motion to Add the Issue of Reopening based upon mistake. Claimant objected to that issue being added for determination at hearing.

At the August 18, 2017 hearing, the ALJ determined, based upon the procedural posture of the case, as well as a need for testimony regarding the procedural and substantive issues, an Order bifurcating the issues set for determination was in the interests of justice. Accordingly, the Court issued an Order Bifurcating the issues set for determination. The following issues were heard initially: Respondents' Motion to Add Issues at hearing; whether Respondents' requested remedy of striking the Division of Worker's Compensation IME is an available remedy under the OACRP and WCRP; whether the issue of the DIME rating was closed; whether the foregoing issues were ripe for determination.

A full Order was issued by the undersigned on May 15, 2018. A transcript of the August 18, 2017 hearing was also lodged with the Court on or about October 11, 2018. Following two status conferences (on June 18, 2018 and October 9, 2018), which were conducted with counsel for the parties, that Order was vacated and the parties were asked to submit a new proposed Order. Claimant and Respondents stipulated to the issuance of the Amended Order and requested the opportunity to present evidence on the remaining issues outlined *infra*. The Court determined it was in the interests of justice to allow Claimant and Respondents to present additional evidence on those issues.

The undersigned issued a procedural Order on September 26, 2018 for the second part of the bifurcated hearing, which added the issue of sanctions/remedy for a Rule 11 violation, if one was found. Pursuant to a Status Conference Order issued on November 1, 2018 (served November 2, 2018), the remaining issues were reserved, to be determined after the second day of hearing.

PRELIMINARY FINDINGS OF FACT

1. Claimant worked as an Assistant Principal for Employer.
2. Claimant's medical history was significant in that he previously injured his low back in 2012 in a motor vehicle accident. An MRI done in May 2012 revealed Claimant had grade 1 spondylolisthesis at the L5-S1 level, with bilateral pars defect. Moderate foraminal stenosis was also noted at this level.
3. On August 14, 2012, Claimant underwent surgery for his low back, which was performed by Hooman Melamed, M.D. The procedure performed included: partial L5 and S1 semicorporectomy (anterior retroperitoneal approach); anterior lumbar interbody arthrodesis at the L5-S1 level; anterior lumbar segmental instrumentation and L5-S1, using RSB interbody plate; insertion of the biomechanical RSB cage with 12-degree lordosis; use of local harvested autograph and allograft bone; iliac crest bone grafting on the left side, separate procedure, separate incision and modifying up to 59; use of intraoperative fluoroscopy in multiplane; use of intraoperative somatosensory evoked potential and electromyographic monitoring. The pre-and post diagnoses were: grade 1 isthmic spondylolisthesis at L5-S1 level; bilateral L5-S1 pars defects; bilateral foraminal stenosis; left leg pain, radiculitis, and sciatica; significant left L5 radiculitis; neurologic deficits in the L5 distribution on the left side; failed conservative management; and progressive worsening of the patient's symptoms of low back pain.
4. Claimant was involved in an altercation in 2014 while working. He underwent an MRI on September 17, 2014, which was ordered because of trauma and weakness in the lumbar spine. The MRI, which was read by Jaime Contreras, M.D., showed no acute findings and the anterior fusion at L5-S1, with grade one anterolisthesis of L5 on S1. Bilateral foraminal stenosis was noted at this level. The other lumbar levels were unremarkable.
5. Claimant sustained an admitted industrial injury on August 20, 2015 while working for Employer. Claimant was injured after he was struck in the parking lot by a parent in a pick-up truck.¹
6. Claimant received treatment for his injuries, including at the North Colorado Medical Center, where he was treated in the Emergency Department.
7. On August 24, 2015, Claimant was evaluated by Jason Haas, D.C.² X-rays were taken and Claimant's posture and body composition was analyzed. Claimant returned to Dr. Haas' office on August 31, 2015 and received chiropractic treatments from Alisha Jacobs, D.C. Claimant's cervical, thoracic and lumbar spine were adjusted.

¹ Exhibit PP, page 477.

² Records of treatment with Dr. Haas before Claimant's work injury were admitted at hearing. These records included treatments on March 19, 26, May 26, August 3, 6, 13, 2015; all of which occurred before the subject injury. Claimant treated for lumbar, cervical and right foot pain, receiving chiropractic adjustments.

Claimant also received chiropractic adjustments and a physical therapy evaluation on September 2, 2015.

8. A General Admission of Liability (“GAL”) was filed on September 16, 2015 Respondents admitted for medical and temporary total disability (“TTD”) benefits.

9. On September 10, 2015, Dr. Melamed issued a report following a telephone conference with Claimant. The report noted Claimant was doing well until recently when he was involved in a car accident. Dr. Melamed had reviewed Claimant’s MRI and the CT scan, which showed psuedoarthrosis at the L5-S1 level. The PEEK cage and plate had completely subsided into the S1 vertebral body, causing bilateral L5-S1 significant foraminal stenosis. Dr. Melamed concluded there was pseudoarthrosis and also a loss of lumbosacral lordosis. Dr. Melamed recommended a posterior pedicle screw fixation at the L5-S1, with bilateral L5-S1 foraminal decompression, requiring an osteotomy and removing the entire facet complex and the pars to open up room for the nerve. Claimant indicated he wanted to go forward with surgical intervention.

10. Claimant received treatment at the Workwell Occupational Health, the designated ATP for Employer, beginning on September 22, 2015. Claimant was evaluated by Kevin Keefe, D.O., who diagnosed sprain/strains-lumbosacral; disturbance of skin sensation. Dr. Keefe opined Claimant’s problem was related to work activities and issued an M164, as well as placing Claimant on restricted duty.

11. On September 30, 2015, Claimant was evaluated by Gregory Reichhardt, M.D. On examination, Claimant demonstrated diffuse give-way weakness in the left lower extremity. His reflexes were 2/4 and symmetrical in the patellae and Achilles. Claimant had good cervical and thoracic range of motion (“ROM”). Marked limitations were found in his lumbar ROM. Dr. Reichhardt’s impression was: low back pain and bilateral lower extremity pain-history of previous L5-S1 fusion for spondylytic spondylolisthesis; mechanism of injury/pedestrian-motor vehicle accident in which he was directing traffic and was hit intentionally by a truck on 8/20/15; lumbosacral spine x-rays- post-op findings at L5-S1, grade II anterolisthesis, which may be chronic; thoracic spine x-ray 8/20/15-no acute findings; pelvic x-ray 8/20/15-no acute findings; CT of the thoracic spine 9/4/15-negative for acute bony pathology; lumbar MRI 9/4/15-bilateral pars defect, L5, grade I anterolisthesis, previous interbody fusion, moderate bilateral neural foraminal narrowing, L5-S1-mild ligamentum flavum and facet overgrowth, other levels normal; CT of the lumbar spine 9/4/15: L5-S1, interior screw fixation device was well-positioned in the line, no loosening fractures, bilateral L5 spondylolisthesis, slight L5-S1 listhesis, no acute pathology; 9/29/15 thoracic MRI demonstrating a small disc extrusion T5 to T7; concern by patient’s prior surgeon re: pseudoarthrosis, with osteolysis; bilateral upper extremity numbness: C-spine x-ray 8/20/15-no acute findings; C3-4 minimal disc bulge, mild bilateral foraminal narrowing, C5-6 mild disc bulge, mild left foraminal stenosis, etiology unclear; opioid use, ORT, high risk; history of Hodgkin’s lymphoma; history of stomach ulcers, psoriasis of hypothyroidism; borderline renal insufficiency. Dr. Reichhardt recommended Claimant keep his evaluation by a spine surgeon and offered various referral options.

12. On December 4, 2015, Claimant was evaluated by Anant Kumar, M.D.³ Dr. Kumar noted Claimant had an antalgic gait and used a cane. Claimant's lumbar spine had localized tenderness at L4-S1. There were no obvious motor deficits, but a subjective decrease in sensation was noted. Dr. Kumar stated Claimant had undergone and L5-S1 anterior lumbar fusion, with anterior fixation using a stand-alone plate/cage. It appeared there had been subsidence of the cage and sacrum, but Dr. Kumar did not have the immediate postoperative x-rays or imaging to compare. In 2014, an MRI showed Claimant had left-sided foraminal stenosis at the L5-S1 level and an in situ fusion at L5-S1, with associated cage subsidence. Dr. Kumar disagreed a posterior only fusion would be successful in a reduction of the spondylolisthesis. He opined a posterior decompression would not decompress Claimant's up-and-down stenosis. Dr. Kumar recommended a revision anterior followed by a posterior spinal fusion.

13. Dr. Kumar is an ATP.

14. Claimant was evaluated by Dr. Pouliot on December 21, 2015. Dr. Pouliot documented Claimant was referred by Dr. Keefe. Dr. Pouliot reviewed the MRI which showed a neural compression at L5. On examination, Claimant's sensation and proprioception were intact on the upper and lower limbs, other than slight decreased sensation on the left in the L5 distribution. Dr. Pouliot's assessment was: 44-year-old male with a work injury on August 20, 2015, reportedly struck by a vehicle speed-now with back and radicular pain bilaterally worse on left, neural compression seen at L5's MRI bilaterally. Claimant was noted to have a history of anterior lumbar interbody fusion at L4-5, with reported pseudoarthrosis and reported negative EMG. Dr. Pouliot offered bilateral L5 transforaminal injections, but felt he would need a spinal operation. Dr. Pouliot noted he would assist Claimant with medication management.

15. Claimant returned to Dr. Keefe on February 9, 2016. Dr. Keefe noted back surgery had been denied by Insurer and Claimant was deciding whether to proceed with procedure using private insurance. Dr. Keefe recommended Claimant see Dr. Mathwich regarding case closure and a potential impairment rating. Dr. Keefe opined the cause of Claimant's problem was related to work activities.

16. On February 24, 2016, Claimant underwent a posterior lumbar spine fusion at L5-S1, which was performed by Dr. Kumar. A posterior instrumented fusion using pedicle screws, local bone graft, a medium in use was performed. Dr. Kumar also did a bilateral decompression of the L5 and S1 nerve roots in the canal and sub-particular zone. Claimant's pre-and post-operative proceedings were the same and included: pseudoarthrosis at L5-S1, status post L5-S1 anterior lumbar fusion; grade 1 spondylolisthesis, with severe foraminal stenosis, bilateral lower limb radiculopathy, left worse than right; present in both upper limbs, left worse than right; inability to stand upright; severe back pain; and failure of conservative treatment.

³ Dr. Kumar stated Claimant was referred by Insurer for an independent medical opinion. Claimant described Dr. Kumar as an ATP in his Position Statement and the referral from Dr. Pouliot was admitted as Exhibit J, p.177.

17. Dr. Kumar opined Claimant's prior L5-S1 anterior lumbar fusion had not healed appropriately and this was a revision surgery performed with no complications. Intraoperatively, Dr. Kumar found that the L5 nerve root was severely compromised and there was significant spinal stenosis in the canal, in the sub-pedicular and sub-articular zone.

18. On March 2, 2016, Claimant was evaluated by Brian Mathwich, M.D. Dr. Mathwich noted he was asked to evaluate Claimant regarding recent complications and the denial of surgery. He noted Insurer had not admitted liability for the lumbar spine and had denied the request for surgery. He spoke to Ms. Harrington, who confirmed the lumbar spine was not related. The lumbar CT and MRI showed significant issues in the lumbar spine, which was determined to be pre-existing and non-work-related. Dr. Mathwich stated Claimant underwent a conservative course of treatment.

19. At the time of Dr. Mathwich's evaluation, Claimant had complaints of bilateral arm numbness and tingling. Dr. Mathwich noted this was a difficult case due to significant pre-existing issues. Dr. Mathwich found a normal cervical spine, reviewed the neurologic and upper extremity exam from Dr. Kumar, with no further complaints from the patient regarding bilateral arm numbness. Dr. Mathwich's diagnosis was: sprain/strains-lumbosacral; disturbance of skin sensation. If there continued to be no significant issues, Dr. Mathwich would consider Claimant to be without impairment rating and would issue permanent restrictions.

20. Dr. Keefe confirmed Insurer had denied liability after speaking to Ms. Harrington and also spoke to Dr. Mathwich. Dr. Keefe determined Claimant was at MMI on March 17, 2016 and completed a M-164.

21. On April 15, 2016, an amended GAL was filed. TTD benefits were terminated based upon Claimant's return to full duty.

22. Claimant returned to Dr. Mathwich, M.D. on April 21, 2016. Dr. Mathwich said Claimant initially had discomfort in the upper extremities, with bilateral arm numbness and had a negative MRI, as well as bilateral negative EMGs. Claimant underwent surgery on February 24, 2016, which was covered by private insurance. At the time of evaluation, Dr. Mathwich found tightness in the paraspinal muscles bilaterally, with some point tenderness of the left L4-5 paraspinal muscles. Tenderness was noted, along with trigger points in the gluteus medius bilaterally, just over the iliac crest. Dr. Mathwich's diagnosis was the same as on March 2, 2016.

23. Dr. Mathwich stated the cause of this problem did not appear to be related to work activities and noted he received documentation from Insurer which said the back injury, surgery and all associated treatment were not compensable. Dr. Mathwich stated there was no choice but to keep Claimant at MMI as of March 17, 2016. He indicated he would agree to be Claimant's primary care provider, if Insurer accepted liability.

24. Respondents requested a DOWC IME and Stephen Lindenbaum, M.D. was selected as the examining physician.

25. Claimant was evaluated by Dr. Lindenbaum on July 23, 2016. At the time of the evaluation the, Claimant walked without an antalgic gait and was able to walk heel to toe without discomfort. Dr. Lindenbaum agreed with Dr. Mathwich that Claimant reached MMI on March 17, 2016. Dr. Lindenbaum noted he received records from Dr. Haas. More particularly, he stated:

“Today, the patient brought in some records from Dr. Haas, who he had been followed prior to the injury for just basic medical and physiological well-being. The notes that were brought to me show that the patient on exams prior to the injury had range of motion of the lumbar spine of flexion over 50° and extension over 26°. The exam after the accident dating 12/28/15, which is roughly 5 months later, shows the patient only has 90° flexion and 12° of extension”.

26. On examination, Claimant had no long tract signs, clonus, or atrophy in the lower extremities. He had a prior injury fusion by Dr. Melamed and advised Dr. Lindenbaum he had no problems with his back since that time, until some mild back pain related to an altercation in 2014.

27. Dr. Lindenbaum obtained valid ROM measurements during his examination. Based on the *AMA Guides*, Table 53, IIB, Claimant had a 10% impairment of the body for his specific spine disorder (lumbar spine) and a 9% range of motion deficit. Combining the range of motion deficit with the specific disorder, Dr. Lindenbaum determined Claimant sustained an 18% whole person impairment. Dr. Lindenbaum agreed with Dr. Kumar that this injury was not pre-existing and was a new injury, since he was previously asymptomatic. Dr. Lindenbaum opined that any postoperative care should have been covered under the compensation claim.

28. On August 4, 2016, the DOWC issued a Notice of Receipt of Division IME (DIME) Report DIME Process Concluded. Insurer received a copy of the Notice, as it was date stamped by its mail operations on August 5, 2016.

29. There was no evidence in the record that Respondents took any steps to procure the DIME report before August 16, 2016.

30. There was no dispute Respondents received a copy of the DIME report on August 17, 2016.

31. Pursuant to 8-42-107.2(4)(c), C.R.S., Respondents were required to either file an admission of liability or request a hearing on or before August 24, 2016.

32. On August 30, 2016, Respondents filed an Application for Hearing ("AFH"), seeking to overcome Dr. Lindenbaum's findings.⁴ This was six days after the deadline for filing set by 8-42-107.2(4)(c), C.R.S. The AFH was withdrawn after Ms. Harrington discussed the case with Insurer's staff attorneys and Claimant's counsel. A Notice of Cancellation of hearing was filed, although the hearing had not been set.⁵

33. On September 12, 2016, a Final Admission of Liability ("FAL") was filed on behalf of Respondents. This was 18 days after the deadline set forth in § 8-42-107.2 (4)(c), C.R.S. Respondents admitted for PPD benefits based upon the medical impairment rating issued by Dr. Lindenbaum. Medical benefits after MMI were denied.

34. Claimant filed a timely objection to the FAL on September 15, 2016.

35. Claimant filed an AFH on October 3, 2016. The issues set for determination included medical benefits, disfigurement, *Grover* medical benefits, mileage and interest on PPD.

36. On November 16, 2016, Respondents filed a Response to the Application for Hearing ("RAH"). The issues listed included reasonableness, necessity and relatedness of any and all medical care sought and/received; authorization/authorized medical care; fee schedule; *Grover v. ICAO*. There was no reference to an alleged violation of WCRP 11 in the RAH.

37. On January 12, 2017, counsel for the parties participated in a Prehearing Conference before Prehearing Administrative Law Judge Michael Harr. PALJ Harr's Order is referenced, *supra*.

38. An AFH was filed on behalf of Claimant on February 28, 2017. The AFH listed the issues of medical benefits, disfigurement, as well as *Grover* medical benefits, mileage, and interest due on PPD.

39. A Response to the AFH was filed on behalf of Respondents on March 2, 2017. Respondents marked the following issues to be considered at hearing: medical benefits, disfigurement, permanent partial disability benefits. Other issues to be heard included reasonableness, necessity and relatedness of any and all medical care sought and/or received; authorization/authorized medical care; fee schedule; *Grover v. ICAO*; overcoming/striking the DIME; violation of Rule 11.

40. A Prehearing Conference was held on April 11, 2017 and an Order issued that same day. The Order vacated the hearing set for May 12, 2017. In addition, the Order allowed Respondents, at their discretion, to suspend payment of PPD benefits, pending a hearing. The Order also provided that if benefits remained owing after the

⁴ Exhibit KK, pp. 463-465.

⁵ Exhibit JJ.

hearing, Respondents were required to pay statutory interest on any amounts not paid during the duration of the suspension.

41. On April 14, 2017, Respondents filed a FAL. Respondents suspended payment of PPD benefits pending the resolution of issues at hearing.

42. On April 18, 2017, Claimant filed an Objection to the FAL.

43. On May 10, 2017, Claimant filed an AFH. He requested a hearing on the following issues medical benefits, disfigurement, along with *Grover* medicals, mileage, interest due on PPD, waiver, ripeness and closure.

44. On June 1, 2017, an RAH was filed on behalf of Respondents. The issues set for determination included medical benefits, disfigurement, and PPD benefits. Other issues include those referenced on Claimant's AFH. Respondents also sought an adjudication on reasonableness, necessity and relatedness of any and all medical care sought and/or received; authorization/authorized medical care; fee schedule; *Grover v. ICAO*; overcoming/striking the DIME; Claimant's violation of Rule 11.

FURTHER FINDINGS OF FACT

45. Dr. Haas testified JTECH is company that prepares a digital ROM assessment. The system on which this is prepared was separate from the medical record system which housed the records related to evaluations of patients.⁶ The individual in his office who gathered the information for the report was Dr. Allison, the physical therapist or the PTA (Justin). Dr. Haas testified he had not reviewed Dr. Lindenbaum's report prior to the deposition. He did not have information as to what records Claimant took to the DIME.

46. Claimant brought notes documenting his ROM findings by Dr. Haas' office to the DIME, which was performed by Dr. Lindenbaum.

47. Respondents were not aware Claimant brought the ROM findings from Dr. Haas' office to the DIME.

48. Dr. Lindenbaum testified he received notes from Dr. Haas at the time of his evaluation of Claimant.⁷ Dr. Lindenbaum confirmed Claimant brought these records to the evaluation.⁸

⁶ Haas deposition page 16:18-25.

⁷ Lindenbaum deposition page 8:14-21.

⁸ Lindenbaum deposition page 8:25-9-10.

49. Dr. Lindenbaum testified in his evidentiary deposition that he did not put much weight in the documents from Dr. Haas, stating at page 9:17-10:3:

“Well, let me preface it by saying, I didn’t put very much credence in it, but I thought it was something that should be placed in my report. It just basically says--Dr. Haas is commenting that he had seen the patient before this injury, [Claimant], and his range of motion was one level. And that several months after the injury, he saw him again, and his range of motion dropped significantly.

Now, let me--let me state here that this is a very--this does not mean a lot to me. Only that I think it is important to put that in here because it is a document that suggests there had been a change”.

50. Dr. Lindenbaum also stated his major concerns were the findings made by orthopedic surgeons. The ALJ noted Dr. Lindenbaum concluded Claimant’s medical impairment was caused by his industrial injury.

51. Dr. Lindenbaum’s testimony that his opinions were not affected by review of Dr. Haas’ records was persuasive to the ALJ.

52. Laura Harrington testified as a representative for Respondent-Insurer. She has been employed by Insurer as a claims adjuster for 18 years and received notice of the claim on August 25, 2015. She has been responsible for adjusting the instant claim since that time. Ms. Harrington testified she became aware of Claimant’s low back condition, which required surgery in 2012, in one of her first conversations with him.

53. Ms. Harrington testified that she and Claimant exchanged the e-mails in which Claimant advised her that Benchmark would get her records. Ms. Harrington testified she sent a release for medical records to Benchmark and did not receive records. Ms. Harrington testified she did not prepare the DIME packet which was submitted to Dr. Lindenbaum. Insurer did not have a copy of Dr. Haas’ JTECH records prior to the DIME. Ms. Harrington was a credible witness.

54. Ms. Harrington testified she telephoned Dr. Lindenbaum’s office on August 16, 2016 and received Dr. Lindenbaum’s DIME report on August 17, 2016, which was faxed to her at 3:56 p.m.⁹ Insurer did not have a copy of this report prior to this time. Ms. Harrington testified she skimmed the report and believed she had 20 days from receipt of the DIME report to take a position. Ms. Harrington testified Respondents disagreed with the DIME and wished to challenge the DIME opinion.

55. The ALJ found Ms. Harrington could have determined there was a reference to Dr. Haas’ ROM records in Dr. Lindenbaum’s report within the time frame to take a position on the DIME. Ms. Harrington incorrectly thought the 20-day time ran

⁹ Exhibit A, p.1.

upon receipt of the DIME report. An AFH could have been filed on behalf of Respondents within the 20-day period to dispute the conclusions made by the DIME physician.

56. The issues concerning the DIME were ripe for determination.

57. The Court does not have jurisdiction to adjudicate Respondents' Objection to the DIME, as the AFH was filed beyond the 20-day time limit provided by statute.

58. It is in the interests of justice to vacate the May 15, 2018 Order.

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

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S. (2016), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2016). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. (2016).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2016). 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).

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).

RIPENESS

In the case at bench, Claimant disputed whether the issue of striking the determination of a DIME physician was ripe. The term "ripeness" refers to whether an issue is "real, immediate, and fit for adjudication". Colorado courts have held that under this doctrine "adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which may never occur". *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006).

That is not present in the instant case. The ALJ determined that the issues related to the DIME, including Respondents' response to the Notice of Receipt of Division IME (DIME) Report DIME Process Concluded and receipt of the report of Dr. Lindenbaum were ripe for determination. (Finding of Fact 56). In addition, Respondents Motion to Strike the DIME report, as well as Claimant's assertion that § 8-42-107.2 (4) (c), C.R.S. barred any attempt to overcome the DIME physician opinions were also ripe for determination.

MOTION TO STRIKE DIME

Claimant contended Respondents' failure to request a hearing within 20 days barred Respondents' attempt to contest the DIME opinion and this Court had no jurisdiction to decide the issue. Respondents asserted that the issues admitted to in a filed FAL are closed, unless Claimant filed a timely objection, pursuant to § 8-43-203(2)(b)(II)(A). Respondents cited *Balfour v Boulder County, W.C. No 4-020-145* (ICAO March 22, 1993) for the proposition that Respondents could then controvert their own admission of liability once the Claimant objected. Respondent further argued that it did not waive its right to contest the DIME opinion since it was not aware Claimant had provided the Dr. Haas' records to Dr. Lindenbaum.

As determined in Findings of Fact 28-30, no contrary evidence was introduced to refute the fact that Respondents received the Notice of Receipt of Division IME (DIME) Report DIME Process Concluded on August 4, 2017. Respondents were required to take a position on or before August 24, 2016 upon issuance of the Notice of Receipt of Dr. Lindenbaum's report. There was evidence in the record, specifically Ms. Harrington's testimony, that Respondent-Insurer did not have a copy of Dr. Lindenbaum's DIME report. (Finding of Fact 54). As found, Respondents took no steps to procure this report until August 17, 2016. (Finding of Fact 29). The evidence also revealed that the DIME report was not received by Respondents until August 17, 2016. (Finding of Fact 53). It was undisputed that Respondents did not have a copy of Dr. Haas' medical records (including the range of motion studies from JTECH) prior to the DIME. (Finding of Fact 30). Even though the adjuster for Insurer (Ms. Harrington) did not have JTECH report which contained the ROM readings before the evaluation, the ALJ determined she could have found the reference to those records in Dr. Lindenbaum's DIME report. (Finding of Fact 54).

The deadline set forth in § 8-42-107.2 (4) (c), C.R.S. has been held to be jurisdictional. *Leprino v. Industrial Claim Appeals Office*, 134 P.3d 475, 482 (Colo. App. 2005). In *Leprino*, Claimant suffered an admitted industrial injury and reached MMI. Claimant requested a lump sum after an FAL was filed and then requested a DIME. The DIME physician concluded Claimant was not at MMI, but Respondents took no position with regard to that opinion. The case went to hearing, the ALJ found Claimant had not reached MMI and was entitled to PPD benefits. The ALJ also determined that Respondents failed to either admit or contest liability within 30 days [the 2005 version of § 8-42-107.2 (4)] and therefore Respondents were precluded from challenging the DIME physicians' opinion.

The Colorado Court of Appeals found Respondents were bound by the DIME physician's report because they failed to contest the findings. Justice Casebolt observed:

"Both sections [§ 8-42-107.2 (4) and § 8-43-203(2)(b)(II)] are part of an overall statutory scheme designed to ensure the prompt payment of benefits without the necessity of litigation in cases that do not present a legitimate controversy. [citation omitted]. The provisions of this statute are clear and require the insurer either to contest the DIME report within thirty days or to admit in accordance with the report. *City Mkt., Inc. v. Indus. Claim Appeals Office*, 68 P.3d 601 (Colo.App.2003) [upholding the imposition of penalties for employer's failure to either contest or admit to the DIME report]. Just as an ALJ lacks jurisdiction, without a DIME, to resolve a dispute concerning an ATP's finding of MMI, *Town of Ignacio v. Indus. Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002), the ALJ also lacks jurisdiction, absent an objection to the DIME physician's findings, to resolve a dispute as to those findings". *Id* at 482.

Leprino has not been overruled and remains good law, which governs the case at bench. No contrary authority was provided to the Court. The time limit prescribed by § 8-42-107.2(4) is jurisdictional. Accordingly, Respondents' August 30, 2016 Application for Hearing was outside the jurisdictional time limit for responding to the DIME report. The ALJ determined there was no jurisdiction once the time provided for in § 8-42-107.2(4) had elapsed. In particular, the issue of whether Respondents may attempt to overcome the DIME physician's opinions by clear and convincing evidence is time-barred.

In coming to this decision, the ALJ considered the application of *Rigoberto Almanza v. Terry Johnson and R. Edeltraud Johnson*, W.C. 4-713-132-02 (ICAO December 7, 2012) to the case at bar. Citing *Leprino v. Industrial Claim Appeals Office*, 134 P.3d 475, *supra*, the Industrial Claim Appeals Panel concluded the provisions of § 8-42-107.2 (4) were jurisdictional. The Panel reversed the ALJ Order which determined Respondents had not waived their right to respond to the DIME report based on a PALJ Order which extended the time to respond. (The basis for challenging the original DIME was because there was an improper communication with the examining physician.) The Order awarding PPD benefits based upon a subsequent DIME was also set aside. The ALJ determined this case does not provide the authority to strike the DIME in its entirety, as suggested by Respondents.

Respondents also averred they did not waive the right to contest the findings of the DIME physician. Respondents correctly pointed out the requirements for waiver were not met here, as there was not a knowing, intentional and voluntary relinquishment of a known right since they were not aware Claimant brought the JTECH report to the DIME. Respondents argued they could not have waived the right to raise the issue of a Rule 11 violation because they were not aware it had occurred. The ALJ found Respondents did not have a copy of Dr. Haas' records prior to Dr. Lindembaum's DIME, which was confirmed by the testimony of Ms. Harrington. (Finding of Fact 51).

The ALJ has determined that Respondents are entitled to present evidence in support of their Petition to Reopen and/or withdrawal of the FAL. Under the particular factual circumstances of this case, the ALJ finds Respondents should be given the opportunity to present evidence on these issues at the subsequent hearing. Likewise, Claimant is entitled to present evidence on this issue.

Finally, the ALJ has determined that the question of whether Claimant violated WCRP 11 and whether sanctions should be imposed is a matter on which Claimant and Respondents may submit additional evidence at the second part of the hearing.

ORDER

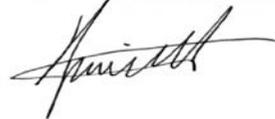
It is therefore ordered:

1. The May 15, 2018 Findings of Fact, Conclusions of Law and Order is vacated.
2. The issue of Respondents' Motion to Strike the DIME is closed by virtue of § 8-42-107.2(4).
3. Claimant's Objection to Respondents adding the issue of Petition to Reopen is overruled. This issue is deemed ripe and is set for determination at the hearing following this Order.
5. All matters not determined herein are reserved for future determination.
6. The following issues are ripe for determination at the upcoming hearing:
 - (a) Medical benefits (pre-MMI and *Grover*) and Respondents' defenses thereto;
 - (b) Disfigurement;
 - (c) Respondents' Petition to Reopen (mistake);
 - (d) Whether Claimant violated WCRP Rule 11;
 - (e) Sanctions/remedy for Rule 11 violation, if a violation is found;
 - (f) Interest on PPD benefits from March 27, 2016 to September 12, 2016;
 - (g) Resumption of permanent partial disability ("PPD") benefit payments, which were suspended pursuant to the April 11, 2017 Order.

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

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

DATED: February 4, 2019



Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-060-982-001**

ISSUES

- Did the uncontested August 13, 2018 Final Admission of Liability close any or all issues raised by Claimant in her July 10, 2018 Application for Hearing?
- Is Claimant barred from seeking hip surgery recommended by Faulkner because she did not timely request a DIME?
- Did Claimant prove the admitted average weekly wage of \$480.01 is incorrect?
- Did Claimant prove she is entitled to additional TTD or TPD benefits beyond those already admitted by Respondent?
- Did Claimant prove Respondent should be penalized for violating the Act or the WCRP?

FINDINGS OF FACT

1. Claimant worked for Employer as a school bus driver. In late October 2017, she developed right hip and groin pain. She initially sought treatment at the Rose Medical Center emergency department on October 30, 2017. An MRI of the right hip showed a labral tear and acetabular "over-coverage" causing femoroacetabular impingement.

2. Claimant reported the injury to her supervisor on October 31, 2017. She attributed the injury to repeatedly pumping the airbrakes, gas pedal, and going up and down the steps of the bus. Claimant identified October 20, 2017 as her best approximation of the date the pain started. Employer completed a First Report of Injury (WC1) and filed it with the Division of Workers' Compensation on November 3, 2017. There is no persuasive evidence a copy of the WC1 was sent to Claimant that same day. Claimant testified she received a copy of the WC1 in response to her request for a copy of her claim file but did not specify the date she received it.

3. Employer referred Claimant to Dr. Brian Beatty, who first examined her on November 1, 2017. Dr. Beatty noted no traumatic injury and questioned whether the labral tear was work-related. He recommended further workup and requested the records from Rose, but in the meantime, he restricted Claimant from commercial driving through November 8.

4. Respondent filed a General Admission of Liability on Monday, November 20, 2017. Since Claimant alleged no specific incident, the injury was admitted as an occupational disease. Employer continued to pay Claimant's wages under its wage continuation program. Respondent admitted for TTD commencing November 1, 2017 but took credit for the wage continuation under § 8-42-124. The adjuster issued a TTD

payment from November 1, 2017 through November 21, 2017, payable to Employer, on November 20 when the GAL was filed.

5. Although Employer paid Claimant under the wage continuation plan, it charged her sick bank for a handful of days she missed because of the injury. Claimant worked a partial shift on October 30 before going to the ER. Claimant persuasively testified the injury caused her to miss work from October 31, 2017 through November 2, 2017, and on November 6. Her testimony that she missed November 3, 2017 due to the injury is not persuasive because her school was not in session that day. She returned to work on modified duty on November 7. She also missed November 13 and 27, 2017 because of the injury.

6. Claimant's pay stubs substantiate her allegation Employer charged her sick bank for time missed in November 2017. Claimant's November 15, 2017 pay stub shows her sick bank was charged \$268.79. The November 30, 2017 paystub shows sick pay of \$319.77. Claimant also testified she missed work and used her sick leave on January 17, 2018, but the ALJ sees no entry for sick pay on the corresponding paystub.

7. Claimant saw Dr. Nathan Faulkner, an orthopedic surgeon, on November 27, 2017. He noted there was no trauma at work, and opined the hip impingement and labral tear were probably not work-related. He left open the possibility that the conditions "could have been" exacerbated by climbing in and out the bus and prolonged sitting.

8. On February 9, 2018, Dr. Faulkner recommended hip surgery. He reiterated that "her hip impingement is a pre-existing condition."

9. Employer stopped accommodating Claimant's restrictions and ended her salary continuation on February 21, 2018. On March 6, 2018, Respondent filed a GAL admitting for TTD and adjusting Claimant's AWW to \$480.01. A TTD check covering February 21 through March 6, 2018 was issued and mailed to Claimant the next day.

10. Dr. Faulkner's office faxed a surgical preauthorization request to Respondent on February 21, 2018. The evidentiary record contains some, but not all documents attached to the preauthorization request.¹ None of the attached documents stated Dr. Faulkner believed the diagnosis or surgery was work-related.

11. On February 27, 2018, the claims adjuster, Jeff Barnard, faxed Dr. Faulkner a denial of the surgery request. The reason for the denial was, "The request for surgery is not approved at this time. IME will be scheduled. Dr. Faulkner previously indicated on 11/27/17 that she did not have any trauma at work, so it is my opinion that her hip impingement and labral tear are less likely than not caused by a work-related injury."

12. Mr. Barnard scheduled an IME with Dr. Timothy O'Brien for April 11, 2018. The ALJ infers April 11 was the first available date, and no persuasive evidence to the contrary was submitted. Claimant testified Mr. Barnard notified her of the IME

¹ Based on fax header information at the top of the pages, the ALJ finds that Respondent's Exhibits pages 271.1, 272.2, 272.3, 271.4, and 272 were included with the preauthorization request.

appointment on March 2, 2018. He also sent her an email regarding the appointment on March 6, 2018.

13. On April 17, 2018, Dr. O'Brien issued a report wherein he opined Claimant's labral tear was not work-related. He opined Claimant suffered no work-related injury on October 20, 2017, and the onset of symptoms was due to her personal health condition. He opined she was not a surgical candidate regardless of causation. Dr. O'Brien's assistant emailed a copy of the IME report to the claims adjuster on April 24, 2018.

14. On May 5, 2018, Claimant emailed Mr. Bernard asking to be paid "for the waiting week" because she "was charged sick time that has not been returned to my account." She listed the missed dates as October 23, 30, 31, November 1-3, 2017, and "a couple others." The information Claimant provided would not reasonably allow the adjuster to calculate accurately any additional temporary disability owed to Claimant. There is no persuasive evidence she missed time because of the injury on October 23, nor does the corresponding paystub show she was charged any sick time. She missed an unspecified portion of her shift on October 30 because she left work early to go to the ER. She was not charged sick time on November 3 because her school was closed.

15. Mr. Bernard responded to Claimant's email on May 7, 2018, stating, "Regarding your issue with sick/time off, you would need to discuss that with [Employer] as you were on salary continuation during that time thus benefits were not paid by CorVel. Let me know if you have any additional questions." There is no persuasive evidence Claimant followed up with sufficient documentation or other information regarding this issue.

16. Mr. Barnard sent Dr. Faulkner a copy of Dr. O'Brien's report on May 7, 2018 with a cover letter reiterating the surgery was denied.

17. Dr. Faulkner issued a report on May 31, 2018 agreeing with Dr. O'Brien's conclusion that Claimant suffered no work-related injury and needed no further treatment in relation to her claim. Dr. Faulkner opined her work "could have exacerbated a pre-existing condition" but did not say it was probable.

18. On July 10, 2018, Claimant requested a copy of her claim file under § 8-43-203. Mr. Barnard received the request on July 12, 2018. Claimant acknowledged she subsequently received a copy of the claim file. No persuasive evidence was presented to establish the date Respondent sent the file but the earliest date it could have been sent was July 12, 2018.

19. Also on July 10, 2018, Claimant filed an Application for Hearing, endorsing numerous issues including medical benefits, average weekly wage, temporary disability, and penalties.

20. On July 13, 2018, Dr. Beatty reviewed Dr. O'Brien's IME report and agreed Claimant suffered no work-related injury.

21. Dr. Beatty placed Claimant at MMI with no impairment on August 10, 2018. He opined her condition was not work-related and no further care was appropriate on an industrial basis.

22. On August 13, 2018, Respondent filed a Final Admission of Liability (FAL) based on Dr. Beatty's report, admitting for 0% impairment and denying medical treatment after MMI.

23. Claimant did not object to the FAL.

24. Respondent proved Claimant's claim is closed by the FAL, except the issues endorsed in the July 10, 2018 AFH.

25. The uncontested FAL closed Claimant's claim for additional medical benefits. Her request for surgery is barred because she did not initiate the DIME process within 30 days of the FAL. Dr. Beatty's determination of MMI is binding on the parties and the Division.

26. Respondent calculated the admitted average weekly wage (AWW) of \$480.01 by averaging the year of wages immediately preceding the date of injury. Claimant failed to prove a basis to change the admitted AWW.

27. Claimant proved she is entitled to additional temporary disability benefits in November 2017 for the days Employer tapped her sick leave.

28. Claimant proved her wages were less than the TTD rate in January 2018, entitling her to TPD.

29. The payment log shows Respondent paid TTD every two weeks, except in June 2018. The payments due on June 12 and June 26 were not paid until July 10, 2018 (28 days late and 14 days late, respectively). No explanation was offered for the late payments.

30. Claimant proved Respondent should be penalized for failing to send her a copy of the Employer's First Report of Injury when it was filed with the Division.

31. Claimant proved Respondent should be penalized for late payment of TTD in June 2018.

32. Claimant failed to prove any other basis for penalties against Respondent.

CONCLUSIONS OF LAW

A. Is all or part of this claim closed by the August 13, 2018 FAL?

An FAL provides a mechanism for the respondents to administratively close a claim. When an FAL is filed, the claimant must take certain actions within thirty days or the claim will "automatically close as to issues admitted in the final admission." A claimant

can request a hearing on ripe and disputed issues or initiate the DIME process by filing a “notice and proposal.” See §§ 8-43-203(2)(b)(II)(A); 8-42-107.2(2)(b). Once a claim has been closed by a FAL, the issues are not subject to further litigation unless reopened under 8-43-303. *Leeway v. Industrial Claim Appeals Office*, 170 P.3d 1254 (Colo. App. 2007).

It is undisputed Claimant did not object to the FAL. Ordinarily, that would have closed the claim. But the statute carves out an exception for issues already pending a hearing when the FAL is filed. Section 8-43-203(2)(b)(II)(A) provides:

Any issue for which a hearing or an application for hearing is pending at the time that the final admission of liability is filed shall proceed to the hearing without the need for the applicant to refile an application for hearing on the issue.

Section 203(2)(b)(II)(A) must be read in conjunction with other statutory provision limiting the ALJ’s jurisdiction at various points in a claim. Specifically, § 8-42-107.2(2)(b) requires a Division IME (DIME) as a jurisdictional prerequisite to disputing an ATP’s determination of MMI. Absent a timely DIME notice and proposal, the ATP’s determination of MMI is “binding on all parties and on the division,” even if the claimant timely requested a hearing.

The determination of MMI “inherently” requires the ATP to decide whether a particular condition is causally related to the claimant’s employment. Dr. Beatty’s August 10, 2018 declaration of MMI necessarily reflects his determination that the recommended hip surgery is not reasonably needed to treat any *work-related* condition. The ALJ has no authority to address that issue without a DIME. Claimant specifically stated at hearing no pre-MMI medical benefits are in dispute, and her sole concern is the surgery and ancillary postsurgical treatment. The ALJ concludes Claimant’s claim for medical benefits is closed by the FAL.

The other issues endorsed in Claimant’s application (average weekly wage, temporary disability, and penalties) do not require a DIME and remain subject to adjudication.

B. Average weekly wage

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee’s average weekly earnings “at the time of the injury.” The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to “fairly” calculate the employee’s AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a “fair approximation” of the claimant’s actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

As found, Claimant failed to prove a basis to change the admitted average weekly wage of \$480.01. Claimant essentially asks that her earnings be averaged over the school

year, without considering the summer when she earns considerably less. The ALJ agrees with Respondent that averaging the entire year is the most appropriate methodology, to account for periods where she otherwise would not have earned reduced wages. Once commenced, TTD benefits continue at a fixed rate until a terminating event, without regard to seasonal variations or other factors that may have otherwise caused a claimant's wages to fluctuate. In Claimant's case, Respondent paid TTD in the summer of 2018, even though Claimant would not have worked (or worked substantially less) during those months.

C. Claimant is entitled to temporary disability for periods Employer charged her sick leave

Under § 8-42-124(2)(a), any employer who continues to pay wages "in excess of the temporary total disability [rate] . . . and who has not charged the employee with any earned vacation leave, sick leave, or other similar benefits" shall be reimbursed or receive a credit for the temporary disability benefits that would otherwise be owed directly to the claimant. If the employer charges the claimant's sick leave, the right to direct payment of temporary disability benefits "shall be reinstated" for that period. Section 8-42-124(4). The practical effect of these provisions is to entitle the claimant to two-thirds of the amount covered by sick leave. *Barnes v. City and County of Denver*, W.C. No. 5-003-724-04 (August 25, 2017).

As found, Employer charged Claimant's sick leave by \$588.56 in November 2017 for time she missed because of the injury. Claimant is entitled to an additional \$392.37 in temporary disability benefits for November ($\$588.56 \times 2/3 = \392.37).

D. TPD owed in January 2018

Claimant's wage records show two other pay periods during which Employer paid less than the temporary total disability rate. Claimant was paid \$530.84 from December 30, 2017 through January 12, 2018. That equates to \$37.92 per day, as compared to her daily TTD rate of \$45.72. Claimant is entitled to \$286.07 in TPD benefits for that period (daily AWW = $\$68.57 - \$37.92 = \$30.65$ wage loss $\times 14$ days $\times 2/3 = \$286.07$).

Employer also paid less than the TTD rate from January 13, 2018 through January 31, 2018. Claimant was paid \$744 during that period, which equates to \$39.16 per day ($\$744 \div 19$ days = $\$39.16$). This results in TPD of \$372.53 ($\$68.57 - \$39.16 = \29.41 wage loss $\times 19$ days $\times 2/3 = \$372.53$).

E. Claimant proved two grounds for the imposition of penalties

Section 8-43-304(1) provides that an 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, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director," shall be punished by penalties of up to \$1,000 per day.

The assessment of penalties is governed by an objective standard of negligence and involves a two-step analysis. First, the ALJ must determine whether the insurer or employer violated the Act, a rule, or an order. Second, the ALJ must determine whether the violation was objectively reasonable. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

Whether the insurer's conduct was objectively reasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005). A party establishes a *prima facie* showing of unreasonable conduct by proving that an insurer violated the statute or a rule of procedure. If the claimant makes a *prima facie* showing, the burden shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office*, *supra*; *Human Resource Co. v. Industrial Claim Appeals Office*, 984 P.2d 1194 (Colo. App. 1999).

An insurer acts unreasonably if it fails to take action a reasonable insurer would take to comply with a statute, rule or order. *Pioneers Hospital*, *supra*. To be objectively reasonable, an insurer's actions (or inaction) must be predicated on "a rational argument based in law or fact." *Diversified Veterans Corporate Center v. Hewuse*, *supra*. Since the analysis involves an objective standard of reasonableness, the claimant need not show the insurer knew or should have known its actions were unreasonable. *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996).

Section 8-43-304(4) provides that any application for hearing on penalties "shall state with specificity the grounds on which the penalty is being asserted." The requirement to describe the basis for the penalty claim "with specificity" is an exception to the general notice pleading rules that otherwise apply to workers' compensation hearings. The specificity requirement serves two functions. First, it notifies the alleged violator of the basis of the claim so it may cure the violation within the statutory timeframe. Second, it ensures the alleged violator receives notice of the legal and factual bases for the penalty claim to protect its due process rights to present evidence, confront adverse evidence, and present argument to support its position. *Jakel v. Northern Colorado Paper, Inc.*, W.C. No. 4-524-991 (October 6, 2003). The party seeking a penalty must plead the appropriate statutory section or rule justifying the penalty claim. *Carson v. Academy School District 20*, W.C. No. 4-439-660 (April 28, 2003). A penalty claim may be dismissed if it does not state the grounds for the alleged penalty with sufficient specificity. *E.g.*, *Maragara v. Xerox Business Services*, W.C. No. 4-946-815-02 (January 27, 2015); *Young v. Bobby Brown Bail Bonds, Inc.*, W.C. No. 4-632-376 (April 7, 2010); *Marcelli v. Echostar Dish Network*, W.C. No. 4-776-535 (March 2, 2010).

As found, Claimant proved two violations giving rise to penalties. First, Respondent failed to mail Claimant a copy of the Employer's First Report (WC1) when it was filed with the Division on November 3, 2017. WCRP 1-4(A) provides,

Whenever a document is filed with the Division, a copy of the document shall be mailed to each party to the claim and attorney(s) of record, if any.

The term “shall” indicates a mandatory requirement. Although the WC1 was filed electronically with the Division, ALJ knows of no authority to excuse the Respondent from simultaneously sending a copy to Claimant per Rule 1-4(A). Respondent offered no explanation why it did not send her a copy of the WC1, and the ALJ concludes the failure to comply with Rule 1-4(A) was objectively unreasonable.

Under § 8-43-304(4), if the violator cures the violation within 20 days after a hearing is requested on penalties, no penalty may be assessed unless the proponent proves “by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation.” Although Respondent subsequently “cured” the violation in July 2018 by sending Claimant a copy of the WC1 with the claim file, that does not change the outcome here.

The ALJ finds the Panel decisions in *Kelly v. Kaiser-Hill Company LLC*, W.C. No. 4-332-063 (August 11, 2000) and *Varga v. A1 Sewer Master Mountain Water*, W.C. No. 4-508-548 (July 1, 2004) instructive and persuasive on this point. In *Kelly*, the ICAO held a penalty was mandatory when the respondents failed to exchange a medical report within 15 days as required by the WCRP. The respondents argued they timely “cured” the violation and no penalty could be imposed because the claimant did not present clear and convincing evidence they knew or should have known of the violation. The Panel disagreed, citing the rule that parties are presumed to know the law,

[T]he claimant did not introduce any specific evidence regarding the respondents’ “knowledge” of the procedural rule. However, parties to a workers’ compensation claim are presumed to know the applicable law. This presumption aids a party in meeting its burden of proof. Furthermore, C.R.E. 301 provides that the party against whom the presumption is directed must come forward with evidence to rebut the presumption.

Although the respondent’s “argued” that their actions were predicated on a belief [the report] did not fall within the requirements of Rule XI(B)(2), they did not present any testimony in support of that position. In the absence of specific evidence to the contrary, the ALJ was required to presume that the respondents knew of the requirements of Rule XI(B)(2). Because the respondents knew the rule and the ALJ was not persuaded the respondents had any rational argument their actions did not violate the rule, the record compels the conclusion of the respondents knew or should have known of their violation. (Internal citations omitted).

The Panel applied the same reasoning in *Varga v. A1 Sewer Master Mountain Water*, *supra*, holding, “Neither the claimant nor the respondents presented any evidence concerning the reasons for the respondents’ violation of [the Act]. Because the respondents . . . did not present any factual or legal argument that their actions did not

violate the rule, the record compels the conclusion that the respondents knew or should have known that their actions violated [the Act].”

In the absence of any rebuttal evidence from Respondent, the ALJ finds it immaterial whether the standard is a mere preponderance or “clear and convincing.”

The penalty period commenced on November 3, 2017 when Respondent filed the WC1 with the Division, but determining the end date of the violation is a challenge. Claimant admitted she received a copy of the WC1 when she received the claim file but presented no evidence to establish the exact date Respondent sent it, or when she received it. Unless the violation is ongoing at the time of the hearing, it is the claimant’s burden to prove the specific period for any penalty. The ALJ finds it appropriate to end the penalty on the day Respondent received Claimant’s request for the claim file, which is the earliest possible date it could have sent the file. Claimant proved by a preponderance of the evidence Respondent unreasonably violated Rule 1-4(A) at least until July 12, 2018. She failed to prove Respondent was in violation on any day after July 12, 2018.

Additionally, the ALJ concludes Respondent unreasonably delayed Claimant’s TTD payments that were due on June 12 and June 26, 2018. Although Claimant characterizes the late payments as an improper “termination” of TTD for one month, it is more appropriately considered a violation of WCRP 5-6(B), which requires that TTD benefits be paid “at least once every two weeks.” See also § 8-42-105(2)(a). Respondent presented no evidence to explain the late payments. Although Respondent subsequently “cured” the violation by paying the past-due TTD on July 10, 2018, the adjuster’s knowledge of the rule is conclusively established by the unrebutted presumption.

F. The amount of the penalty

Although the ALJ lacks discretion to deny a penalty when the statutory criteria are met, the ALJ has wide discretion in determining the amount of any penalty. *Crowell v. Industrial Claim Appeals Office*, 298 P.3d 1014 (Colo. App. 2012). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The penalty should be sufficient to discourage future violations, but should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Industrial Claim Appeals Office*, ___ P.3d ___ (Colo. App. 2017), *cert. granted*, 17SC200, September 11, 2017. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005); *Pueblo School Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). The ALJ should consider factors such as the reprehensibility of the conduct, the harm to the non-violating party and the difference between the amount of the penalty and civil damages that could be imposed in comparable cases. *Associated Business Products, supra*. Actual prejudice or harm to the claimant is relevant a relevant factor but is not dispositive, particularly where the violation is not explained by the evidence. *Strombitski v. Man Made Pizza, Inc.*, W.C. No. 4-403-661 (July 25, 2005).

The ALJ considers late payment of TTD a relatively serious offense given the importance of wage replacement benefits to most injured workers. A temporarily disabled claimant's finances are already compromised because they are subsisting on two-thirds of their preinjury income. Irregular payments can lead to serious financial harm by interfering with the claimant's ability to make timely payments to creditors. The ALJ also notes Respondent did not explain the delay or offer evidence of mitigating factors.

The ALJ concludes Respondent should be subject to a penalty of \$200 per day for the 28-days Claimant was without TTD. This is well within the range of penalties assessed by other ALJs for similar cases, including *Jones v. Duckwall*, W.C. No. 4-430-994 (March 28, 2003), where ALJ Friend assessed \$100 per day² for late payment of TTD. The ALJ concludes this amount strikes a reasonable balance between the goals of punishment and deterrence while avoiding excessive or disproportionate penalties.

The ALJ considers the Respondent's failure to mail Claimant a copy of the WC1 a far less serious matter. Claimant did not persuade the ALJ she suffered any appreciable harm because of Respondent's technical violation of the rule. While it is important to maintain the integrity of the system by enforcing the rules of procedure, the ALJ is not persuaded to give Claimant a windfall by imposing more than a *de minimis* penalty. The ALJ concludes Respondent should be penalized \$3 per day for the 252-day delay in sending her a copy of the WC1.

The ALJ further concludes the penalties awarded herein shall be apportioned 75% to Claimant and 25% to the Colorado Uninsured Employer Fund created in § 8-67-105.

G. The remainder of Claimant's penalty claims are without merit

The ALJ has carefully considered the remainder of Claimant's penalty claims and finds them all without merit.

a. Violation of WCRP 3-5

WCRP 3-5(A) and (B) reference an employer's obligation to post notices at the work site. Claimant presented no persuasive evidence regarding notices posted (or not posted) at her workplace. Claimant failed to prove Respondent violated WCRP 3-5.

b. Violation of § 10-2-127

Claimant cited numerous instances where she believes Respondent violated "section 10-2-127." This argument fails for several reasons. First, the cited statutory section is not part of the Colorado Revised Statutes, and a party cannot violate a

² The maximum penalty was raised to \$1,000 per day effective August 11, 2010. This reflects the General Assembly's intent "to increase the level of punishment for those who violate the Act and thereby necessitate litigation." *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323, 326 (Colo. App. 2005). Thus, it is logical to conclude a violation that warranted a \$100 daily penalty in 2003 would now warrant \$200 per day.

nonexistent statute. Second, even if Claimant meant to refer more broadly to Title 10, penalties are only available for violations of the Act, the WCRP, the OACRP, or orders of the Director or an ALJ. Alleged violations of Title 10 are not subject to penalties under § 8-43-304.

c. Violation of § 8-42-106

Claimant alleges she missed 12 shifts, but she does not explain how Respondent allegedly violated this section. If she asserts Respondent should have admitted for TPD benefits, the Court of Appeals has held that failing to admit liability for the correct amount of temporary disability benefits does not support the imposition of penalties. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). And there is no requirement that modified duty be offered in writing.

d. Violation of WCRP 5-6 (other than the June 2018 late payments)

Under WCRP 5-6(B), the initial payment of TTD must be made so the claimant receives it no later than five calendar days after the date of the GAL. Subsequent payments are due every two weeks thereafter. This rule is not directly applicable to payments under Respondent's first GAL because the benefits were paid directly to Employer under § 8-42-124(3).³ Regardless, Respondent filed the GAL on November 20, 2017 and issued the first TTD check that same day to cover November 1, 2017 through November 21, 2017. To the extent Claimant was owed any additional temporary disability benefits because of her sick leave, Rule 5-6 does not establish a timeframe for such payment.

e. Violation of WCRP 5-2

Claimant alleges Respondent failed to admit or deny liability within 20 days after the Employer's First Report of injury was filed with the Division as required by WCRP 5-2(C). The Employer's First Report was filed on November 2, 2017 and the GAL was timely filed on November 20, 2017. Respondent did not violate WCRP 5-2.

f. Violation of WCRP 5-3

Claimant alleges she was notified of Respondent's position regarding liability before the Division in violation of WCRP 5-3. But the certificate of service on the GAL indicates it was mailed to Claimant the same day it was sent the Division.

g. Violation of 5-13

Claimant alleges Respondent did not advise the Division of a change in the claims adjuster or a change in the new adjuster's phone number. But WCRP 5-13 only requires Respondent to provide such notice if there is a change of carrier or TPA, not when there

³ The late payment of TTD in June 2018 has already been addressed in Section E.

is a change of adjuster. Respondent did not change the carrier or TPA, and the claim has remained with CorVel throughout.

h. Violation of § 8-42-102

Claimant alleges the claims adjuster “intentionally” miscalculated her AWW, and “used” (?) November 1, 2017 to calculate AWW instead of October 31, 2017. There is no persuasive evidence Respondent intentionally miscalculated AWW, and in fact, the ALJ agrees with Respondent’s methodology. In any event, penalties are not available for failing to admit for a specific AWW. *Reves v. McCormick Excavating & Paving, LLC, W.C. No. 4-835-166-04* (July 19, 2012) (“the statute does not prescribe a precise method for calculating the average weekly wage, and an insurer does not violate the Act when it fails to admit for a specific wage.”).

i. Violation § 8-42-124(2) and WCRP 1-7 (was 1-8 in the 2017 version)

Claimant alleges she was “charged and never reimbursed for sick leave that was used due to the work-related injury even though employer received credit or reimbursement.” The Act does not prohibit an employer from charging an injured worker’s sick leave but merely entitles the claimant to temporary disability benefits for periods where the employer has done so.

j. Violation of WCRP 5-4

Claimant alleges Respondent has not filed any medical records with the Division and did not exchange medical records within 15 days of receipt. The ALJ rejects this penalty claim for several reasons. First, Claimant offered no admissible evidence to establish what records were or were not sent to the Division. Regardless, there is no persuasive evidence any records had to be filed with the Division in this case. Nor did Claimant present persuasive evidence that Respondent failed to timely exchange medical records. The claim notes show medical records were routinely sent to Claimant every 2 to 4 weeks. Claimant offered no persuasive evidence to identify any specific medical records not exchanged within 15 days of receipt.

k. Violation of § 8-43-203

Claimant alleges the penalty for violation of § 8-43-203 for Respondent’s failure to note the correct date of injury on the GAL, failure to specify the disability for which compensation will be paid, and failure to timely submit the initial payment of TTD. None of these arguments has merit. The October 20, 2017 date of injury was provided to Respondent *by Claimant*. Both GALs stated benefits would be paid for *temporary total* disability (as opposed to temporary partial, permanent partial, or permanent total disability). The initial TTD payment was issued the same day as the November 30 GAL. The second GAL was filed on March 6, 2018, and the payment log shows the corresponding TTD payment was issued the next day.

I. Violation of §§ 8-43-317 and 8-43-404

Claimant alleges respondent violated the Act by not sending her copies of correspondence sent to Respondent's IME, Dr. O'Brien. Neither statute cited by Claimant, or any other section of the Act, requires Respondent to give Claimant copies of communications with their IME unless specifically requested.

m. Violations of WCRP 16-3, 16-9, 2C-10, and 16-11

WCRP 60-3, 16-9, 16-10, and 16-11 deal with the Medical Treatment Guidelines, the notification process, prior authorization, and contesting prior authorization. Claimant requests a penalty for Respondent's alleged failure to follow the MTGs and for unreasonably an untimely denying the hip surgery.

Claimant's MTG allegation is vague and nonspecific and cites no specific provision of the MTGs that Respondent allegedly violated.

Claimant failed to prove Respondent violated Rule 16. Claimant's primary argument is that Respondent did not timely request a peer review or schedule an IME after receiving the request. But the requirement to obtain a peer review or an IME only applies if the respondents contest a preauthorization request on *medical* grounds, i.e. whether the requested treatment is reasonably necessary. No medical opinion is required when treatment is denied based on relatedness **unless** an ATP has explained in writing they believe the treatment is related to the admitted claim. See WCRP 16-11(A); 16-12(B)(1). Dr. Faulkner did not indicate the surgery was injury-related and had previously opined it was probably *not* work-related. Thus, Respondent was only obliged to deny the request in writing within seven business days, as set forth in Rule 16-11(A). The request was faxed to the adjuster on February 21, 2018,⁴ and the written denial dated February 28 was timely.

To the extent Claimant argues Respondent should be penalized for violating WCRP 16-11(F) by "unreasonably" denying the surgery, the ALJ disagrees. Dr. Beatty had expressed skepticism as to whether Claimant's hip problems were work-related and Dr. Faulkner had opined the pathology was probably not related. Based on the information already in their possession, it would have been reasonable for Respondent to simply deny the surgery and force Claimant to take the matter to hearing. Instead, Respondent obtained an IME with an orthopedic surgeon at its own expense to evaluate the issue in more detail. Dr. O'Brien determined the surgery was not work-related and Respondent reaffirmed its denial. Ultimately, Dr. Faulkner and Dr. Beatty agreed with Dr. O'Brien's

⁴ Claimant points to an email from Dr. Faulkner's medical assistant stating the request was faxed to the adjuster on February 14, 2018. But that email does not indicate what materials were sent, and there is no persuasive evidence that whatever Dr. Faulkner's office sent on February 14 constituted a "completed request" as required by WCRP 16-10(F). See *McDaniel v. Vail Associates, Inc.*, W.C. No. 3-111-363 (July 18, 2011). It is the claimant's burden to prove the existence of a completed request. *Murray v. Tristate Generation and Transmission Association*, W.C. No. 4-997-086-02 (December 22, 2017).

causation assessment. Thus, the ALJ finds no merit to Claimant's suggestion Respondent acted unreasonably in denying the surgery.

n. Violation of § 8-43-401.5

Claimant alleges a violation of § 8-43-401.5, contending Respondent's IME opinions were improperly obtained in exchange for payment. As an initial matter, Application of § 8-43-401.5 is limited to insurers, self-insured employers, and treating providers, not IMEs. Moreover, under § 8-43-404, and WCRP 18-6(G)(4), Respondent is allowed to pay for an IME. See §8-43-401.5(3)(b).

o. Suspension/Revocation of License

Claimant is asking the Director to request the Commissioner of insurance to suspend or revoke the Respondent's license to do business in Colorado for multiple alleged "intentional, knowing, or willful" violations of the above statutes and rules. Such a request is beyond the ALJ's purview. Regardless, the ALJ finds no violation that would remotely warrant such a sanction against Respondent.

ORDER

It is therefore ordered that:

1. Claimant's request to amend the admitted AWW of \$480.01 is denied and dismissed.
2. Respondent shall pay Claimant \$392.37 in temporary disability benefits for sick leave used in November 2017.
3. Respondent shall pay Claimant \$286.07 in TPD benefits for December 30, 2017 through January 12, 2018.
4. Respondent shall pay Claimant \$372.53 in TPD benefits for January 13, 2018 through January 31, 2018.
5. Respondent shall pay Claimant statutory interest in the amount of 8% per annum on all benefits not paid when due.
6. Respondent shall pay penalties in the aggregate amount of \$5,600 for late payment of TTD benefits, apportioned 75% to Claimant and 25% to the Colorado Uninsured Employer Fund.
7. Respondent shall pay penalties in the aggregate amount of \$756 for the 252-day delay in mailing her a copy of the WC1 form, apportioned 75% to Claimant and 25% to the Colorado Uninsured Employer Fund.
8. Claimant's request for additional medical treatment, including the hip surgery proposed by Dr. Faulkner, is denied and dismissed.

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

DATED: February 5, 2019

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he is entitled to a change of physician from Dr. Michael Volz to DaVita Medical Group due to Respondents' failure to authorize medical treatment for non-medical reasons.

II. Whether Claimant has established that Respondents are subject to penalties pursuant to § 8-43-304(1) C.R.S. for failure to comply with ALJ Spencer's March 9, 2017 Order, specifically for failing to provide all reasonable, necessary, and related care with Dr. Volz, including diagnostic testing and for failing to pay previously submitted medical billing on a "forthwith" basis to mitigate damage to Claimant's credit.

III. Whether Claimant has established by a preponderance of the evidence that Respondents are subject to penalties pursuant to § 8-43-304(1) for dictating medical care in violation of § 8-43-503(3).

IV. Whether Respondents "cured" Claimant's penalty allegations.

FINDINGS OF FACT

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

1. The claim has been the subject of a prior hearing held before ALJ Patrick Spencer on February 1, 2017. The issues presented at that hearing included Claimant's request for additional medical treatment and whether Respondents were liable for an April 19, 2016 bill from Quest Diagnostics for lab work on the grounds that the aforementioned lab work was reasonable, necessary, and causally related to Claimant's October 25, 2014 industrial injury.

2. Following the February 1, 2017 hearing, ALJ Spencer ordered Respondents to authorize and pay for omalizumab (Xolair) therapy to treat Claimant's ongoing urticarial and immunological symptoms caused by his October 25, 2014 work-related injury. ALJ Spencer also ordered Respondents to pay for additional diagnostic testing as suggested by Dr. Volz, if Claimant wanted to such testing. Finally, ALJ Spencer ordered Respondents to pay an outstanding \$539.73 bill from Quest Diagnostics for lab work performed April 19, 2016. Regarding this bill, ALJ Spencer "encouraged" Respondents to pay the bill "forthwith to mitigate any further damage to Claimant's credit". The above referenced order was issued March 9, 2017.

3. The ALJ adopts, as articulated in the March 9, 2017 Order, ALJ Spencer's Findings of Fact.

4. After the hearing held before ALJ Spencer, the parties agreed to designate Dr. Volz as Claimant's authorized treating provider (ATP).¹ The change to Dr. Volz as Claimant's ATP was necessitated by the prior ATP assigned to the case leaving his medical practice.²

5. Based upon the evidence presented, it is unclear to the ALJ when the change of physician to Dr. Volz took place. The record evidence supports that Leigha Nikolas, paralegal to Respondents' counsel, responded to a request from "Sar" (Sareang Seang) of Dr. Volz' office on December 18, 2017 indicating that she (Ms. Nikolas) would gather the medical records and send them to Dr. Volz' office.

6. Claimant was evaluated in Dr. Volz' office on January 4, 2018. At 1:54 p.m. "Sar" emailed Ms. Nikolas indicating a PFT test needed to be done and she asked how she was to get approval for said testing. Ms. Nikolas responded, stating, "Everything will go through the adjuster, contact info below" and the contact information for Susan Bond with Sedgwick CMS was provided.

7. Ms. Seang emailed Ms. Nikolas again on January 8, 2018. Ms. Seang stated that she had attempted to contact Ms. Bond twice already with no response. The email message states:

Everything is on hold as for right now until we get approval for testing. She were (sic) suppose (sic) to send me approval for the PFT that was done on the same day, still nothing. And Dr. Volz order (sic) blood work so we are not moving forward until approval [is] received. Just an FYI since the appointment was scheduled by you. Please let me know if you hear anything from Susan. Thanks.

Ms. Nikolas responded indicating she would pass the information along to Respondents' counsel.

8. The ALJ finds from the above email message and the medical records submitted into evidence that pulmonary function testing was completed during Claimant's January 4, 2018 appointment with Dr. Volz. The ALJ finds further that Dr. Volz' office was to receive approval for this testing the same day it was completed but the approval was not forthcoming. Moreover, the ALJ finds that after two additional failed attempts to obtain approval to "move forward" with additional diagnostic testing, Dr. Volz' office elected to put "everything on hold" until approval was secured. Ms. Nikolas responded by noting as follows: "I will pass along to the attorney as well and see if we can help get this moving forward".

¹ Dr. Volz had previously performed an Independent Medical Examination (IME) of Claimant on November 17, 2016.

² Dr. Matthew Bowdish was acting ATP until he left his medical practice at which time the parties agreed that since Dr. Volz was familiar with Claimant's medical situation and Dr. Bowdish had left his practice, it was appropriate to allow Dr. Volz to assume Claimant's care.

9. On April 10, 2018, Claimant filed an Application for Hearing endorsing “[p]enalties from March 29, 2017 through the present and ongoing pursuant to §8-43-304(1) for failure to comply with ALJ Spencer’s March 9, 2017 Order that Respondents shall pay for all reasonable and necessary medical treatment to cure and relieve the effects of Claimant’s injury, specifically the additional diagnostic testing suggested by Dr. Volz”. Claimant sought a \$1000.00/day penalty for each day that Respondents unreasonably delayed Claimant’s treatment. Claimant also sought a \$1000.00/day penalty pursuant to §8-43-304(1) for “dictating medical care in violation of §8-43-503(3) by repeatedly failing to respond to an authorized provider’s requests for treatment. Finally, Claimant sought penalties in the amount of \$1000.00/day for Respondent’s failure to pay for treatment already performed. Claimant requested the imposition of penalties at \$1000.00/day pursuant to §8-43-304(1) beginning January 5, 2018 and ongoing for this violation. Claimant did not include any claim for a penalty for failing to pay the Quest Diagnostic bill “forthwith” as ordered by ALJ Spencer in the April 10, 2018 Application for Hearing. Claimant also failed to endorse “Change of Physician” or “Right of Selection” as an issue for hearing in the April 10, 2018 Application for Hearing.

10. Claimant notified Respondents’ counsel of his decision to file an Application for Hearing endorsing penalties. Notice was provided via email dated April 10, 2018 at 11:44 a.m. At 11:53 a.m. on April 10, 2018, Respondents counsel notified Claimant’s counsel via email response that a new adjuster had been assigned to the claim as of the previous Friday. The ALJ takes judicial notice that the Friday before Tuesday, April 10, 2018 was April 6, 2018. In his responsive email Respondents’ counsel identified the new adjuster as Christina Smith with Sedgwick CMS, noting further that Ms. Smith and her supervisor had authorized treatment but not the lab requests of Dr. Volz. He also advised Claimant’s counsel that he spoke with Sar in Dr. Volz’ office to provide her Ms. Smith’s authorization for treatment and telephone number to “confirm anything necessary”.

11. The evidentiary record contains a note from Ms. Seang, dated April 10, 2018 reflecting that a new adjuster had been assigned to the claim. According to this note, the claim was assigned to “Christina Smith” who could be reached at 214-922-0664. The ALJ finds this information was provided by Respondents’ counsel to Dr. Volz’ office per the April 10, 2018, email referenced above.

12. On April 12, 2018, Respondent’s counsel sent an email to Claimant’s counsel asking if he was “still having lab scheduling issues”.

13. On May 1, 2018, Ms. Smith verbally authorized the use of Xolair to “rule out causation issues” as evidenced by an email message generated by Dr. Volz’ office. On May 3, 2018, Ms. Smith, via email, authorized the following treatment: OV (office visit), Allergy skin testing, spirometry, and “any labs that needs (sic) to be ordered”. The approval to proceed with the above was forwarded to Ms. Seang. The ALJ finds that this email effectively transmitted Insurer’s authorization for the additional testing requested by Dr. Volz on January 4, 2018.

14. It was not documented that Dr. Volz's office attempted to contact Claimant for a follow-up until Ms. Seang's note dated May 21, 2018.

15. Claimant testified that he called Dr. Volz's office multiple times after January 4, 2018 about a follow-up appointment. Claimant never returned to Dr. Volz for additional testing/treatment, as it was his understanding that the testing/treatment recommended by Dr. Volz had not been approved by Respondents. The ALJ finds this consistent with the January 8, 2018 email message to Ms. Nikolas from Sar at Dr. Volz' office notifying her that everything had been placed on hold pending authorization.

16. Lacking authorization to continue to treat with Dr. Volz, Claimant presented to DaVita Medical Group (DaVita), specifically Dr. Christopher Webber on April 16, 2018 for "chronic idiopathic urticaria and exertional shortness of breath". Claimant testified that he sought treatment from Dr. Webber because Dr. Volz would not see him and he needed to see a doctor because he had been breaking out in hives nearly every day for the past year and was having a lot of difficulty breathing. Claimant specifically testified that he felt he was in "dire straits" and needed treatment for his condition despite Respondents' lack of attention to this claim. Claimant testified that he began receiving the Xolair treatment with Dr. Webber and that by his second round of treatment, he was no longer breaking out in hives and his breathing issues had subsided slightly. It was Claimant's understanding that he was supposed to have up to six Xolair shots to continue treatment for his condition.

17. The deposition of the new adjuster, Ms. Christina Smith, was taken on October 31, 2018, forty-three days after the hearing. Ms. Smith testified that she took over Claimant's claim from Susan Bond around the end of March, beginning of April, 2018. This was due to Ms. Bond taking medical leave. (Depo. p. 5:2-17). On cross-examination, Ms. Smith testified that she had absolutely no knowledge of whether anybody with the Insurer was covering for Ms. Bond's claims while she was out on medical leave, but the last notes in the file were from Ms. Bond. (Depo. pp. 6:22 – 7:9).

18. Ms. Smith testified that Respondents' counsel alerted her in April of 2018 regarding the testing requests from Dr. Volz's office. She was then asked if she authorized the treatment, and if so, when. Ms. Smith testified, "Yes, I did. I did it verbally on May 1st, and then I putting [sic] it in writing on – on May the 5th, 2018. (Depo. pp. 5:18 – 6:5). On re-direct, Respondent's counsel asked, "And just to be clear, you had advised them prior to May 1st that the treatment was authorized; is that correct?" To which Ms. Smith stated, "That's correct." (Depo. pp. 7:25 – 8-3). Ms. Smith's testimony suggesting that she advised Dr. Volz' office that treatment was authorized before May 1, 2018 is inconsistent with the more persuasive evidence that she authorized Xolair treatment on May 1, 2018 and additional treatment, including testing on May 3, 2018. The ALJ finds Ms. Smith's testimony that she authorized treatment prior to May 1, 2018 unsupported by the record. The ALJ finds this testimony unreliable and unpersuasive.

19. Claimant's Exhibit 7 reveals that Respondents did not pay the Quest Diagnostics bill until August 30, 2017.

CONCLUSIONS OF LAW

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

I. Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

II. Claimant's Right to Select a Physician to Attend to his Ongoing Medical Symptoms

C. Authorization refers to a physician's legal status to treat an injured worker's industrially related injury(ies) at the respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo.App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo.App. 1997). Under §8-43-404(5)(a)(I)(A), C.R.S., the employer has the right in the first instance to designate the authorized provider to treat the claimant's compensable condition(s). The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo.App. 2005). Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo.App. 1999); *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973).

D. Section 8-43-404(10)(a) and (b) provides the mechanism by which a claimant may secure a change of physician in the event that an authorized physician refuses to treat an injured worker or discharges said injured employee for non-medical

reasons. In determining whether an injured employee is entitled to select his/her treating physician under the circumstances presented, § 8-43-404(10)(a) provides that “[t]he director or any administrative law judge of the office of administrative courts has jurisdiction to resolve disputes regarding whether a refusal to provide medical treatment . . . was for medical or nonmedical reasons”. Although the “change of physician/right of selection” issue presented at hearing was not specifically endorsed in this case, the ALJ concludes that the issue was tried by consent as Respondents voiced no objection to hearing the same at the outset of the hearing, elicited testimony from Claimant regarding his treatment with DaVita and addressed the issue directly in his post hearing position statement. Accordingly, the ALJ concludes that he has jurisdiction to determine whether Dr. Volz’ decision to not schedule Claimant for a follow-up medical appointment was secondary to non-medical reasons. Here, the evidence presented supports a conclusion that Dr. Volz’ office placed “everything”, i.e. treatment/testing on hold due until “approval” was received from the adjuster. The approval was not forthcoming until May 3, 2018 when Ms. Smith emailed Dr. Volz’ the requested authorization for additional treatment and testing. Based upon the evidence presented, the ALJ is convinced that Dr. Volz’ elected not to treat Claimant because he was not given authority to do so. The ALJ concludes that this is a nonmedical reason.

E. Because he was denied treatment/testing for nonmedical reasons and Respondents did not designate a new doctor to attend to his condition after Dr. Volz put treatment on hold, Claimant asserts that he is entitled to select a new provider to attend to his medical condition. Based upon the evidence presented, the ALJ is not convinced. In this case, the evidence fails to establish compliance with § 8-43-404(10)(b), C.R.S. which provides in relevant part:

If the insurer or self-insured employer receives written notice pursuant to paragraph (a) of this subsection (10)³, or if the insurer or self-insured employer and the authorized treating physician receive written notice by certified mail, return receipt requested, from the injured employee or the injured employee’s legal representative that an authorized physician refused to provide medical treatment to the injured employee or discharged the injured employee from medical care for nonmedical reasons when such injured employee requires medical treatment to cure or relieve the effects of the work injury, and there is no authorized physician willing to provide medical treatment, then the insurer or self-insured employer shall, within fifteen calendar days from receiving the written notice, designate a new authorized physician willing to provide medical treatment. If the insurer or self-insured employer fails to designate a new physician pursuant to this paragraph (b), then the injured employee may select the physician who attends to the injured employee.

³ Paragraph (a) provides an authorized physician refusing to treat for nonmedical reason to, within three business days from the refusal, to provide written notice of the refusal by certified mail, return receipt requested, to the injured employee explaining the reasons for the refusal to treat. Based upon the evidence presented, the ALJ finds that Dr. Volz failed to provide such notice.

F. Because Dr. Volz' office and Claimant or his legal representative failed to comply with the notice requirements of § 8-43-404(10)(a) and (b) prior to presenting to DaVita, Respondents were never afforded the opportunity to designate a new physician willing to provide medical treatment designed to cure and relief Claimant of the ongoing effects of his industrial injury. The ALJ concludes, from the evidence presented, that Claimant's decision to present to DaVita without first affording Respondents the opportunity to designate a new provider by providing notice as set forth in § 8-43-404(10)(a) and (b) is fatal to his claim that he was entitled to select DaVita as his authorized provider in this case. Consequently, the ALJ finds the services rendered there unauthorized relieving Respondents of the obligation to pay for this care. *Yeck v. Industrial Claim Appeals Office, supra.*

III. Penalties

G. Section 8-43-304(1) authorizes the imposition of penalties when an employer or insurer: (1) Violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or Panel. *Pena v. Industrial Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2005). The imposition of penalties under §8-43-304(1), *supra*, requires a two-step analysis. First, the ALJ must 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 then determine whether the insurer or 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). Objectively unreasonable conduct will result in the imposition of penalties. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo.App. 1995). 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). Section 8-43-304(4) also provides that an application for penalties "shall state with specificity the grounds on which the penalty is being asserted."

H. A purported violator can "cure" a penalty by paying the benefits or complying with the statute or order which was allegedly violated. Section 8-43-304(4) provides that any party alleged to have committed any violation categorized above shall have twenty days to cure the violation from the date of mailing of an application for hearing in which penalties are alleged. Section 8-43-304(4) also provides that if the alleged violator cures the violation within the twenty-day period, and the party seeking a penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The cure statute effectively adds an element of proof to a claim for penalties in cases where a cure is proven. In the ordinary case, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they

were in violation. All that is necessary is that the party seeking penalties prove the putative violator acted unreasonably under an objective standard. See *Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo.App.2003); *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo.App. 1996). Section 8-43-304(4) modifies this rule and adds an extra element of proof when a cure has been effected. Accordingly, when a penalty allegation has been cured the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo.App. 1997); *Ray v. New World Van Lines of Colorado W. C. No. 4-520-251* (October 12, 2004).

I. In this case, Claimant has asserted two separate penalties for a violation of ALJ Spencer's March 9, 2017 Order in addition to a penalty for Respondents asserted dictation of medical care in violation of § 8-43-503(3) C.R.S. As noted, a violation of an order occurs when a party authorized or obligated to perform does an action prohibited by the order, or fails to take an action required by the order. See *Dworkin, Chambers and Williams, P.C. v. Provo*, 81 P.3d 1053, 1058 (Colo. 2003). Respondents contend that they have cured any violations and that Claimant's penalties claims have not been pled or are vague and lack specificity as required by § 8-43-304(4). Accordingly, Respondents request dismissal of the penalty claims. As the claims for penalties are separate and based on specific conduct, they are discussed independently below.

J. First is the issue of whether Respondents are subject to penalties for failing to pay for all reasonable and necessary medical treatment to cure and relieve the effects of Claimant's injury, including additional diagnostic testing suggested by Dr. Volz in keeping with ALJ Spencer's March 9, 2017 order. Respondents' assert that this penalty is not pled with specificity and even if it was, the penalty was cured requiring Claimant to prove the penalty by clear and convincing evidence which he failed to do. Before analyzing this penalty claim, the ALJ notes that ALJ Spencer's March 9, 2017 order became final on March 29, 2017 as Respondents did not appeal it.

K. Concerning Respondents' claim that the penalty claim was not pled with specificity, the ALJ disagrees. In the Application for Hearing filed April 10, 2018, Claimant specifically noted that he was seeking penalties beginning "March 29, 2017 through the present and ongoing pursuant to § 8-43-304(1) for failure to comply with ALJ Spencer's Order that Respondents shall pay for all reasonable and necessary treatment to cure and relieve the effects of Claimant's injuries, specifically the additional diagnostic testing suggested by Dr. Volz". Claimant requested penalties at a rate of \$1000.00/day for this alleged violation. The ALJ concludes that Claimant's penalty statement is sufficient, pursuant to § 8-43-304(4), to place Respondents on notice of the basis for the penalty by noting that the alleged conduct resulting in the penalty allegation was the purported violation of ALJ Spencer's order, specifically that portion which required Respondents to pay for additional diagnostic testing, in violation of § 8-43-304(1).

L. Regarding Respondents claim that this penalty was cured within twenty (20) days from the mailing of the April 10, 2018 Application of Hearing, the undersigned also disagrees. Here, Respondents contend that they cured the penalty as early as April 10-12, 2018 and this cure was subsequently clarified between May 1 and May 3, 2018 in writing. As found, at 11:53 a.m. on April 10, 2018, after being notified of the Application for Hearing, Respondents counsel advised Claimant's counsel that a new adjuster had been assigned to the claim. In his email, Respondents' counsel identified the new adjuster as Christina Smith with Sedgwick CMS, noting further that Ms. Smith and her supervisor had authorized treatment but not the lab requests of Dr. Volz. He also advised that he spoken with Sar in Dr. Volz' office to provide her Ms. Smith's authorization for treatment and telephone number to "confirm anything necessary". On April 12, 2018, Respondent's counsel sent an email to Claimant's counsel asking if he was "still having lab scheduling issues" suggesting that authorization to proceed had not been forthcoming. Based upon the evidence presented, the ALJ is not convinced that the email exchange between Counsel for Respondents and Dr. Volz' office served to "authorize" the additional diagnostic care that had been suggested by Dr. Volz. Rather, the email merely notified both Claimant's counsel and Dr. Volz' office that there was a new adjuster assigned to the claim and that this adjuster had verbalized a willingness to authorize care but not lab/diagnostic work. Based upon the email evidence, the ALJ concludes that without receiving written authorization for diagnostic work-up, including lab work, Dr. Volz and Claimant were left wondering if the same had specifically been authorized. Ms. Smith did not actually authorize the any care or diagnostic work-up, including lab work, skin testing and spirometry until May 3, 2018 when she emailed Dr. Volz' office providing written confirmation/authorization of the same. This authorization came 23 days after mailing of the April 10, 2018 Application for Hearing endorsing penalties. Consequently, the ALJ concludes that Respondents did not effectively cure the alleged violation of ALJ Spencer's order within twenty (20) days as required by § 8-43-304(4), C.R.S. Accordingly, the ALJ concludes that Claimant is only required to prove the penalty by a preponderance of the evidence.

M. Based upon the totality of the evidence presented, the ALJ concludes that Respondents violated ALJ Spencer's order requiring the payment of all reasonable and necessary medical treatment, specifically the additional diagnostic testing as requested by Dr. Volz. The ALJ notes that counsel for both parties explained there was difficulty in finding Claimant an authorized treating physician after Dr. Bowdish left his practice. Consequently, the ALJ is declining to impose penalties for the time period before Claimant established treatment with Dr. Volz during which the request for additional diagnostic testing was made.⁴ Indeed the conduct giving rise to the penalty claim

⁴ Although not raised in his post hearing position statement, Respondent's counsel made a fleeting reference during his opening remarks at hearing that Claimant's claimed penalty for violation of ALJ Spencer's order for failing to pay for additional diagnostic testing was "time-barred" as he was seeking penalties from March 29, 2017 and the Application for Hearing was filed April 10, 2018, or more than one year after the date for which penalties per the Application for Hearing in contravention of § 8-43-304(5), C.R.S. Because the ALJ finds that Claimant only became aware of and first knew of the facts giving rise to the penalty allegation in January 2018, after Dr. Volz placed treatment on hold for lack of authorization

arose, as found above, on January 8, 2018, when Dr. Volz' office put all treatment, including diagnostic testing on hold pending authorization. Accordingly, the ALJ determines the period for the imposition of penalties extends from January 8, 2018, the date by which Claimant's care was placed on hold for lack of authorization to perform blood testing and pulmonary function tests (PFT) through May 2, 2018, as the aforementioned diagnostic testing was approved May 3, 2018. This represents a period of 114 days. Once a violation occurs, each subsequent day that the violation continues constitutes a separate violation which may be joined with the first for purposes of adjudicating the violator's total liability for penalties. *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d at 177-178. Thus, a violation occurs and is subject to penalties from the day the improper conduct occurs.

N. While the evidence presented supports that a violation of ALJ Spencer's order occurred for failure to authorize the requested additional diagnostic testing, it is necessary to analyze whether the insurer's delay in and failure to authorize this care despite being ordered to do so was objectively reasonable. The evidence presented establishes that, at or around the time Claimant first presented to Dr. Volz's office for treatment, Susan Bond was the claims adjuster assigned to this case. Per Ms. Smith's testimony, Ms. Bond was out on medical leave and Ms. Smith did not take over the handling of Claimant's claim until around the end of March or early April, 2018. Ms. Smith testified that she was unaware whether anybody was even assigned to Claimant's claim for proper claims adjusting once Ms. Bond went on medical leave, but could state that the last note in the file prior to her taking over said file was from Ms. Bond. It was Insured's duty, based upon the March 9, 2017 order, either through Ms. Bond or another representative to provide a response to Dr. Volz's office for requested treatment, which it failed to do. Of importance is that the office of Respondents' counsel specifically informed Ms. Seang to contact Susan Bond for authorization, and yet nothing was done by Respondents until the date Claimant filed his application for hearing. Even with Claimant's application for hearing being filed April 10, 2018, it was not until May 3, 2018, twenty-three (23) days later, that Dr. Volz's office was given written authorization to provide the requested care for Claimant.

O. Respondents acknowledge the existence of "authorization issues" but contend that the language of ALJ Spencer's Order is so vague and ambiguous that they could not be expected to know what medical treatment he ordered Respondents to pay for. Moreover, Respondents assert that Claimant's medical situation was "fluid and changing". As such, Respondents couch the issue confronting the ALJ not as a penalty for violating the order, but as a "delay with an explanation and justification" for not authorizing the treatment/testing earlier. The ALJ is not persuaded. While this case clearly has a complex procedural history and Claimant's treatment was interrupted by Dr. Bowdish leaving his practice, the ALJ notes from the evidence submitted that Insurer has been represented continuously during the claim by qualified counsel since the February 1, 2017 hearing before ALJ Spencer. It is because this case has a

and because he filed his Application asserting penalties on April 10, 2018, within a year of having that knowledge, the ALJ concludes that this penalty allegation was filed timely.

complex history, created by the litigation that has ensued, that the undersigned finds it highly improbable that Respondents would not know that they were obligated to provide additional diagnostic testing and that failure to authorize the same would result in a violation of ALJ Spencer's directive. Based upon the evidence presented, the ALJ concludes that Insurer simply failed to take action on the order, probably because Ms. Bond was on leave and had not assigned the matter to a new adjuster. While the ALJ understands the precarious position Ms. Smith finds herself in, Insurer's negligence in assigning this claim to another adjuster in the absence of Ms. Bond and their failure to act upon the order for 114 days after the testing was requested is objectively unreasonable. This is especially true in light of the efforts of Dr. Volz' office to secure authorization. Simply asserting that a change of Adjusters somehow excuses Insurers failure to act on the request for authorization in light of the order is unpersuasive. Respondents additional assertions that Ms. Smith never denied care, that Claimant's lab testing resulted in normal outcomes and that he was unaffected by the delay in authorizing the aforementioned testing are equally unpersuasive. It is the failure to follow the order that justifies the imposition of penalties in this case.

P. Concerning Claimant's second claim for penalties for failing to pay the Quest Diagnostics bill "forthwith" as ordered by ALJ Spencer, the ALJ agrees with Respondents that this asserted penalty was not pled, let alone with specificity as required by § 8-43-304(4), C.R.S., in the April 10, 2018 Application for Hearing. Indeed, the April 10, 2018 Application for Hearing is silent on the specifics of this penalty claim. Moreover, Respondents' counsel stated, at the outset of hearing, that he was unaware that failure to pay the Quest Diagnostic billing was an issue for hearing. Because the penalty was not pled and Respondents were not apprised/noticed regarding the nature of the penalty, the ALJ concludes that it was not properly placed before the ALJ at the September 19, 2018 hearing.

Q. Due process requires that parties be given advance notice of the issues that may be considered at a hearing. See *Shaw v. Valdez*, 819 F.2d 965 (10th Cir. 1987). The fundamental requirements of due process are notice and an opportunity to be heard. Due process contemplates that the parties will be apprised of the evidence to be considered and afforded a reasonable opportunity to present evidence and argument in support of their positions. Inherent in these requirements is the rule that a party will receive adequate notice of both the factual and legal bases of the claims and defenses to be litigated. See *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076, 1077 (Colo.App. 1990). As established above, such notice was not properly given concerning the alleged penalty for failing to pay the Quest Diagnostic billing. Any contention that this issue was also tried by consent is unpersuasive. Although issues may be "tried by consent," unendorsed issues should not be heard unless there no reasonable doubt exists that the issue was intentionally and actually tried. *Bill Dreiling Motor Co. v. Schultz*, 168 Colo. 59, 450 P.2d 70 (Colo. 1969); *Bradford v. Nationsway Transport Service*, W. C. No. 4-349-599 (March 16, 2000). It is not enough that some evidence connected to the issue has been received. *Id.* In light of the exchange between the ALJ and counsel at the outset of hearing specifically wherein Respondent specifically noted that he was not aware that

penalties for failing to pay the Quest Diagnostic billing were an issue for hearing, the ALJ concludes that the issue of penalties for failing to pay the aforementioned billing “forthwith” was not properly before the undersigned ALJ for adjudication.

R. Finally, Claimant contends that Respondents are subject to penalties for “dictating” medical care in contravention of § 8-43-503(3), C.R.S. “by repeatedly failing to respond to an authorized provider’s requests for treatment and for failing to pay for treatment already performed for (sic) an authorized provider”. As the ALJ interprets Claimant’s contention, Respondents delay in authorizing treatment is tantamount to dictating care. The ALJ is not persuaded.

S. Section 8-43-503(3) C.R.S. states: “Employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment. “Dictate” is defined as ordering or instructing what is to be said or written. Black’s Law Dictionary, *Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, Sixth Ed. 1990. By analogy, dictating medical care would be to order or instruct what medical treatment is to be given. A fair reading of § 8-43-503(3), when replacing the word “dictate” with “order or instruct” would be: “Employers, insurers, claimants, or their representatives shall not order or instruct any physician concerning the type or duration of treatment or degree of physical impairment. In support of his claim for penalties for dictating medical care, Claimant relies on the decision of the Industrial Claims Appeals Office (ICAO) announced in the case of *Jose Casillas v. Bemis Construction, Inc.*, W.C. No. 4-777-652, (May 24, 2010). Claimant contends that the Casillas decision stands for the proposition that Respondents in the instant matter can be penalized under § 8-43-503(3) for unduly delaying authorization of medical treatment. The ALJ finds Claimant’s interpretation of the *Casillas* matter misplaced.

T. In the *Casillas* matter, ICAO upheld the ALJ’s determination that Respondents violated § 8-43-503(3) C.R.S., not as a direct result of undue delay in authorizing care, but rather for the adjuster issuing a command, i.e. dictating to the authorized treating physician that his request for an EMG be done through a “gatekeeper” agency known as One Call (OC). In affirming the ALJ’s decision to impose penalties for dictation of care, the Panel noted:

The Respondents’ arguments notwithstanding, there is substantial evidence in the record to supporting (sic) the ALJ’s conclusion that the insurer effectively dictated the claimant’s treatment by unilaterally attempting to modify Dr. Ogin’s status as a ATP by dictating that before he performed the EMG he was required to go through “vetting” by OC, the insured “gatekeeper”.

The Panel went on to note that the adjuster’s requirement that Dr. Ogin adhere to the “gatekeeper” policy resulted in the adjuster effectively commanding that Dr. Ogin take an action he was “not legally required to take in order to secure payment for the EMG” and that this mandate by the adjuster “prolonged the duration of claimant’s treatment by

influencing Dr. Ogin not to perform the EMG” as he had planned. Accordingly, the Panel affirmed the imposition of penalties on the grounds that the adjusters affirmative command/order/instruction to Dr. Ogin, not only dictated the type of care Claimant was to receive but also the duration of that care. Simply put, the prolonged duration of care was occasioned by the adjuster’s “unjustified demand” that the EMG be performed by OC. In contrast, the instant matter does not involve the overt influence or unjustified commands, instructions or orders of the adjuster assigned to the claim. Indeed, the adjuster in the instant matter took no action to influence Claimant’s ability to seek care with Dr. Volz or see to it that the order of ALJ Spencer’s was obeyed. The delay in procuring treatment, which may have impacted the type and duration of future care in this case, was not caused by the dictation of medical care in this case, but rather the negligence of Insurer in failing to take action to authorize diagnostic testing that had been ordered by ALJ Spencer. It is that conduct with subjects Respondents to penalties, rather than the claim that the Respondents were dictating medical care for Claimant.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that the right to select a physician passed to him following Dr. Volz’ decision to place all treatment on hold and not treat for nonmedical reasons. Claimant’s request that DaVita Medical Group be considered an authorized provider in this case is denied and dismissed.

2. Respondents shall pay to Claimant a penalty in the amount of two hundred (\$200.00) dollars per day for 114 days for a total penalty of \$22,800.00 for their violation of ALJ Spencer’s order requiring payment of all reasonable and necessary medical treatment to cure and relieve the effects of Claimant’s injury, including additional diagnostic testing suggested by Dr. Volz.

3. Pursuant to § 8-43-304(1) the penalty assessed is apportioned between Claimant and the Colorado uninsured employer fund created in § 8-67-105. Fifty percent (50%) of the penalty assessed shall be paid to Claimant and the remaining fifty percent of the penalty assessed shall be paid to the Colorado uninsured employers fund.

4. Claimant’s request for penalties for failure to pay the billing associated with Claimant’s diagnostic testing through Quest Diagnostics is denied and dismissed.

5. Claimant’s request for penalties for dictation of medical care in violation of § 8-43-503(3) is denied and dismissed.

If you are dissatisfied with the Judge’s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service;

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

DATED: February 6, 2019

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the recommended lower left leg magnetic resonance image (MRI) is medical treatment that is reasonable and necessary to maintain the claimant at maximum medical improvement (MMI).

FINDINGS OF FACT

1. On December 23, 2017, the claimant was working as a ski instructor for the employer. On that date, the claimant injured his left calf while he was demonstrating to a ski class how to lean forward in a ski boot. This is an admitted claim. Following the December 23, 2017 injury, the claimant received medical treatment at Vail Valley Urgent Care and Avon Urgency Center.

2. During this claim Vail Health has been the claimant's authorized treating provider (ATP). The claimant was first seen at Vail Health on December 27, 2017 by Dr. Alisa Koval. At that time, Dr. Koval ordered a magnetic resonance image of the claimant's left lower extremity.

3. A left leg MRI was performed on December 31, 2017 that showed an acute tear of the distal surface medial head of the gastrocnemius muscle belly. Lucia London, CNP with Vail Health asked Dr. Joseph with Vail Summit to review the claimant's MRI. Based upon Dr. Joseph's review, Ms. London noted in a January 2, 2018 medical record that surgical intervention was not necessary. Thereafter, the claimant underwent physical therapy treatment with Howard Head Sports Medicine.

4. On January 24, 2018, the claimant returned to Ms. London and reported that he was pain free and had increased his activity to walking up to three miles per day.

5. On February 5, 2018, the claimant reported to his physical therapist, Heidi Edwards, that he was running without pain or decreased function.

6. On February 6, 2018, the claimant returned to Ms. London and again reported that he was pain free and not using any pain medications. The claimant also reported to Ms. London that he was able to jog and believed he could return to skiing. On that same date, Ms. London placed the claimant at maximum medical improvement (MMI) with no work restrictions and no permanent impairment.

7. The claimant testified that from February 2018 until early June 2018 he did not experience any left calf symptoms. However, beginning in early June 2018, the claimant noted intermittent spasm and pain in his left calf muscles.

8. On July 13, 2018, the claimant contacted Dr. Koval by telephone and reported his left calf symptoms. At that time, Dr. Koval recommended that the claimant seek treatment for a possible deep vein thrombosis (DVT). However, the claimant did not seek that recommended treatment at that time.

9. On August 8, 2018, the claimant returned to Ms. London. On that date, Ms. London ordered a lower left extremity ultrasound and a lower left extremity MRI to determine whether the claimant had DVT. Ms. London also noted that a new MRI would be utilized to “evaluate the prior gastroc[nemius muscle] injury or to see if there is a new injury or pathology.”

10. The respondents asked Dr. Marc Steinmetz to review the claimant’s medical records and opine regarding the reasonableness, necessity, and relatedness of the recommended left leg ultrasound and left leg MRI. On August 17, 2018, Dr. Steinmetz issued a written report in which he opined that the claimant’s current left calf symptoms are not related to the December 23, 2017 work injury. In support of his opinion, Dr. Steinmetz noted that at the time the claimant was placed at MMI on February 6, 2018 he was pain free with no work restrictions and no permanent impairment. Dr. Steinmetz also noted that the claimant had pre-existing arthritis in his left ankle joint. Dr. Steinmetz opined that the “non-work-related arthritis in [the claimant’s] ankle joint would likely cause pre-existing and ongoing mechanical ergonomic limitations with his exertional activities with his left leg”. Dr. Steinmetz further opined that the recommended ultrasound and MRI were not reasonable, necessary, or related to the claimant’s work injury.

11. On September 26, 2018, the respondent filed a Final Admission of Liability (FAL) that admitted for reasonable, necessary, and related maintenance medical treatment provided by an ATP.

12. On November 19, 2018, the claimant attended an independent medical examination (IME) with Dr. Steinmetz. In connection with the IME, Dr. Steinmetz reviewed the claimant’s medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Steinmetz reiterated his opinion that the left calf symptoms the claimant began to experience in June 2018 are unrelated to the admitted work injury. Dr. Steinmetz opined that the claimant’s pain was caused by either DVT or a new strain. In reaching this conclusion, Dr. Steinmetz noted that the claimant “finished an aggressive ski season and was symptom free.” Dr. Steinmetz also opined that the claimant’s non-work related activities such as biking, walking his dog, and fly fishing were more likely to cause his current calf symptoms than the “trivial” December 23, 2017 incident.

13. The claimant testified that he was not active between May and June 2018. The claimant noted that it was too early to ride his mountain bike and he did not start his job as a fly fishing guide until early July 2018.

14. The ALJ credits the medical records and the opinions of Dr. Steinmetz and finds that the claimant's current left calf symptoms are not related to the December 23, 2017 work injury. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that the left lower extremity MRI is reasonable and necessary to maintain the claimant at MMI.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. 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 (2017).

3. 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).

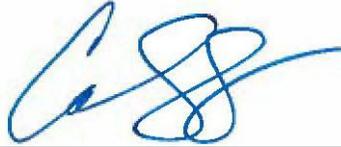
4. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits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

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the lower left leg MRI is medical treatment that is reasonable and necessary to maintain the claimant at MMI. As found, the medical records and the opinions of Dr. Steinmetz are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for a lower left leg MRI is denied and dismissed.

Dated February 6, 2019



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-083-160-001**

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury while in the course and scope of her employment with Employer in July of 2017.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to a general award of reasonable and necessary medical benefits causally related to her July 2017 injury.

STIPULATIONS

1. If the claim is found compensable, the parties stipulate that the visit to Estes Park Medical Center on July 14, 2017 is authorized. The parties also stipulate that if the claim is found compensable, UC Health and referrals from UC Health are also authorized.

FINDINGS OF FACT

1. In the summer of 2017, Claimant was employed by Employer. Claimant was hired on May 30, 2017 and was employed through August of 2017.

2. Claimant initially worked for Employer as a backpacking guide in Wyoming leading hikes for those in addiction recovery. Claimant was then sent to High Peaks Camp as extra help when the last few sessions of the Wyoming hike experience were not filled. At High Peaks Camp Claimant performed program staff work including outdoor education, rock climbing, zip line, arts and crafts, etc.

3. While at High Peaks Camp, campers arrived Monday in the afternoons and were there until Saturday mornings. Claimant then had off from Saturday afternoon until Monday Morning. High Peaks Camp is just outside of Estes Park, Colorado.

4. While in Wyoming, Claimant would hike up to 27 miles per day. Other than general soreness throughout the body from long hiking days, Claimant was generally pretty strong and had no specific problems with her ankles.

5. In July of 2017, Claimant was at High Peaks Camp. During the week of July 10-14, 2017 and on a particular day early in that week, Claimant was working the zip line alongside co-worker Adam Nicholson. Claimant was catching campers at the bottom of the zip line and was standing on a platform. When a larger camper came down the zip line, Claimant was pulled off the platform deck by the counterweight of the camper and Claimant fell onto the ground.

6. The ground was approximately 1-2 feet from the platform. When Claimant fell off the platform she felt immediate pain in her right ankle. Claimant had never experienced pain like that before in her ankle. Claimant's co-worker assisted with the camper and helped put Claimant in a golf cart.

7. Mr. Nicholson testified that he was working the zip line next to Claimant and that he observed her being dragged off the platform to the ground and that he saw Claimant fall. He also testified that Claimant's ankle was hurting bad after the fall and that Claimant was taken down on a golf cart and given crutches and ice. He testified that he had also worked the backpacking trips in Wyoming with Claimant and that although everyone's bodies hurt because they had big hiking days, he had no recollection of any specific body part of Claimant's (like her ankle) hurting before this incident at the zip line. Mr. Nicholson is found credible and persuasive.

8. Claimant testified that she was taken to the camp nurse, was given ice and crutches, and was told to stay off her ankle. Claimant testified that she was able to get around for the next few days but couldn't walk like normal and after not improving over the next few days, Claimant went to the emergency room in Estes Park the Friday of that week.

9. On July 14, 2017, Claimant was evaluated at Estes Park Medical Center. Claimant was discharged with instructions of crutch walking, a note of lower extremity contusion as a new problem, and recommendation for follow up in 2-3 days. The note from Estes Park Medical Center indicates that Claimant reported that her symptoms began or occurred suddenly 5 days prior in New Mexico when claimant stumbled while walking and had a hyper-plantarflexion/inversion type of injury. The notes indicate Claimant reported that she was seen in a local emergency department where x-rays were negative but that she was given an ace wrap and crutches and that the pain had gotten worse. See Exhibits 5, A.

10. On a physician's report of worker's compensation injury also filled out July 14, 2017 and during that same visit with Estes park Medical Center, it is noted that Claimant's description of the accident/injury was that she took a fall while working the bottom of the zip line. It is also noted that Claimant was to be on crutches, weight bearing as tolerated. See Exhibits 5, A

11. Claimant testified credibly that she did not know where the report about an injury in New Mexico came from and that she was not in New Mexico in July of 2017. Claimant testified credibly that she had last been to New Mexico several years prior and that she was working at camp in Estes Park in July of 2017. Claimant noted that when she had a little extra time off from camp in July for the 4th of July Holiday, she was in Denver. Claimant's electronic bank reports show she made a purchase at a Safeway store in Denver on July 3, 2017 and that she paid for a yoga class at Corepower Yoga in the Highlands neighborhood of Denver on July 4, 2017. Claimant's testimony is credible. See Exhibit 12.

12. The two reports from the visit to Estes Park Medical Center on July 14, 2017 are inconsistent. One indicates a report of a fall while working the bottom of the zip line and one indicates an injury while walking in New Mexico. Claimant's testimony, substantiated by a co-worker, is credible and consistent with the report from July 14, 2017 describing the accident/injury as occurring at the bottom of the zip line.

13. Further, Claimant's co-worker credibly testified that Claimant had no specific problems with her ankle before the zip line incident. He credibly testified that he worked with Claimant during the summer on a daily basis. He would have seen or known if Claimant had an ankle injury prior to the zip line incident.

14. On August 1, 2017, Claimant was evaluated by Erika Norris, M.D. Claimant reported that she had worn a splint and used crutches for a while after a right ankle sprain but reported that she was back to hiking. Claimant reported that she still hurt along the medial tibia after a long hike. On exam, Claimant had very mild tenderness at the distal tibia above the ankle. Dr. Norris opined that Claimant was healing well but recommended Claimant consider wearing the ankle splint on long hikes if hiking irritated the sprain. Dr. Norris also recommended use of topical voltaren if Claimant ached or if Claimant knew she would ache after exercise. See Exhibit 8.

15. On June 14, 2018, Claimant was evaluated at UC Health by Janet Gelman, PA. Claimant reported right ankle pain due to an ankle sprain and injury in June of 2017. Claimant reported falling with immediate pain to her leg and ankle when she was working at the bottom of a zip line. Claimant reported that she was diagnosed with a sprain. Claimant reported that the pain could be intermittent but sometimes was constant. Claimant reported that the symptoms were worse with ambulation, standing for a long time, or doing yoga. Claimant reported that she had been wearing an ankle splint but had not taken any medications recently. Claimant reported that in the beginning she took ibuprofen and used voltaren gel without relief. Claimant requested an MRI. Claimant was noted on exam to have gait problems, joint swelling, and a lumpy feeling on the leg next to the tibia. PA Gelman referred Claimant to James Rafferty, D.O. See Exhibit 6.

16. On July 2, 2018, Dr. Rafferty evaluated Claimant. Claimant again reported the injury while working on the zip line and reported that she has had ankle pain since then. Claimant reported that she went to the emergency department in Estes Park a few days after the injury and was told her x-rays were negative for fractures and that she was never instructed to follow up with an occupational medical provider. Claimant reported that she remained symptomatic with moderate pain over the medial aspect of her ankle that radiating into the medial aspect of her leg with increased activities. Claimant reported that she has avoided running, jogging, and yoga due to the persistence of her symptoms. Claimant reported limping on occasion and having minor weakness in her ankle. Claimant reported that she had no prior problems with her right foot or ankle. On examination, Dr. Rafferty found her right ankle to have no gross abnormalities, full and pain free range of motion, and 5/5 strength. He noted that Claimant was unable to heel raise on the right without considerable discomfort but could heel raise on the left very

comfortably. Dr. Rafferty assessed right ankle strain, and possible posterior tibialis and/or talar dome OCD. He recommended an MRI of the right ankle. See Exhibits 6, B.

17. On July 16, 2018, Claimant underwent an MRI of her right ankle. The impression was minimal posterior tibialis tenosynovitis; findings consistent with a remote deltoid ligament sprain; and mild bone marrow edema in the mid navicular which may represent a contusion or be due to overlying partial-thickness cartilage loss. See Exhibit 7.

18. On August 22, 2018, Dr. Rafferty evaluated Claimant. Claimant reported that her symptoms were unchanged. Dr. Rafferty noted that Claimant's MRI was positive for minimal posterior tibialis tenosynovitis and consistent with a remote deltoid ligament sprain and mild bone edema in the mid-navicular. Dr. Rafferty opined that Claimant's right ankle sprain, posterior tibialis tenosynovitis, and presumptive bone bruise of the navicular were work related due to trauma. He recommended referral to Dr. Ocel for evaluation, review of the MRI findings, and treatment recommendations. See Exhibits 6, B.

19. Claimant testified that when she fell off the zip line she had immediate pain and had never had pain like that before. Claimant testified that her ankle pain eventually went down from a 7-8/10 level to a 1-2/10 level but that it never went away. Claimant testified that a few months after the injury she went on a small hike and the pain got worse so she saw Dr. Norris because of her concern. Claimant testified credibly that she was told it can take weeks or months to heal and that she was mostly off her ankle over the winter while in school and working part time at a desk job. Claimant testified that in the spring of 2018 her pain was still there at a 1-2/10 and that she tried again to go on a hike and her pain went up to a 7-8/10. After again attempting hiking with increased pain, Claimant testified that she asked to be re-evaluated and wanted an MRI to figure out what was wrong. Claimant testified that her pain is still at a 1-2/10 daily and is okay but that with activity her pain continues to go up.

20. Claimant's testimony is credible and persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. See § 8-41-301(1)(b) & (c), C.R.S. 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).

Claimant has established, by a preponderance of the evidence, that she sustained a compensable right ankle injury the week of July 10-14, 2017 while in the course and scope of her employment with Employer at High Peak Camp. Claimant's testimony surrounding the acute right ankle injury that occurred while she was working the zip line is credible. It is consistent with the report of her co-worker Mr. Nicholson. It is consistent with one of the reports from the first treatment on July 14, 2017. Although Respondents point to a report that same date documenting an inconsistent injury, the inconsistent injury report is not found to be an accurate report of what Claimant told the physicians or of what occurred. Claimant was not in New Mexico at any point in 2017 or in the month of July 2017. Claimant has established that she sustained an acute injury while working at camp during this time period.

Additionally, Claimant is credible and persuasive that although her pain got better and went down to a 1-2/10, it remained constant and did not go away. Claimant is also

credible that with a hike/increased activity her pain went up higher causing her to see a physician in August of 2017. At that time, the physician noted her belief that the ankle was healing and told Claimant it could take time. At that advice, Claimant believed her symptoms were normal and that the ankle was healing. However, with increased activity the next spring and summer Claimant knew the ankle was not, in fact, healing as it should and she sought more treatment. Claimant's testimony is credible that her pain never went away and her actions are logically consistent with someone who assumes the ankle healing was just taking time. However, Claimant logically sought additional treatment when her pain levels continued to increase with activity after a year. Respondents' arguments are not found persuasive. Claimant had an immediate and significant need for treatment acutely on July 14, 2017 after injuring her right ankle at work. Claimant has had a continued pain since July of 2017 and the need for right ankle treatment continues to be related to the initial incident and injury to her right ankle in July of 2017 while working for Employer.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that she sustained a compensable work related injury to her right ankle in July of 2017.
2. Claimant is entitled to a general award of reasonable and necessary medical benefits to treat her right ankle injury from July of 2017.
3. All matters not determined herein are reserved for future determination.

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

DATED: February 8, 2019

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-067-439-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 7, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 11/7/18, Courtroom 4, beginning at 1:30 PM, and ending at 4:00 PM).

Claimant's Exhibits 1 through 19 were admitted into evidence, without objection. Respondents' Exhibits A through R were admitted into evidence, without objection.

At the conclusion of the hearing, the record was left open pending the filing of the post-hearing evidentiary deposition of Brian Reiss, M.D., followed by briefs. Dr. Reiss' post-hearing evidentiary deposition was taken on November 19, 2018 and a written transcript thereof was referred to the ALJ on December 24, 2018. Respondents' opening brief in support of Petition to Terminate Benefits was referred to the ALJ on December 24, 2018. Claimant's combined brief in opposition to Respondents' opening brief and in support of payment of medical bills was referred to the ALJ on December 24, 2018. Respondents' response to Claimant's combined brief was referred to the ALJ on December 24, 2018. The matter was deemed submitted for decision on December 24, 2018.

ISSUES

The issues to be determined by this decision concern whether the Respondents' Petition to Modify, Terminate or Suspend temporary disability benefits, effective July 30, 2018, based on Claimant's alleged at-fault termination from employment (Respondents bear the burden of proof by preponderant evidence on this issue) should be granted; whether the surgery the Claimant underwent by Sharad Rajpal, M.D. on March 10, 2018 was emergency treatment, rendering it authorized although outside the chain of referrals; and, whether post-surgical treatment provided by Boulder Community Hospital is authorized as part of Claimant's allegedly ongoing emergency (Claimant bears the burden of proof by a preponderance of the evidence on these issues).

The Claimant does not dispute that she voluntarily resigned from employment to pursue other interests, however, it is her position that her condition related to the admitted injury worsened and the bar on temporary disability benefits should be lifted as of the time of worsening, without the necessity of formally filing a Petition to Re-open which, if granted, would start a new scenario wherein temporary disability benefits could be commended anew under the holding in *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004). The Claimant bears the burden of proof by preponderant evidence on this proposition.

FINDINGS OF FACT

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

Preliminary Findings

1. Respondents filed a General Admission of Liability (GAL), dated February 2, 2018, admitting for an average weekly wage (AWW) of \$503.96, authorized medical benefits; and, temporary total disability (TTD) benefits of \$335.99 per week from January 21, 2018 and "ongoing."
2. Respondents filed a Petition to Terminate, Modify or Suspend Compensation on July 30, 2018, alleging that Claimant voluntarily resigned from her employment on February 5, 2018.
3. On August 3, 2018, Claimant filed an Objection to Respondents' above Petition, stating that "Respondents' Motion is not supported by facts or law," and requesting that the matter be set for hearing on the Respondents' Petition. As found herein below, Respondents' Petition is **clearly supported by facts and law.**

4. The Claimant is a four-year employee of the Employer. Her date of birth is February 3, 1990, and she was 28-years old on the date of the hearing.

The Admitted Compensable Injury

5. The Claimant started working as a flight attendant for [the Employer] on February 15, 2017. She was injured on January 20, 2018, while in the course and scope of employment as a flight attendant for [the Employer] while flying from Denver, Colorado, to Edmonton, Canada.

6. The Claimant's injury occurred when severe turbulence knocked her to the ground. She landed first on her right side and then levitated, landing again, this time on her stomach. The ALJ infers and finds that by filing a GAL and continuing to pay the Claimant temporary total disability (TTD) benefits, at least until July 30, 2018, without raising the "termination of benefits" issue, the Respondents essentially conceded that the Claimant sustained a compensable injury on January 20, 2018, with significant consequences. Respondents Petition to Terminate benefits is based on an alleged "voluntary resignation," **not** on a subsequent discovery that the consequences of the Claimant's injury abated and the Claimant returned to a baseline of naturally progressing rheumatoid arthritis (RA), as opined by some of Respondents' IMEs.

At-Fault Termination

7. On February 5, 2018, the Claimant sent an email to Phally Kent, Chief Flight Attendant and a supervisor to the Claimant, voluntarily resigning from the Employer's company. The email read as follows:

Hello Phally,
Though I have greatly appreciated my time with [Employer], it is with a tremendous amount of thought and prayer that I have decided to turn in my resignation from the company today. I will forever be grateful for all the places I have seen and the people have met along the way but it is time for me to start a new chapter in my life.
[Employer] has been one of the best companies I have ever worked for....
s/Claimant.

Kent replied:
Hi there...oh no...what happened [Claimant]?

To which Claimant replied:

Nothing happened. I just want to pursue a new avenue...Respondents' Exhibit P, p. 144)

8. Based on the above email exchange, the ALJ finds that the Claimant voluntarily and willfully caused her separation from employment by voluntarily resigning. There is no credible evidence that would lead to an inference of any circumstance supporting a constructive discharge. Further, in her brief, the Claimant concedes that she voluntarily terminated her employment.

Medical Treatment Before Worsening

9. The Claimant immediately suffered pain as a result of this event but continued working on her flight. When she returned to Denver she was referred to Dee Jay Beach, D.O. on January 22, 2018, and then to Concentra. The Concentra records from January 27, 2018, describe the Claimant's symptoms as cervical strain, left shoulder strain, right shoulder strain and lumbar strain (Respondents' Exhibit L, bates stamp [BS] 88).

10. The Claimant was given restrictions by Concentra and she was offered modified duty by her Employer, which she commenced on February 2, 2018.

11. Following her resignation, the Claimant continued treatment with Concentra and sought a second opinion with Sharad Rajpal, M.D., at Boulder Neurological and Spine Associates Community Hospital in February 2018 (Claimant's Exhibit 10, BS 337, 339). Potential surgical intervention was discussed but no surgery decision was made.

12. The ALJ finds that the Claimant would have continued at her modified, accommodated work from February 5, 2018, through March 5, 2018, the day before her condition significantly worsened whereby she could no longer work at modified, accommodated work.

Worsening Condition

13. On March 6, 2018, the Claimant was walking in a parking lot when she felt a sharp pain in her injured right shoulder and cervical region. This pain was caused her to fall to the ground. The ALJ infers and finds that the fall and injuries were directly and proximately caused by the Claimant's condition that resulted from her compensable injuries of January 20, 2018.

14. The Claimant sought emergency care at UC Health Longs Peak on March 6, 2018, for worsening low back pain. The records from Long Peak state that the Claimant had an exacerbation of her chronic back pain with a syncopal episode (Respondents' Exhibit M, BS 112). The records indicate that Claimant had fallen on her back and was having increased pain there. *Id.*, BS 113. She also had tingling in her right arm and in her bilateral legs. The

records from Longs Peak noted that the Claimant had previously undergone surgery (microdiscectomy in 2016) for back pain. The ALJ finds and pinpoints the time of a medically supported worsening of condition as March 6, 2018.

15. Thereafter, the Claimant followed-up with an appointment with Chiropractor Dr. Smith, D.C., on March 7, 2018, to whom she had been referred by Concentra. Authorized Treating Provider (ATP) Dr. Smith refused to treat the Claimant at that time, expressing concern about the severity of her symptoms.

16. On March 7, the Claimant returned home following her visit to Dr. Smith, D.C., with severe low back pain which continued worsening throughout that evening and to the next morning. Her mother transported her to UC Health Boulder Community Hospital for further emergency care on March 8, 2018.

17. The Claimant underwent an MRI (magnetic resonance imaging) on March 8, 2018, which established a large paramedian disc herniation and extrusion resulting in severe left lateral recess stenosis. *Id.*, BS 291.

18. The records from Boulder Community Hospital show that the Claimant was seen on March 8, 2018, with a “2-month history of severe progressive lumbar pain and radiculopathy that worsened acutely over the last 24 to 48 hours” (Claimant’s Exhibit 9, BS 271). A hospital summary accurately described the circumstances of the Claimant’s hospitalization:

HOSPITAL COURSE: Patient is a 28-year-old female patient who had previously been seen in Dr. Rajpal’s office as an outpatient. She was found to have a known recurrent disc herniation at L4-L5 and also bilateral pars defect at L5-S1. She presented to the emergency room with uncontrolled pain. She was working as a flight attendant, had some turbulence in the airplane, which made her symptoms much worse. She was admitted to the hospital for pain control and definite management. We discussed risks, benefits, and alternate treatment options with the patient and after much deliberation, the patient elected to proceed with surgical intervention in the way of a redo L4-L5 discectomy, with TLIF and posterior fusion L4-L5. The procedure was performed by Dr. Sharad Rajpal, for which there were no known complications. Please see his operative note for further details. Surgery took place on March 10, 2018. After the operation, the patient was in stable condition and was transferred from the operating room to the PACU, and from the PACU to the postsurgical floor. On the floor, patient received physical therapy, occupational therapy, and pain management. The patient did have some episodes of hypotension and dizziness. The hospitalist team was consulted and worked on managing this. Her symptoms improved. She was cleared by

Physical Therapy and Occupational Therapy. Her postoperative x-rays demonstrated stable, well placed hardware. All drains and catheters were removed. On March 14, 2018, the patient's pain was well managed, she was cleared by the medicine team and she was subsequently discharged to home.

(Claimant's Exhibit 9, BS 267).

19. Dr. Rajpal he concluded that the Claimant required immediate fusion surgery intervention due to the presence of progressive neurological deficits impacting the lower extremity and resulting in radiculopathy, weakness, and numbness. *Id.* The Claimant underwent an L4/L5 fusion on March 10, 2018. *Id.*, BS 306. The ALJ finds Dr. Rajpal's decision credible and supportive of the need for emergency surgery. Further, the ALJ makes a rational choice, based on substantial evidence, to accept Dr. Rajpal's decision to perform emergency surgery and to reject any opinions to the contrary. Thus, the ALJ finds Dr. Rajpal's surgery reasonably necessary, causally related to the admitted compensable injury herein, and of an emergent nature. The Claimant remained hospitalized for approximately one-week post-surgery. The ALJ infers and finds that causal opinions to the contrary strain credulity because of the unlikelihood that the surgery was needed because of the natural progression of RA in a 28-year old woman, as opposed to the work-related trigger..

20. Boulder Community Hospital submitted payment for the emergency treatment rendered to the Claimant, including surgery and post-surgery care. This was denied by the Respondents (Claimant's Exhibit 19). The Claimant has continued treatment with Concentra and Nicholas K. Olsen, D.O. (Respondents' Exhibit L and Claimant's Exhibit 14.)

21. The records from Concentra show that the Claimant was seen on April 11, 2018. PAC (Certified Physician's Assistant) Ron Rasis at Concentra who stated that he "[d]iscussed need for review of significant medical records, coordination of care with neurosurgeon. . . ." *Id.*, BS 107.

22. Following surgery, the Claimant was released by Dr. Rajpal, with the following restrictions: avoiding higher powered twisting motions, no tennis until nine months post-surgery, and avoid heavy impact activities such as horseback riding. The Claimant was told that she may increase her weight by 5 lbs. per week and would be permitted to lift at least 20 - 30 lbs., as of August 13, 2018. (Claimant's Exhibit 10, BS 353).

23. According to the Claimant, since her surgery she has been unable to return to work at [the Employer] and has not again been offered modified duty by [the Employer] following her resignation.

24. Prior to her January 20 injury and while working for [the Employer] following her 2016 microdiscectomy with Fernando Techy, M.D. (Respondents' Exhibit I), the Claimant continued her physical activity which included working out several days a week, running, hiking, and horseback riding (specifically timing exercises for roping steers) although her low back began hurting more in mid-2017 (Respondents' Exhibit L, BS 65). Until her injury of January 20, 2018, the Claimant was able to perform all of the essential functions of her job. She was able to perform modified work until her voluntary resignation on February 4, 2018. Afterward her

significant worsening on March 6, 2018, the Claimant was not able to perform essential job functions nor was she able to engage in the leisure activities described herein above. .

Nicholas K. Olsen, D.O., ATP

25. Concentra eventually referred the Claimant to Dr. Olsen. She underwent her first evaluation with him in August 20, 2018 (Claimant's Exhibit 14). Dr. Olsen performed an extensive records review and described the circumstances leading up to the Claimant's hospitalization based on this review. His report describes the progression of the Claimant's low back symptoms, to the events preceding her hospitalization on March 8, 2018. As of October 10, 2018, the Claimant 's restrictions were 15 lbs. repetitive lifting and maximum lifting of 40 lbs. (Claimant's Exhibit 14, BS 369).

26. Dr. Olsen noted that the Claimant had undergone a microdiscectomy in 2016, performed by Dr. Techy in July 2016 (Respondents' Exhibit I, BS 47). The Respondents argue that the Claimant's need for emergent surgery on March 10, 2018, was related directly to her prior low back injury and surgery in 2016. This contention is not persuasively borne out by the facts of this case.

27. In 2017 prior to her injury, the Claimant reported limited back problems which caused her to take time off work. She stated that these back problems arose when she was realigning seatbelts on an aircraft which required her to engage in constant bending. Although she missed work, she did not file a workers' compensation claim and returned to work full duty and, was working full duty prior to the events of January 20, 2018.

Brian Reiss, M.D., Respondents' IME

28. Respondents rely on the testimony of IME Dr. Reiss who was of the opinion that the events occurring on January 20, 2018, were insufficient to give rise to a worsening condition warranting hospitalization on March 8, 2018. He also stated the opinion that the surgery on March 10, 2018, was not reasonable or causally related to the January 20, 2018 injuries. For the reasons stated herein below, the ALJ does not find Dr. Reiss' opinions adequately founded or credible.

29. Dr. Reiss testified at his deposition on November 19, 2018, that the Claimant had suffered an aggravation of her pre-existing back problems but stated the opinion that the aggravation should have resolved within a month following her January 20, 2018, injury. The ALJ finds his opinion "should have resolved within a month" as lacking in an adequate foundation, contrary to the weight of the evidence and as significantly lacking in credibility. Dr. Reiss could point to no documents in the records showing that the Claimant had been placed at maximum medical improvement (MMI) for her medical condition related to the present injury. Dr. Reiss agreed that the surgery performed by Dr. Rajpal did not breach the medical standard of care, although he stated the opinion that there **may have been** (emphasis supplied) a

violation of the Medical Treatment Guidelines (*Guidelines*) because adequate time had not passed prior to the performance of surgery. He **did not** render an opinion that the Guidelines “were violated.” He acknowledged, however, that the presence of significant pain could warrant the intervention of the fusion performed by Dr. Rajpal on March 10, 2018 (Dr. Reiss’ deposition, November 19, 2018, p, 20, lines 6 – 13).

Ultimate Findings

30. Based on the totality of the evidence, the ALJ finds the Claimant credible. Further, the ALJ finds Dr. Rajpal’s opinions to be persuasive and credible with respect to the work-relatedness, worsening of condition related to the admitted injury, and the emergent need for the surgery which was performed. To the extent other medical opinions are consistent with Dr. Rajpal’s opinions, the ALJ finds them to be credible and persuasive. As found herein above, the ALJ finds the medico-legal opinions of Dr. Reiss to be contrary to the weight of the evidence and, therefore, lacking in persuasiveness and credibility. The ALJ finds the Claimant’s testimony concerning the occurrence of the March 6, 2018, incident for which she sought and received emergency medical care at UC Health Boulder Community Hospital and UC Health Longs Peak credible and highly persuasive.

31. Between conflicting testimonies and evidence, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant’s testimony, the opinions of Dr. Rajpal and treatment providers that support a work-related worsening of condition, and to reject any opinions to the contrary, including the opinions of Dr. Reiss.

32. The totality of the evidence establishes that the Claimant’s need for low back surgery on March 10, 2018, arose as a result of a substantial worsening of condition after her fall on March 6, 2018. This required her to seek emergency medical care at UC Health Boulder Community Hospital and undergo fusion surgery.

33. There is no persuasive evidence in the record that the Claimant demanded a fusion surgery or that the Claimant’s hospitalization at UC Health Boulder Community Hospital was the result of anything but the need for emergency surgery. Rather, the records establish a progression in work-related symptoms requiring her to undergo a fusion at L4/L5 On March 10, 2018, following her debilitating fall on March 6, 2018.

34. Prior to the admitted injury of January 20, 2018, the Claimant was working full time and was able to perform a variety of physical activities without restriction; and, her need for further treatment was triggered by the worsening events of March 6, 2018.

35. The Claimant’s voluntary resignation from employment served as a bar to TTD benefits from February 5, 2018, until March 6, 2018, when her condition worsened to the point that she could no longer perform modified duties for the Employer.

36. After March 6, 2018, the Claimant has been temporarily and totally disabled (TTD), and she continues to be TTD, which had previously been admitted in the GAL.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See *Bodensleck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office*, 297 P.3d 964, **2012 COA 85**. 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); also see *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). 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). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert’s knowledge, skill, experience, training and education. See § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). As found, based on the totality of the evidence, the Claimant was credible. Further, Dr. Rajpal’s opinions were persuasive and credible with respect to the work-relatedness, worsening of condition related to the admitted injury, and the emergent need for the surgery which was performed. To the extent other medical opinions were consistent with Dr. Rajpal’s opinions, they were credible and persuasive. The medico-legal opinions of Dr. Reiss, however, were contrary to the weight of the evidence and, therefore, lacking in persuasiveness and credibility. The Claimant’s testimony concerning the occurrence of the March 6, 2018, incident for which she sought and received emergency medical care at UC Health Boulder Community Hospital and UC Health Longs Peak, plus Dr. Rajpal’s surgery, was credible and highly persuasive..

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005). Also see *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). 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). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett*, 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies and evidence, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's testimony, the opinions of Dr. Rajpal and treatment providers that support a work-related worsening of condition, and to reject any opinions to the contrary, including the opinions of Dr. Reiss.

At Fault Termination

c. Respondents argue that the Claimant's entitlement to TTD benefits ceased and was barred into the future when she tendered her resignation on February 5, 2018. They request that TTD be terminated as of July 30, 2018, the date they filed the Petition to Modify, Terminate, or Suspend (Claimant's Exhibit 3). They also dispute that the fusion surgery the Claimant underwent on March 10, 2018, was the result of an emergency, was reasonably necessary, or was causally related to her January 20, 2018, injury. Ordinarily, § 8-42-105 (4), C.R.S., provides that an employee responsible for her own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that "responsibility for termination" must be through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Indus. Claim Appeals Office*, 58 P. 3d 1061 (Colo. App. 2002). A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to termination. *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008); *Apex Transport, Inc. v. Indus. Claim Appeals Office*, **2014 COA 25**. An unqualified voluntary resignation, as found herein above, qualifies as a volitional act. The Supreme Court, however, has determined that the "responsibility for termination" defense is not absolute and is vitiated when a worsening of condition occurs. *Anderson v. Longmont Toyota*, 102 P. 3d 323 (Colo. 2004). In *Longmont Toyota*, the Supreme Court did **not** indicate that the mechanistic action of filing a petition to re-open and the granting of a re-opening was necessary to end the bar on termination of temporary disability benefits.

The Supreme Court quite simply held that a worsening of condition period is all that is necessary to end the bar on temporary disability benefits. Indeed, the critical facts in *Longmont Toyota* are virtually identical to the facts herein—a worsening of condition occurred after the claimant’s voluntary resignation. As found, prior to the admitted injury of January 20, 2018, the Claimant was working full time and was able to perform a variety of physical activities without restriction; and, her need for further treatment was triggered by the worsening events of March 6, 2018. Her voluntary resignation from employment served as a bar to TTD benefits from February 5, 2018, until March 6, 2018, when her condition worsened to the point that she could no longer perform modified duties for the Employer. After March 6, 2018, the Claimant has been temporarily and totally disabled (TTD), and she continues to be TTD, which had been admitted in the GAL.

Medical—Emergent Care and Surgery

d. A medical emergency allows an injured worker the right to obtain treatment without undergoing the delay inherent in notifying the employer and awaiting approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing care. *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). As found, the totality of the evidence established that the Claimant’s need for low back surgery on March 10, 2018, arose as a result of a substantial worsening of condition after her fall on March 6, 2018. This required her to seek emergency medical care at UC Health Boulder Community Hospital and undergo fusion surgery. As further found, there was no persuasive evidence in the record that the Claimant demanded a fusion surgery or that the Claimant’s hospitalization at UC Health Boulder Community Hospital was the result of anything other than the need for emergency surgery. The persuasive medical records established a progression in work-related symptoms requiring her to undergo a fusion at L4/L5 On March 10, 2018, following her debilitating fall on March 6, 2018.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. See *City of Boulder v. Streeb*, 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office*, 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). When a respondent seeks to terminate or suspend temporary benefits, however, the respondent bears

the burden of proof by preponderant evidence. 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 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. Also see *Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001). “Preponderance” means “the existence of a contested fact is more probable than its nonexistence.” *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Respondents sustained their burden insofar as benefits should be suspended from February 5, 2018, through March 5, 2018. Respondents, however **failed** to sustain their burden after the worsening of condition on March 6, 2018.

f. The Claimant has sustained her burden with respect to medical treatment for her work-related injuries. Indeed, the GAL admits for medical benefits. Further, the Claimant has proven that the treatment and surgery by Dr. Rajpal was of an emergent nature and, thus, the liability of Respondents although outside the chain of authorized referrals.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents having failed to establish entitlement to suspend temporary disability benefits after March 6, 2018, the General Admission, dated February 2, 2018, remains in full force and effect with respect to this time period.

B. Respondents may suspend temporary disability benefits from February 5, 2018, through March 5, 2018 and to this extent the General Admission is modified accordingly.

C. Respondents shall pay the costs of all medical care and treatment, including the emergency care and surgery by Sharad Rajpal, M.D., causally related to the admitted injury of January 20, 2018, subject to the Division of Workers Compensation Medical Fee Schedule.

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

DATED this _____ day of February 2019.

A rectangular box containing a digital signature. The text "DIGITAL SIGNATURE" is printed in the top left corner. The signature itself is a cursive script that reads "Edwin L. Felter, Jr." followed by a stylized flourish.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this _____ day of February 2019, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Court Clerk

Wc.ord

ISSUE

- Whether Claimant has overcome by clear and convincing evidence the Division Independent Medical Examination (DIME) opinion of Dr. Stephen Lindenbaum that Claimant sustained 0% impairment because of his work injury.

FINDINGS OF FACT

1. On March 2, 2017, Claimant and a co-worker had a dispute regarding paperwork that Claimant was advised to sign in order to complete his job duties. At the time of the incident, Claimant was 79 years old and had worked for Employer for a lengthy period as both a maintenance worker and a tax preparer.

2. During the dispute, Claimant's co-worker grabbed him by the collar of his shirt, spun him around and pushed him out a door where he fell to the ground and landed on his hands and knees. A witness called the local police department and officers responded to the incident. Claimant notified his maintenance supervisor of the incident. On March 3, 2017, Claimant's supervisor took Claimant to Concentra to initiate medical treatment for any injuries.

3. Claimant has a history of neck pain, medical treatment, and surgery. In approximately 2000, Claimant began to develop numbness in his neck. These symptoms eventually progressed to the point where Claimant began to lose function in his left arm. Claimant ultimately underwent a multi-level cervical fusion procedure. In 2006, Claimant was involved in a motor vehicle accident that required him to undergo a cervical MRI, but no medical treatment.

4. On March 3, 2017, Claimant presented to Concentra for an initial evaluation of his March 2, 2017 injury. His provider assessed a strain of his neck muscles and anterolisthesis.

5. Respondents retained orthopedic surgeon Dr. William Ciccone to perform an Independent Medical Evaluation (RIME) on October 18, 2017. Dr. Ciccone opined Claimant sustained a minor sprain/strain of the cervical spine because of his March 2, 2017 injury. Dr. Ciccone agreed with Claimant's surgeon, Dr. Ghiselli, that no need for surgical intervention related to the work injury. Dr. Ciccone noted Claimant's MRIs showed no evidence of an acute injury and opined that Claimant's continuing symptoms related to progressive cervical spine pathology and not to the work accident.

6. Claimant received conservative medical treatment at Concentra until January 30, 2018, when Dr. Amanda Cava placed him at maximum medical improvement (MMI) with no permanent impairment, no medical maintenance, and no permanent work restrictions.

7. Claimant applied for a Division IME in response to Dr. Cava's MMI report. Dr. Stephen Lindenbaum performed the DIME on May 25, 2018. Dr. Lindenbaum agreed with Dr. Cava's January 30, 2018 MMI date and 0% impairment rating.

8. Dr. Lindenbaum evaluated Claimant and noted his nerve studies were negative for radiculopathy and that Claimant's symptoms were myofascial. Dr. Lindenbaum ultimately determined that the findings then seen in Claimant's cervical spine related to the effects of a long fusion with increased motion and stress at the levels above and below the prior fusion. Dr. Lindenbaum further opined the C6-C7 pseudoarthrosis was not related to Claimant's March 2, 2017 injury because there was no evidence of any changes in the plate positioning and it was very unlikely the pseudoarthrosis would relate to the work injury without some associated abnormalities seen on the imaging studies. In determining Claimant had a 0% impairment rating, Dr. Lindenbaum reasoned that there was no evidence of any significant structural abnormality related to the work accident and that any loss of range of motion was likely related to the prior cervical fusion. The ALJ finds Dr. Lindenbaum's opinions to be credible and persuasive and notes they are supported by the opinions of Claimant's treating providers. The ALJ finds Dr. Lindenbaum appropriately used his discretion as the DIME in determining Claimant was at MMI with 0% impairment related to his work injury.

9. Claimant testified at hearing regarding the events of his injury and his prior cervical fusion. He testified that following the injury he was no longer able to ride his motorcycle across country and that he had not ridden his motorcycle since the March 2, 2017 injury. Claimant testified that prior to the March 2, 2017 injury he had no limitations in his range of motion following his cervical neck fusion. Claimant testified that after being placed at MMI he has had tingling in his right arm, but has not had pain. Claimant testified he has returned to his regular job duties with Employer and can do everything he used to do prior to the March 2, 2017 accident, except that he can no longer replace ceiling tiles because he cannot look straight upwards.

10. Dr. Jack Rook testified at hearing on behalf of Claimant. He testified that in his opinion, Dr. Lindenbaum inappropriately provided Claimant a 0% impairment rating because claimant had 6 or more months of pain and rigidity that qualified him for an impairment rating under Table 53 of the *America Medical Association Guidelines to the Evaluation of Permanent Impairment, 3rd Ed.* Dr. Rook, however, had not reviewed the medical record and was not aware of material facts, such as Claimant having MRIs that preexisted the March 2, 2017 injury. The ALJ finds that Dr. Rook's testimony and opinions are not persuasive.

11. The ALJ finds that Claimant's testimony and the testimony and medical opinions of Dr. Rook do not amount to clear and convincing evidence to overcome the DIME of Dr. Lindenbaum.

CONCLUSIONS OF LAW

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

General Legal Principles

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

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

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

Claimant Failed to Present Clear and Convincing Evidence to Overcome the Division Independent Medical Examination (DIME) Opinion of Dr. Stephen Lindenbaum that Claimant Sustained 0% Impairment because of His Work Injury

A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola*, W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett*, W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

As found, Claimant failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Lindenbaum that Claimant sustained a 0% whole person impairment as a result of his March 2, 2017 admitted work injury. Claimant failed to demonstrate that Dr. Lindenbaum improperly applied the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*) or otherwise erred in assigning a 0% impairment rating. After reviewing Claimant's medical records, Dr. Lindenbaum ultimately determined that the findings now seen in Claimant's cervical spine are related to the effects of a long fusion with increased motion and stress at the levels above and below the prior fusion. Dr. Lindenbaum further opined the C6-C7 pseudoarthrosis was not related to claimant's March 2, 2017 injury because there was no evidence of any changes in the plate positioning and it was very unlikely the pseudoarthrosis would be related to the work injury without some associated abnormalities seen on the imaging studies. In determining Claimant had a 0% impairment rating, Dr. Lindenbaum reasoned that there was no evidence of any significant structural abnormality related to the work accident and that any range of motion loss was likely related to the prior cervical fusion. Although Claimant argues that Dr. Lindenbaum's determination is incredible, Dr. Lindenbaum properly applied the *AMA Guides* and exercised his discretion in assigning a 0% impairment rating because of the March 2, 2017 injury. Accordingly, Claimant has failed to produce clear and convincing evidence that Dr. Lindenbaum's impairment determination is incorrect.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Claimant failed to overcome the Division IME of Dr. Stephen Lindenbaum by clear and convincing evidence. Claimant sustained 0% impairment from his March 2, 2017 work injury.

DATED this 8th day of February 2019.

/s/Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a Petition to Review form at: <http://www.colorado.gov/dpa/oac/forms-wc.htm>.**

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-971-426-002**

ISSUES

- I. Determination of Claimant's average weekly wage ("AWW").
- II. Whether Claimant is equitably estopped from seeking an increase in his AWW.
- III. Whether Respondents are entitled to a credit against permanent partial disability benefits based on the net proceeds of Claimant's third party settlement.
- IV. Whether Respondents are entitled to recover an overpayment.

STIPULATIONS

1. Claimant's AWW on date of injury, December 30, 2014, is \$126.25. Claimant was an employee for Employer on the date of injury and was operating under an independent contractor agreement. The AWW on the date of injury was derived by subtracting the expenses incurred by Claimant to provide transportation service from his gross earnings as a cab driver.

2. If applicable, Claimant's AWW on the date of MMI, April 20, 2017, was \$984.20.

3. Claimant's net proceeds from settlement of his third-party personal injury action was \$24,205.79. At the time of settlement, Respondents' lien was \$52,320.12 based upon the payment of \$43,275.39 in medical benefits and \$9,044.82 in disability benefits. Respondents have previously recovered \$28,300.00 in satisfaction of their subrogation lien.

4. Claimant received an overpayment in temporary total disability ("TTD") benefits from January 8, 2017 to April 19, 2017 in the amount of \$924.84. Respondents are entitled to credit that amount against liability for future indemnity benefits.

FINDINGS OF FACT

1. Claimant is a 57 year old male who worked for Employer as a cab driver. At the time of his industrial injury, Claimant had been working for Employer for eight years.

2. On December 30, 2014, Claimant sustained an admitted industrial injury when he was involved in a motor vehicle accident. Claimant was initially placed on restrictions of no lifting/pushing/pulling more than 10 pounds, no reaching above shoulders with affected extremities, no commercial driving, and performing only sedentary work.

3. Claimant returned to work for Employer approximately one month after the motor vehicle accident with work restrictions. Claimant underwent physical therapy, epidural steroid injections, trigger points injections and a knee injection.

4. Claimant testified he ceased working as a cab driver at some point in 2015 and began receiving TTD benefits.

5. Claimant relocated from Colorado to Georgia in August or September of 2016.

6. Christopher Taylor, M.D. assumed Claimant's care upon his relocation to Georgia. On October 20, 2016, Claimant presented to Dr. Taylor with complaints of right-sided low back pain and right knee pain. Dr. Taylor noted Claimant was currently working as a lighting consultant with restrictions of no lifting over 30 pounds, no kneeling and a two hour break every 10 hours of work. He diagnosed Claimant with a right knee meniscus tear and possible lumbar discogenic pain and assigned work restrictions no lifting greater than 30 pounds, no kneeling, and taking a two hour break for every 10 hours of work.

7. Claimant testified he began employment as a conservation energy representative in January 2017. Claimant described the job as an entry-level position that involves approaching customers to perform energy assessments in small commercial businesses.

8. On February 8, 2017, Claimant filed an Application for Hearing ("AFH") endorsing the issues of medical benefits (authorization of a right knee arthroscopy), temporary indemnity benefits from the date of injury onward, and AWW. A hearing was scheduled and then ultimately rescheduled for July 25, 2017.

9. On April 20, 2017, Dr. Taylor placed Claimant at maximum medical improvement ("MMI") and imposed a permanent work restriction of no lifting over 100 pounds.

10. On May 18, 2017, the parties attended a prehearing conference before PALJ John A. Steninger during which Respondents sought supplemental answers to interrogatories, including provision of Claimant's 2015 and 2016 income tax returns, and "a detailed explanation and basis for the AWW claimed by the Claimant." In an order dated May 18, 2017, PALJ Steninger ordered Claimant to "submit clarification and supplementation as to the basis for Claimant's AWW".

11. Claimant complied with ALJ Steninger's order, submitting supplemental responses on May 31, 2017. The first interrogatory asked Claimant to "state the [AWW] sought by [him] and produce copies of all documentary evidence upon which Claimant will rely at hearing to support this claimed [AWW]." Claimant stated that, based upon his 2014 tax records, he "asserts an AWW of \$126.25 based on \$6,565 in net profits."

12. Claimant subsequently moved to withdraw the February 8, 2017 AFH, without prejudice, and vacate the July 25, 2017 hearing. ALJ Michelle Jones granted Claimant's motion in an order dated July 20, 2017.

13. On July 17, 2017, Allison Fall, M.D. performed an impairment assessment. Dr. Fall treated Claimant prior to his relocation to Georgia. Claimant reported low back complaints. Dr. Fall noted Claimant had new employment in Georgia and listed the name of the company. She examined Claimant's knees and found full range of motion, mild bilateral crepitation, and no instability. There were no shoulder complaints. Dr. Fall's final assessment was chronic low back pain with degenerative changes following a MVA. Dr. Fall concurred Claimant reached MMI as of April 20, 2017. She assigned a combined whole person impairment of 16% for lumbar range of motion deficits and a rightward disc protrusion at L4-5. She agreed with Dr. Taylor's permanent restrictions.

14. July 20, 2017, ALJ Michelle Jones granted Claimant's unopposed motion to withdraw the Application for hearing without prejudice and vacate the July 25, 2017 hearing.

15. On August 7, 2017, Respondents filed a Final Admission of Liability ("FAL") based on Dr. Fall's report, admitting to 16% whole person impairment, permanent partial disability based on an AWW of \$63.47. Claimant objected to the August 7, 2017 FAL and requested a Division Independent Medical Examination ("DIME").

16. Brian Shea, D.O. performed the DIME on December 21, 2017. Dr. Shea documented that Claimant resided in the Atlanta metro area and worked as an energy computer business consultant. Dr. Shea noted Claimant complained of low back and left shoulder stiffness and some neck pain, but continued to improve and was "highly functional." He agreed Claimant reached MMI as of April 20, 2017 and found 1% cervical range of motion impairment, 4% for Table 53 cervical impairment, 7% for Table 53 lumbar impairment, and 10% lumbar range of motion impairment. The spinal impairment ratings combined for 20%. Dr. Shea also awarded Claimant 8% upper extremity impairment which converted to 5% whole person impairment. The spinal and converted extremity ratings combined for a 24% whole person impairment rating. Dr. Shea found no lower extremity impairment and rendered no opinion as to permanent restrictions of any kind.

17. On January 31, 2018, Respondents filed a FAL admitting to a 24% whole person impairment per Dr. Shea's report, and PPD benefits based on an AWW of \$63.47.

18. On February 28, 2018, Claimant filed an AFH endorsing PPD and AWW at the time of MMI. A hearing was scheduled for June 21, 2018.

19. On March 27, 2018, Respondents filed an Amended FAL admitting to the 24% whole person impairment rating assigned by Dr. Shea, and PPD based on an AWW of \$126.25. On April 7, 2018, Claimant objected to the Amended FAL, noting a hearing was already scheduled for June 21, 2018.

20. The June 21, 2018 hearing was rescheduled to August 21, 2018 and subsequently vacated so the parties could attend a settlement conference. An order

dated August 15, 2018 signed by Designated Clerk Gabriela Chavez granted Claimant's motion to withdraw the AFH without prejudice and vacate the August 21, 2018 hearing.

21. On September 6, 2018, Claimant filed another AFH endorsing, among other things, AWW and PPD. The AFH states, "Claimant is not challenging the impairment rating. PPD is endorse (*sic*) by Claimant solely for purposes of increasing the PPD award based on an increase in AWW."

22. Claimant testified that he graduated school with an associate degree in renewable energy shortly before the admitted industrial injury and that he had been actively seeking employment in the renewable energy industry in the time, in the fields of solar, wind and geothermal heating. Claimant testified entry-level positions in the industry require physical activities including climbing wind towers, standing on roofs, and installation of solar panels and heat pumps in construction areas. Claimant testified that his temporary physical restrictions arising out of his work-related injury precluded him from pursuing job opportunities in the field of renewable energy. Claimant testified that he was precluded from obtaining on-the-job training from prospective employers to further his career goals and advancement in the renewable energy field due to the physical limitations caused by his work injury. Claimant testified he was unable to take tests to prove he could climb a 100 foot tower while carrying safety gear to obtain employment in the wind industry due to the weight of the gear exceeding Claimant's lifting restrictions. Claimant testified that, as a result, he did not apply for jobs in the wind industry that carried these requirements. Claimant also testified that he did not apply for jobs that required installation of solar panels on uneven roofs as these jobs exceeded his physical capacity arising out of his work-related injuries. Claimant testified that the renewable energy jobs in the construction field typically required minimum lifting requirement of 50 pounds which exceeded Claimant's temporary restrictions following his injury.

23. Claimant testified he relocated from Colorado to Georgia to assist in the care of a family member and to pursue employment prospects in the renewable energy industry, which he stated were more plentiful on the east coast. Claimant testified he had been unable to obtain entry-level employment in the renewable energy field after his injury while living in Colorado.

24. Claimant testified he obtained entry-level employment in the renewable energy field in December 2016 and began the employment on January 8, 2017. Claimant's job as a conservation energy representative involves approaching customers to provide energy assessments for small commercial businesses. Claimant testified his job duties do not involve the wind or solar energy field and he is not able to obtain the experience and career advancement opportunities he desires in wind or solar energy through his current position. Claimant testified he believes he is precluded from obtaining employment in the wind and solar industry due to the physical limitations arising out of his work injury.

25. Regarding the May 2017 supplemental discovery responses, Claimant testified he provided his 2014 tax records "to show that my income is much less than it currently

is in 2017” and to support how he came to an AWW of \$126.25, which would be the AWW at the date of injury. Claimant testified that he notified Insurer of his relocation to Georgia so that his TTD checks could be forwarded. Claimant testified he did not notify Respondents of his employment and wages in Georgia.

26. Amber Castillo testified as a claims representative for Insurer. Ms. Castillo is the adjuster on Claimant’s workers’ compensation claim and has been adjusting claims in Colorado for approximately 10 years. Ms. Castillo testified she used a net income figure derived from Employer’s records in preparing admissions of liability. Ms. Castillo testified that, when Claimant provided supplemental discovery responses in May 2017, she did not dispute the AWW figure stated therein as it was based on tax records and was consistent with the manner in which she calculated the AWW of independent contractors such as Claimant. She testified that, between Claimant’s relocation to Georgia in December 2016 and Claimant’s return to Colorado for an impairment rating with Dr. Fall in July 2017, Ms. Castillo received no information as to Claimant’s Georgia wages.

27. Ms. Castillo testified she admitted to the impairment rating from Dr. Fall based on a cost-benefit analysis that included Claimant’s asserted low AWW. Ms. Castillo testified she would not have admitted to the impairment rating from Dr. Fall if Claimant had previously asserted an AWW of \$984.20. Ms. Castillo further testified that the DIME physician, Dr. Shea, provided a higher rating than Dr. Fall and issued an impairment rating on the schedule of injuries. Ms. Castillo testified she would not have converted the schedule rating to a whole person rating and admitted to a combined whole person rating if Claimant would have previously asserted an AWW of \$984.20. Ms. Castillo testified the cost-benefit analysis of the higher AWW would have resulted in Respondents admitting to the schedule impairment rating which would result in a lower PPD award. She testified that by the time she received notice Claimant was seeking a higher wage, it was too late for her to initiate the hearing process to overcome the DIME.

28. Claimant filed a complaint in Denver District Court against another individual for causing the December 30, 2014 accident and his resulting injuries. The case settled on May 2, 2018. In compromise of the existing lien, Claimant paid Respondents \$28,300.00.

29. Claimant’s testimony regarding the effects of the work injury on his future earning capacity is not found credible or persuasive.

30. The ALJ finds that Claimant’s AWW at the time of injury, \$126.25, is a fair approximation of Claimant’s wage loss and diminished earning capacity.

31. The ALJ finds Respondents are entitled to a credit against future workers’ compensation benefits for the \$24,205.79 in net recovery proceeds from Claimant’s third party lawsuit.

32. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

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

Equitable Estoppel

Respondents argue Claimant's request to increase his AWW is barred by the doctrine of equitable estoppel.

To establish an application of the doctrine of equitable estoppel, the claimant must prove four elements: (1) the party to be estopped must know the relevant facts; (2) the party to be estopped must also intend that its conduct be acted on or must so act that the party asserting the estoppel has a right to believe the other party's conduct is so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting the estoppel must reasonably rely on the other party's conduct to his or her detriment. *Johnson v. Industrial Commission*, 761 P.2d 1140, 1146; *Sneath v. Express Messenger Service*, 931 P.2d 565 (Colo. App. 1996).

Respondents contend Claimant was aware of his increased wages when he was placed at MMI and when he provided supplemental discovery responses claiming an AWW of only \$126.25. Respondents maintain they had a right to believe Claimant intended to assert an AWW of \$126.25 moving forward, based on the supplemental discovery responses, and that they were unaware of Claimant's Georgia employment and wages until after admitting to the DIME's impairment rating. Lastly, Respondents assert they detrimentally relied on Claimant's failure to disclose his Georgia wages in making their decision not to contest the impairment ratings of Dr. Fall and Dr. Shea. The ALJ disagrees each element of equitable estoppel has been met here.

Claimant was aware of the relevant facts. He began employment in Georgia in January 2017 and was earning wages from such employment at the time he was placed at MMI in April 2017. Thus, at the time Claimant submitted supplemental discovery responses, he was aware his AWW at the time of MMI was higher than \$126.25. Claimant was also aware he did not notify Employer of his Georgia employment or wages.

Nonetheless, the ALJ is not persuaded Claimant intended his conduct to be acted on or acted so that Respondents had a right to believe Claimant's conduct was so intended. In his May 2017 supplemental responses, Claimant claimed at AWW of \$126.25 based on 2014 tax records, the date of injury. Although Claimant had been placed at MMI by the time he submitted the supplemental responses, no impairment evaluation had taken place and no definitive impairment rating had been assigned. Claimant's February 8, 2017 AFH was subsequently withdrawn without prejudice, preserving the issue of AWW. Respondents then filed an August 7, 2017 FAL admitting to an AWW of \$63.47, to which Claimant objected and requested a DIME. Pursuant to Section 8-43-203 (2)(b)(II)(A), C.R.S., Claimant was not required to file a request for hearing on the AWW issue until the DIME process was terminated. Accordingly, it was appropriate for Claimant to not file an AFH on the issue of AWW at the time of MMI in response to Respondents' August 7, 2017 FAL.

Although Claimant failed to notify Respondents of his Georgia employment and wages, there is reference to Claimant's new employment in both Dr. Fall's July 17, 2017 impairment assessment report and Dr. Shea's December 21, 2017 DIME report, which Respondents relied upon in filing the FALs. The record contains no indication that, prior to filing the August 7, 2017 and January 31, 2018 FALs, Respondents made any attempt to confirm Claimant continued to claim an AWW of \$126.25, despite deciding to use that figure as their basis for not contesting the assigned impairment ratings. While it

was practical for Respondents' to undergo this cost-benefit analysis, it was Respondents' choice to do so, and such choice does not result in Claimant being equitably estopped from requesting an increase in AWW under the specific circumstances.

AWW

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3) establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, *supra*.

Claimant contends that determining his AWW at the time of MMI more fairly compensates him for his loss of future earning capacity, based on his impairment and restrictions. Claimant relies on *Pizza Hut v. ICAO*, 18 P.3d 867 (Colo. App. 2001). In *Pizza Hut*, the claimant was injured as a part-time pizza delivery driver. The claimant had recently graduated nursing school and obtained a full time job with a hospital shortly after his work-injury. Following the DIME, the respondents filed a FAL admitting to the AWW from the part-time pizza job. The claimant objected and requested an AWW based on his earnings at the hospital when he attained MMI. The Court affirmed the Panel's order upholding utilizing the AWW at the time of MMI. *Pizza Hut*, 18 P.3d. at 870.

As found, the AWW at the date of injury is a fair approximation of Claimant's wage loss and earning capacity. While Claimant obtained a degree in renewable energy shortly before sustaining the work injury, the ALJ is not persuaded by Claimant's testimony that he was unable to pursue work in this field as a result of the work injury. Claimant began an entry level position in the renewable energy field shortly after relocating to Georgia, prior to being placed at MMI. When placed at MMI, the only permanent restriction assigned to Claimant limited Claimant from lifting more than 100 pounds. The ALJ did not find Claimant's testimony regarding the physical requirements of the jobs and his inability to pursue work opportunities in the renewable energy field credible or persuasive. The ALJ is not persuaded the work injury limited Claimant in pursuing other jobs in the renewable energy industry to obtain experience and further advance his career. Claimant's AWW at the time of injury, \$126.25, fairly approximates the impact of Claimant's injury on his future earning capacity.

Credit of Net Tort Recovery Against Future Indemnity Benefits

Where an employee is injured through the fault of a third party, there are two components or elements to be considered, a lien representing benefits already paid and a potential credit to be offset against the obligation to provide workers' compensation benefits in the future. *Tate v. Industrial Claim Appeals Office*, 815 P.2d 15 (Colo. 1991); *Andrews v. Industrial Claim Appeals Office*, 952 P.2d 853 (Colo. App. 1998); *Metcalfe v. Bruning Division of AMI*, 868 P.2d 1145 (Colo. App. 1993). Mere acceptance of money to fully or partially satisfy the lien, without more, does not affect an insurer's right to claim a credit. *Metcalfe*, supra.

Here, Respondents accepted the sum of \$28,300.00 to extinguish a lien of \$52,320.12, resolving the lien, but not Respondents' right to a credit. The parties stipulated Claimant's net tort recovery was \$24,205.79. Claimant does not contest Respondents are entitled to a credit against future workers' compensation benefits for the \$24,205.79 in net recovery proceeds from the third party lawsuit.

ORDER

It is therefore ordered that:

1. Claimant's AWW is \$126.25.
2. Respondents are entitled to credit the \$24,205.79 representing Claimant's net recovery from the 3rd party tort action against any future indemnity benefits.
3. Respondents are entitled to a credit in the amount of \$924.84 representing TTD benefits received by Claimant from January 8, 2017 to April 19, 2017 against future indemnity benefits.
4. All matters not determined herein are reserved for future determination.

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

DATED: February 7, 2019

A handwritten signature in black ink, appearing to read 'Kara Cayce', is positioned above a solid horizontal line.

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the recommended four level cervical fusion from C3-7 is reasonable, necessary, and causally related to his admitted industrial injury.
- Whether Claimant has proven by a preponderance of the evidence that the recommended ankle arthroscopy, Brostrom procedure, and repair of peroneal tendons surgery is reasonable, necessary, and causally related to his admitted industrial injury.

FINDINGS OF FACT

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

1. On January 17, 2018, Claimant suffered an admitted injury to the left ankle, left shoulder and cervical spine. Claimant testified that he fell to the ground landing on his left shoulder. Claimant testified that he tapped his head when he fell, but his medical records did not support that testimony.

2. On the day of the fall, Claimant presented to North Suburban Medical Center with medial and lateral left ankle pain after a fall at work. A radiologist read his left ankle x-ray as normal. Claimant did not report head trauma or neck pain.

3. Also on the date of the injury, Claimant had an initial evaluation with ATP Dr. Matthew Lugliani. Claimant reported ankle pain and an inability to bear weight. Again, he reported no head trauma or neck pain. Claimant filled out a pain diagram on which documents the sole location of pain as the left ankle. Yet at hearing, Claimant testified that after he fell, his neck was immediately sore.

4. On January 22, 2018, Claimant reported the onset of shoulder pain. A pain diagram Claimant filled out on this day documented symptoms in his left shoulder along with his left ankle. Claimant noted no neck symptoms. A January 30, 2018 pain diagram documented the same symptoms.

5. On February 16, 2018, Claimant reported symptoms radiating down his left arm, but still no neck pain or symptoms. However, Claimant testified the numbing down his arm started a week after the accident.

6. By February 21, 2018, a month after the accident, Claimant began reporting "persistent left-sided neck pain." At hearing, Claimant testified that sometime in February, "like the 21st," he informed the doctor his neck was sore and he was having headaches. Dr. Lugliani referred Claimant to Dr. Pehler for his neck, Dr. Myers for his ankle, and Dr. Davis for his shoulder.

7. By March 28, 2018 Claimant's symptoms expanded to include aching in his head and stabbing pain at the back of his neck, as documented Claimant's pain diagram.

8. Dr. Lugliani referred Claimant to pain specialist Dr. Lesnak for treatment and an EMG.

9. On April 6, 2018, Dr. Lesnak saw Claimant. Dr. Lesnak noted diffuse complaints through the neck, scapula, shoulder and arm. Dr. Lesnak noted a history of bipolar manic depression. On physical exam, Claimant demonstrated giveaway weakness in his left shoulder and significant guarding to any attempt at examination. Claimant had decreased sensation throughout his arm in a non-dermatomal distribution. Claimant demonstrated diffuse tenderness with gentle brushing on the skin on his neck, but no distinct trigger points or spasms. Overall, the findings were nonphysiologic. Dr. Lesnak noted that Claimant had no "real clear objective findings to support his complaints." Dr. Lesnak noted an extremely high level of somatic pain complaints, which "strongly suggests an underlying somatic disorder. Patients with these types of diagnoses frequently embellish/exaggerate their symptomology and their subjective complaints are commonly unreliable at best." Thus, Dr. Lesnak recommended that any medical diagnoses be based solely on reproducible objective findings, and not his complaints. Dr. Lesnak recommended moving forward with the EMG to confirm the diagnosis.

10. As part of his exam, Dr. Lesnak performed a Comprehensive Outcome Assessment, which includes a psychological assessment. Claimant's results placed him in the "distressed depressive" category, which means, "there are significant psychological factors that are influencing the patient's symptoms, recovery, and perceived function at this point in time."

11. On April 16, 2018, Dr. Lesnak performed the EMG. The EMG revealed no abnormalities of the left upper extremity, neck or scapular region. This finding concerned Dr. Lesnak, who noted no "reproducible objective findings to suggest any symptomatic cervical spine pathology." His complaints are "dramatically out of proportion to what one would expect given the mechanism of his incident." Dr. Lesnak recommended moving forward with the left shoulder MRI, and basing further recommendations off those results. Dr. Lesnak did not prescribe opioid pain medications.

12. Claimant went to the ER reporting terrible pain. Dr. Sheldon Goldberg, the attending physician at the hospital, put Claimant on a "cocktail" of painkillers. Dr. Goldberg did not perform any psychological evaluation.

13. On April 18, 2018, Dr. Lugliani performed a Comprehensive Outcome Assessment, which included a psychological assessment. Claimant's results placed him in the "distressed depressive" category, which means, "There could be significant psychological factors that could interfere with recovery." Dr. Lugliani believed this was preexisting and not related to the work injury.

14. At a follow-up on April 25, 2018, Dr. Lugliani noted that Claimant had elected to move to a different pain specialist, Dr. Goldberg, contrary to their policy, so he released Claimant from his care.

15. Dr. Stuart Myers treated Claimant's ankle. By April 9, 2018, Dr. Myers stated he had expected Claimant to be at MMI for his ankle by now, but "things seem to be progressing a bit more slowly than I initially anticipated." Dr. Myers ordered an ankle MRI that revealed intra-articular pathology. Dr. Myers recommended an ankle injection. The injection provided no benefit. Accordingly, Dr. Myers recommended an ankle arthroscopy, Brostrom, and peroneal tendon debridement repair of tendon.

16. By May 15, 2018, Claimant reported a "limited ability to do standing and walking." At hearing, Claimant testified that Dr. Myers gave him a boot for his ankle that he "pretty much wears all the time." On surveillance taken over six different days, Claimant is not wearing a protective boot.

17. At hearing, Claimant testified that he has difficulty going up steps, and has to gauge how much room he has before squaring up and stepping up. He further testified that if he is approaching a step he leads with his right foot, since his left foot is continuing to have issues. However, surveillance footage of Claimant walking while talking on a cell phone reveals no abnormal hesitation while Claimant walks up a curb, leading with his injured left foot.

18. Claimant testified that his ankle has even affected how he gets in and out of the car. Video surveillance shows Claimant getting into and out of his truck repeatedly with no obvious issue, including specifically pushing off his left injured ankle while getting into his pickup truck.

19. Dr. Stephen Pehler treated Claimant's cervical spine. Dr. Pehler noted that Claimant had "a relatively atypical nature of his presentation." Dr. Pehler cited the "fairly perplexing and concerning clinical presentation," with some symptoms "consistent with progressive spinal cord and nerve root compression . . . and some other signs and symptoms that do not match with this particular pathology."

20. Nonetheless, on May 25, 2018 Dr. Pehler recommended a C3-C7 anterior and posterior cervical decompression and fusion. Dr. Pehler noted "this is obviously an extensive undertaking," and Claimant will "likely have long-term pain and disability following this operation." Dr. Pehler opined that it would be "a fairly debilitating operation for the patient to recover from," and that he would not likely return to his work as a mechanic. Dr. Pehler further opined that given Claimant's pain symptoms, "recovery from this procedure is questionable at best.

21. Claimant testified that he needs the cervical fusion to be able to function, as his current status "is not functioning." He agreed that his current condition is so bad that he is willing to take the risk with some of the functionality issues he may have after the fusion. Dr. Castro noted his concern for performing the 4-level fusion when Claimant was functioning pretty well while washing his car and in the surveillance videos. The

surveillance shows Claimant washing his truck, using a soap brush to soap the vehicle, including lifting his injured left arm above shoulder level to remove and replace his hat with ease, and applying rigorous force while soaping his truck with a brush, using his left shoulder and neck, all with no obvious dysfunction.

22. Claimant testified at times his neck hurts to move, and specifically when looking down or turning in both directions, and that his neck symptoms have been the same for the last three to four months. The surveillance shows Claimant looking down and to the left while talking to the mail carrier, with no apparent issue. The surveillance also shows Claimant bending his head straight down without any apparent issue.

23. Claimant testified he can move his head towards his shoulder, but not all the way, and that he experiences pain like “a red-hot poker getting stuck” in him when he moves his head towards his shoulder. Dr. Castro agreed that the action of pinning a phone to your shoulder with your head is not something an individual who requires a four-level fusion would like to do, as it will bring on pain. Yet on surveillance, Claimant pins his phone against his left shoulder with his head, while he steps into his truck, with no apparent issue.

24. Claimant testified that if he is driving and has to look left and right at a stop sign, he can turn his head to a point but then has to roll his body. However, surveillance documents Claimant moving his head side to side repeatedly and with ease while driving his truck.

25. Dr. Davis is treating Claimant’s shoulder. He recommended a shoulder surgery, which Insurer has authorized. However, Dr. Davis is refusing to go forward with the shoulder surgery until the neck surgery is performed. Dr. Pehler opined that the shoulder surgery could move forward before any neck surgery. Dr. Castro agreed, and stated that the shoulder may be the underlying cause of his neck issues.

Dr. Bryan Andrew Castro

26. Dr. Castro testified as a level II accredited, board certified orthopedic spine surgeon who performs surgery four to six times a week.

27. Dr. Castro testified that the recommended four-level fusion would not benefit Claimant. The surgery is typically performed for major trauma, fractures, spinal cord injury, and tumors.

28. In assessing whether to perform a four-level fusion, Dr. Castro testified that you look for a clear dermatomal pattern of persistent radiculopathy that can be fixed. Although Claimant had complaints of pain, his normal EMG and strength findings on physical exam do not support a finding of significant cervical radiculopathy. Claimant had migratory patterns that would not predict a good result. Claimant’s MRI also did not match the dermatomal pattern. If the MRI results were causing radiculopathy, it would be on the thumb side, and not on the pinky side that Claimant is reporting. The pinky

side nerve is located at C8, which was patent on the MRI, with nerve channels open with no compressing.

29. Dr. Castro testified that this surgery would result in long-term pain and disability. He testified that the risks associated with this surgery are significant, including dysphagia, infection, permanent loss of range of motion, and particularly in Claimant's case fusion failure resulting in the need for additional operations. He stated that when the ramifications of a surgery are so high, it is important that you can determine the patient will be predictably better after the surgery. The ramifications for this surgery increase because it involves four levels. Dr. Castro explained that the fusion rate for a four-level fusion is in the low 40th percentile. This healing rate is before factoring Claimant's nicotine usage (chewing tobacco), which inhibits bone healing.

30. Dr. Castro testified that Dr. Pehler's opinion that the surgery is needed to ameliorate myelopathy is not supported by the actual findings for Claimant. Myelopathy spinal cord compression results in very specific findings, including balance problems, gait disturbances, hand dexterity changes, and a very unique set of reflexes that is consistent with myelopathy. Dr. Castro testified that Claimant did not have these physical findings as documented on surveillance, nor did he have the cardinal reflex findings. The surveillance does not support what any of the providers were finding on physical examination, including himself. Dr. Rook also testified that he did not find myelopathic symptoms on his physical examination. Nor did the neck MRI reveal any injury to the spinal cord.

31. Dr. Castro testified that in the workers' compensation setting the concern is not just pain amelioration but also functional improvement. Dr. Castro stated that this surgery would not be of benefit, and instead would cause a "tremendous functional worsening of his condition."

Dr. Robert Messenbaugh

32. Dr. Messenbaugh testified as a board certified, level II accredited orthopedic physician.

33. Dr. Messenbaugh testified that Claimant suffered an ankle sprain and has an MRI that shows a tear of the anterior talofibular ligament (ATFL). Dr. Messenbaugh noted that Dr. Myers' recommend surgery is for documented instability of the ankle.

34. Dr. Messenbaugh opined that the surgery was not indicated given the lack of documented instability. He noted that stress tests used to assess instability were not performed. He further noted that the surveillance videos revealed no instability or reluctance to put weight on his lower extremity. Dr. Myer's own physical exams do not document instability, as no stability physical examination testing was done given Claimant's discomfort. Dr. Messenbaugh agreed that he could not even stress Claimant's ankle sufficiently to determine whether it was unstable or not.

35. Dr. Messenbaugh physically examined Claimant, specifically looking for findings consistent with his ATFL tear. He did not find tenderness consistent with the ATFL tear, and instead found tenderness in a separate part of the ankle where the peroneal tendons pass. Since the ATFL area was not tender, he expressed concern whether a repair of that ligament would serve any good for Claimant. Meanwhile, peroneal tendinosis, which may explain Claimant's symptoms, could be caused by Claimant's age and obesity.

36. On cross, Dr. Messenbaugh agreed that Claimant stating that his ankle gives way, if the treating physician believed him, could be evidence of instability. However, the surveillance taken over six days documents Claimant walking, getting into his vehicle, and stepping up and down curbs, and shows no evidence of instability or issue.

Dr. Jack Rook

37. Dr. Jack Rook testified as a board certified physical medicine and rehabilitation level II accredited expert. Dr. Rook opined that Claimant's industrial injury caused the need for the surgeries recommended by Drs. Pehler and Myers.

38. When Dr. Rook saw Claimant for an examination, Claimant favored his left leg while walking and held his left arm in a protective manner, which is what Dr. Rook would expect with a torn ankle ligament and severe shoulder pain/pathology. Yet surveillance video documents Claimant walking without apparent limp or protective manner towards his left arm, and in fact hops down a curb onto his injured left ankle with no issue. Surveillance also documents Claimant driving himself to a physician appointment with his partner in the passenger's seat, his partner tossing him his shoulder sling prior to entering the appointment, and then removing it after the appointment, before getting back in the car to drive. Dr. Rook testified that he did not view the surveillance.

39. Dr. Rook testified that Claimant reported severe neck pain, ongoing and constant since the accident occurred, particularly when looking down. However, Claimant's neck pain began roughly a month after the accident.

40. Dr. Rook opined that the recommended ankle surgery would improve Claimant's weight bearing while walking or standing. However, surveillance documents Claimant standing, bearing his full weight on his left leg, with his right leg crossed, with no apparent issue.

41. Dr. Rook testified that Claimant reported to him a poor level of functional ability. The consideration for performing the four-level fusion is that his current function is so poor that it is worth considering this serious surgery. Surveillance footage of Claimant's functional ability contradicts Dr. Rook's opinion.

42. The ALJ does not credit the testimony of Dr. Rook. Dr. Rook's analysis is based on faulty information. Dr. Rook recommended the surgeries given the severe dysfunction Claimant reported. Dr. Rook opined that the potential benefit to improve

Claimant's function, since Claimant's condition is so poor, outweigh the risks associated with the four-level fusion. The surveillance completely contradicts the level of functional deficit Claimant alleges and reports to Dr. Rook and the other treating physicians. As Dr. Rook testified that he did not review this surveillance footage, his opinion is not persuasive.

43. Surveillance showing what Claimant is able to do fails to support his alleged disabilities and his reports to his treating physicians. Claimant's medical records document nonphysiologic complaints, unusual findings that do not match the diagnostics, and subjective complaints out of proportion to the findings. Therefore, the opinions of the physicians who viewed Claimant's surveillance, Drs. Castro and Messenbaugh, are more persuasive.

CONCLUSIONS OF LAW

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

GENERALLY

In addition to determining the sufficiency of the evidence presented, the ALJ evaluates the credibility and probative value of conflicting evidence, including competing experts and inconsistencies in a particular witness' testimony. *Johnson v. ICAO*, 973 P.2d 624, 626 (Colo. App. 1997).

The ALJ does not have to reject explicitly every theory found to be unpersuasive. Nor does the ALJ have to make findings about every piece of evidence. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000). An ALJ may even reject uncontroverted evidence. *Mosley v. ICAO*, 78 P.3d 1150, 1153 (Colo. App. 2003).

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

MEDICAL BENEFITS

Respondents are liable for authorized medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994).

Whether medical treatment is reasonable and necessary is for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The

claimant bears the burden of proof to establish the right to specific medical benefits. *Wal-Mart Stores, Inc. v. Industrial Claims Office, supra.*

The ALJ finds that, more likely than not, the recommended surgeries: 1) fusion from C3-C7; and 2) ankle arthroscopy, Brostrom procedure, and repair of peroneal tendons surgery, are not reasonable, necessary or related to the industrial injury. The ALJ is highly concerned about the level of disability Claimant demonstrated at hearing, testified to and reported to his treating physicians, versus his demonstrated functionality in the surveillance video when he was not aware he was being observed.

Each physician acknowledges that a 4-level fusion is a significant undertaking with significant risks. However, it may be necessary for certain severe injuries. Dr. Pehler, the spine surgeon who recommended the fusion, did so in part based on findings of myelopathy. Yet the surveillance shows none of the balance issues or gait disturbances expected if Claimant's cord was compressed. Dr. Castro noted Claimant did not present with the Cardinal reflex. Even Claimant's own IME Dr. Rook agreed that on physical exam Claimant showed no myelopathic findings. Dr. Pehler himself expressed significant reservation throughout his treatment of Claimant, noting the atypical findings throughout. Oddly, Dr. Pehler has now agreed that Claimant's shoulder surgery can proceed prior to the neck surgery. This seems contradictory to Dr. Pehler finding that the neck surgery is truly needed, since Claimant's neck must be manipulated in order to perform the shoulder surgery, and if Claimant truly had a compressed cord, it is unlikely he would be comfortable allowing the shoulder to proceed first. On the contrary, it appears that Dr. Pehler's opinion may be more in line with Dr. Castro's, in that the shoulder may be the true cause of Claimant's symptoms, if any.

Claimant's subjective complaints serve as the base for Dr. Myers and Dr. Pehler's surgical recommendation. The reasonableness of these surgical recommendations depends on the veracity of Claimant's statements to them. Given the evidence presented at hearing, Claimant's subjective complaints are not credible. At hearing Claimant appeared very debilitated, limping and demonstrating pain behaviors. He also testified to his inability to function, including experiencing "red-hot pokers" of pain in his neck with movement, and the need to constantly wear a boot on his left ankle. This is consistent with what he reported to his treating physicians. For the ankle, Claimant reported to Dr. Myers that he has a limited ability to stand/walk. Dr. Myers could not even perform a physical examination of the ankle given pain complaints.

Dr. Pehler opined that the only option given Claimant's complaints is a 4-level fusion. At hearing, when confronted with the likelihood of permanent post-surgical disability and pain, Claimant testified that he still wanted to proceed with the surgery since his current level of function was so bad.

The surveillance contradicts the level of disability Claimant reports. In viewing the surveillance, it is not obvious that Claimant has any injury at all, whether to his left ankle, left shoulder, or neck. Claimant carries himself with the ease expected of an individual his size, and he not once winces in pain or exhibits the hesitation or protective behaviors

one would expect given his alleged injuries. Claimant casually leans his full weight on his left ankle. He walks with ease, hopping up and down curbs. Claimant moves his neck repeatedly and even while applying force while soaping his vehicle, and yet exhibits no pain reactions or limitations. Even the left shoulder, which is admitted for surgery and not in dispute at this hearing, shows no obvious sign of injury, with Claimant opening his door, and lifting his arm above shoulder height without issue. In totality, the surveillance videos taken on 4/18, 5/16, 5/26, 5/31 and 6/7 contradict the disability and lack of function Claimant alleges. Claimant argued at hearing that he may have been having a good day during the surveillance. Yet the surveillance spanned six days from April 18, 2018 to June 7, 2018, and in no instance did Claimant appear disabled to the extent he is claiming.

The ALJ finds psychological issues and/or somatic disorder to be the most likely explanation for the discrepancy between Claimant's purported disability and what he demonstrates on surveillance. Unreliable subjective complaints would also explain the "atypical, unusual" findings from each of Claimant's treating physicians, including Drs. Pehler and Myers. Spine surgeon Dr. Pehler expressed concern throughout, with some symptoms consistent with cord compression and others not consistent. These physicians relied on the truthfulness of Claimant's complaints for their surgical recommendations. They do not have the benefit of viewing the surveillance and the treating records of the other physicians, which also document nonphysiologic and unusual findings. Thus, while the ALJ does not question their credentials, their opinions are undermined by their reliance on Claimant's unreliable complaints.

This ALJ gives significant weight to the opinions of Dr. Lesnak. He was a pain management treating physician, and the only physician to perform psychological testing. Claimant is bipolar manic-depressive. The psychological testing revealed that Claimant was "depressed distressed," with significant concern for somatic disorder and unreliable complaints. Because of this, Dr. Lesnak recommended relying on objective evidence, and requested an EMG. Once the EMG returned normal, Dr. Lesnak refused to prescribe opioids pending additional diagnostics for the shoulder. Once Dr. Lesnak refused to prescribe opioids, Claimant began seeing Dr. Goldberg (who did prescribe opioids *without* psychological testing), resulting in Claimant's discharge from Dr. Lugliani/Dr. Lesnak's care for noncompliance. Claimant has been on opioids since the beginning of his treatment, and sought other care as soon as he was denied opioids, yet no other physicians have performed a psychological assessment, particularly considering his baseline bipolar condition.

The ALJ finds that the recommended ankle arthroscopy, Brostrom procedure, and repair of peroneal tendons surgery is not reasonable, necessary or related to the industrial injury, as it is based on Claimant's subjective complaints and not objective evidence. Claimant's complaints of ankle instability are not credible and are not supported by the surveillance. Claimant's ankle pain complaints migrate and are not consistent, as documented by the physical exams of Drs. Messenbaugh, Rook and Myers. Also, as Dr. Messenbaugh testified, there is a lack of objective evidence documenting instability, which is the indicator for this surgery.

The ALJ also finds that the recommended cervical fusion from C3-7 is not reasonable, necessary or related to the industrial injury. The physician who recommended this surgery, Dr. Pehler, shows significant concern throughout with Claimant's atypical findings. Dr. Pehler states that Claimant will be disabled and with permanent pain, yet continues to recommend the surgery given Claimant's complaints. The ALJ credits Dr. Castro's testimony that Claimant's functioning would be far worse after the surgery than his current condition. Dr. Castro's testimony that Claimant's complaints have been nonphysiologic and inconsistent find support in the medical records, including the normal EMG and cervical MRI with degenerative pathology that would tie to different dermatomal complaints than what Claimant is alleging. Ultimately, Claimant at hearing appeared hobbled, in pain, and disabled. Yet the Claimant on surveillance went about his daily life with no obvious injury or disability. Given Claimant's demonstrated ability and the lack of objective findings in the medical records, the 4-level fusion is not reasonable, necessary or related.

ORDER

It is therefore ordered that:

1. Claimant's request for a cervical fusion from C3-7 is denied and dismissed.
2. Claimant's request for an ankle arthroscopy, Brostrom procedure, and repair of peroneal tendons is denied and dismissed.
3. Any issues not resolved in this order are reserved for future determination.

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

DATED: February 12, 2019

/s/Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor,
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable right shoulder injury during the course and scope of her employment with Employer on June 21, 2018.
2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.
3. Whether Claimant has proven by a preponderance of the evidence that Respondents failed to timely provide a list of at least four designated physicians in compliance with §8-43-404(5)(a)(I)(A), C.R.S. and she is thus permitted to select a treating physician.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of \$401.66.
2. If the claim is compensable, Claimant is entitled to receive Temporary Partial Disability (TPD) benefits for the period June 22, 2018 through November 23, 2018.

FINDINGS OF FACT

1. Claimant worked for Employer as a Cashier. She testified that on June 21, 2018 she was helping another cashier unload a customer's cart. While lifting a six-pound package of hamburger patties across her body to place on a conveyor belt, Claimant suffered a burning sensation in her right shoulder.
2. Claimant reported her injury to her supervisor but did not initially seek medical care. Although Claimant had not received work restrictions Employer accommodated her by modifying her job duties. However, when Claimant's symptoms did not resolve, she completed a First Report of Injury on June 25, 2018.
3. Employer directed Claimant to UC Health Urgent Care for medical treatment. On June 27, 2018 Claimant visited UC Health for an examination. Claimant reported that, while working for Employer six days earlier, she lifted a six-pound package of hamburger and suffered a sharp pain in her right shoulder that radiated into her right chest area. She noted sharp pain with movement, but Advil and a heating pad provided some relief. On physical examination Claimant exhibited tenderness and

decreased range of motion in her right shoulder area down to her first and second right ribs. Jocelyn Cavender, PA-C diagnosed Claimant with somatic rib dysfunction, strain of the neck muscles and strain of the right shoulder. PA-C Cavender prescribed medications and assigned work restrictions of no lifting, carrying, pushing or pulling in excess of five pounds and no overhead reaching.

4. Claimant explained that she desired to continue follow-up treatment with UC Health. However, she commented that she had a conversation with her manager and the insurance adjuster. Claimant testified that the insurance adjuster informed her the claim was denied and she would be unable to receive any additional authorized medical care. She subsequently attempted to schedule an appointment with her primary care physician but her request was initially declined because she had suffered a work injury.

5. On July 10, 2018 Insurer filed a Notice of Contest challenging Claimant's claim. The Notice of Contest specifically provided that the claim was denied because Claimant's injury was not work-related.

6. Claimant testified that, approximately one month after her injury, Employer's Human Resources (HR) person presented her with a list of doctors. The HR person told Claimant to circle the doctor she had visited for her industrial injury. Claimant noted that she signed, but did not date, the form.

7. Claimant subsequently obtained treatment from her primary care physician. On October 24, 2018 Claimant visited David Bak-Yen Leung, N.P. at Centura Orthopedics and Spine for an initial examination. She reported that while at work in late June 2018 she was trying to lift a heavy object and felt a burning sensation in her right shoulder. N.P. Leung recommended an MRI to evaluate Claimant's right shoulder pathology. He remarked that "she very likely has a biceps tendon injury but also has an exam consistent with rotator cuff injury as well."

8. On October 17, 2018 Claimant underwent an independent medical examination with Timothy S. O'Brien, M.D. Dr. O'Brien issued a report on October 31, 2018. Claimant reported that on June 21, 2018 she was unloading a customer's cart while working for Employer. She picked up a six-pound package of frozen beef and immediately experienced right shoulder pain. After considering Claimant's medical records and conducting a physical examination, Dr. O'Brien concluded that the June 21, 2018 work incident caused a "diffuse strain and sprain of the right shoulder girdle" that included the first and second right ribs. He noted that Claimant did not sustain any permanent or partial disability as a result of the work incident and does not require any additional medical treatment. Dr. O'Brien emphasized that "whatever minor injury occurred on June 21, 2018" had healed by the time of his examination. He reasoned that the mechanism of injury was "innocuous" and would not have generated sufficient energy to "result in substantial tissue breakage or yielding." Dr. O'Brien summarized that Claimant's injuries would likely have healed within four weeks of the event and her current symptoms were unrelated to the June 21, 2018 incident.

9. On November 2, 2018 Claimant underwent a right shoulder MRI. The MRI revealed a “partially healed/synovialized superior labral tear” and “short segment insertional tendinosis and low-grade interstitial split tearing” of the anterior distal rotator cuff tuberosity attachment.

10. On November 15, 2018 Dr. O’Brien issued a Supplemental Report after reviewing additional medical records and the November 2, 2018 MRI. He concluded that Claimant’s right shoulder MRI was normal for her age. He reiterated that Claimant’s mechanism of injury was not traumatic enough to cause “substantial tissue breakage or yielding.” Dr. O’Brien summarized that Claimant’s continuing pain symptoms were not organically based.

11. On November 21, 2018 Claimant returned to her primary care physician and visited orthopedic surgeon Landon Richard Fine, D.O. for continuing right shoulder symptoms. After conducting a physical examination and reviewing Claimant’s November 7, 2018 right shoulder MRI, Dr. Fine diagnosed Claimant with the following: (1) a SLAP tear; (2) impingement with subacromial bursitis; and (3) a small interstitial supraspinatus rotator cuff tear. He discussed treatment options with Claimant that included possible surgery. Dr. Fine specifically noted that the arthroscopic surgery would consist of “subacromial decompressions of biceps tear pieces plus or minus rotator cuff repair.” However, Claimant chose to continue conservative treatment that included medications, physical therapy and activity modifications.

12. On January 8, 2019 the parties conducted the post-hearing evidentiary deposition of Dr. O’Brien. Dr. O’Brien maintained that Claimant’s June 21, 2018 work incident did not cause a disability or require medical treatment. He specifically explained that lifting six pounds of beef from a shopping cart to a conveyor belt lacked sufficient force to cause a labral tear in Claimant’s right shoulder. Dr. O’Brien detailed that lifting hamburger meat from a cart would not generate enough energy to “aggravate or accelerate a preexisting tear beyond its normal rate of progression.”

13. Dr. O’Brien determined that Claimant suffered a diffuse strain and back sprain of the right shoulder girdle that included the first two ribs on the right side. He remarked that Claimant’s symptoms were not the result of “substantial tissue breakage or yielding, but rather a fairly deconditioned musculoskeletal system that was performing a very innocuous activity.” Claimant did not require medical treatment because her symptoms were “self-healing and self-limited.” Dr. O’Brien also noted that Claimant’s right shoulder MRI was normal for a 41 year-old individual.

14. Claimant has established that it is more probably true than not that she sustained a compensable right shoulder injury during the course and scope of her employment with Employer on June 21, 2018. Initially, Claimant explained that on June 21, 2018 she suffered right shoulder pain while lifting a six-pound package of hamburger meat from a customer’s cart to a conveyor belt when performing her job duties. On June 27, 2018 Claimant visited UC Health and reported that, while working for Employer six days earlier, she lifted a six-pound bag of hamburger and suffered a sharp pain in her right shoulder that radiated into her right chest area. PA-C Cavender

diagnosed Claimant with somatic rib dysfunction, strain of the neck muscles and strain of the right shoulder. By October 24, 2018 Claimant visited personal provider N.P. Leung for an examination. N.P. Leung recommended a right shoulder MRI and remarked that she likely had a biceps tendon injury and an examination consistent with rotator cuff injury. The MRI revealed a partially healed labral tear. Moreover, after conducting a physical examination and reviewing the right shoulder MRI, orthopedic surgeon Dr. Fine diagnosed Claimant with the following: (1) a SLAP tear; (2) impingement with subacromial bursitis; and (3) a small interstitial supraspinatus rotator cuff tear. Finally, Dr. O'Brien determined that the June 21, 2018 work incident caused a "diffuse strain and sprain of the right shoulder girdle" that included the first and second right ribs. He noted that Claimant did not sustain any permanent or partial disability as a result of the work incident and "whatever minor injury occurred on June 21, 2018" had healed by the time of his examination. Accordingly, the bulk of the persuasive medical evidence reflects that Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Claimant thus suffered a compensable right shoulder injury on June 21, 2018.

15. Claimant has established that it is more probably true than not that she is entitled to receive reasonable, necessary and causally related medical treatment for her June 21, 2018 industrial injuries. The record reflects that Claimant is seeking additional medical treatment for her right shoulder. Respondents are not challenging a specific medical benefit but instead assert that Claimant's current symptoms are not related to the injuries and seek a denial of additional medical treatment. Relying on the opinion of Dr. O'Brien, Respondents assert that Claimant is not entitled to receive any additional medical treatment because her injuries have resolved.

16. Dr. O'Brien reasoned that any injuries Claimant suffered on June 21, 2018 healed prior to his October 17, 2018 independent medical examination. He specified that "whatever minor injury occurred on June 21, 2018" had healed by the time of his examination. He reasoned that the mechanism of injury was "innocuous" and would not have generated sufficient energy to "result in substantial tissue breakage or yielding." Claimant did not require medical treatment because her symptoms were "self-healing and self-limited." Dr. O'Brien summarized that Claimant's injuries would likely have healed within four weeks of the event and her current symptoms were unrelated to the June 21, 2018 incident.

17. Relying on Dr. O'Brien's analysis requires a *de facto* finding that Claimant has reached Maximum Medical Improvement (MMI) regarding the June 21, 2018 right shoulder injury. Because Claimant is entitled to medical benefits until reaching MMI, a denial of all further medical treatment necessarily reflects an implicit determination that Claimant reached MMI for the effects of his industrial injuries. However, there has been no medical determination of MMI by an Authorized Treating Physician (ATP) or Division Independent Medical Examination (DIME) physician. Furthermore, Claimant's medical care has been reasonable, necessary and related to her June 21, 2018 industrial injury. The persuasive opinions of Claimant's treating doctors also demonstrate that she requires additional medical treatment. Accordingly, Claimant is entitled to receive

continuing reasonable, necessary and related medical treatment for her June 21, 2018 work injuries.

18. Claimant has proven that it is more probably true than not that Respondents failed to timely provide a list of at least four designated physicians and she is thus permitted to select a treating physician. After Claimant reported her injury and sought medical care Employer directed her to UC Health Urgent Care for medical treatment. On June 27, 2018 Claimant visited UC Health for an examination. Claimant was diagnosed with somatic rib dysfunction, strain of the neck muscles and strain of the right shoulder. She received medications and work restrictions. Although Claimant desired to continue treatment with UC Health, the insurance adjuster informed her the claim was denied and she would be unable to receive any additional authorized medical care. Claimant credibly testified that, approximately one month after her injury, Employer's HR person presented her with a list of doctors. The HR person told Claimant to circle the doctor she had visited for her industrial injury. Claimant noted that she signed, but did not date, the form listing the doctors. Claimant subsequently obtained treatment from her primary care physicians.

19. Although Claimant reported her June 21, 2018 right shoulder injury and completed a First Report of Injury on June 25, 2018, Employer failed to provide her with a list of at least four designated providers. In fact, Claimant was simply directed to circle the provider from which she had received treatment approximately one month after her industrial injury. The right of selection thus passed to Claimant and she was permitted to choose a treating physician. Claimant chose to obtain treatment from her personal physician and associated referrals. The record reflects that the medical treatment Claimant has received through her personal physicians and associated referrals is reasonable, necessary and related to her June 21, 2018 industrial injury. Accordingly, Respondents are financially responsible for Claimant's medical treatment.

CONCLUSIONS OF LAW

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

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

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

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

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 established by a preponderance of the evidence that she sustained a compensable right shoulder injury during the course and scope of her employment with Employer on June 21, 2018. Initially, Claimant explained that on June 21, 2018 she suffered right shoulder pain while lifting a six-pound package of hamburger meat from a customer's cart to a conveyor belt when performing her job duties. On June 27, 2018 Claimant visited UC Health and reported that, while working for Employer six days earlier, she lifted a six-pound bag of hamburger and suffered a sharp pain in her right shoulder that radiated into her right chest area. PA-C Cavender diagnosed Claimant with somatic rib dysfunction, strain of the neck muscles and strain of the right shoulder. By October 24, 2018 Claimant visited personal provider N.P. Leung for an examination. N.P. Leung recommended a right shoulder MRI and remarked that she likely had a biceps tendon injury and an examination consistent with rotator cuff injury. The MRI revealed a partially healed labral tear. Moreover, after conducting a physical examination and reviewing the right shoulder MRI, orthopedic surgeon Dr. Fine diagnosed Claimant with the following: (1) a SLAP tear; (2) impingement with subacromial bursitis; and (3) a small interstitial supraspinatus rotator

cuff tear. Finally, Dr. O'Brien determined that the June 21, 2018 work incident caused a "diffuse strain and sprain of the right shoulder girdle" that included the first and second right ribs. He noted that Claimant did not sustain any permanent or partial disability as a result of the work incident and "whatever minor injury occurred on June 21, 2018" had healed by the time of his examination. Accordingly, the bulk of the persuasive medical evidence reflects that Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Claimant thus suffered a compensable right shoulder injury on June 21, 2018.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or 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). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier*, W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

8. Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. See *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The employer's obligation continues until the claimant reaches MMI. MMI is defined as the point in time when the claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. However, the claimant may receive medical benefits after MMI to maintain his status or prevent a deterioration of his condition. See *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Furthermore, §8-42-107(8)(b)(I) & (II), C.R.S. provide that the initial determination of MMI is to be made by an ATP. If either party disputes the ATP's MMI determination, the claimant must undergo a DIME. The statute also provides that the ALJ lacks authority to determine MMI until there has been a medical determination of MMI by an ATP or a DIME. See *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995); *In Re Bruno*, W.C. Nos. 4-947-316-01, 4-935-813-03 (ICAP, July 31, 2015).

9. As found, Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment for her June 21, 2018 industrial injuries. The record reflects that Claimant is seeking additional medical treatment for her right shoulder. Respondents are not challenging a specific medical benefit but instead assert that Claimant's current symptoms are not related to the injuries and seek a denial of additional medical

treatment. Relying on the opinion of Dr. O'Brien, Respondents assert that Claimant is not entitled to receive any additional medical treatment because her injuries have resolved.

10. As found, Dr. O'Brien reasoned that any injuries Claimant suffered on June 21, 2018 healed prior to his October 17, 2018 independent medical examination. He specified that "whatever minor injury occurred on June 21, 2018" had healed by the time of his examination. He reasoned that the mechanism of injury was "innocuous" and would not have generated sufficient energy to "result in substantial tissue breakage or yielding." Claimant did not require medical treatment because her symptoms were "self-healing and self-limited." Dr. O'Brien summarized that Claimant's injuries would likely have healed within four weeks of the event and her current symptoms were unrelated to the June 21, 2018 incident.

11. As found, relying on Dr. O'Brien's analysis requires a *de facto* finding that Claimant has reached Maximum Medical Improvement (MMI) regarding the June 21, 2018 right shoulder injury. Because Claimant is entitled to medical benefits until reaching MMI, a denial of all further medical treatment necessarily reflects an implicit determination that Claimant reached MMI for the effects of his industrial injuries. However, there has been no medical determination of MMI by an Authorized Treating Physician (ATP) or Division Independent Medical Examination (DIME) physician. Furthermore, Claimant's medical care has been reasonable, necessary and related to her June 21, 2018 industrial injury. The persuasive opinions of Claimant's treating doctors also demonstrate that she requires additional medical treatment. Accordingly, Claimant is entitled to receive continuing reasonable, necessary and related medical treatment for her June 21, 2018 work injuries. See *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995); *In Re Bruno*, W.C. Nos. 4-947-316-01, 4-935-813-03 (ICAP, July 31, 2015) (where the claimant had not reached MMI, ALJ's finding terminating all future medical treatment reflected an implicit determination that the claimant had reached MMI and was thus erroneous); *Davis v. Little Pub*, W.C. No. 4-947-977 (June 17, 2015).

Right of Selection

12. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when

it has “some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.” *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381, 383 (Colo. App. 2006).

13. As found, Claimant has proven by a preponderance of the evidence that Respondents failed to timely provide a list of at least four designated physicians and she is thus permitted to select a treating physician. After Claimant reported her injury and sought medical care Employer directed her to UC Health Urgent Care for medical treatment. On June 27, 2018 Claimant visited UC Health for an examination. Claimant was diagnosed with somatic rib dysfunction, strain of the neck muscles and strain of the right shoulder. She received medications and work restrictions. Although Claimant desired to continue treatment with UC Health, the insurance adjuster informed her the claim was denied and she would be unable to receive any additional authorized medical care. Claimant credibly testified that, approximately one month after her injury, Employer’s HR person presented her with a list of doctors. The HR person told Claimant to circle the doctor she had visited for her industrial injury. Claimant noted that she signed, but did not date, the form listing the doctors. Claimant subsequently obtained treatment from her primary care physicians.

14. As found, although Claimant reported her June 21, 2018 right shoulder injury and completed a First Report of Injury on June 25, 2018, Employer failed to provide her with a list of at least four designated providers. In fact, Claimant was simply directed to circle the provider from which she had received treatment approximately one month after her industrial injury. The right of selection thus passed to Claimant and she was permitted to choose a treating physician. Claimant chose to obtain treatment from her personal physician and associated referrals. The record reflects that the medical treatment Claimant has received through her personal physicians and associated referrals is reasonable, necessary and related to her June 21, 2018 industrial injury. Accordingly, Respondents are financially responsible for Claimant’s medical treatment.

ORDER

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

1. Claimant sustained a compensable right shoulder injury during the course and scope of her employment with Employer on June 21, 2018.

2. Claimant has received reasonable, necessary and causally related medical treatment for her June 21, 2018 industrial injuries. She is also entitled to receive continuing reasonable, necessary and causally related medical treatment for her right shoulder condition.

3. Because Respondents failed to timely provide a list of at least four designated physicians Claimant is permitted to select a treating physician.

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

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

DATED: February 12, 2019.

DIGITAL SIGNATURE:


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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-082-980-001**

ISSUES

The issues set for determination included:

- (1) Did Claimant sustain a compensable work-related injury to her right upper extremity?
- (2) If Claimant sustained a work-related injury, what medical benefits are related, reasonable and necessary to cure and relieve the effects of the industrial injury?
- (3) What was Claimant's AWW?¹

STIPULATION

The parties stipulated that should this claim be found compensable, Respondent will reimburse Claimant \$10.00 for out-of-pocket expenses associated with the purchase of ibuprofen. The Stipulation was accepted by the Court and is made part of this Order.

FINDINGS OF FACT

1. Claimant has worked as a dental assistant for Employer since 2002. Claimant testified she works at the Denver Reception and Diagnosis Center and was part of the intake process for offenders. Her job duties included entering information in the data system and taking dental x-rays. Claimant testified she worked 7 AM to 3 PM, Monday through Friday.

2. Claimant testified her job duties included completing the intake procedures for anywhere from 45 to 60 offenders per day. The process of taking dental x-rays involved a panorex machine, which required the offender to put their head in a chin rest and bite on a bite stick. This required Claimant (who is 5' 3" tall) to reach overhead. Claimant was required to push a button for 25 seconds continuously while the panorex x-ray was completed. Claimant would then push print after the x-ray was completed and she was responsible for cleaning the panorex machine.

3. Claimant testified her salary was \$3,775.00 per month (gross wages).

4. Claimant's prior medical records were admitted into evidence and medical history was significant in that she treated for chronic back pain. In particular, treatment records from Matthew Dickson, D.C. from July 1, 2009 through January 6, 2014 for admitted into evidence. Claimant consistently reported mid-and low back pain, as well as

¹ Claimant listed AWW as an issue to be determined at hearing in the Application for Hearing and her CIS form. However, this was not identified as an issue by either party at the outset of the hearing and neither party briefed this issue in their post-hearing submissions.

occasional cervical pain. Dr. Dickson diagnosed Claimant as suffering from lumbar, sacral, thoracic and cervical segmental dysfunction, as well as lumbar and sacrum sprain/strain. Claimant received chiropractic manipulation on a regular basis during that time. In 2009, Claimant received 24. The ALJ noted Claimant complained of pain in both shoulder on one occasion (July 1, 2009) she complained of shoulder pain.

5. In 2010, Claimant underwent 51 chiropractic treatments and the ALJ noted there were references to pain in both of her shoulders at five visits including February 10, March 10, 15, 22, and April 12, 2010. Acquired spondylolisthesis was added to list of diagnoses. On September 7, 2010, Claimant underwent a microdiscectomy at L5-S1. Claimant received 13 chiropractic treatments in 2011 and there was no reference to shoulder pain. She underwent 28 chiropractic and 2 massage therapy treatments in 2012 and on one occasion (April 5, 2012 during a massage therapy session) there was a reference to shoulder symptoms. Additional diagnoses in 2012 included degeneration of lumbar, lumbosacral IVT; joint disorder/facet syndrome; kyphosis postural; cervical, thoracic, lumbar stiffness/restriction; unequal leg length.

6. In 2013, Claimant underwent 16 chiropractic treatments. The ALJ noted there were references to back and upper extremity symptoms on three occasions (February 7, 13, 21, 2013), as well as a reference to repetitive activities at work. In 2014, Claimant underwent one chiropractic manipulation at this facility, but there was no reference to shoulder or upper extremity pain. The ALJ inferred that Claimant's references to right upper extremity pain during the chiropractic appointments was infrequent.

7. Claimant also received chiropractic treatment from various chiropractors at the facility called The Joint in Aurora from December 2013 through December 31, 2018. The various providers noted subluxations at various levels and chiropractic manipulation was performed to the cervical, thoracic and lumbosacral spine. Claimant three adjustments in 2013 and six treatments in 2014 at this facility. Claimant underwent 31 chiropractic treatments/adjustments in 2013 and 38 in 2016. Claimant received 17 treatments in 2017. There was no reference to the right shoulder or upper extremity complaints in these records.

8. There was evidence Claimant treated for low back pain, as well as shoulder and elbow pain before 2017. On July 6, 2015, Claimant was evaluated by Daniel Hubbard, M.D. for low back. Dr. Hubbard's assessment included degeneration of what lumbar spine or lumbosacral into full disk, along with medial epicondylitis. Claimant was to continue doing daily stretches and taking medications. Claimant returned to Dr. Hubbard for elbow pain on August 25, 2015. Dr. Hubbard diagnosed medial epicondylitis of the elbow joint and lateral epicondylitis. Claimant underwent a steroidal injection.

9. The ALJ concluded Claimant's chiropractic treatment for chronic back pain was episodic in nature and the frequency varied. There was no evidence before the Court Claimant experienced anything more than periodic right upper extremity symptoms during the time she received chiropractic treatment.

10. On February 16, 2016, Claimant was evaluated by Dr. Hubbard, as she was experiencing shoulder pain and back pain. The onset of the shoulder pain was approximately nine months before, with no injury described. Claimant's back pain was described as six months in duration. Dr. Hubbard's assessment was: spinal stenosis, lumbar region, dorsalgia, chondrocostal junction syndrome, somatic dysfunction of rib cage. Medications were prescribed.

11. There was no evidence in the record Claimant had permanent restrictions related to the right upper extremity or thoracic spine before 2017.

12. Claimant testified her job duties changed in January 2017. A new computer system (EOMIS) was installed and additional keyboarding was required. Claimant said the new system at work increased the number of clicks she was doing from 44 to 64 clicks per offender. In addition, Claimant testified that the new system required manual data entry between where the panorex x-rays were stored and the computer terminal for the new system. Employer also completed an audit during the months of January through March 2017, which increased Claimant's workload. Claimant said the increased job duties caused pain in her right arm and elbow.

13. Claimant was initially evaluated by Martin Kalevik, D.O. on March 17, 2017 to whom she was referred by Employer. She was having arm pain and numbness, which she attributed to a change in the computer system at work in January which led to increased clicking and leaning on her arm. On examination, Claimant had stiffness in the right upper arm to the forearm. Mild tightness was noted in the forearm flexors, with an equivocal Phalen test.

14. Dr. Kalevik's assessment was: probable carpal tunnel syndrome, tendinitis involving extensor tendon from and forearm flexors, myofascial pain involving upper arm and lateral deltoid. Dr. Kalevik instructed Claimant on improved ergonomics, as well as stretching, along with the use of heat and ice. Claimant was provided a brace. Dr. Kalevik issued temporary work restrictions for Claimant requiring her to take a five-minute break for every 30 minutes of typing. The M-164 completed by Dr. Kalevik, who noted his objective findings were consistent with the history and/work related mechanism of the injury/illness.

15. Claimant returned to Dr. Kalevik on March 28, 2017. At that time, mild tension in the forearm was noted, but Claimant had full motion in all joints of the upper extremity. She reported numbness of the second and fifth fingers on the right hand. Dr. Kalevik's assessment was: probable carpal tunnel syndrome, mild tendinitis, with some myofascial pain in the upper arm. An EMG/nerve conduction study was pending and Claimant was to continue therapy.

16. Similar symptoms for Claimant were noted in the appointment on April 11, 2017. Dr. Kalevik's assessment was probable mild tendinitis and he also noted that the EMG was negative. Claimant was to continue therapy and Dr. Kalevik recommended a job site evaluation. Claimant was discharged by Dr. Kalevik on April 25, 2017. Dr. Kalevik noted she had no impairment or restrictions.

17. A job site evaluation was completed by Sara Shugars, MS CRC CCM, COEE, AEP (ergonomic consultant) on July 18, 2017. The job analysis gave a breakdown of daily job tasks, which included mousing (3-5 hours), keyboarding (1-2 hours), phone use (limited), scanning/printing/faxing (30 minutes-1.5 hours), handwriting (limited), assisting dentist (2-3 hours), other: counting and storing instruments (20-30 minutes). Ms. Shugars identified as a primary risk factor that was present at Claimant's worksite: four hours of wrist flexion > 45°, extension > 30°, or ulnar deviation > 20°.

18. Claimant provided additional information about her job duties by way of an addendum to the job site evaluation.² In the addendum, Claimant stated she would make 63 separate clicks from starting the system through entering the data for an inmate and taking an x-ray. This was in addition to typing information into the system. Claimant testified that beginning in October 2017, two x-rays per offender were taken.

19. Claimant received chiropractic treatments from January 2018 to July 2018 at which were provided by Phillip Sarver, D.C. There were references in these records to symptoms resulting from work duties.

20. An Independent Medical Examination was conducted on June 4, 2018 by Randy Burris, M.D., at the request of Respondent.³ Dr. Burris said Claimant reported that pain in her shoulder and upper arm begin in January 2017. On examination, Claimant reported 2/10 pain throughout the right shoulder girdle in the upper arm regions. Diffuse tenderness was found throughout the posterior myofascial shoulder girdle. Numerous trigger points were present without muscle spasm. There was full ROM in the shoulder. Dr. Burris noted a negative impingement sign, speed test, Ferguson's test and drop arm sign. Claimant had full ROM at the elbow, wrist and all digits, with no tenderness noted over the medial and lateral epicondylitis. There was no pain with resisted flexion and extension of the wrist.

21. Dr. Burris' assessment was: right upper extremity myofascial pain. He noted Claimant had nonspecific myofascial complaints of the right shoulder girdle without a definitive diagnosis. Dr. Burris said Claimant's MRI findings were consistent with impingement syndrome, which was an anatomical condition that occurred absent trauma. Dr. Burris said Claimant did not meet the criteria for work-related shoulder pathology under the Colorado Division of Workers' Compensation Medical Treatment Guidelines ("DOWC MTG"). In particular, Dr. Burris analyzed the following risk factors: overhead work consisting of additive times per day of at least 30 minutes/day for a minimum of five years; work that requires shoulder movement at the rate of 15-36 repetitions per minute with no 2 second pauses for 80% of the work cycle; work that requires shoulder movement with force 10% or greater of the maximum voluntary force and has no 2 second pauses for 80% of the work cycle.⁴ The ALJ found Dr. Burris did not analyze the aggravation of the underlying changes in Claimant's shoulder, limiting his analysis to the DOWC MTG.

² Exhibit E, pp. 32-39.

³ Exhibit F.

⁴ WCRP Rule 17, Exhibit 4, p.17

Dr. Burris opined Claimant did not the criteria to establish a work-related occupational disease of the shoulder.

22. Dr. Burris noted the job evaluation report identified some awkward posture of the risk with keyboarding and use of the mouse which may contribute to elbow/wrist conditions, however, he did not believe significant risk factors were identified for the shoulder joint. Dr. Burris based this on what he described intermittent operation of the x-ray. Dr. Burris also postulated that Claimant did not currently have a work-related occupational disease at the elbow because she had no complaints and the examination was normal. He recommended adjustments should be made to avoid awkward keyboarding postures previously identified. The ALJ noted Dr. Burris did not appear to consider Claimant's addendum, which described significant keyboarding and mousing for each inmate intake. Dr. Burris also did not consider the amount of overhead reaching Claimant performed for each intake, as well as the number of x-rays taken.

23. Claimant testified that Dr. Burris inaccurately recorded her history. More particularly, Claimant noted she did not have shoulder issues in January 2017. She also did not tell Dr. Burris that her symptoms never fully recovered. Claimant's prior treatment record records corroborated her testimony.

24. On or about July 16, 2018, Claimant completed a Worker's Claim for Compensation. It listed the date of injury as July 13, 2018 and stated her right hand, arm and shoulder were injured. The Worker's Claim said the injury was caused by excessive repetitive clicking of a computer mouse and having to reach above her head to adjust the patient's head for intake x-rays.

25. Claimant returned to Dr. Kalevik on July 18, 2018. Claimant reported she had been doing excessive repetition, with repeated mouse clicking and overhead reaching. She said her ergonomic set-up had not been changed. Claimant could move all joints of her upper extremities fully. Dr. Kalevik found mild muscle tension in the posterior right shoulder, but no scapular winging. Soreness was noted on the right lateral epicondylar area, but full motion was present with no crepitus. Mild muscle tension was present in the extensors and flexors of the right forearm. No swelling was present in the hand or fingers.

26. Dr. Kalevik's assessment was: sprain of other specified parts of thorax, initial encounter; pain in right elbow, pain in right shoulder. The ALJ noted the thorax sprain was a new diagnosis. Dr. Kalevik stated he would provide occupational therapy and encourage Claimant on a home exercise program. He recommended change of repetitive activity every 15 minutes for different activity, as well as the use of anti-inflammatory medications. The work-related diagnosis was listed as sprain of other specified parts of thorax, initial encounter. The M164 completed by Dr. Kalevik noted his objective findings were consistent with the history and/work related mechanism of the injury/illness. The ALJ credited this opinion of Dr. Kalevik and found it more persuasive than Dr. Burris' opinion.

27. An Employer's First Report of Injury was completed on or about July 18, 2018. It specified Claimant reported an aching arm, prickly sensation in fingers, side, and palm of right hand, right index finger from repetitive mouse clicking and overextending arms above head during the week of July 9, 2018.

28. A Notice of Contest was filed on behalf of Employer on August 14, 2018. The claim was being contested/denied for further investigation of Claimant's prior medical history and a job site evaluation.

29. On August 22, 2018, Claimant returned to Dr. Kalevik. Claimant had full range of motion ("ROM") of all joints in the upper extremity, with mild muscle tension of the extensors on the right. Dr. Kalevik's assessment was the same as the July 18, 2018 evaluation. Dr. Kalevik concluded Claimant was at MMI, with no permanent medical impairment. He opined Claimant did not require maintenance care, but Dr. Kalevik sent Claimant back to the therapist to go over her exercises and recommended the use of proper ergonomics.

30. Claimant underwent an MRI of the right shoulder on September 9, 2018 and the films were read by David Solsberg, M.D. Dr. Solsberg's impression was: arthritis of the acromioclavicular joint, which mildly compressed superior aspect of the supraspinatus myotendinous junction and therefore may be associated with impingement symptoms. Dr. Solsberg noted there was no rotator cuff or labral tear; there was tendinosis of the supraspinatus and infraspinatus tendon. There was subacromial sub deltoid bursitis.

31. On September 21, 2018, Claimant underwent a physical therapy ("PT") evaluation.⁵ She was experiencing chronic right arm pain from repetitive motions at work and Kevin Gabrych, DPT muscular dysfunction in the right pec minor and posterior RTC. The ALJ noted these were objective signs of dysfunction in Claimant's right upper extremity. Good passive ROM was present, but AROM was limited due to pain. A six-week PT program was begun.

32. Dr. Hubbard authored a letter, dated September 24, 2018, after Claimant underwent the MRI on her shoulder. Dr. Hubbard noted the MRI showed arthritis in the AC joint with shoulder blade joined the clavicle. He wished to discuss the impingement with Claimant.

33. The ALJ found that it was more probable than not that Claimant experienced shoulder, arm and thorax symptoms on July 18, 2018 as a direct result of her work for Employer. The ALJ credited Claimant's testimony regarding the onset of her symptoms.

34. Claimant successfully proved that, on balance, it is more probable than not that the condition of her right upper extremity and thoracic spine was exacerbated by her job duties and caused her to experience symptoms.

⁵ Exhibit K, pp. 391-392.

35. Claimant proved she is entitled to receive medical benefits to cure and relieve the effects of the industrial injury.

36. Respondent is required to provide treatment to Claimant to cure and relieve the effects of the industrial injury.

37. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

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

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

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).

Compensability-Upper Extremity

Claimant was required to prove by a preponderance of the evidence that, at the time of the injury, she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Sections 8-41-301(1)(b) & (c), C.R.S. (2016). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). This case presented a question of whether Claimant's work activities aggravated a pre-existing condition.

Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971). Claimant must establish a nexus between the work activities and the claimed disability. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

Claimant asserted she sustained a compensable occupational disease while working for Employer. Claimant attributed increased symptoms in her right shoulder and arm, as well as thoracic spine to the change and duties and increased physical requirements of her job. Respondent averred Claimant failed to meet her burden of proof to prove she suffered a compensable occupational disease arising out of and in the course of his employment. Respondent relied upon the opinions of Dr. Burris and argued Claimant's symptoms were not caused by her work duties. As the criteria under WCRP Rule 17, Exhibit 5 were not met.

As a starting point, the ALJ determined Claimant's work caused symptoms to be present in her thoracic spine, as identified by Dr. Kalevik. The medical evidence revealed Claimant required chiropractic treatment for degenerative changes in her spine prior to 2017/2018 and the ALJ determined that Claimant's work activities aggravated this condition. (Finding of Fact 33). This conclusion was supported by the Dr. Kalevik, who opined Claimant's symptoms were related to work activities. (Finding of Fact 23). This aggravation of a pre-existing condition fits within the Colorado Court of Appeal's holding in *H & H Warehouse v. Vicory, supra*, 805 P.2d at 1170 and is therefore compensable.

The ALJ also determined Claimant's duties aggravated the underlying condition of her right upper extremity, including the shoulder and thus, she suffered a compensable injury as a result of her work activities. As determined in Findings of Fact 1-3, Claimant testified that her job duties involved use of the upper extremity, which included using a keyboard and mouse. She also stated these job duties increased, specifically the x-rays taken of inmates and the number of clicks required in the intake process. (Finding of Fact 12). The ALJ found the work Claimant was doing for Employer caused an increase in symptoms. Further, the job analysis report admitted at hearing corroborated Claimant's testimony regarding the number of clicks on the mouse, typing required and movement of the right upper extremity. (Findings of Fact 15-16). This evidence was not controverted by Respondent. Thus, the ALJ determined Claimant suffered an occupational exposure which caused her to experience symptoms in the right upper extremity.

The medical evidence in the record, including the MRI performed on December 22, 2017, established there were degenerative changes in the shoulder joint, as well as impingement in Claimant's right shoulder. Tendinosis of both tendons was present. (Finding of Fact 30). No medical evidence was admitted at hearing which showed Claimant required treatment or missed time from work because of the prior treatment for her lumbar, thoracic and cervical spine. (Finding of Fact 6). In addition, Claimant's prior

treatment record revealed only intermittent shoulder symptoms over the course of several years of treatment. (Findings of Fact 4-8). Accordingly, the ALJ determined Claimant's work duties were the cause of her shoulder symptoms. (Findings of Fact 32-33).

When evaluating this issue of causation, the ALJ may consider the provisions of the DOWC MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the DOWC MTG are not dispositive of the issue of causation and the ALJ need not give them any more weight than he determines they are entitled to in light of the totality of the evidence. See *Cahill v. Patty Jewett Golf Course*, WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services*, WC 4-535-290 (ICAO November 21, 2006).

The ALJ considered Dr. Burris' expert opinions and analysis under the DOWC MTG and concluded Claimant's job duties aggravated her shoulder, along with the elbow and forearm. In this regard, Claimant's occupational exposure and resulting constellation of symptoms do not fit neatly with in the DOWC MTG or the traditional occupational disease analysis under § 8-43-201(14), C.R.S. and *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). Nonetheless, based upon the evidence before the Court, the ALJ determined the specific physical tasks associated with Claimant's job were sufficient to cause an occupational injury.

As found, the job analysis (including Claimant's addendum) identified an exposure that the ALJ concluded could cause both the shoulder and arm symptoms. Dr. Burris conceded that the awkward positioning could cause Claimant's arm symptoms, although his opinion was circumscribed. The ALJ found Dr. Burris did not consider the overhead reaching done by Claimant, as well as the frequency of the physical movements required when x-rays were taken with each intake. As found, Claimant had substantial keyboarding, mousing and overhead reaching, particularly when her job duties changed. Also, Dr. Burris analyzed Claimant's shoulder symptoms under WCRP Rule 17 Exhibit 4, as opposed to Exhibit 5. (Finding of Fact 21). Respondents cited WCRP Rule 17, Exhibit 5 to support their contention Claimant did not sustain an occupational disease. In the case at bench, the Court determined there was a sufficient occupational exposure to be the cause of Claimant's symptoms and credited Dr. Kalevik's opinions on this subject. On balance, the ALJ determined there was sufficient evidence introduced at hearing to establish the required causal connection between Claimant's work activities and support a finding of compensability with regard to Claimant's arm condition (elbow and forearm).

Medical Benefits

Claimant is entitled to receive medical treatment that is reasonable and necessary to cure and relieve the effects of the injury. § 8-42-101(1)(a), C.R.S.; *Yeck v. Industrial Claims Appeals Office*, 996 P.2d 228 (Colo. App. 1999). Claimant bears the burden to prove by a preponderance of the evidence there was a causal relationship between the work-related injury and the condition for which treatment is sought. *Snyder v. Industrial Claims Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The ALJ determined Claimant was entitled to medical benefits to cure and relieve the effects of her work-related injury. Respondent will be ordered to provide medical benefits through the ATP, Dr. Kalevik and any referrals made by him. In addition, pursuant to the Stipulation of the parties, Respondent shall reimburse Claimant \$10.00 for out-of-pocket expense medications.

ORDER

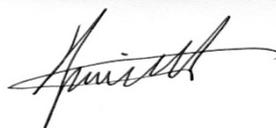
It is therefore ordered:

1. Claimant proved she suffered a compensable injury on July 13, 2018, namely an aggravation of the preexisting degenerative changes in her right shoulder, injurious exposure to her wrist, elbow and forearm and a thoracic strain.
2. Respondents shall pay for medical benefits to cure and relieve the effects of Claimant's injury, including reimbursing Claimant \$10.00 for out of pocket expenses.
3. All matters not determined herein are reserved for future determination.

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

DATED: February 12, 2019

STATE OF COLORADO



Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that the left shoulder magnetic resonance imaging (MRI) recommended by Dr. Randall Shelton is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted March 31, 2017 injury
- At hearing, the parties stipulated to an average weekly wage (AWW) of \$750.00. The ALJ approves and adopts the stipulation regarding AWW.

FINDINGS OF FACT

1. The claimant worked for the employer as a home health provider. On March 31, 2017, the claimant injured her left foot while at work. The claimant testified that on that date she became locked out of her client's home while taking out the trash. In an attempt to reenter the home, the claimant climbed a fence and jumped to the ground. The claimant testified that her left foot landed on a rock, causing pain from her foot up her leg. The respondents have admitted for the March 31, 2017 injury to the claimant's left foot/ankle.

2. On March 31, 2017, the claimant received treatment at Montrose Memorial Hospital. Imaging of the claimant's left foot and ankle showed a closed fracture of the left calcaneus. There was no reported injury to the claimant's shoulders on March 31, 2017.

3. At the beginning of this claim the claimant's authorized treating provider (ATP) was Dr. Jeffrey Krebs. Later Dr. Randall Shelton became the claimant's ATP.

4. On July 12, 2017, the claimant was seen by Dr. Mitchell Copeland for an orthopedic consultation. Dr. Copeland diagnosed a "CLOSED NONDISPLACED FRACTURE OF [the] BODY OF [the] LEFT CALCANEUS WITH ROUTINE HEALING" (emphasis in the original). At that time, Dr. Copeland recommended the use of arch supports and suggested that the claimant continue the work restrictions assigned by Dr. Krebs. The claimant testified that she underwent physical therapy to treat her left foot/ankle injury.

5. On September 15, 2017, the claimant was standing on a chair in her home attempting to reach a crockpot. The claimant testified that when she stepped off of the chair with her left foot, that foot "gave out" causing her to fall. The claimant testified that she attempted to catch herself by grasping the countertop, but she fell into the refrigerator with her right shoulder. Thereafter, the claimant had pain in her right arm and shoulder.

6. The respondents have admitted for the claimant's right shoulder injury. As the ALJ understands the claimant's testimony, the right shoulder injury has been deemed related to the March 31, 2017 work injury because she fell when her weakened left foot gave out resulting in an injury to her right shoulder.

7. The claimant has undergone physical therapy for her right shoulder, but continued to report pain. On October 26, 2017, an MRI of the claimant's right shoulder showed full thickness tearing near the conjoined supraspinatus tendon and possible tearing of the superior labrum.

8. Subsequently, the claimant returned to Dr. Copeland to address her right shoulder. Dr. Copeland recommended that claimant undergo surgery. On January 11, 2018, Dr. Copeland performed surgery on the claimant's right shoulder. That surgery included arthroscopic repair of chronic retracted tear of the supraspinatus, biceps tenotomy, debridement of the superior labrum, and subacromial decompression. The respondents have paid for medical treatment of the claimant's right shoulder including the January 11, 2018 surgery.

9. The claimant testified that following the January 1, 2018 surgery she continued to participate in physical therapy for her right shoulder. However, the claimant continued to experience pain in her right shoulder.

10. On June 27, 2018, the claimant was seen by Dr. Shelton regarding her March 31, 2017 work injury. On that date, the claimant first complained of pain in her left shoulder. Dr. Shelton recorded that the claimant "has noticed pain since she had had to use her arm more as her right arm is recovering". On that same date, Dr. Shelton opined that the claimant's left arm pain was "most likely secondary to overuse as [the claimant's] right arm is recovering." Dr. Shelton recommended the claimant left arm be included in her physical therapy treatment.

11. The claimant testified that although Dr. Shelton ordered physical therapy for her left arm, she declined to pursue physical therapy of that body part. The claimant testified that she was afraid that she would further injure her left arm/shoulder if she participated in left arm physical therapy.

12. On July 5, 2018, the claimant returned to Dr. Shelton. At that time, the claimant informed Dr. Shelton that her physical therapist believed she had bursitis in her left shoulder. On that date, Dr. Shelton recommended that the claimant address her left shoulder complaints with Dr. Copeland. In addition, he made a referral to Dr. Daniel Olson for consultation regarding the claimant's back pain and "possible anatomical asymmetry".

13. Following Dr. Shelton's recommendations for treatment of the claimant's left shoulder, Dr. Jon Erickson was asked to opine regarding the relatedness of the claimant's left shoulder symptoms to the March 31, 2017 work injury. In a physician advisor report dated July 6, 2018, Dr. Erickson noted that the claimant did not suffer a specific injury to her left shoulder, but that she believed that her left shoulder pain was due to overuse and overcompensation because of the right shoulder injury. Dr. Erickson recommended that treatment of the claimant's left shoulder be denied. In support of his opinion Dr. Erickson noted that injury of a contralateral body part is not indicated by "overuse".

14. On July 11, 2018, the claimant was seen by Dr. Copeland and reported her left shoulder complaints. The medical record indicates the claimant's continued belief that her left shoulder pain was due to overuse of her left shoulder following her right shoulder surgery. Dr. Copeland did not opine as to the cause of the claimant's left shoulder symptoms, but recommended a left shoulder MRI.

15. On July 24, 2018, Dr. Shelton submitted a request for authorization for a left shoulder MRI.

16. A physician advisor report was completed by Dr. Brian Mathwich on July 25, 2018. In his report, Dr. Mathwich agreed with Dr. Erickson that the claimant's left shoulder symptoms are not causally related to the March 31, 2017 work injury. Based upon Dr. Mathwich's opinion, the respondents denied authorization for the left shoulder MRI.

17. The claimant was seen by Dr. Shelton on July 26, 2018. At that time the claimant and Dr. Shelton discussed the respondents' denial of the left shoulder MRI. Dr. Shelton encouraged the claimant to begin the recommended left shoulder physical therapy. The claimant expressed a fear of further injury with physical therapy. In that same medical record, Dr. Shelton indicates that he would appeal the denial of the left shoulder MRI.

18. On August 7, 2018, the claimant returned to Dr. Shelton and reported that her left shoulder pain was getting worse. On that date, Dr. Shelton opined that the claimant's left shoulder symptoms were "likely related to overuse injury from her difficulties in postop recovery from her right shoulder." A second authorization request for a left shoulder MRI was submitted to the respondents.

19. Following that additional MRI request, Dr. Erickson issued a physician advisor report dated August 10, 2018. Dr. Erickson reiterated his opinion that the claimant's left shoulder complaints are not related to her work injury. He further opined that there was "no valid mechanism of injury" to the claimant's left shoulder. Following this opinion of Dr. Erickson, the respondents again denied the left shoulder MRI.

20. On August 14, 2018, the claimant returned to Dr. Copeland and reported a fall at home on her lawn on July 27, 2018. The claimant further reported that after that fall she had pain in her right shoulder. Dr. Copeland recommended the claimant wait a month to see if she had improvement. However, he noted that if the claimant's right shoulder did not improve a right shoulder MRI would be warranted.

21. When seen by Dr. Copeland on September 26, 2018, the claimant's right shoulder was still painful. At that time, Dr. Copeland recommended an MRI arthrogram of the claimant's right shoulder.

22. That right shoulder MRI arthrogram was performed on October 10, 2018 and showed a full thickness tear of the anterior infraspinatus tendon at the site of the prior repair.

23. Based upon the results to of the October 10, 2018 MRI arthrogram, Dr. Copeland recommended revision surgery of the claimant's right shoulder.

24. On November 13, 2018, the claimant attended an independent medical examination (IME) with Dr. Douglas Scott. In connection with the IME, Dr. Scott reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Scott opined that the claimant's bilateral shoulder pain is related to "preexisting injuries and/or conditions or subsequent injuries".

25. Dr. Copland performed the recommended right shoulder revision surgery on January 10, 2019.

26. At the request of the respondents, Dr. Erickson conducted a review of the claimant's medical records. On January 13, 2019, Dr. Erickson submitted his written report of that review. In his report, Dr. Erickson opined that the claimant's left shoulder symptoms are the result of the aging process and not the March 31, 2017 work injury. Dr. Erickson also noted that the medical literature provides that overuse or compensation for a contralateral injured extremity does not cause significant pathology. In addition, Dr. Erickson opined that overuse and/or compensation "has not caused or aggravated [the claimant's] left shoulder condition." Although Dr. Erickson noted that a left shoulder MRI may be reasonable medical treatment, he clarified his opinion on causation and stated in his report "there is no chance that [the claimant's] left shoulder complaints are in any way related to her work injury on 3/31/2017."

27. The claimant testified that her current symptoms include burning in her left bicep. She also testified that her left shoulder is very painful and very weak. The claimant testified that her shoulders and neck have been effected by this pain.

28. The ALJ credits the medical records and the opinions of Drs. Mathwich and Erickson over the contrary opinion of Dr. Shelton and finds that the claimant has failed to demonstrate that it is more likely than not that her left shoulder complaints are causally related to the March 31, 2017 work injury. Therefore, the ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that the left shoulder

MRI is reasonable medical treatment necessary to cure and relieve the claimant from the effects 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 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. 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 (2017).

3. 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).

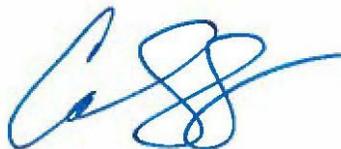
4. As found, the claimant has failed to demonstrate by a preponderance of the evidence that her left shoulder condition and symptoms are related to the admitted work injury. Therefore, the claimant has also failed to demonstrate by a preponderance of the evidence that the recommended left shoulder MRI is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the March 31, 2017 work injury. As found, the medical records and the opinions of Drs. Mathwich and Erickson are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant's request for a left shoulder MRI is denied and dismissed.
2. The ALJ adopts the stipulation of the parties that the claimant's AWW for this claim is \$750.00.
3. All matters not determined here are reserved for future determination.

Dated February 14, 2019



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- I. Whether Respondents overcame the DIME physician's opinion on MMI by clear and convincing evidence.

FINDINGS OF FACT

1. Claimant is a 63 year old woman who began working for Employer in February 2015 as a homemaker performing housekeeping duties. Claimant subsequently became a personal care worker, which involved performing housekeeping duties and assisting clients with bathing, dressing, and ambulating. On November 24, 2015, Claimant became a certified nursing assistant ("CNA"). As a CNA, Claimant went on home visits and assisted clients with bathing, toileting, ambulating and other personal care needs. Claimant's role as a CNA required frequent bending, stooping, squatting, reaching, ascending and descending stairs, and kneeling to maneuver patients. The position also required frequent exertion of objects up to 25 pounds and occasional exertion of objects between 50-75 pounds. Claimant did not have assistance while performing her job duties for Employer. Claimant worked between 40-50 hours a week for Employer.

2. At the time of Claimant's admitted work injury, Claimant also worked 20 hours a week as a cashier at a home improvement store. Claimant's job at the home improvement store required constant standing and the ability to lift up to 50 pounds. During her employment at the home improvement store, Claimant sustained an injury to her foot in 2014 and left hand in 2016. Claimant returned to work for Employer after receiving treatment for both injuries and was able to perform her regular job duties for Employer leading up to the admitted industrial injury she sustained during the course and scope of her employment with Employer on May 8, 2016.

3. On May 8, 2016, Claimant sustained an admitted injury to her right knee during the course and scope of her employment for Employer when she attempted to transfer a large elderly client from a wheelchair to a bed. Claimant was assisting the client using a gait belt when the client lost her balance and collapsed against Claimant. Claimant attempted to use her leg to reposition the client's foot to no avail. Claimant ultimately pivoted her body to heave the client onto the bed.

4. Claimant testified she immediately felt a sharp pain and a burning sensation in her right knee. She testified she had to finish her shift as "there was no one to call." She reported the injury to Susan Jean in the human resources department the next morning. Claimant informed Ms. Jean she was hoping it was just a sprain, and would attempt to treat it on her own before seeking medical attention.

5. Claimant continued to work both jobs from May 9, 2016 to May 17, 2016. Claimant testified she braced herself on a bed and shifted her weight to her left leg when lifting. Claimant was allowed to sit on a stool while she performed her cashier duties at the home improvement store. During this time period, Claimant treated her knee with compression, ice and elevation. Claimant ultimately decided to seek medical treatment when her symptoms worsened and she felt unable to bear weight on her right leg.

6. On May 18, 2016, Claimant presented to Colleen Moss, P.A. at Kaiser Permanente. Claimant reported she injured her right knee on May 8, 2016 when a client collapsed in her arms with her full weight. Claimant reported that she experienced symptoms that evening which had since worsened. On examination, P.A. Moss noted tenderness to palpation with no ecchymosis, erythema or laceration. She noted it was difficult to assess effusion due to Claimant's body habitus. P.A. Moss assessed Claimant with right knee pain with possible meniscal involvement and suggested Claimant follow up with a workers' compensation provider.

7. On May 20, 2016, Claimant presented to authorized provider Robert Broghammer, M.D. at HealthOne. Claimant reported to Dr. Broghammer that she injured her right knee while transferring a very large client. On examination of the right knee, Dr. Broghammer noted mild effusion and positive medial and lateral joint line pain. He assessed Claimant with a work-related right knee strain and recommended that Claimant undergo a right knee MRI, noting the "duration of symptoms, with ongoing effusion, medial joint line pain, and physical findings, as well as history, [were] highly suggestive of a meniscal tear." Claimant was placed on 20 pound lifting limit with restrictions of no crawling, kneeling, squatting or climbing.

8. Claimant underwent a right knee MRI on May 26, 2016. William R. Dunfee, M.D.'s impression was as follows: 2.1 cm long horizontal tear medial meniscus, osteoarthritis with areas of grade 2 and 3 cartilage fissuring, and small knee joint effusion and Baker's cyst.

9. On May 27, 2016, Dr. Broghammer noted Claimant's MRI revealed a large horizontal tear in the medial meniscus. He further noted,

In addition, she has quite a bit of associated degenerative changes, not necessarily unexpected, with grade 2 and grade 3 osteoarthritic changes in multiple areas of the knee. [Claimant] was surprised by the arthritic findings because she never had symptoms. I told her that imaging studies are poorly coordinate with symptomatology, especially when it comes to arthritis.

Dr. Broghammer assessed Claimant with a right knee strain with meniscal tear, continued her work restrictions, and referred Claimant for an orthopedic evaluation.

10. On June 9, 2016, Claimant presented to John Schwappach, M.D. for an orthopedic evaluation. Claimant reported the same mechanism of injury to Dr.

Schwappach. Dr. Schwappach reviewed the MRI results and opined Claimant sustained an acute right strain on top of chronic osteoarthritis. He doubted the horizontal meniscal tear was an acute injury. Dr. Schwappach administered a right knee corticosteroid injection, recommended Claimant begin taking ibuprofen, and referred Claimant for physical therapy. Claimant reported experiencing improvement after the injection.

11. On June 17, 2016, Claimant was involved in a non-work-related motor vehicle accident (“MVA”) when she was cut off by another vehicle and T-boned a truck.

12. Dr. Broghammer reexamined Claimant on July 12, 2016, noting that Claimant had been involved in a recent MVA. Claimant reported left knee, right ankle, low back, and whiplash symptoms as a result of the MVA. Dr. Broghammer noted Claimant’s right knee was “status quo” after the MVA.

13. Claimant returned to Dr. Schwappach on July 28, 2018 and received a second right knee steroid injection, which caused Claimant’s pain to increase. Claimant experienced intermittent swelling, difficulty walking and weight bearing. On August 9, 2016, Dr. Broghammer noted Claimant was now ambulating with a cane. Claimant reported to Dr. Broghammer that her knee had returned to feeling like it did when she was first injured.

14. On September 1, 2016, Dr. Schwappach recommended Claimant undergo a right knee arthroscopy and partial meniscectomy. In a September 2, 2016 medical note, Dr. Broghammer noted that he agreed with Dr. Schwappach’s recommendation for surgery based on Claimant lack of response to conservative modalities.

15. On September 12, 2016, physician advisor Jon M. Erickson, M.D. performed a review of the requested right knee arthroscopy and partial meniscectomy. He noted Claimant’s May 26, 2016 MRI revealed a degenerative horizontal tear of the medial meniscus and advanced osteoarthritic changes with no evidence of acute trauma. Dr. Erickson opined that Claimant’s abnormalities were pre-existing, and that the requested arthroscopic partial medial meniscectomy would be appropriate, “with the understanding that such procedure in the face of advanced osteoarthritis holds very little chance of long term benefit.” He explained that any continued substantial knee pain or need for a total knee replacement would be directly related to Claimant’s pre-existing advanced osteoarthritis and not the work injury.

16. Claimant underwent a left knee MRI on September 27, 2016 in connection with her non-work-related MVA. The left knee MRI revealed a horizontal tear of the medial meniscus body, blunting of the lateral meniscus inner margin, and osteoarthritis. Claimant was subsequently with assessed a left knee medial meniscus tear with underlying osteoarthritis. Charlie C. Yang, M.D. recommended that Claimant undergo a total left knee arthroscopy.

17. On October 5, 2016, Claimant underwent a right partial medial meniscectomy, partial lateral meniscectomy and chondroplasty, performed by Dr. Schwappach. On October 17, 2016, Dr. Schwappach noted near resolution of Claimant’s preoperative

symptoms. However, on October 19, 2016, Claimant reported that her knee was feeling worse and increasingly achy. Claimant engaged in extensive physical therapy after the surgery, yet Claimant continued to report constant knee pain and require the assistance of a cane. On February 20, 2017, Dr. Schwappach offered to administer a third right knee steroid injection, which Claimant declined.

18. On March 20, 2017, Claimant presented to Levi Miller, D.O. upon the referral of her authorized providers at HealthOne. Claimant reported the same mechanism of injury to Dr. Miller. Claimant rated her pain 2/10 at best and 9/10 at worst. Dr. Miller diagnosed Claimant with chronic right knee pain and a meniscal tear from the May 8, 2016 industrial injury. He recommended Claimant use a brace and prescribed a topical cream.

19. Dr. Schwappach last evaluated Claimant on June 15, 2017. Claimant reported she continued to have some pain but was making progress in physical therapy. Dr. Schwappach concluded Claimant reached MMI for her right knee and discharged her from his care.

20. Due to her ongoing pain, Claimant sought a second orthopedic opinion on her right knee with Nathan Faulkner, M.D. on June 30, 2017. Dr. Faulkner recommended Claimant undergo weight-bearing x-rays and a second right knee MRI.

21. Claimant attended a follow-up evaluation with Dr. Faulkner on August 29, 2017, reporting 3-7/10 pain. Dr. Faulkner noted that June 30, 2017 x-rays revealed mild medial joint space narrowing with well-maintained lateral and patellofemoral joint spaces. He further noted that a July 27, 2017 MRI showed grade 4 chondromalacia of the medial ridge and medial patellar facet, mild/moderate chondromalacia of the medial and lateral femoral condyles, and a small recurrent vertical tear of the posterior horn medial meniscus. He opined that, despite the recurrent tear, Claimant's pain distribution and exam was more consistent with arthritis. Dr. Faulkner recommended Claimant undergo a PRP injection, which he administered on September 15, 2017.

22. On September 27, 2017, Claimant reported to Dr. Miller experiencing significant pain since receiving the PRP injection. Claimant was released to return to work in an administrative capacity working four hours per day.

23. On December 18, 2017, Dr. Faulkner reevaluated Claimant. Claimant reported 3-7/10 persistent pain. Dr. Faulkner noted that he had prescribed Claimant a Medrol Dosepak which helped Claimant with swelling but not pain. Dr. Faulkner opined that the next step for Claimant would be a total knee replacement, as Claimant had an extensive workup and had not responded to conservative treatment.

24. Claimant returned to Dr. Miller on December 27, 2017 reporting continued symptoms. Dr. Miller noted that the July 27, 2017 MRI revealed a recurrent meniscal tear with associated degenerative changes in the medial joint compartment. He further noted that Claimant was reporting locking and catching symptoms, "which may be

consistent with recurrent meniscal tear and undersurface flap, as described by the radiologist.”

25. On January 3, 2018, physician advisor Albert Hattem, M.D. reviewed Dr. Faulkner’s recommendation for additional surgery. Dr. Hattem agreed with Dr. Erickson and opined that the recommended surgery was to treat Claimant’s pre-existing degenerative joint disease, which was not caused by the work injury.

26. Dr. Miller reevaluated Claimant on January 16, 2018. He initially opined that Claimant’s need for a total knee replacement was work-related, stating,

The patient, in my opinion, is a candidate for total knee replacement to be paid for by Colorado Worker’s Compensation as she suffered the knee injury while working and there is no record of prior knee complaints or treatment despite the preexisting degenerative changes as seen on the MRI, the patient has been fully functional and working full time prior to this injury; the patient’s current knee pain and limited function is attributable to the industrial injury. Currently, the patient remains at a stable and stationary though substantially diminished functional status, a knee replacement would very likely return the patient to work full time without permanent restrictions.

27. Claimant also saw Dr. Faulkner on January 16, 2018. Dr. Faulkner also initially opined Claimant’s need for surgery was work-related. He wrote, “It is my opinion that while her arthritis was not caused by the injury, it is as likely as not that the treatment and sequela for her work-related injury to the meniscus including including (*sic*) knee arthroscopy and partial medial meniscectomy could have caused progression of her arthritis.”

28. On February 6, 2018, Kathy F. McCranie, M.D. performed an independent medical examination (“IME”) at the request of Respondents. Claimant reported the same mechanism of injury to Dr. McCranie as she did to her providers. Dr. McCranie performed a records review and physically examined Claimant, noting moderate pain behaviors and complaints on examination. She opined Claimant sustained a medial meniscal tear and possible lateral meniscal tear of the right knee in relationship to the May 8, 2016 work injury. She concluded that Claimant’s right knee osteoarthritis was unrelated to the work injury and agreed with Dr. Hattem and Dr. Erickson that Claimant’s need for a total knee arthroplasty was related to Claimant’s pre-existing osteoarthritis. Dr. McCranie opined Claimant was at MMI with a 24% lower extremity impairment and permanent restrictions limiting walking, standing, squatting, kneeling and crawling. She suggested potential maintenance care in the form of completing physical and psychotherapy sessions and use of topical analgesic cream.

29. On February 9, 2018, Dr. Miller issued a letter stating Claimant was restricted from lifting/pushing/pulling greater than 20 pounds, and was to avoid kneeling, climbing, squatting, in addition to walking or standing for greater than 10 minutes per hour. Dr. Miller reiterated his then-opinion that Claimant was an appropriate candidate for a total

knee replacement, and stated that, without the knee replacement, Claimant's current restrictions would become permanent.

30. After subsequently reviewing Dr. McCranie's IME report, Dr. Miller issued a letter on February 18, 2018 stating, "I am in agreement with the opinions and recommendations of the examining physician."

31. On March 12, 2018, Dr. Miller placed Claimant at MMI with 26% lower extremity impairment. Claimant reported 3/10 pain, diminished range of motion, and swelling with activity. Dr. Miller noted continued to use a cane. His final assessment was: right knee pain associated with medial and lateral meniscal tear superimposed on pre-accident osteoarthritis, medial and lateral meniscal tear due to work-related injury 05/08/2016, status post arthroscopic partial medial and lateral meniscectomy and chondroplasty. He assigned permanent restrictions of no lifting/pushing/pulling more than 20 pounds, avoiding climbing and squatting, and avoiding walking and standing for greater than 10 minutes. He recommended Claimant complete her pending physical therapy and psychotherapy sessions and use topical analgesic cream for up to one year.

32. On March 20, 2018, Respondents filed a Final Admission of Liability ("FAL") in accordance with Dr. Miller's March 12, 2018 report, admitting for 26% scheduled impairment and reasonable, necessary and related maintenance benefits. Claimant objected to the FAL on April 2, 2018 and requested a DIME.

33. Timothy Higginbotham, M.D. performed the DIME on July 10, 2018. Dr. Higginbotham reviewed Claimant's medical records, including both right knee MRIs, and examined Claimant. Claimant reported the same mechanism of injury. Claimant denied any right knee complaints, evaluation or treatment prior to the work injury. Dr. Higginbotham noted Claimant was involved in a non-work-related MVA in 2016 and was experiencing issues with her left knee. Dr. Higginbotham noted no notable pain behaviors on examination. He assessed Claimant with, *inter alia*, a torsion strain event of the right knee, previously asymptomatic early degenerative changes of the right knee, structural diagnostic evidence of a large 2 cm radial medial meniscal tear, and post-operative structural diagnostic evidence of a recurrent medial meniscal tear superimposed upon associated degenerative joint disease. He opined was not at MMI due to her need for a total right knee arthroplasty. Dr. Higginbotham opined a total knee replacement was reasonable, necessary and related to the work injury. He assigned a provisional lower extremity impairment of 24%.

34. Dr. Higginbotham addressed the causality of the total knee replacement, specifically addressing the conflicting opinions of Drs. Schwappach, Erickson, Faulkner, Hattem, Miller, and McCranie in his report. He noted there were no medical records or personal history indicating Claimant had arthritic symptoms or loss of function prior to the work injury. Dr. Higginbotham explained,

Surely the degenerative processes were pre-existing. However, degenerative processes in and of themselves may not connote symptomatic or dysfunctional processes. Without the so described injury

mechanism and as cautioned by the WC orthopedic adviser and discussed by the latest treating orthopedist about the arthroscopic debridement, it is merely speculative as to when, or possibly if ever, a total arthroplasty would have been necessary.

35. On October 18, 2018, Timothy S. O'Brien, M.D. performed an IME at the request of Respondents. Dr. O'Brien reviewed medical records, including the MRI imaging, and physically examined Claimant. Claimant reported the same mechanism of injury to Dr. O'Brien. Claimant reported she did not have knee pain prior to the May 8, 2016 injury and that since the injury her knee pain had not resolved. Claimant rated her knee pain 9/10. Dr. O'Brien concluded Claimant solely sustained a very minor knee strain on May 8, 2016. He opined Claimant did not sustain an acute tear of her meniscus, or any other acute injury of her right knee as a result of the May 8, 2016 work injury. He based this opinion on the MRI imaging, as well as the fact that Claimant did not seek any medical care for approximately two weeks following the injury. Dr. O'Brien stated such behavior would not be typical for someone following an acute knee injury, but would be typical for a person with pre-existing knee pain due to osteoarthritis. Dr. O'Brien explained that, if Claimant had sustained an acute injury, there would have been evidence of bleeding and post-traumatic fluid as well as an acute meniscus tear on the May 26, 2016 MRI. Dr. O'Brien opined that all of the pathology shown on Claimant's MRI was pre-existing. Additionally, Dr. O'Brien further noted that very early in the case Claimant began to develop non-organic physical findings, with Claimant's pain escalating despite a lack of physiologic or anatomic explanations. He noted that, despite Claimant's assertions she never had any right knee pain prior to the work incident, the likelihood of that was actually very small, based on his experience performing over 3000 knee replacements and treating thousands of patients with osteoarthritis of the knee.

36. Dr. O'Brien agreed with Dr. Hattem, Dr. Erickson, and Dr. McCranie that Claimant's need for a total knee replacement is not related to her admitted work injury, and that the admitted injury did not aggravate or accelerate her need for a total knee replacement. He opined that the surgery that was performed was not related and contraindicated. He further opined that Dr. Higginbotham's opinion regarding MMI was flawed because Dr. Higginbotham incorrectly stated Claimant had sustained a serious injury on May 8, 2016 and "inappropriately assumed" Claimant's continued symptomatology was work-related.

37. Drs. Miller and Faulkner subsequently reviewed Dr. O'Brien's IME report. In letters dated November 19, 2018 and November 29, 2018, Dr. Miller and Dr. Faulkner, respectively, stated they agreed with Dr. O'Brien that Claimant's need for a total right knee replacement is related to Claimant's pre-existing arthritis, which was not aggravated or accelerated by her admitted work injury.

38. Dr. Higginbotham testified by pre-hearing deposition on November 20, 2018 as a Level II accredited expert in occupational medicine. Dr. Higginbotham reviewed Dr. O'Brien's IME report and testified that, while he agreed Claimant's ongoing symptoms are due to the progression of her osteoarthritic symptomatology, he disagreed

Claimant's condition is solely a personal health issue and not work-related. Dr. Higginbotham testified Claimant had degenerative changes in her knees, but opined that her current complaints, condition, and need for treatment are related to the May 8, 2016 work injury. In support of his opinion, he explained that, prior to the work injury, Claimant was not under any treatment for her knee, was working in her usual capacity without experiencing any disabling patterns, and was not symptomatic such that she required evaluation.

39. Dr. Higginbotham reviewed additional medical records from Claimant's June 2016 MVA. He testified that the bilaterally of the knee symptoms did not change his opinion on the relatedness of the right knee total replacement, reiterating his opinion that Claimant's symptomatology was significantly aggravated by the work injury and caused the need for surgery. Dr. Higginbotham testified Claimant is an appropriate candidate for a total arthroplasty of the right knee. He expressed some concern as to the potential for success of the surgery due to Claimant's obesity but testified that, at this time, "the most appropriate and only option is the total knee replacement."

40. Dr. O'Brien testified at hearing as a Level II accredited expert in orthopedic surgery. Dr. O'Brien testified consistent with his IME report. He testified that the May 26, 2016 MRI showed significant pre-existing age-related osteoarthritic changes throughout her knee, with no evidence of any acute damage to her knee. Dr. O'Brien testified that if Claimant had aggravated or accelerated her pre-existing condition when she was injured at work she would have sought treatment immediately, the provider at Kaiser would have documented an acute injury, and/or her radiological findings would have reflected an acute injury. Dr. O'Brien explained that, in general, an aggravation or acceleration would at least be apparent from the presence of bleeding on an MRI. Dr. O'Brien also noted that in order for an aggravation or acceleration of Claimant's bone on bone osteoarthritis to be found, extensive force would have needed to be present such that a fracture would occur which was not found on Claimant's MRI, nor could such a force have been exerted given the nature of Claimant's injury.

41. Dr. O'Brien testified that it is virtually impossible for Claimant to have not experienced any sort of knee pain given her age, obesity, and radiological findings. Dr. O'Brien testified that it is typical for a patient to have no history of seeking treatment for their knees before finally coming in to be evaluated for treatment despite having long standing pain complaints. Dr. O'Brien further testified that Claimant's significant physical decline could not be explained physically or anatomically. He noted that the only way to explain her behavior is to implicate non-organic factors such as secondary gain. Dr. O'Brien noted that the bilateralism of Claimant's knee issues is further evidence that Claimant's need for a total knee replacement for her right knee is not related to her work injury. Dr. O'Brien stated he disagreed with the decision to perform a knee arthroscopy. He testified that scoping arthritic knees introduces trauma that accelerates the need for a knee replacement. Dr. O'Brien stated that had the knee arthroscopy been related to Claimant's industrial injury, the knee replacement would be related to her industrial injury.

42. Dr. O'Brien stated that Dr. Higginbotham's opinion that the absence of pre-existing pain indicates that there is a direct causal link between the incident at work and her need for the total knee replacement is clearly in error. Dr. O'Brien testified that Dr. Higginbotham's opinion is not supported by science and logic, and that Dr. Higginbotham has never had the training to correlate an MRI scan finding with true surgical findings. Dr. O'Brien testified that Dr. Higginbotham's mental picture of the severity of Claimant's injury is not supported by any objective evidence. He further stated Dr. Higginbotham failed to explain how he came to his conclusions absent what Dr. O'Brien believed to be objective evidence of an acute injury to the right knee. Dr. O'Brien concluded that Claimant's candidacy as a patient who should undergo a total knee replacement was established radiographically years before the incident at work. Dr. O'Brien testified that Dr. Higginbotham's opinion that it is merely speculative that Claimant would ever need to undergo a total knee replacement is clearly wrong.

43. Cheryl Mochizuki testified at hearing on behalf of Claimant. She works for Employer as a paraprofessional educator and observes each CNA to ensure they are physically able to perform their job. Ms. Mochizuki explained that a CNA has to be able to bear the weight of each patient and transfer the patient from bed to chair, chair to chair, or from chair to bed. When performing a transfer, a CNA has to do a stand-to-pivot, which requires the CNA to take the sitting patient from the side of the bed, help the patient get up, turn the patient, and place them into the wheelchair. She further elaborated that heavier patients require an extensive amount of pulling, pushing, and lifting in order to be positioned correctly. When performing a stand-to-pivot motion, a CNA must demonstrate flexing at the knee and hip while also having the ability to stand with the patient. Ms. Mochizuki stated that she observed Claimant perform these motions on December 22, 2015. She also observed Claimant after this date during co-visits. Ms. Mochizuki testified she did not perceive any issues with Claimant performing these motions, nor did it appear Claimant experienced pain when performing these motions.

44. Claimant testified she did not have any knee pain or seek treatment for her knee prior to the work injury. Claimant testified she did not have any issues performing her job duties prior to the work injury. Claimant stated she did not begin using a cane until after receiving the second injection to her knee. Claimant testified that her current symptoms included pain, swelling, and an inability to walk or sit for extended periods of time. She stated she can no longer walk her three dogs, which she was able to do prior to the work injury. Claimant has permanent restrictions. She returned to work for Employer working 20 hours a week performing customer service, scheduling and other administrative duties.

45. Claimant's testimony is found credible and persuasive.

46. On the issue of relatedness of the total right knee replacement and MMI, the ALJ credits the opinion of DIME physician Dr. Higginbotham over the conflicting opinions of Drs. Miller, Faulkner, Hattem, Erickson, McCranie and O'Brien.

47. The ALJ credits Dr. Higginbotham's opinion that Claimant is a candidate for a total right knee replacement due to the work injury's significant aggravation of Claimant's pre-existing osteoarthritis.

48. Respondents failed to overcome Dr. Higginbotham's DIME opinion on MMI by clear and convincing evidence.

49. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME on MMI

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. 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).

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*, 5 P.3d 385 (Colo. App. 2000). 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). Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician’s finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert, supra*.

As found, Respondents failed to prove it is highly probable Dr. Higginbotham’s DIME opinion on MMI is incorrect. Respondents point to Claimant’s delay in seeking medical treatment in support of their position that Claimant only sustained a minor strain as a result of the work incident. Although Claimant did not immediately seek medical attention, she credibly testified as to the sudden onset of symptoms during the work injury and the subsequent worsening of symptoms. Claimant credibly testified she did not have prior right knee symptoms, which Dr. O’Brien opined is virtually impossible based on Claimant’s MRI findings. Assuming *arguendo* Claimant did have knee pain prior to the work injury due to pre-existing degenerative changes, there is no evidence Claimant required treatment or was incapacitated to the extent she has been post-work-

injury and treatment. Even with pre-existing degenerative changes, prior to the work injury Claimant was able to work two jobs that involved frequent standing, lifting, squatting, bending, and kneeling without any restrictions or accommodations. Subsequent to the work injury, Claimant has experienced continuing pain and functional limitations, even after undergoing extensive conservative treatment and surgery which was provided within the workers' compensation system as a result of the May 8, 2016 injury. Although Dr. O'Brien opined the arthroscopy was not related or indicated, he acknowledged that such procedure introduces trauma to arthritic knees and that the trauma accelerates the need for a knee replacement.

Respondents emphasize that each of the providers, IME physicians and physician advisors in this case opine that Claimant's need for a total knee replacement is related to her pre-existing osteoarthritis, which was not aggravated or accelerated by the work injury. The ALJ notes that Drs. Faulkner and Miller initially opined Claimant's total knee replacement was due to the work injury, and that Dr. Faulkner also at one point opined that it was likely Claimant's treatment could have caused the progression of her osteoarthritis. Drs. Faulkner and Miller subsequently changed their opinions based on the reports of Drs. McCranie and O'Brien.

Dr. Higginbotham was aware of these conflicting opinions and their bases, and directly addressed them in his report and deposition testimony. Dr. Higginbotham was told the same mechanism of injury and history as the other examiners and reviewed the same MRIs and medical records. He was aware of Claimant's pre-existing bilateral degenerative condition and continued to opine the work injury significantly aggravated Claimant's right knee condition, causing the need for a total knee replacement. Dr. Higginbotham credibly opined Claimant is not at MMI due to the need for a total knee replacement, which he described as Claimant's only option at this point. As noted above, a finding that a claimant needs additional medical treatment to improve his or her injury-related medical condition is inconsistent with a finding of MMI. Although multiple opinions to the contrary are reflected in the record, the ALJ is persuaded these amount to mere differences of opinion that are insufficient to overcome Dr. Higginbotham's DIME opinion.

ORDER

It is therefore ordered that:

1. Respondents failed to overcome Dr. Higginbotham's DIME opinion that Claimant is not at MMI by clear and convincing evidence.
2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

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

DATED: February 13, 2019

A handwritten signature in black ink, appearing to read 'Kara Cayce', is written over a horizontal line.

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- a. Did Claimant prove by a preponderance of the evidence that she sustained a compensable occupational disease on or about September 21, 2017?
- b. Did Claimant prove by a preponderance of the evidence that she is entitled to medical treatment which is reasonable, necessary and related to the alleged occupational disease?
- c. Whether Claimant is disabled from her usual employment as a result of the occupational disease and therefore entitled to an award of indemnity benefits?
- d. What is Claimant's average weekly wage?

Findings of Fact

1. Claimant testified that prior to starting work for Employer she was a stay at home mom from 1995 to 2017 and subsequently worked 5 to 10 hours a week as a part time real estate agent for the last 15 plus years. Claimant's first full time job in years was when she applied for Southwest Airlines.
2. Claimant is a 57 year old 5'7 female who weighs 138 lbs.
3. Claimant was hired as a customer service agent with Employer. Claimant began her employment on July 13, 2017. She had computer training the first week of her job. She started performing training work for about 10 days after her start date. As a result, Claimant did not perform substantial work activities until the last week of July 2017.
4. Claimant testified she first began to experience symptoms around August 7, 2017, just a week or two after she started performing her first training work with Employer. She alleged that it felt like she pulled a muscle in her right hip. She alleged that this occurred while she was working at the ticket counter where customers check in.
5. Claimant testified that she had only been performing training activities for about two weeks before she started developing pain. During training, Claimant performed several different types of jobs with job duties that changed and were not repetitive.
6. Claimant went to Dallas on August 20, 2017, for two weeks of sedentary training. She returned from Dallas on September 1, 2017. Claimant started her regular job with Southwest Airlines when she got back from training in Dallas.
7. Claimant testified she became concerned about her pain and symptoms when she returned from the training in Dallas on September 1, 2017. According to Claimant,

her symptoms first became significant after sitting through sedentary training for two weeks in Dallas.

8. Claimant told a supervisor about the alleged injury on September 26, 2017. As a result, Claimant reported her alleged occupational disease to her manager about a month and a half after she first experienced pain and three weeks after she became worried about her symptoms upon her return from sedentary training in Dallas.
9. Christina Trueworthy credibly testified on behalf of Respondents. Ms. Trueworthy has worked at Employer for 23 years and her current position is station services team lead.
10. Ms. Trueworthy credibly testified about Claimant's work schedule. From July 12, 2017, to July 23, 2017, according to Ms. Trueworthy, Claimant did not perform any physical jobs, instead, it was all instructional activities during this time frame.
11. Claimant first performed work activities as a trainee on July 24, 2017. Claimant was working directly with a station trainer. The first phase of training involved the trainer demonstrating how to perform the job functions. As a result, Claimant was training and not performing significant or repetitive lifting activities prior to heading to Dallas for additional training.
12. During training, Claimant generally would work at either the ticket counter or self-tagging area. She also worked at the gate and the bag service office for about a week.
13. At the ticket counter, Claimant helped customers with tickets, took their bag, tagged the bag and put it on the conveyor belt. Claimant described her activities that she would lift the bag, twist at the waist, move her feet and put the bag on the conveyor belt.
14. When Claimant worked at the self-tagging area, she checked customers' identification and placed the bag behind her on the conveyor belt. It would only take a couple of seconds to check identification and put the bag on the belt.
15. Claimant stated there were times she would walk around the ticket area as part of her job.
16. At the bag service area, if customers did not pick up their bags, Claimant would go to the baggage carousels, put them on a cart and take them to the baggage holding area until customers picked them up.
17. Ms. Trueworthy credibly testified that during the week of July 24 to July 28, 2017, Claimant worked in the gate area three days and baggage service office two days. Ms. Trueworthy credibly testified Claimant did not perform significant bag lifting based on the schedule. There was no bag lifting when working a gate podium. She

stated there could be some limited lifting in the baggage service office. The goal of training in that office was focused on the computer system to trace luggage. There would be times they would clear excessive bags off a luggage carousel that were not claimed.

18. The next week, July 21 through August 4, 2017, Claimant was scheduled to work at the gates all five days. All of those dates were morning shifts where Claimant would not have been transitioned to the baggage service office. Claimant did not do any lifting the second week of performing her job duties.
19. On August 7, 2017, Claimant trained at the full service kiosk at the ticket counter. Ms. Trueworthy credibly testified that the baggage lifting at this station was not significant. Claimant was with a trainer and the first day at the ticket counter was focused on learning the computer system. Customers at the ticket counter need to talk to employees about a ticketing transaction so it slows down the process and the amount of baggage lifted.
20. Based on Claimant's schedule, Ms. Trueworthy credibly testified that Claimant did not perform any significant repetitive lifting before August 7, 2017.
21. The rest of that week, August 8 through August 11, 2017, Claimant worked in the full service kiosk the first two days of the week, August 7 and 8, and trained at gates for three days. Again, those days did not involve significant lifting.
22. Claimant then had three days off and, on August 15, 2017, she worked at the self-service kiosk, had a full day of meetings preparing to go to Dallas and worked at gates for two days. Ms. Trueworthy testified there would be no significant lifting in those positions.
23. Of the 19 days Claimant worked before going to Dallas for training, 13 of those days she worked at the gates. Claimant agreed that when she worked at the gates, there was no heavy or significant lifting. Claimant agreed the six other days she was working, she lifted intermittently.
24. Claimant was off for a day and then travelled to Dallas. While in Dallas, Claimant did not identify significant physical activity performed but Claimant's pain increased substantially.
25. When Claimant returned from Dallas, she worked with a trainer and would have shared her lifting responsibilities.
26. In training, Claimant watched videos teaching proper lifting techniques of bags from the scales to the baggage belt.
27. The totality of the evidence demonstrates that Claimant performed intermittent lifting on six days before alleging that she suffered an occupational disease. This history

of limited and intermittent lifting over six days at the start of her employment is insufficient to prove a compensable occupational disease.

28. Claimant first sought treatment for her right hip complaints with PA-C Jonathan Joslyn at Concentra on October 3, 2017. Claimant reported on that date she remembered lifting a specific heavy bag onto the conveyor belt and felt a pull in her right leg. As a result, Claimant initially reported a specific injury, not an occupational disease.
29. Claimant also immediately had physical therapy at Concentra. During her initial visit on October 4, 2017, Claimant gave a history of lifting a suitcase from the scale to the conveyor belt. She claims she used her right knee to help her lift when she felt sudden pain in the front of her hip. Claimant contemporaneously reported to both Concentra and the physical therapist that she had suffered a specific and distinct injury involving a specific bag.
30. Subsequently, Claimant denied there was a specific incident where she lifted one bag that caused her pain. At hearing, Claimant testified that there was no specific work injury and instead Claimant suffered an occupational disease.
31. Claimant had a MRI of her right hip on October 12, 2017. The findings included mild chondromalacia and mild degeneration. There was either a small tear in the labrum or small capsulolabral recess. The impression also noted evidence of mild chronic ischiofemoral impingement.
32. On October 19, 2017, Claimant saw Dr. Nirav Shah at Front Range Orthopedics. Claimant reported the onset of her hip pain was acute and occurred in a persistent pattern for three weeks. Dr. Shah provided the diagnosis in his report: "Osteoarthritis of the right hip."
33. Claimant's treating orthopedic surgeon confirmed that there was no acute injury or findings on the MRI scan. The treating orthopedic surgeon diagnosed Claimant with osteoarthritis.
34. Dr. Carlos Cebrian testified in this matter and performed a records review on November 3, 2017. Dr. Cebrian credibly opined that Claimant's alleged right hip condition was not related to her job duties.
35. Dr. Cebrian also evaluated Claimant for an independent medical evaluation (IME) on February 20, 2018. For the IME, Dr. Cebrian evaluated Claimant in person. Dr. Cebrian used the medical treatment guidelines for a causation analysis. Dr. Cebrian diagnosed Claimant with ischiofemoral impingement. Dr. Cebrian also agreed with the diagnosis of osteoarthritis in the right hip based upon the MRI that demonstrated evidence of a degenerative condition.

36. Dr. Cebrian noted that Claimant denied a specific injury occurring but attributed her complaints to her job duties as a customer service agent. After summarizing Claimant's job history and duties with Employer, Dr. Cebrian opined that Claimant's right ischiofemoral impingement, degenerative changes and possible labral tear were not due to Claimant's job duties and work activities.
37. Dr. Cebrian explained that impingement occurs over a period of time from pressure of the upper leg bone and can cause wearing away of the hip joint itself. He also reviewed the MRI that demonstrated mild atrophy. He explained that where the pinching occurs, the muscle shrinks in size with atrophy supporting a chronic ischiofemoral impingement. Dr. Cebrian credibly opined that to have atrophy in the muscle, the problem would have to occur for at least six months, if not longer, and would not relate to the alleged August 2017 work incident.
38. The MRI showed labral tears and degeneration which are related to impingement problems. Dr. Cebrian credibly explained that impingement findings are degenerative in nature, and one type of degeneration is osteoarthritis. Dr. Cebrian credibly opined that with Claimant's diagnosis, he would expect that Claimant would have symptoms with normal and physical activities.
39. Dr. Cebrian credibly opined, and it is found that, Claimant did not suffer an occupational disease within a reasonable degree of medical probability. Even though Claimant was moving bags at work, it was for a limited amount of time and with limited repetition. Dr. Cebrian explained the medical treatment guidelines indicate that impingement abnormalities are usually congenital. These abnormalities can be aggravated by repetitive force or trauma but Claimant did not sustain any significant trauma. Dr. Cebrian testified that any abnormality Claimant had in her hip was likely developing for several years and present for over a decade.
40. Claimant did not describe any work activities for a duration of time that would lead to an occupational disease and require treatment under the workers' compensation system. Accordingly, it is concluded that Claimant failed to sustain her burden of proof to establish by a preponderance of the evidence that she suffered an occupational disease while employed with Employer.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786, 789 (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 the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

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

Occupational disease

4. Claimant contends that she sustained her burden of proof to establish that she suffered an occupational disease. By contrast, Respondents contend that Claimant did not sustain her burden of proof to establish an occupational disease. Respondents assert that Claimant did not engage in work activities which caused her hip condition.
5. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S., as:

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

6. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of

employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

7. Claimant failed to prove that she suffered an injury or occupational disease as a result of her job duties with Employer for numerous reasons. Claimant began working for Employer on July 13, 2017. She testified that she first began to experience symptoms around August 7, 2017. Yet Claimant failed to report any incident or issue to her supervisor until September 26, 2017. Claimant did not seek medical treatment until October 3, 2017.
8. There was conflicting evidence about the mechanism of injury. At the hearing, Claimant alleged an occupational disease and denied that lifting one specific bag caused her pain. Claimant's initial medical records, however, document the allegation of a specific injury. As a result, Claimant's story about how her injury occurred changed over time.
9. During the hearing, Claimant's job duties were reviewed in detail and the specific activities she performed while working in the various positions. While in the baggage service office, Claimant would have performed some physical activity when clearing excessive bags from the luggage carousel. The goal of training was to learn the computer system to trace luggage. When working at the full service kiosk, Claimant learned how to work the computer system and would have talked to customers and lifted their bags from the scale and put them on the conveyor belt behind her. Lifting of the bags was not constant as there were times when Claimant discussed ticketing issues or transactions with customers. Further, Claimant worked with a trainer so would not have lifted all of the bags herself. When Claimant worked at the gate area, she did not lift any bags or perform physical activity. Claimant agreed to the same during her testimony.
10. The ALJ credits Ms. Trueworthy's testimony as credible and specifically finds that Claimant performed minimal baggage lifting prior to her alleged injury.
11. Claimant was an employee for 27 work days prior to attending training in Dallas. Of those dates, Claimant was off one day and in training 8 of those days. She worked in the gate area 13 of those days. Two days were spent in the baggage service office. Only three work days were at the full service kiosk where Claimant would have intermittently lifted luggage. As a result, Claimant did not perform any significant lifting before alleging an occupational disease in her brand new employment.
12. The ALJ further credits Dr. Cebrian's expertise and opinion in finding that Claimant failed to demonstrate she sustained an occupational disease. Dr. Cebrian utilized

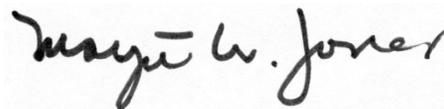
the medical treatment guidelines to evaluate Claimant's allegations and perform a causation analysis. Dr. Cebrian testified that any abnormality Claimant had in her hip was likely developing for several years and present for over a decade.

13. Dr. Cebrian also reviewed Claimant's job duties and her work history at Employer. He opined that Claimant did not have significant enough exposure for an underlying impingement abnormality to become symptomatic and require medical treatment. When Claimant moved bags at work, the activity was limited and not repetitive. Additionally, even the treating surgeon admitted that Claimant's only hip problems were due to osteoarthritis and not trauma.
14. The ALJ finds that Claimant failed to meet her burden of proof that she sustained a compensable work injury, or occupational disease, when lifting luggage. Claimant's history of injury varied. Further, the ALJ finds that Claimant failed to demonstrate that she performed repetitive lifting activities that could have caused a repetitive trauma injury. The ALJ credits the opinions of Dr. Cebrian who evaluated Claimant, reviewed her job description and the job duties she performed, and after performing a causation analysis per the Medical Treatment Guidelines, failed to find that Claimant met the requirements of a repetitive trauma.

ORDER

Claimant's claim is denied and dismissed.

DATED: February 14, 2019



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
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**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-966-735-02**

ISSUES

The issues set for determination included:

- (1) Did Claimant overcome the opinions of the physician who performed the DOWC Independent Medical Examination ("DIME") [John Douthit, M.D.] regarding causation and relatedness by clear and convincing evidence?
- (2) If Claimant overcame the DIME's opinion, did she prove that she sustained permanent medical impairment to her low back, including the SI joint?
- (3) Is Claimant entitled to *Grover* medical benefits?

PROCEDURAL STATUS

The Court issued Findings of Fact, Conclusions of Law and Order on or about December 17, 2018 (mailed on December 19, 2018). Claimant filed an Unopposed Motion for a Corrected Order on or about December 21, 2018, which was received by the undersigned on December 31, 2018. More particularly, the Motion requested the elimination of paragraph four of the previous Order. That part of the Order provided that Claimant's recovery was subject to the combined PPD/TTD limits found in § 8-42-107.5, C.R.S.¹ Claimant's Motion for a Corrected Order is granted and this Order follows.

STIPULATIONS

The parties stipulated to the following facts: (a) Claimant is at maximum medical improvement; (b) Claimant is not seeking retroactive temporary disability benefits; (c) Claimant is not challenging Dr. Douthit's extremity ratings; (d) Respondents have paid \$74,544.99 in indemnity benefits to date. The Stipulations were accepted by the Court and are made part of this Order.

FINDINGS OF FACT

1. Claimant was employed as a home health LPN for Employer.
2. There was no medical evidence in the record that Claimant suffered an injury to her low back/hip or right SI joint before 2014.

¹ The ALJ notes that at the outset of the hearing when the issues to be determined were discussed, at the time the parties related the Stipulation concerning the amount of temporary benefits paid, counsel for Claimant and Respondents agreed that the question of statutory caps was an issue in the case. The parties' assent was the reason for the inclusion of § 8-42-107.5, C.R.S. in the prior Order.

3. Claimant suffered an admitted industrial injury when she was involved in a motor vehicle accident (“MVA”) on November 14, 2014. She was a restrained driver, who was involved in a head-on collision with another vehicle. Claimant testified there was significant force associated with the impact and both airbags deployed in her vehicle. Claimant testified she felt pain all over after the accident, including her back and her right leg. The initial focus of her treatment was on her right leg and the tibial plateau fracture.

4. Claimant was transported by ambulance to Poudre Valley Hospital (University of Colorado Health). The EMS report and the initial documentation from University of Colorado Health documented right knee pain only.² Claimant complained of right knee and left foot numbness and tingling in the Emergency Department. Claimant underwent surgery (open reduction internal fixation) to repair the right tibial plateau fracture, which was performed by orthopedic surgeon Robert Baer, M.D. on November 14, 2014

5. An Employee’s Report of Injury was completed on November 21, 2014 and signed by Claimant. In the injury description section, Claimant listed a right tibia plateau fracture and right lower leg to the right hip pain, which was caused by a head-on collision.

6. On December 2, 2014, Claimant was evaluated by Kevin O’Connell, M.D. In a pain diagram she completed, Claimant referenced burning in her hip and aching in her low back. Claimant testified that she advised Dr. O’Connell of pain in her low back and hip area early on when she treated with him. Dr. O’Connell’s diagnosis was right tibial plateau fracture-closed. There was not a diagnosis related to the hip or low back.

7. In the physical therapy (“PT”) notes authored by Jennifer Himot, PT, dated December 22, 2014, there was a reference to rib pain and reduced muscle strength in the right hip (abduction, adduction and extension). The references to reduced MMT in the right hip were reflected in PT Himot’s notes through April 3, 2015.

8. Dr. O’Connell noted Claimant was making gradual progress to weight-bearing in the treatment note of January 20, 2015. Claimant reported right-sided costochondral soreness and x-rays were taken at that time. The x-rays were negative for fracture. Dr. O’Connell’s record reflected claimant gradually advanced to weight-bearing. Dr. Baer noted Claimant was able to ambulate without a cane or crutch on February 11, 2015, but it was still recommended she use a cane.

9. When Claimant returned to Dr. O’Connell on March 24, 2015, it was noted she slipped in the bathroom while exiting the shower. Her right knee gave out and she impacted the right leg, as well as her right arm and shoulder. Dr. O’Connell’s assessment continued to be specific to the right knee tibial plateau fracture, status post-ORIF. However, Dr. O’Connell also examined her right shoulder and right arm.

² Exhibit C, pp.6-11 (Exhibit 1 to Dr. Anderson-Oeser’s deposition.)

10. In the six evaluations of Claimant by Dr. O'Connell which occurred between April 30, 2015 and August 28, 2015, there was no reference to low back or hip pain, although a shoulder sprain was included in Dr. O'Connell's diagnoses. Claimant underwent surgery to remove the hardware in the right knee on August 5, 2015. She continued to receive PT following that procedure.

11. On October 9, 2015, Claimant returned to Dr. O'Connell and reported right hip discomfort, which she thought was attributable to her original right knee injury. Dr. O'Connell did not list a diagnosis for the low back or hip for this visit. Claimant also reported hip/low back, as well as right leg symptoms at the November 3, 2015 appointment with Dr. O'Connell. Were documented in a pain diagram she completed. O'Connell noted Claimant there were myalgias and joint swelling present at the time of the examination.

12. Claimant testified she felt pain in her hip and SI joint once she transitioned to weight-bearing on the right leg. The ALJ found the medical records corroborated Claimant's testimony that she was not weight-bearing for a period of time and the focus of her treatment was on the right knee. Her symptoms in the low back and hip area increased as she used her leg more.

13. In a treatment note, dated December 10, 2015, Dr. O'Connell noted Claimant was experiencing more pronounced right-sided low back pain at the SI areas radiating into the right groin. The symptoms were often triggered by movements of the right hip. Dr. O'Connell's diagnoses were: tibial plateau fracture, right, closed with routine healing; labral tear of hip, degenerative; sciatica neuralgia, right. Although Dr. O'Connell initially questioned whether the back complaints were causally related to subsequent to December 2015, he made referrals for evaluation and treatment of the low back/hip. Claimant was also referred for diagnostic testing, including an MRI of the low back. The ALJ inferred this supported the conclusion Dr. O'Connell believed Claimant's low back and hip condition were related to the industrial injury.

14. Claimant was referred for an MRI of the lumbar spine on December 23, 2015. Jeremy McCue, M.D. read the films and noted a small focal right foraminal protrusion at L3-L4, contacting the exiting right L3 nerve root. The disc did not cause a significant anatomic stenosis. Mild degenerative changes with annular fissuring was also noted at L4-5 and L5-S1. The ALJ found this MRI showed objective evidence of anatomic lesions in the lumbar spine.

15. On January 12, 2016, Claimant underwent arthroscopy of the right knee, which was performed by Robert Trumper, M.D. Grade IV post-traumatic osteoarthritis was identified at that time. The ALJ inferred the traumatic osteoarthritis resulted from the MVA.

16. Dr. O'Connell continued to oversee Claimant's treatment, as she treated for symptoms in the right knee, hip, right shoulder and neck. When Claimant returned to Dr. O'Connell on January 15, 2016, additional diagnoses included neck pain,

radiculitis of the right cervical region; shoulder sprain, right; adjustment reaction; in addition to those identified in December 2015.

17. On February 10, 2016 Claimant was evaluated by Hans Coester, M.D. to whom she was referred by Dr. O'Connell. At that time, her chief complaints were listed as neck, shoulder, right arm and back pain. Dr. Coester found extension of Claimant's neck aggravated her pain, but she had no arm pain or weakness. She also had no weakness in her lower extremities. Dr. Coester noted Claimant had degenerative disc disease at multiple levels of the cervical spine. There was a small protrusion at C7-T1, without significant nerve root compression. Dr. Coester did not recommend any cervical treatment/intervention. Claimant's lumbar MRI scan showed mild degenerative disc disease at the L4-5 and L5-S1 level, but no nerve root compression. Dr. Coester did not recommend surgical intervention and thought the burning pain may be the result of the meralgia paresthetica. He recommended a physiatry evaluation and possible nerve conduction tests.

18. On March 1, 2016, Jeff Raschbacher, M.D. (Occupational Medicine) reviewed a prior authorization request related to treatment of Claimant's right hip on behalf of Insurer. Dr. Raschbacher noted the hip was mentioned in June 2015 by an orthopedic physician and it was his opinion that given the nature of the injury, this could have caused a labral tear in the right hip, the force being transmitted up the extremity proximally from the knee. He recommended a review of the PT records before authorizing the treatment.

19. Claimant was evaluated by Brian White, M.D. on March 16, 2016 with a focus on the right hip pain. She complained of worsening right hip pain, as well as low back pain, without numbness, tingling, or any significant radicular symptoms. On examination (performed by Shawn Karns, PA-C), Claimant had a non-antalgic gait, with excellent lumbar range of motion ("ROM") and no midline or paraspinal muscular tenderness. The bilateral hip exam showed flexion of the right hip to be limited as compared to the left. Straight leg test was negative for low back pain radicular symptoms and FABER test was negative for SI joint pain. No tenderness was found to palpation over the greater trochanters.

20. PA-C Karns' concluded Claimant had findings consistent with right hip femoroacetabular impingement and labral tear. Due to the extent of her pain and failure of conservative treatment, she was a candidate for hip arthroscopy surgery. Dr. White's addendum noted Claimant had significant pain with anterior impingement maneuver, otherwise good ROM. The MRI showed a labral tear. Dr. White's assessment was: Claimant had an underlying labral tear likely from a subluxation event at the time of her injury. He recommended that Claimant lose weight before undergoing hip surgery.

21. On July 22, 2016, Claimant was evaluated by Kimberly Siegel, M.D. at UC Health. Dr. Siegel noted Claimant previously treated with Dr. O'Connell, whose most recent notes indicated Claimant was approaching nearing MMI with respect to all conditions, except for the right hip labral tear. Claimant was also to have a NCS/EMG

to rule out right lumbar radiculitis. Claimant's pain diagram reflected pain in the right side of her low back, as well as radiating pain down the right leg. At the time of the evaluation, Claimant's gait demonstrated mild favoring of the right lower extremity. Cervical ROM was moderately limited in all planes and lumbar ROM was limited to about 30 to 40° flexion by right-sided low back pain. Extension was mildly limited and elicited pain, along with bilateral flexion.

22. Dr. Siegel's assessment was: labral tear of hip, degenerative; neck pain; low back pain with radiation, right; cervical myofascial pain syndrome; pain, right thigh. Dr. Siegel noted surgery was not recommended on Claimant's neck or back. Dr. Siegel opined Claimant was primarily having myofascial pain in her neck and back and thought some treatment (i.e. dry needling) directed specifically at this may be of some benefit. The ALJ inferred Dr. Siegel was of the opinion that Claimant's low back required additional treatment, as evidenced by referrals made and this opinion was persuasive.

23. Claimant was evaluated by George Girardi, M.D. on May 9, 2016. Dr. Girardi noted Claimant had a history of low back pain going into the right hip, right groin and right anterior thigh. Her MRI demonstrated a right foraminal protrusion at L3-4, which correlated with her symptoms. On examination, Claimant was able to reproduce her pain with extension and had a positive Spurling's maneuver to the right side. Claimant also had discomfort with the straight leg test on the right side of the anterior thigh and groin.

24. Dr. Girardi's assessment was: neck pain, with right radicular symptoms potentially due to a C6-7 disc protrusion; low back pain, with right anterior thigh pain, with the disc protrusion at L3-4. Dr. Girardi ordered epidural steroid injections for the lumbosacral area, as well as the cervical, thoracic region.

25. Claimant was evaluated by Raymond Van den Hoven on August 17, 2016. She was complaining of pain in the right SI joint, buttock, lateral hip, and anterior thigh region, along with burning in the right anterolateral leg. On examination, Dr. Van den Hoven found right SI joint tenderness, along with piriformis and hip adductor tenderness. Hip flexion/adduction/internal rotation resulted in pain in the right anterior hip region, but no popping or catching was noted. Claimant's lumbar spine was not tender and there was no tenderness over the ASIS region. There was negative Tinel's over the lateral femoral cutaneous nerve near ASIS. FABER testing resulted in SI joint pain and anterior hip pain. Dr. Van den Hoven also noted sensitivity in the skin around anterior knee and medial shin, but normal sensation in L3 and L4 dermatomes above the knee.

26. Dr. Van den Hoven's impression was: no acute or chronic lumbar radiculopathy in the L3 through S1 myotomes, right lower extremity; no clinical evidence for meralgia parasthetica, right lower extremity; no tarsal tunnel syndrome, bilateral lower extremities; no fibular neuropathy in the knee or ankle, bilateral lower extremities; no peripheral neuropathy. Dr. Van den Hoven opined Claimant's pain appeared to be multifactorial and related to the right SI joint strain, tendinopathy of the right abductor

tendons, right anterior hip labral tear, knee issues, with right thigh pain likely being somewhat related to all of these sources. The skin sensitivity was likely due to cutaneous nerve injuries, possibly post-surgical. Dr. Van den Hoven recommended consideration of right SI joint and right hip abductor tendon injections, along with resolving the right hip labral tear issues.

27. On October 18, 2016, Claimant underwent surgery for her right hip Adventist Hospital. Dr. White performed a right hip arthroscopy, with femoral osteoplasty, limited acetabular rim trimming, minor shaving chondroplasty, acetabular labral reconstruction and capsular closure.

28. Claimant returned to Dr. White on December 14, 2016. Claimant was described as doing really well with regard to the right hip, but having issues with her SI joint and knee on the ipsilateral side. Dr. White noted this was all stemming from the MVA. Dr. White thought Claimant's SI joint may come around with further PT. If she had continued pain, he recommended Jeffrey Donner, M.D. for an evaluation and possible injections.

29. In a follow-up to visit with PA-C Karns on February 9, 2017, he documented Claimant walked with a mildly antalgic gait, which she attributed to the knee. Mild tenderness was found over the greater trochanter. In PA-C Karns' assessment, Claimant was noted to be progressing well post-surgery, but still dealing with right knee and SI joint issues. If Claimant's hip bursa became more of an issue, a cortisone injection was recommended.

30. From February 13, 2017 through February 27, 2017, Claimant underwent three Hyalgan injections in the right knee. Relief was noted after those injections.

31 On February 15, 2017, Claimant was evaluated by Albert Hattem, M.D., at the request of Respondents. Claimant reported right leg pain and sensitivity, right-sided low back pain, right hip tenderness, along with upper back and neck tightness. Dr. Hattem's medical records summary stated there was a PT note from Orthopedic Center of the Rockies in which Claimant reported right rib, hip, low back, right knee and right ankle pain. On examination, Claimant's right knee revealed a well-healed surgical scar, with no swelling or skin discoloration. There was mild to decreased flexion and extension, but no crepitation noted. Claimant's right hip had well-healed surgical scars, very mild decreased range of motion and slight tenderness over the lateral aspect. Slight right paraspinous tenderness was noted in the lumbar spine. Claimant's cervical spine and bilateral shoulders had full range of motion, with mild use tenderness.

32. Dr. Hattem' diagnoses were: right bicondylar tibial plateau fracture, post-open reduction internal fixation by Dr. Baer on November 15, 2014; status post right knee hardware by Dr. Baer on August 5, 2015; post-traumatic osteoarthritis versus aggravation of pre-existing arthritis of medial femoral condyle right knee, status post right knee arthroscopic chondroplasty of the medial femoral condyle and chondroplasty of the patella performed by Dr. Trumper on January 12, 2016; right hip femoral

acetabular impingement and labral tear, status post right arthroscopic femoral osteoplasty, limited acetabular trimming, chondroplasty, and acetabular labral reconstruction by Dr. White on October 8, 2016; myofascial cervical and shoulder/upper back pain; mechanical nonspecific low back pain.

33. Dr. Hattem opined Claimant would be at MMI for the right knee in a month, once she completed injections. He noted the right shoulder exam was unremarkable with full ROM and Claimant's right hip was approaching MMI. Claimant was at MMI for her neck and low back. Dr. Hattem stated Claimant's right knee, right hip and low back were causally related to the November 14, 2014 work injury. He did not believe the cervical spine complaints were related to the work injury.

34. Dr. Hattem testified as an expert in Physical Medicine and Rehabilitation at hearing. He is Level II accredited pursuant to the WCRP. He testified consistently with his report and noted on evaluation Claimant did not have objective evidence of pain in the lumbar spine, including radiculopathy. He said the MRI was negative for acute pathology and Claimant had a small disc protrusion.

35. Dr. Hattem took issue with Dr. Anderson-Oeser's conclusion that a positive Faber's test and pain to palpation were objective signs. Dr. Hattem testified there was no objective evidence to establish Claimant's SI joint was involved in this case because the SI joint injection was not diagnostic, Claimant's pain complaints were subjective, and the FABER test could have been positive for Claimant's right hip pathology. Also, Claimant's arthritic knee could have caused the antalgic gait. He also concluded there was no objective evidence to establish a permanent impairment for Claimant's low back because myofascial back pain is not entitled to a permanent impairment rating. Dr. Hattem stated Claimant was not entitled to a permanent medical impairment rating for low back/hip. Dr. Hattem testified this was consistent with Dr. Siegel's findings and noted Dr. Siegel did not rate Claimant's lumbar spine.

36. On cross-examination, Dr. Hattem admitted he did not perform provocative maneuvers when he evaluated Claimant. He agreed that in his report he concluded the low back was injured as a result of the motor vehicle accident. He admitted the mechanism of injury in this accident could cause an injury to the hip/low back and the right SI joint had required treatment.

37. On April 10, 2017, Claimant was evaluated by Dr. Siegel, who concluded she was at MMI and evaluated her permanent medical impairment. Dr. Siegel noted Claimant continued to have right low back pain, which was felt to stem from right SI joint inflammation or dysfunction. Dr. Siegel referred Claimant to Dr. Donner, but she had not been evaluated by that physician. Dr. Siegel's diagnoses were: sprain of right hip; tibial plateau fracture, right, closed, with routine healing; traumatic arthritis of the knee, right; ACL laxity, right; pain of right thigh; low back pain with radiation, right; cervical myofascial pain syndrome; and chronic myofascial pain.

38. Dr. Siegel assigned a permanent medical impairment rating to Claimant's right knee and right hip. Dr. Siegel assigned a 39% extremity impairment rating for the right knee, which included range of motion loss (11%) and Table 40 diagnoses (arthritis and ACL loss). Dr. Siegel assigned a 25% impairment to the hip, which included the right hip flexion, abduction and adduction, as well as internal and external rotation. The lower extremity impairments combined to a total of 54%, which corresponded to a 22% whole person impairment. Dr. Siegel noted Claimant's right low back pain had been felt to stem from right SI joint inflammation or dysfunction. However, Dr. Siegel did not perform range of motion testing on Claimant's lumbar spine and did not detail in her report why Claimant would or would not be entitled to a medical impairment for the lumbar spine/SI joint.

39. Dr. Siegel opined Claimant required maintenance treatment, including a follow-up with Dr. White, as well as completion of the remaining PT for her hip. Claimant was also to receive maintenance/adjustment/replacement of the knee brace, as well as viscosupplementation injections for the knee. Claimant was to follow-up with Dr. Trumper every 2-4 years to monitor functional status of right knee, as well as to continue with her prescription meds. The ALJ credited Dr. Siegel's opinion with regard to Claimant's need for maintenance treatment for her hip and knee. Claimant was authorized to follow-up with Dr. Donner possible right SI joint injection, per the prior referral. The ALJ inferred Dr. Siegel was of the opinion that treatment for the SI joint was reasonable, necessary and related to the industrial injury.

40. On June 1, 2017, Claimant was evaluated by Chris Kottonstette, PA-C. At that time, she described pain over the SI joint, including pain of the posterior sacral sulcus and along the SI joint line. Single leg standing increased her pain on the right. Shear and compressive force in the supine position increased her pain and there was a positive Lasegue's test, along with increased pain at 30° elevation during the straight leg raise. Dr. Donner was in to examine the patient, reviewed her imaging studies and treatment plan. PA-C Kottonstette noted they would set Claimant up for a right SI joint injection, as well as potential discography determine whether the two annular tears contributing to her back pain. The right SI joint injection was performed on June 28, 2017.

41. The ALJ noted there was nothing in the record to confirm Dr. Donner requested authorization for an additional procedure (injection) from Insurer. There was no follow-up with Dr. Donner after the first injection and no record in which he recommended further injections.³

42. Claimant underwent a DIME which was performed by Dr. Douthit on July 10, 2017. Claimant complained of pain in the right knee, low back pain and sacroiliac joint pain, which she referenced as near the sacrum. She also complained of

³ Dr. Anderson-Oeser was asked about an SI joint injection which Claimant underwent on June 28, 2017. (Deposition of Dr. Anderson-Oeser, p. 29:10-16.) There was no evidence before the Court which showed Dr. Donner saw Claimant after that time.

hypersensitivity in the lower leg. Claimant stated her shoulder and hip pain had resolved. On examination, Dr. Douthit found the right knee was stable in both the Lachman and drawer maneuvers. There was no collateral ligament instability. There was limitation in range of motion of the right hip on extension, internal rotation and external rotation, along with mild atrophy of the gluteus muscle.

43. Dr. Douthit stated he was missing some of the early records and relied on Dr. Hattem's report for the records of the first year. This is not proscribed by the AMA Guides. Dr. Douthit said he did not find records that she was complaining of low back pain in the months after the accident and the first records that were noted were in December 2015. This was contradicted by evidence in the record. Claimant had no neurological findings and limited motion was from volitional guarding of the lumbar spine. Also, there were no medical imaging studies to indicate an injury to the SI joint occurred and the MRI finding of the lumbar spine did not demonstrate convincing evidence of an associated back injury.

44. Dr. Douthit noted the MRI showed mild labral tearing of the right hip and x-rays were equivocal/open to interpretation. He assigned 12% scheduled impairment for the mild loss of range of motion of the right hip. Dr. Douthit determined Claimant sustained a 25% impairment of the lower extremity for the right knee, which included 12% related to loss of range of motion, 10% impairment for arthritis and 5% for the possibility of attenuation of the cruciate ligament. The 25% impairment was added/combined to the 12% extremity rating for the hip which equaled 34% impairment of the lower extremity and 14% whole person impairment. Dr. Douthit did not find objective medical evidence of permanent injury of the lumbar spine, shoulder, neck or SI joint and did not assign an impairment rating to those areas of the body.

45. Claimant underwent three Hyalgan injections in the right knee in September 2017. Dr. Trumper opined Claimant would require a total knee replacement and the strategy was to defer that procedure as long as possible.⁴

46. A record review was prepared by Mark Failinger, M.D., dated December 10, 2017. After reviewing Claimant's course of treatment, Dr. Failinger opined Claimant sustained a high-energy injury to her knee which created, with reasonable medical probability, post-traumatic arthritis. This arthritis progressed with time and would not improve. Dr. Failinger agreed with Dr. Trumper's opinion that the Claimant had a high chance that the knee had progressed to arthritis, which would, with medical probability, become recalcitrant to conservative measures, including those she had undertaken to this point. A knee replacement was the next most reasonable step, with one repetition in Claimant's lifetime. The ALJ concluded Claimant will require continuing treatment for her right knee, including possible joint replacement surgery.

47. On December 14, 2017, Claimant was evaluated by Dr. Anderson-Oeser, who performed an IME at the request of her attorney. At that time, Claimant reported

⁴ Exhibit G, p.185.

an aching sensation in the right posterior shoulder girdle, along with aching pain to the lower lumbar region, including the right sacroiliac and buttocks, left buttocks and posterior thigh. She also reported burning sensation over the lateral aspect of the right lower extremity to her ankle and numbness over the right knee. The ALJ noted these latter complaints were not reported to Dr. Douthit. On her examination, Claimant's gait was mildly antalgic. Her cervical ROM was within functional limits. Claimant was tender over the lower lumbar SI joints, bilateral PSIS and bilateral sacroiliac joints, as well as right gluteal muscles. The FABER test was positive on the right.

48. Dr. Anderson-Oeser opined, based on the mechanism of Claimant's injury and the fact that she reported pain in the low back and SI region from the onset, these were causally related to the vehicle accident of November 14, 2014. Dr. Anderson-Oeser testified that a lumbar rating was appropriate for SI joint injuries. Dr. Anderson-Oeser assigned a 9% impairment of the lumbar spine due to loss of range of motion and a 5% impairment of the lumbar spine based on Table 53 II(B); for a total of 14% spinal impairment. The ALJ credited the opinion offered by Dr. Anderson-Oeser with regard to Claimant's permanent impairment in the lumbar spine/SI joint.

49. Dr. Anderson-Oeser testified as an expert in Physical Medicine and Rehabilitation, the specialty in which she is board-certified. She is Level II accredited pursuant to the WCRP. Dr. Anderson-Oeser testified that this MVA caused the front-end of the dashboard to push the femur up into the hip socket, which transferred the forces across Claimant's sacrum. This can cause an injury to the SI joint, as well as low back pain. Dr. Anderson-Oeser opined that the mechanism of injury involved in an MVA can cause injury to the SI joint and spine.⁵ Dr. Anderson-Oeser concluded Claimant had a problem on the right SI joint and myofascial pain in the lower lumbar region. The ALJ credited this opinion.

50. Dr. Anderson-Oeser testified Claimant's SI joint could have constant irritation, if it was not moving appropriately. On examination, Claimant had positive Faber's sign on the right, along with tenderness to palpation. Dr. Anderson-Oeser agreed there was a subjective element to these findings. There was also spasm of the gluteal muscles, along with a loss of ROM in the lumbar spine. On the question of whether Claimant initially reported low back/hip/SI joint problems, Dr. Anderson-Oeser referenced will the pain diagram Claimant completed for Dr. O'Connell, as well as the initial report of injury. She did not recommend a DIME physician relying on the medical records summary, as Dr. Douthit did in this case. The ALJ inferred Dr. Anderson-Oeser reviewed the initial report of symptoms at as supportive of the conclusion that there was an injury to this area of body and thus, potential impairment. Also the evidence of muscle spasm and loss of ROM were objective findings. The ALJ found Dr. Anderson-Oeser's opinions to be more persuasive than Dr. Hattem.

51 Dr. Anderson-Oeser opined Claimant was at MMI for the SI joint and low back condition. She believed these conditions could be treated as part of medical maintenance.

⁵ Deposition of Dr. Anderson-Oeser, p. 8:5-17.

52. Claimant suffered an injury to her low back, and right SI joint as a result of the November 14, 2014 MVA.

53. There was agreement amongst the physicians, including Dr. Douthit, Dr. Hattem and Dr. Anderson-Oeser that Claimant did not sustain a permanent medical impairment to her cervical spine or right shoulder. The dispute in the case centered on the lumbar spine and right SI joint.

54. Claimant proved she is entitled to post-MMI medical treatment, including treatment for the right knee.

55. No ATP, including Dr. Siegel, recommended further injections for Claimant's right SI joint after June 2017.

56. Claimant failed to prove she required additional treatment for her right SI joint at this juncture.

57. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

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

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

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).

Overcoming the DIME

In resolving the issues, the ALJ notes the question of whether Claimant overcame Dr. Douthit's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence". § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO Nov. 17, 2000).

The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Indus. Claim Apps. Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions that result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id.* The elevated burden is evidence of the Colorado Legislature's intent to limit overcoming the DIME physician's opinion to those cases where it is more probable than not that the opinion was incorrect.

The crux of the issue represented by the case is whether Dr. Douthit's opinion that Claimant did not sustain a permanent impairment to the lumbar spine (including the SI joint) was more probably wrong. The ALJ considered the arguments proffered by Claimant and Respondents with regard to Dr. Douthit's opinion. Claimant asserted that Dr. Douthit's conclusions were erroneous because he did not review Claimant's treatment early records where she reported low back pain. Respondents' argued that the Dr. Douthit's opinions were not overcome by clear and convincing evidence, as there was a lack of objective evidence to support the conclusion there was a lumbar spine/SI joint injury. Respondents also asserted the MRI did not show evidence of an acute lumbar injury and on the occasions when Claimant had an antalgic gait, this was related to her knee injury. Respondents relied upon the testimony of Dr. Hattem to support their contentions. In the case at bar, the ALJ determined Claimant met her burden to overcome Dr. Douthit's opinion.

There are two facets to the ALJ's reasoning; first, there was a sufficient quantum of evidence introduced that Dr. Douthit's conclusions vis a' vis the lumbar spine were erroneous. As found, Dr. Douthit relied upon Dr. Hattem's summary of the early treatment records, which does not constitute an error *per se*. However, this lessened the weight of Dr. Douthit's opinion. Dr. Douthit went on to conclude that Claimant did not complain of low back pain initially, (which is contrary to the records) as part of his conclusion Claimant sustained no permanent medical impairment for lumbar spine.

As determined in Findings of Fact 3, 5-7, 11, Claimant complained of low back/hip pain in the initial aftermath of this accident. Claimant also referenced low back pain in her report of injury (Finding of Fact 5) and testified she had low back pain after the accident. There were also references to hip pain in the PT notes admitted into evidence. (Finding of Fact 7). The medical evidence in the record supported the conclusion Claimant had low back and right sided hip/leg pain following the accident. To the extent Dr. Douthit based his opinion that Claimant did not sustain an injury to the low back/hip as a result of the MVA because there were no complaints initially, this conclusion was erroneous.

In addition, the records of Dr. Siegel (an ATP) indicate she believed that Claimant suffered an injury to her low back/SI joint, which required diagnostic testing and treatment for these areas of the body. The ALJ credited Dr. Siegel's opinions in this regard. (Finding of Fact 22.) Medical records from other physicians confirmed Claimant had symptoms and treatment involving the lumbar spine and SI joint. As found, Dr. O'Connell initially questioned causation with regard to the hip and low back complaints. (Finding of Fact 13). However, the medical evidence in the record indicated Dr. O'Connell referred Claimant for diagnostic testing (MRI) as an ATP. (Findings of Fact 13-14). Other ATPs who opined that the hip, low back and right leg complaints were related to the subject accident included Drs. Girardi, White, Van den Hoven, and Donner (ATPs). Even Respondents' IME physician, Dr. Hattem, determined Claimant's low back was injured in the subject accident. (Finding of Fact 33.)

To be sure, there was not a uniform consensus between the doctors regarding the source of Claimant's pain complaints during the course of her treatment. Several physicians identified a labral tear in Claimant's hip as the pain generator. Also, there was a delay before Claimant's treatment focused on the hip and lumbar spine. On balance, the ALJ was persuaded that based upon the evidence, including the physicians' opinions, the MVA caused an injury to Claimant's lumbar spine and SI joint which required treatment. (Finding of Fact 52).

Second, the ALJ credited Dr. Anderson-Oeser's opinion that Claimant's low back and SI joint were causally related to the subject accident and Claimant sustained a permanent medical impairment to that area of her body. At the time of her evaluation, Dr. Anderson-Oeser had reviewed Dr. Hattem's report, as well as Dr. Douthit's. Dr. Anderson-Oeser's opinion on causation was supported by Dr. Raschbacher, as well as

by Respondents' expert, Dr. Hattem who in his initial report concluded the hip and low back were related. Dr. Siegel, who was an ATP, also concluded Claimant's SI joint pain was related to the subject accident and referred Claimant to Dr. Donner for an evaluation and treatment. (Finding of Fact 34). All of these physicians concluded Claimant had an SI joint diagnosis which supported the ALJ's conclusion that Claimant was entitled to a rating for the low back/SI joint under the AMA Guides. Dr. Anderson Oeser testified, which provided a rationale and support for the conclusion Claimant suffered a permanent medical impairment to the lumbar spine and the basis for rating. This was the most complete explanation that opinion of all the opinions within the record. The ALJ credited Dr. Anderson Oeser's opinion that Claimant was entitled to a Table 53II(B) impairment under the AMA Guides and concluded Claimant's total impairment was 14% whole person. (Finding of Fact 48).

Therefore, after considering the totality of the medical evidence, the ALJ concluded Claimant sustained a permanent medical impairment to lumbar spine (including the SI joint) and was entitled to a permanent medical impairment rating. Since Dr. Douthit's conclusion that Claimant did not have lumbar impairment was based, at least in part, on the erroneous belief Claimant did not complain of symptoms, his opinion was overcome. Accordingly, Claimant is entitled to additional PPD benefits for the injury to the lumbar spine/SI joint which was injured in the subject accident.

Grover Medical Benefits

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). As found, Claimant's traumatic injury to the right knee caused post-traumatic arthritis. (Finding of Fact 46). The medical evidence revealed Claimant may require knee joint replacement for the right knee and Respondents are liable for said treatment. Claimant proved she is entitled to continuing treatment to maintain MMI for the right knee. (Findings of Fact 45, 53). In this regard, Claimant's ATP, Dr. Siegel, opined Claimant required maintenance medical treatment at the ALJ credited this opinion. (Finding of Fact 39).

Claimant offered the opinion of Dr. Anderson-Oeser to support her contention that she requires maintenance treatment for her SI joint and low back. The ALJ concluded Claimant failed to prove entitlement to those medical benefits to either maintain MMI or prevent deterioration. (Findings of Fact 54-55). As found, Dr. Siegel referred Claimant to Dr. Donner and she was evaluated by PAC Kottonstette at Dr. Donner's office on June 1, 2017. Claimant underwent one injection, but there was no evidence in the record Claimant returned to Dr. Donner after that time. Claimant failed to prove the efficacy of said injection, such that a further SI joint injection would be warranted. Based upon this failure of proof, Claimant's claim for additional medical benefits for the low back and SI joint is denied.

ORDER

It is therefore ordered:

1. Claimant's Motion for a Corrected Order is granted.
2. Claimant met her burden to overcome the DIME physician's findings with regard to causation and medical impairment by clear and convincing evidence.
3. Respondents shall pay PPD benefits to Claimant based upon a 14% whole person impairment to lumbar spine.
4. Pursuant to the Stipulation of the parties, Respondents shall pay the scheduled impairment ratings issued by Dr. Douthit. This includes a 25% scheduled impairment of the lower extremity (right knee), which was added to the 12% extremity rating (hip) and that totaled a 34% scheduled impairment of the lower extremity, which converts to a 14% whole person impairment.
5. Respondents are entitled to a credit for PPD benefits paid.
6. Respondents shall pay reasonable and necessary post-medical treatment, including treatment for post-traumatic arthritis in the right knee.
7. All matters not determined herein are reserved for future determination.

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

petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: February 12, 2019

STATE OF COLORADO



Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-978-924-003

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 8, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 1/8/19, Courtroom 3, beginning at 1:30 PM, and ending at 3:15 PM).

Claimant's Exhibits 1 through 6 were admitted into evidence, without objection. Respondents' Exhibits A through O were admitted into evidence, without objection. The evidentiary deposition of William Ciccone, M.D., taken on September 12, 2018 (referred to herein after as Ciccone Depo., followed by a page number).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on January 17, 2019. Respondent was given two working days within which to file objections. Objections not having been timely filed, the matter was deemed submitted for decision on January 23, 2019. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the Claimant's Petition to Re-Open; and, if reopened, medical benefits.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. Respondent filed a Final Admission of Liability (FAL) on or about April 2, 2015. At the hearing, the Claimant stated that her claim arose from her attempt to climb and descend stairs in a somewhat hurried fashion while under restrictions from a previous, unrelated automobile accident. Claimant's version of the incident was consistent with the medical records. Respondent did not assert any form of safety violation or similar benefit reduction in its FAL.

2. The FAL was accompanied by medical records authored by Kathy F. McCranie, M.D., and Eric Tentori, D.O., and therein Respondent agreed to "medical care that is reasonable, necessary and related and authorized by (sic) designated clinic/authorized treating physician."

3. In the FAL, Respondent also admitted for a medical impairment rating/permanent disability award of 9 percent of the whole person, apportioned out due to her "preexisting condition" and finally resulting in an award of 3% whole person. The FAL admitted a maximum medical improvement (MMI) date of February 2, 2015.

4. In his report, Dr. Tentori noted that Claimant "was provided with activity restrictions above/beyond her pre-work activity restrictions." He also was of the opinion that "this injury has resulted in permanent physical therapy (sic) impairment."

5. In her report, Dr. McCranie stated that the Claimant suffered from "low back pain predominately left sided" and "possible facetogenic pain." In the course of providing her impairment rating, including the above-referenced apportionment, Dr.

McCranie also noted that the Claimant was on “irregular work restrictions” at the time of the incident.

Petition to Re-open

6. On or about July 20, 2017, the Claimant filed a timely Petition to Reopen her claim on the basis of a change in her medical condition. Attached to it was a medical report from Amy Pearson, M.D., dated February 21, 2017, which stated that the Claimant’s back pain had returned with the same pattern and intensity as she originally suffered from her claim. Dr. Pearson also stated that the Claimant had experienced a worsening of condition and was no longer at MMI. Dr. Pearson prescribed “additional care” in the form of physician visits, a facet block and a possible nerve ablation along with physical and aqua therapy and therapeutic massage. Dr. Pearson stated the opinion that this was necessary to bring the Claimant “back” to MMI.

7. On or about January 9, 2017, Elena Pimanova, M.D., stated the opinion that the Claimant was not at MMI, had experienced a worsening of condition and was in need of additional care (Claimant’s Exhibits, p. 58).

8. Dr. Pearson confirmed Dr. Pimanova’s opinion, in her medical report, dated February 21, 2017 (*Id.* 18).

9. The Claimant received a lengthy course of physical therapy (PT) through Benchmark PT during 2017. Her treatment was consistent with her presentation as referenced above by the opinions of, Dr. Pimanova and Dr. Pearson.

10. Gerald Chai, D.O. saw the Claimant regularly from early 2016 through the beginning of 2017. He was of the opinion that the Claimant had lumbar spondylosis, disc atrophy and chronic pain syndrome for which he provided treatment which was approved by Respondents (*Id.* 34).

11. The Claimant’s testimony was credible, overall, and consistent with the above medical opinions. The Claimant stated that her condition from the admitted workers’ compensation claim had worsened and she requested the treatment prescribed by Dr. Pearson.

Respondent’s Independent Medical Examiner (IME), William Ciccone, M.D.

12. Respondent sent the Claimant to an IME physician of its choosing in preparation for the hearing. The IME physician, Dr. Ciccone was of the overall opinion in his report that the Claimant did not suffer a workers’ compensation injury and/or claim

in the first place. Dr. Ciccone's opinion would have compensability re-litigated. For this reason and other reasons specified herein below, the ALJ finds Dr. Ciccone's opinion concerning "compensability," contrary to the weight of the evidence and lacking in credibility on the issue of causality.

13. In his evidentiary deposition submitted at the hearing, however, Dr. Ciccone stated that the Claimant moved "very slowly" and exhibited a left-sided limp at the time of his examination. Dr. Ciccone stated that the Claimant was limited due to pain and had limited motion in her low back along with muscular weakness. He also noted that Claimant had reported a worsening of her pain symptomatology over time. Finally, he stated that, regardless of causation, he agreed within a reasonable degree of medical probability with Dr. Pearson's recommendations for her care (Respondents Exhibits, p. 12, lines 20-24; *Id.*, p. 13, line 2; *Id.*p. 36, lines 17-22 or Deposition transcript p. 8, lines 20-24; p. 9, line 2; p. 32, lines 17-22).

14. When taken with the evidence as a whole, Dr. Ciccone's opinion is not credible or persuasive with regard to the Claimant's not having a worsening of condition or, for that matter, the original existence of a compensable claim. His agreement(s) with her need for medical care, however, is credible and persuasive. The ALJ infers that the foundation of this opinion is either Dr. Ciccone's underlying assumption that the Claimant's treatment is for non-work related causes. The ALJ does not find this purported underlying assumption credible.

Ultimate Findings

15. The Claimant presented forthrightly and credibly. Her testimony alone supports a worsening of condition after MMI. The ALJ finds the opinions of Dr. Pearson and Dr. Pimanova, concerning a worsening of condition, unequivocal, credible and highly persuasive. On the other hand, Dr. Ciccone's causality opinions are **not** credible.

16. Between conflicting testimonies and evidence, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Pearson and Dr. Pimanova, and to reject the opinions of dr. Ciccone.

17. The Claimant has proven a worsening of her condition, after MMI, by a preponderance of the evidence.

18. The Claimant has established that all authorized medical care and treatment, after the worsening of the Claimant's work-related condition, was and is causally related and reasonably necessary to cure and relieve the effects of the worsening of condition.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See *Bodensleck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office*, 297 P.3d 964, **2012 COA 85**. 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); also see *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). 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); CJL, Civil, 3:16 (2005). The fact finder should consider an expert witness’ special knowledge, training, experience or research (or lack thereof). See *Young v. Burke*, 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert’s knowledge, skill, experience, training and education. See § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). As found, the Claimant’s testimony alone supports a worsening of condition after MMI. See *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo.App. 1997). As further found, the opinions of Dr. Pearson and Dr. Pimanova, concerning a worsening of condition, were unequivocal, credible and highly persuasive. On the other hand, Dr. Ciccone’s causality opinions were **not** credible.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010); *Leeway v. Indus. Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005). Also see *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). 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). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett*, 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies and evidence, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Pearson and Dr. Pimanova, and to reject the opinions of Dr. Ciccone.

Re-Opening

c. A workers' compensation "award" may be reopened within six years after the date of injury on the ground of fraud, an overpayment, an error, a mistake, or change in condition. § 8-43-303(1), C.R.S. A change in condition refers either "to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that can be causally connected to the original compensable injury." *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 330 (Colo. 2004). As found, Claimant's condition worsened after MMI.

d. The reopening authority granted to an ALJ by § 8-43-303, C.R.S. "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ." *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177, 1181 (Colo.App.1996). Moreover, whether a claimant's condition is due to the natural progression of a pre-existing condition or a new industrial accident is one of fact for resolution by the ALJ. *Pavelko v. Southwest Heating and Cooling, LLC*, W.C. No. 4-897-489-02 [Indus. Claim Appeals Office (ICAO), September 4, 2015] (citing *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999)). Further, whether a claimant proved a worsened condition, and whether the worsening was causally related to the industrial injury, are factual issues for resolution by the ALJ. *Id.* As found, the Claimant has proven a work-related worsening of condition.

Medical

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). As found, Claimant's medical treatment is causally related to the worsening of her work-related condition after MMI. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt*, 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of the worsening of condition.

Burden of Proof

f. The party seeking to reopen an issue or claim bears the burden of proof as to any issues sought to be reopened. § 8-43-303(4), C.R.S. A claimant has the burden of proof in seeking to reopen a claim for a worsened condition. *Richards v. Indus. Claim Appeals Office*, 996 P.2d 756, 758 (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 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. Also see *Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to re-opening and reasonably necessary and causally related medical care and treatment.

ORDER

IT IS, THEREFORE, ORDERED THAT:

- A. W.C. No. 4-978-924-001 is hereby re-opened.
- B. Respondent shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment, subject to the Division of Workers Compensation Medical fee Schedule.
- C. Any and all issues not determined herein are reserved for future decision.

DATED this 14th day of February 2019.

A rectangular box containing a digital signature. The text "DIGITAL SIGNATURE" is printed in the top left corner of the box. The signature itself is a cursive script that appears to read "Edwin L. Felter, Jr." followed by a stylized flourish.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this _____ day of February 2019, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Court Clerk

Wc.ord

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-041-794-001**

ISSUES

I. Whether Claimant has established, by a preponderance of the evidence, that she suffered a compensable injury on January 4, 2016 during the performance of her duties with Respondent-Employer.

II. If Claimant established that a compensable injury occurred on January 4, 2016, whether Respondent-Employer has proven, by a preponderance of the evidence, that Claimant was an independent contractor thereby precluding her entitlement to workers' compensation benefits.

FINDINGS OF FACT

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

Background

1. On January 4, 2016, Claimant was moving a bin of hockey sticks through a doorway when the sticks shifted, causing her to hit her head on the doorjamb. Claimant described shouldering her way through the door with a vertical bin full of approximately 40 sticks when the door closed on the sticks causing them to swing around, which in turn caused her to strike her head on the jamb. After striking her head, Claimant reportedly blacked out

2. Claimant testified that her next recollection was being brought to by a co-worker named "Jimmy". Claimant had no understanding of how long she had been unconscious. Claimant testified that "Jimmy" assisted her to the employee area of the lobby where she laid down on the floor behind a desk. She testified that the lights in the area were bothersome, that she had a headache and was nauseous. She recalled the phone ringing and when no one else answered it, she did. According to Claimant, the person on the other end of the phone happened to be Andrew Sherman. Mr. Sherman is co-owner of Respondent-Employer.

3. This incident forms the basis for Claimant's purported claim of injuries while working for Respondent-Employer.

4. Claimant testified that she began working for Respondent-Employer, i.e. "the ice rink" after making a mindful decision to quit her "corporate" job since it was keeping her from seeing her children as much as she preferred. Claimant had prior experience with the programs offered by Respondent-Employer as her daughter had been skating there for "years". According to Claimant, the rink was like "family" to her.

5. Claimant testified that she was aware that the rink was “short-staffed” and felt they could use someone, full time in customer service. She also had hopes of running the Zamboni. Accordingly, she approached Allen Pedersen, Respondent-Employer’s general manager about working there. Mr. Pedersen reportedly told Claimant that Mr. Sherman would need to make the final decision regarding her request.

6. Claimant was unable to recall if she completed a job application but testified that she had a “sit-down” interview with Mr. Sherman. Claimant was hired and once she began working, testified that she was taught how to use the computer system, maintain and drive the Zamboni, care for the ice and organize a free hockey program for small children on Saturday mornings.

7. Claimant also testified that she had a “very set schedule” provided to her once a week. Although her hours varied, Claimant testified that she was required to clock into work. She also testified that Mr. Sherman expected people working the rink to arrive and leave on time. According to Claimant, “[w]e showed up and left when we were assigned”. Claimant testified that requests for schedule changes and/or time off were directed to management. During rebuttal testimony, Claimant submitted pictures of a typical schedule and testified that the schedule board was, in part, how she was advised as to her shifts.

8. Claimant testified that she was provided with a grey shirt and jacket bearing Respondent-Employer’s logo, testifying that she was required to wear the same around the rink. A picture of Claimant wearing her “uniform” was submitted during her rebuttal testimony.

Claimant’s Purported Injuries

9. Claimant testified that after blacking out and answering the phone, she made contact with Mr. Sherman, who also happened to be walking into the rink. According to Claimant, Mr. Sherman instructed Claimant’s friend to take her to “Marcus”. Based upon the evidence presented, the ALJ finds that “Marcus” works in a clinic specializing in efforts to remediate the post concussive effects of head injuries

10. Claimant testified that Marcus directed her to the hospital for evaluation as she was experiencing intolerance to light and having seizures.

11. Claimant presented to the emergency room where the following history was documented: “The patient is a 47-year-old female, alert and oriented x3. Arrives to the ER today by a family friend. She was at work and hit the side of her face when she was walking into a door jamb and then fell over. She hurt her neck and head. . . . She has had severe head injuries before.¹ Immediately when she arrived to the ER, a limited trauma was called.”

¹ Claimant admitted to having as many as five prior concussions during cross examination.

12. While in the ER, lab work was obtained as was imaging of Claimant's brain. Claimant would subsequently go on to receive a variety of medications provided by Dr. David Smith to cure and relieve her on the ongoing effects of her head injury.

The "Declaration of Independent Contractor Status Form" and Other Evidence of Independence

13. On December 30, 2015, five (5) days before hitting her head, Claimant signed, before a notary, a declaration of independent contractor status form (hereinafter, the "Form"). According to Claimant, she read the agreement but did not understand the significance of the form. She testified that she only completed/signed the form because she was threatened with the loss of her job and forfeiture of pay if the form was not completed and returned to the rink. Claimant did not identify who threatened her.

14. The Form contains a section identifying nine (9) areas that the rink argues establishes that Claimant is an independent contractor. The ALJ finds these nine areas to be the same nine factors contained § 8-40-202(2)(b)(II) to prove independence and freedom from direction and control of a purported employer, in this case, the rink. Claimant initialed all nine factors as did Allen Pedersen (AP). The Form also, in capitalized letter and bold type, indicates:

"THE INDPENDENT CONTRACTOR UNDERSTANDS THAT HE/SHE:

- **WILL NOT BE ENTITLED TO ANY WORKERS' COMPENSATION BENEFITS IN THE EVENT OF INJURY.**
- **IS OBLIGATED TO PAY ALL FEDERAL AND STATE INCOME TAX ON ALL MONEY EARNED WHILE PERFORMING SERVICES FOR THE BUSINESS**
- **IS REQUIRED TO PROVIDE WORKERS' COMPENSATION INSURANCE FOR ALL WORKERS THAT HE/SHE HIRES.**

15. The Form also indicates that Claimant would be performing "Events" as an independent contractor for "Respondent-Employer". The ALJ finds Claimant's designation of "events" as the type of work she would be performing for Respondent-Employer vague. Neither Claimant nor Respondent-Employer presented further evidence on what the indication of "events" meant. Rather, as noted, Claimant indicated simply that she drove the Zamboni, maintained the ice and assisted in organizing a free youth hockey program. She also described using the computer system to clock in/out of work and to reserve ice time for various customers of the rink.

16. Claimant testified that she completed a W2 form and that to the best of her recollection taxes were withheld from her pay. Contrary to this testimony, the evidence presented established that Claimant completed a W9 form indicating that she had formed a limited liability company identified as Rochelle Sandstrom, LLC for tax purposes. The W9 form was returned to the rink at the same time she submitted the independent

contractor form. Respondent-Employer issued a Form 1099 to Claimant for “nonemployee” compensation based upon Claimant’s filing of a W9. No taxes were withheld from Claimant’s earnings based on this 1099.

17. Claimant was paid at a rate of ten (10) dollars per hour. Checks were issued to Rochelle Sandstrom, LLC. Claimant testified that she requested that her checks be made payable to the above referenced LLC because she had changed her name after her divorce. Prior to and during the divorce transition, Claimant testified that she was working for a travel agency that required her to establish an LLC. She also opened a bank account under that LLC for deposits from the travel agency. This account was never closed after Claimant quit contracting with the travel agency. As noted, after her divorce Claimant changed her name to “Rochelle Sandstrom-Knight”. According to Claimant, her financial institution would not deposit checks issued by the rink in the name of Rochelle Sandstrom unless the “LLC” was added to the checks. Consequently, Claimant testified that she requested Respondent-Employer to make her checks out to the “LLC” to expedite the deposit.

18. While she was working for Respondent-Employer, Claimant was also working as an independent sales agent for Limu Energy Drinks. Moreover, she was cleaning Al Pedersen’s personal residence and housing figure skaters in her residence for pay.

19. The ALJ finds Claimant’s professed ignorance regarding the significance of the Form and any suggestion that she did not know what she was signing unpersuasive. Claimant has worked as an independent contractor before. She set up an LLC at the request of a prior business she was contracting for. Moreover, she has worked as an independent sales agent for Limu products. Finally, she conceded that she was cleaning Mr. Pedersen’s home personally. Given the aforementioned history, including Claimant’s “corporate” experience, the ALJ finds the claim that she did not know the significance of what she was signing dubious.

20. Based upon the evidence presented, the ALJ is persuaded that Claimant probably understood the contents and significance of the Form she signed on December 30, 2015. Simply put, the ALJ is convinced that Claimant knew she was an independent contractor and not an employee of the rink. She also probably knew that she was not covered for injury under the workers’ compensation act. Indeed, Claimant delayed filing her claim for compensation for approximately 14 months following her accident. Her suggestion that she did so because she did not want hurt the rink as they were like family is unconvincing.

Andrew Sherman’s Testimony

21. Mr. Sherman testified as an owner of Respondent-Employer since 2012. Mr. Sherman testified that he knew Claimant prior to retaining her services around the rink as she had a daughter who was involved in the arena’s hockey program. He testified that Claimant struggled to pay the fees associated with that program, noting further that

Claimant would ask about available opportunities at the rink to help cover the costs associated with her daughter's hockey program.

22. While Mr. Sherman testified that he retained and paid Claimant, he explained that she did not have a fixed work schedule and no one, to his knowledge, ever required her to be present at the rink during certain times.

23. According to Mr. Sherman, the rink is a place of positive energy. Indeed, Claimant testified that the rink embodied an attitude for caring for people and doing what was right. Accordingly, Mr. Sherman questioned Claimant's assertion that she was told that if she did not sign the independent contractor agreement she would be fired. He testified that he personally never threatened Claimant, but agreed during cross examination that he was unaware of what may have been said to Claimant by others at the time she was asked to complete the Form.

24. Mr. Sherman testified that he was not present at the rink when Claimant struck her head, blacked out and fell. However, in keeping with the rink's credo of wanting to help people and giving them the best opportunity for a positive outcome, Mr. Sherman testified that he suggested that Claimant schedule an appointment with "Marcus" at Turning Point for help.

25. Mr. Sherman disagreed with Claimant's assertion that her primary duty while she was present at the rink was to drive the Zamboni. He testified that he never observed Claimant operate the Zamboni. According to Mr. Sherman, being a Zamboni driver requires a big commitment that Claimant was unable to give because of family responsibilities, obligations under her divorce, and the demands of her other jobs, specifically her Limu and cleaning businesses. As such, Mr. Sherman testified that the subject of Claimant becoming a Zamboni driver was never brought up.

26. When asked if Claimant worked consistent shifts, Mr. Sherman testified that Claimant was someone who had problems and had asked for help, so they gave her an opportunity to "make a little bit of money" to help defray some of the costs of her daughter's hockey fees which were never paid and which losses were absorbed by the rink. He characterized Claimant's situation as someone who approached the rink about needing some financial help and who was subsequently brought on to help out when and wherever she could. He explained that no working hours were dictated by the rink; however, he agreed that Claimant was probably asked when she could work and may have been given some suggestions regarding hours of need. Regardless, Mr. Sherman testified that the rink did not decide when they needed Claimant. Rather, Claimant was allowed to come to work whenever she wanted to. Moreover, he testified that no one at the rink ever dictated Claimant's duties to her because she was experienced with the functions of and programs offered by the rink having been there extensively in the past. Thus, she knew what needed to be done and went about those duties freely.

27. Mr. Sherman testified that Claimant worked inconsistent hours because of her responsibilities to her children and her other business endeavors. Documentary

evidence, including a prepared summary of Claimant's earnings along with the rink issued 1099, substantiate Mr. Sherman's testimony.

The Testimony of Allen Pedersen

28. Mr. Pedersen testified as the "general manager" of the rink. He is an independent contractor. He testified that he is at the rink "a lot", up to 100 hours/week.

29. Mr. Pedersen is responsible for cutting paychecks and testified that he personally cut checks to pay Claimant for her services. According to Mr. Pedersen, he cut paychecks to Claimant as an "LLC" at her request. No taxes were withheld from the checks cut to Claimant.

30. Mr. Pedersen testified that he was unaware if Claimant had been trained to operate the Zamboni. He did not train her personally and does not recall ever seeing her operating it.

31. While he could not recall whether he gave Claimant the independent contractor form and W9 for completion, Mr. Pedersen testified that he never threatened Claimant with forfeiture of her position and pay if she did not complete the aforementioned forms. Like Mr. Sherman, Mr. Pedersen chaffed at the suggestion that anyone associated with the rink would threaten Claimant with nonpayment if the forms were not completed. According to Mr. Pedersen, "we don't threaten anyone with anything", there are "no threats at our rink".

The Testimony of Austin Fink

32. Mr. Fink testified as a former independent Zamboni driver for the rink. Mr. Fink's primary duties for the five (5) years while working at the rink was to operate the Zamboni to maintain the ice surface. He also did some cleaning. During November and December 2015, Mr. Fink testified that he was easily working 40 hours per week. He testified that he went in early in the mornings, before the rink opened to maintain the ice and after would return home only to come back in the evening and check the condition of the ice.

33. Mr. Fink met Claimant through his position with the rink. According to Mr. Fink, Claimant approached him about driving the Zamboni. He testified that he let her drive the machine a couple of times and that she did a poor job, damaging the equipment. Consequently, he never let her drive again. He did however, teach Claimant how to maintain the batteries.

34. Claimant testified at length about prepping the Zamboni for operation. She also explained the importance of the different techniques/methods utilized by the Zamboni drivers to maintain the ice sheet depending upon the discipline using it, be it figure skating, hockey or curling. While the evidence supports a finding that Claimant had "high hopes" of driving the Zamboni and probably trained on how to prep the machine and interpret ice conditions, the suggestion that she was a Zamboni driver is unpersuasive. Based upon the evidence presented, the ALJ credits the testimony of Mr. Fink to find that while

Claimant may have driven the Zamboni on a couple of occasions, she likely did a poor job and after damaging the equipment Mr. Fink decided against letting her operate the machine again. Coincidentally, Claimant presented two pictures of her operating the Zamboni on two separate dates in August. No other pictures of Claimant operating the Zamboni on different dates were tendered for inclusion in the evidentiary record.

35. According to Mr. Fink, Claimant's primary duties around the rink included working concessions, maintaining sign in sheets and helping kids don their gear. Mr. Fink explained that Claimant's schedule was very "loose" and she was free to come and go as she pleased.

36. Mr. Fink testified that he did not provide Claimant with the independent contractor or W9 forms and never threatened her by suggesting that if the forms were not completed she would be fired and lose her pay. He was unaware of anyone ever threatening Claimant with the same.

37. The ALJ finds Claimant's assertion that she was threatened unsubstantiated and outweighed by the more persuasive testimony of Mr. Sherman, Mr. Pedersen and Mr. Fink that no one would have threatened her. Indeed, Mr. Pedersen, a person Claimant considered to carry a high degree of integrity, testified that no one at the rink would threaten anyone with anything. The ALJ finds it difficult to believe that the very people Claimant testified were like family would threaten her and if someone did she would not feel comfortable in reporting the same to Mr. Sherman or Mr. Pedersen, whom she admired. Claimant's protestations that she simply signed the Form out of fear of losing her job and/or pay are unpersuasive.

38. While the ALJ finds from the evidence presented that Claimant probably struck her head and subsequently "passed out" while moving the aforementioned bin of hockey sticks, the totality of the evidence presented supports a finding that Claimant was an independent contractor that the time of her accident.

CONCLUSIONS OF LAW

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

Generally

A. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability & Independent Contractor Status

B. A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and County of Denver*, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando*, 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra*; *Deterts v. Times Publ'g Co.*, 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption that an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

C. In this case, the ALJ concludes that the evidence presented supports a conclusion that Claimant was performing services for Respondent-Employer for a wage when she suffered injuries to her head after striking it on a door jamb while moving a bin of hockey sticks on January 4, 2016. These injuries required medical attention and treatment. Accordingly, the burden shifted to Respondent-Employer to prove that Claimant was an independent contractor rather than an employee of the rink.

D. Only employees of an employer are entitled to compensation for work-related injuries. C.R.S. §8-41-301(1)(a), (stating that an injury is compensable if, "at the time of the injury, both employer and employee are subject to the provisions of said articles..."). Individuals who are "free from control and direction in the performance of [a] service" for an employer are not employees. C.R.S. §8-40-202(2)(a). Such individuals are referred to as "independent contractors." See C.R.S. §8-40-202.

E. The party asserting that a claimant is an "independent contractor" bears the burden of proving independence by a preponderance of the evidence. The putative

employer may establish that the claimant is an independent contractor because he/she was free from direction and control and engaged in an independent business or trade through a written document or by proving the presence of some or all of nine criteria set forth in §8-40-202(2)(b)(II), C.R.S 2015; *Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App.1998).

The Declaration of Independent Contractor Status Form

F. Here, Respondent-Employer relies heavily on Claimant's execution of the Form to argue that she was an independent contractor at the time of her accident. Pursuant to C.R.S. § 8-40-202 (b)(IV), if the parties complete a written document and a purported employer uses that document in an effort to prove independence pursuant to paragraph (b) of § 8-40-202(2), the document must be signed by both parties. While Claimant signed the form in question, Respondent-Employer did not. Consequently, Claimant suggests that the independent contractor agreement is invalid and Respondent's reliance on the Form, as dispositive of the issue of Claimant's status at the time of her accident, must fail. Claimant argues further that even if Respondent-Employer had signed the Form, it would only create a rebuttable presumption of an independent contractor relationship between Claimant and Respondent-Employer.

G. Respondent-Employer argues that while the intent of the parties to the agreement is not controlling, it is a factor to consider in determining the status of the individual for workers' compensation purposes. *Brush Hay & Mill Co. v. Small*, 388 P.2d 84, 88 (Colo. 1963). In this case, Respondent-Employer asserts that the evidence presented supports a conclusion that the parties "specifically intended that [Claimant] be considered an independent contractor". The ALJ agrees with Claimant that the writing in question is not signed and even if it was it would only create a rebuttable presumption that Claimant was retained as an independent contractor to perform services at the rink. Nonetheless, the agreement was signed by Claimant which constitutes some evidence of her intent to be considered an independent contractor for Respondent-Employer. Here, Claimant specifically signed the Form certifying that she understood that she would not be entitled to any workers' compensation benefits in the event of injury. Furthermore, she initialed the nine factors contained on the form which, if found to exist, would serve to exclude her from the workers' compensation act. As found, Claimant's suggestion that she did not understand what she was signing is unpersuasive. Moreover, even though the Form is not signed by Respondent-Employer, the same factors initialed by Claimant are initialed by Mr. Pedersen. Consequently, the ALJ concludes that the writing constitutes some evidence of the rink's intent that Claimant be considered an independent contractor.

H. While the Form constitutes some evidence regarding Claimant's status while she worked at the rink, it is not, as noted, dispositive of the issue of whether she was in fact an independent contractor at the time of her accident. Therefore, the ALJ has also considered the collateral evidence presented and analyzed this case pursuant to § 8-40-202(2)(b)(II) by applying a totality of the circumstances test that evaluates the dynamics of the relationship between Claimant and her putative employer. See generally,

Industrial Claim Appeals Office v. Softrock Geological Services Inc., 325 P.3d 560 (Colo. 2014).

II. Section 8-40-202(2)(b)(II), C.R.S.

J. Pursuant to § 8-40-202(2)(b)(II) “to prove independence it must be shown that the person for whom services are preformed does not:”

- Require the individual to work exclusively for the person for whom services are preformed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;
- Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;
- Pay a salary or at an hourly rate instead of at a fixed or contract rate;
- Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;
- Provide more than minimal training for the individual;
- Provide tools or benefits to the individual; except that materials and equipment may be supplied;
- Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;
- Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and
- Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

K. While the ALJ must consider the factors listed in the statute, the fact that the party asserting independence does not prove one of the factors is not conclusive evidence that the claimant is an employee. See C.R.S. §8-40-202(b); *Nelson v. Industrial Claim Appeals Office*, *supra*. Rather, §§ 8-40-202(b)(I) and (II) create a “balancing test” requiring the party asserting independence to overcome the presumption of an employment relationship contained in § 8-40-202(2)(a) and establish instead, independent contractor status. *Nelson v. Industrial Claim Appeals Office*, *supra*. As noted above, once a claimant establishes that he/she was injured in the performance of services for an alleged employer for a wage, the burden shifts to the respondent to prove the

injured worker was not an employee by showing that he/she was free from direction and control and customarily engaged in an independent business.

L. Based upon the totality of the evidence presented, the ALJ finds the testimony of Andrew Sherman, Allen Pedersen and Austin Fink concerning Claimant's employment status more persuasive than the contrary testimony of Claimant. Analysis of the nine factors supports the following conclusions:

- Claimant was not required to work exclusively for the rink. Indeed, Respondent presented evidence establishing that Claimant typically worked far below the standard forty hours per week that one would expect with full-time, exclusive employment. The evidence presented also supports a conclusion that Claimant worked selling Limu products, cleaned houses and housed skaters while working at the rink. Consequently, the ALJ finds that the evidence presented supports a conclusion that Claimant was acting as an independent contractor rather than an employee of the rink.
- Respondent-Employer did not set a quality standard for Claimant's work. In this regard, the ALJ credits the testimony of Mr. Sherman who testified that Claimant had extensive prior contacts with the rink, was familiar with the programs offered and knew what needed to be done. Outside of her driving the Zamboni on two occasions, which the ALJ finds was not a primary duty for Claimant, the evidence presented fails to establish that Claimant's work was managed, inspected, scrutinized or overseen by anyone at the rink. As such, the ALJ concludes that this factor tips in favor of Claimant being an independent contractor.
- Claimant was paid an hourly rate of \$10.00 per hour rather than a fixed or contracted rate. Therefore, this factor weighs in favor of Claimant being an employee.
- Respondent-Employer did not terminate Claimant during the contract period for violating the terms of the service contract or failing to produce a result acceptable to Respondent-Employer. Rather, Claimant left work secondary to the effects of her injuries. The ALJ finds relevant to the question of whether Claimant was an independent contractor or an employee at the time of her accident the fact that neither Claimant nor the rink took any steps following the accident which would substantiate that Claimant was in fact functioning as an employee of the rink. For example, if Claimant considered herself to be an employee, the ALJ finds it odd that she would not at least call in to inform her employer that she would not be able to work given her injury. Moreover, Respondent-Employer did not terminate Claimant for a no call/no show for work. Rather, the evidence presented supports that Claimant simply stopped coming into the rink following her accident and the rink took no action on her absence other than to tell her she could return when she was able. Such conduct supports the conclusion that both Claimant and Respondent-Employer

believed that Claimant was an independent contractor, free form control of the rink. Accordingly, the ALJ concludes that this factor weighs in favor of Claimant being an independent contractor.

- Claimant was only given minimal instruction on how to use the computer to reserve time and to report her presence in the rink. While she was given instruction of how to drive the Zamboni, the evidence supports that she only drove the machine on a couple of occasions and did a poor job while doing so. Consequently, further training and use of the Zamboni stopped. Based upon the evidence presented, the ALJ is not persuaded that Claimant was provided training to the extent contemplated by the statute to establish that she was an employee of the rink. Indeed, outside of her driving the Zamboni a couple of times, the evidence presented establishes that Claimant was familiar with the rink and her duties and went about them freely without the need for training. Accordingly, the ALJ concludes that this factors tips in favor of Claimant being an independent contractor as opposed to an employee of the rink.
- Claimant was not provided with “tools” with which to fulfill her job duties. Rather, the ALJ concludes that the rink provided equipment, in keeping with the statute, to allow Claimant to discharge her services to the rink. Specifically, the ALJ finds that a Zamboni, whiteboards and a computer system containing software used by the business to track people coming and going from the rink constitute equipment rather than tools. As such, the evidence concerning this factor supports a conclusion that Claimant was functioning as an independent contractor as the time of her accident.
- Respondent-Employer did not control the means, methods or results of Claimant’s work. Nonetheless, Claimant also contends that factor seven, which precludes dictating the time of performance of the job weighs in favor of her being an employee because she was given a set schedule, was required to “clock in” and had to get permission to change her hours. The ALJ concludes that the evidence presented concerning this factor is critical to the determination of whether Claimant was an independent contractor or an employee at the time she suffered injuries to her head on January 4, 2016. Generally, an employee is a person who is subject to their employer’s control over the means and methods of their work, as well as the results. *Carpet Exchange of Denver, Inc. v. Industrial Claim Appeals Office*, 859 P.2d 278 (Colo. App. 1993). Here, Claimant attempted to demonstrate that she was under the control and direction of the putative employer by suggesting that the she was assigned specific hours, i.e. a fixed schedule, by having to clock in and because she went to management if she was going to change her hours. Based upon the evidence presented, including the testimony of Mr. Sherman, Mr. Pedersen and Mr. Fink, the ALJ is persuaded that Claimant had a “loose” agreement with the rink which allowed her to come and go as she pleased in order to perform duties she felt were necessary to get done. The ALJ resolves the conflict in the testimony presented regarding Claimant’s hours in favor of

Respondent-Employer to find that placing Claimant's name on the schedule and asking her to "clock in" simply constituted notice to the rink that she would likely be in the building on a given day and time and that she was in fact there when she checked in on the computer. Moreover, letting rink management know that she was going to change her hours does not, contrary to Claimant's suggestion, constitute dispositive proof that the rink was controlling her comings/goings. In this case, no persuasive evidence was presented that the rink precluded, i.e. controlled Claimant from changing the time she would be present at the rink. Accordingly, the ALJ finds the evidence presented concerning this factor to support a conclusion that Claimant was acting as an independent contractor at the time of her January 4, 2016 accident.

- All checks cut by Respondent-Employer to pay Claimant for her services were issued in the name of Claimant's LLC. The ALJ finds Claimant's explanation for why the checks were issued in the name of her LLC unconvincing. The evidence presented on this factor tips in favor of Claimant being an independent contractor at the time of her work related accident.
- No evidence was presented concerning factor nine enumerated at § 8-40-202(2)(b)(II).

M. Upon careful review and consideration of the evidence presented and the factors set forth in §8-40-202(2)(b)(II), the ALJ concludes that the scale tips in favor of Claimant being an "independent contractor" for Respondent-Employer as opposed to an employee. As noted above, C.R.S. §8-40-202 (2)(b)(II), does not establish any precise number or combination of factors which is decisive in determining whether or not a claimant is an employee or an independent contractor. *Rapouchova v. Frankie's Installation, W. C. No. 4-630-15 (August 17, 2005)*. Rather, it is for the ALJ to determine, based on the dynamics of the relationship between Claimant and her putative employer, whether or not particular factors are present to establish whether a claimant is an employee or independent contractor based on the totality of the evidence presented. In this case, the ALJ finds that there is ample record evidence to support a conclusion that Respondent-Employer did not control the means, methods and/or results of Claimant's work, including the fact that Claimant was free to pursue other employment opportunities, was not overseen or instructed in how to discharge her duties to the rink, was paid in the name of an LLC, was not control/directed regarding the time of performance of her duties, was not provided more than minimal training, and was not provided with specific tools with which to complete her job duties for the rink. Accordingly, her claim for benefits must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits arising out of injuries sustained after striking her head on a door jamb on January 4, 2016, is denied and dismissed.

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

DATED: February 15, 2019

/s/ Richard M. Lamphere _____

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- I. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease to her upper extremities during the course and scope of her employment with Employer.
- II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve her from the effects of her occupational disease.

FINDINGS OF FACT

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

1. Claimant was born on July 3, 1966, and was 52 years of age at the time of the hearing.
2. At the time of the hearing, Claimant was employed by Lockheed Martin. Claimant started working at Lockheed Martin on May 6, 1986. Claimant performed her work at Lockheed Martin's Waterton Campus.
3. For the ten years prior to the hearing, Claimant worked full time (40 or more hours per week) as an electrical senior specialist. Claimant's job duties involved building by hand – and using hand tools - satellite harnesses, ground test cables, power cables, and test racks to test the satellites. Claimant is right-hand dominant.
4. Claimant testified that she performed her various job tasks using various hand tools such as wire cutters and wire crimpers. This required the repetitive and forceful gripping of various hand tools throughout her work shift.
5. Claimant also testified that she used her hands 100% of the time to perform her job tasks. Claimant described her job tasks as follows:

When I start a project, you cut wire – you cut enough wire – when you cut, you cut, cut, cut, cut; and then when you label, you label, label, label, label; you route, route, route, route; when you twist, you twist and you tie like that.
6. Claimant credibly testified that between 2014/16 she worked 2600 hours and in 2017 she worked over 2900 hours and that from August 1 through November of 2017 she was a project lead where she worked lots of hours until her hands hurt.

7. Claimant further testified that throughout 2017, she never worked as hard as she did from August until the end of the year in 2017 because she was required to train a lot of new employees. Claimant testified that she trained the new employees how to measure, cut, label, and crimp wires and perform other prep work - all of which was done by hand.
8. Claimant testified that prior to November of 2017 she had no issues with either of her hands.
9. On December 13, 2017, Claimant was evaluated by Physicians' Assistant Amanda Doetsch, at New West Physicians, complaining of bilateral hand pain and arm tingling. Claimant indicated that her pain was worse at night and that it sometimes radiated up to her shoulders and back. Her musculoskeletal examination revealed joint swelling and joint stiffness combined with bilateral wrist pain and tingling. PA Doetsch diagnosed Claimant as suffering bilateral carpal tunnel syndrome, with the left being worse than the right. She also prescribed, among other things, wrist splints.
10. Employer regularly shuts down for two weeks at the end of each year. The shutdown at the end of 2017, started around December 22, 2017, which was a Friday, and would have gone through approximately Friday, January 5, 2018.
11. On December 18, 2017, Claimant went to the Lockheed Martin Wellness Center, which is on the Waterton Campus, and was evaluated by Nurse Practitioner Tracy Jessen. NP Jessen suspected either wrist arthritis or carpal tunnel syndrome. She sent Claimant for bilateral wrist x-rays, which were unremarkable and did not demonstrate evidence of arthritis.
12. On January 4, 2018, Claimant returned to the Lockheed Martin Wellness Center on the Waterton Campus and was seen by Dr. Andrew Plotkin. Dr. Plotkin noted in his report that Claimant has worked for Employer for 30 years as an electrical specialist building electrical components requiring repetitive use of her hands while using hand tools. He noted that Claimant stated that her job tasks included crimping, routing, stripping, and wire cutting. He did note that Claimant said there might have been some mild improvement with splint use and being off work due to the shutdown. Dr. Plotkin also noted in his report that Claimant stated that she had previously had some paresthesias in her hands at night, while in bed, but that it resolved without treatment. In his assessment, Dr. Plotkin noted that Claimant presented with symmetric upper extremity pain and paresthesias. He stated in his report that:

The mechanism of injury was reviewed and based on my initial evaluation, suggests possible risk factors for cumulative trauma disorders. The presentation, however is somewhat less typical for cumulative trauma disorder such as peripheral nerve entrapment syndromes given the sudden onset of bilateral symmetric symptoms. (Ex. A, pg. 002)

He went on to say that:

[I]t is not clear that there were any significant changes in the work load, work tasks or ergonomic factors which may have precipitated the patient's symptoms.

He also stated that:

Based on my evaluation, other potential causes of her underlying symptoms have not been excluded including other musculoskeletal, neurological, inflammatory, and metabolic disorders. I carefully reviewed causality issues today with the patient. Additional information is required prior to making a determination regarding causality.

In order to investigate other causative factors, Dr. Plotkin's plan involved:

- a. Obtaining claimant's medical records from her primary care physician; and
 - b. Ordering various blood tests to check Claimant's CBC, Sed rate, RF, ANA, uric acid, and folic acid/B12 to look for a metabolic reason for Claimant's upper extremity complaints.
13. On Monday, January 8, 2018, after not working for approximately two weeks, Claimant returned to New West Physicians and saw her primary treating physician, Leanne Richardson, M.D. At this visit, Claimant's chief complaints were bilateral hand and finger numbness for approximately 2 months. It was noted in the report from this visit that Claimant reported a lot of repetitive movement with both hands at work. It was also noted that Claimant was wearing her wrist splints and was not working.
14. On January 11, 2018, Claimant returned to Dr. Plotkin. At that time, she indicated the Employer could not accommodate her restrictions and she had been off work. Dr. Plotkin noted in his report that she had stopped taking her medications but that she was still wearing her wrist splints. Despite wearing her wrist splints, Dr. Plotkin indicated that Claimant's symptoms had increased and her symptoms were symmetric and included numbness in both hands including all fingers. Dr. Plotkin also noted that he had received and reviewed Claimant's prior medical records which included the December 13, 2017, visit with PA Doetsch, in which it was noted Claimant's symptoms started the week before. Dr. Plotkin also indicated Tinel's testing was positive bilaterally, but that Phalen's testing was negative bilaterally.

Dr. Plotkin's assessment included the following statement:

The results of her metabolic testing was normal overall except for a borderline elevated HgA1c of 5.6. The patient's presentation is quite atypical for a cumulative trauma type injury, given the sudden onset of symmetric bilateral upper extremity pain and paresthesias. No clear precipitating factor factors are noted and the patient describes her work as "the same." The distribution of her exam findings are

diffuse and symmetric and would involve multiple nerve distributions. Based on all of the information available, I do not feel that this represents a work-related injury within a reasonable degree of medical probability. (Ex. A, pg. 5)

15. On January 15, 2018, Claimant returned to Dr. Richardson. The medical report from this visit indicates Claimant was advised by her workers' compensation physician that her symptoms were not related to her job duties and that Claimant can return to work without restrictions. The medical report also indicates that Claimant stated she continues to have the same symptoms which started after an intense project where she was doing repetitive movement with her hand tools for up to 10-14 hours per day for several months. (Ex. 4, pg. 31) Dr. Richardson noted Claimant had "***absolutely no comorbid illnesses which could explain her upper extremity symptoms.***" (Emphasis added.)
16. On February 5, 2018, Claimant returned to Dr. Richardson, with continued complaints of bilateral hand pain, numbness, and weakness – which included a weakened grasp. Dr. Richardson assessed Claimant's risk factors for developing her symptoms. Dr. Richardson concluded Claimant's only risk factors were her "**job related activities.**" Dr. Richardson diagnosed Claimant with carpal tunnel syndrome and continued Claimant's work restrictions which required Claimant to avoid repetitive movement of her hands and she also recommended that Claimant continue wearing her wrist splints. (Ex. 4, pg. 38.)
17. On February 21, 2018, Claimant underwent a routine physical – health maintenance evaluation. Dr. Richardson noted that Claimant's active problems included her carpal tunnel syndrome. She also noted Claimant's past medical history included:
 - a. Acute upper respiratory infection,
 - b. Eustacian tube dysfunction,
 - c. Laryngitis,
 - d. Streptococcal pharyngitis,
 - e. Iron deficiency anemia due to inadequate dietary intake of iron,
 - f. Oral thrush,
 - g. Overweight, and
 - h. Urticaria.(Ex. 4, pg. 36.)
18. On February 22, 2018, Claimant underwent Nerve Conduction testing at Blue Sky Neurology, which was normal, and did not demonstrate evidence of carpal tunnel syndrome. (Ex. 4, pg. 32.) However, as noted by Dr. Plotkin, the testing performed was only a screening and did not include a full electromyography, which Dr. Plotkin stated was preferable. (Dep. pg. 25.)

19. On February 23, 2018, Claimant returned to Dr. Richardson. Claimant indicated that although she still had tingling in her thumb, index, and middle finger – bilaterally – her feeling, weakness, and pain had improved. Dr. Richardson went over Claimant’s nerve conduction results, which were negative. Dr. Richardson released Claimant back to full duty, as long as she could wear her wrist splints while doing repetitive and forceful work (Ex. 4, pg. 30.) Dr. Richardson also noted the following:

She is very anxious to get back to work. She reports she still has tingling in her thumb index and middle finger bilaterally, but her feeling is improved, she still has some weakness but it’s improved as well. Her pain has mostly subsided since the swelling in her wrists decreased. She has continued to do her home physical therapy exercises and states that PT has been very helpful.

Dr. Richardson also noted that her physical exam revealed a negative Tinel’s sign and a negative Phalen’s maneuver. Therefore, removing Claimant from performing her repetitive and forceful job duties resulted in a decrease in her symptoms and abatement of clinical findings, i.e., negative Tinel’s and Phalen’s testing. (Ex. 4., pg. 31). Based upon Claimant’s nerve conduction studies and negative Tinel’s and Phalen’s testing, Dr. Richardson returned Claimant to full duty.

20. On February 26, 2018, Claimant returned to work full time and at full duty.

21. On March 12, 2018, after returning to work full time and at full duty, Claimant returned to Dr. Richardson due to an increase in symptoms. Dr. Richardson noted that Claimant returned to work on February 26, 2018, and that she was okay for the first week, which was only three days, but after the first week, Claimant’s pain came back and the pain was constant. In addition to the work activities causing an increase in pain, it also caused the tingling in her hands to come back. Upon further provocative testing, Dr. Richardson also noted that after Claimant returned to work, and her symptoms got worse, she also had the reemergence of positive Tinel’s and Phalen’s signs. (Ex. 4., pg. 22.)

22. Dr. Richardson also indicated that although Claimant’s EMG was normal, it was performed after Claimant had an extended period off from work and after her symptoms had greatly improved.

23. On June 25, 2018, after Claimant returned to work - which required the repetitive and forceful use of her hands - and caused an increase in symptoms and the reemergence of positive Tinel’s and Phalen’s findings, Claimant underwent another EMG. The findings of the second EMG were not symmetrical. The study showed evidence of left mild carpal tunnel syndrome without axonal loss and no electrodiagnostic evidence of right sided carpal tunnel syndrome.

24. Despite the lack of electrodiagnostic findings for right sided CTS, Dr. Horner, of Panorama Orthopedics, noted Claimant’s symptoms were pretty pathognomonic – consistent – with CTS. Therefore, Dr. Horner recommended corticosteroid

injections to each carpal tunnel for diagnostic and therapeutic purposes. (Ex. 5, pg. 77.)

25. On July 3, 2018, Claimant underwent bilateral diagnostic and therapeutic corticosteroid carpal tunnel injections. The injections did not alleviate her symptoms.

26. On August 21, 2018, Dr. Lodha, from Panorama Orthopedics, evaluated Claimant. After considering the results of Claimant's physical examination and second EMG, as well as her response to the injections, Dr. Lodha opined:

I cannot say that carpal tunnel releases would offer any benefit to this patient. I do not have a structural or pathophysiological explanation for her pain. She may benefit from potentially rheumatologic evaluation vs. evaluation with neurology for further workup. However, I am afraid we don't have anything else to offer her at this point. (Ex. 5, pg. 62).

27. On November 8, 2018, Dr. Richardson wrote a letter regarding her assessment of Claimant and addressed causation: Her letter provides:

To Whom It May Concern:

I have been the primary care Physician for [Claimant] for over 10 years. During this time she has not had significant hand or wrist complaints until seen by a PA in our office on 12/13/17. Based on her clinical symptoms she was diagnosed with carpal tunnel syndrome and conservative therapy was advised.

I saw her in follow up on 1/8/18, and at that time she was working with Workman's Comp regarding her concerns, and was having similar complaints to when she was seen initially. She came back on 1/15/18 stating she was advised by Workman's Comp her symptoms were not work related. I did not have access to those records. Claimant reported her symptoms started after an intense project requiring working overtime, up to 10 to 14 hours per day for several months. Her job is described as working with hand tools/repetitive movement. Her symptoms of pain in thumbs, index and long fingers, wrist pain, numbness and swelling are consistent with CTS, which is often caused by and exacerbated by repetitive movement. Other causes for her symptoms were not evident.

I am not a hand specialist or occupational medicine specialist. It seems reasonable to conclude her symptoms were caused by her occupational activities, but she was also referred to an orthopedic hand specialist for further

evaluation and treatment. I would defer to their opinion on this matter.

28. On September 17, 2018, Claimant was seen by Dr. John Froelich, at Panorama Orthopedics for a second opinion. Dr. Froehlich evaluated Claimant and many of her records, which included Dr. Lodha's, and the results from the injections and second EMG. After evaluating the matter, Dr. Froelich concluded Claimant suffers from bilateral carpal tunnel syndrome.
29. Claimant complied with Lockheed Martin's rules with regard her alleged claim. Claimant reported it to her supervisor and then went to see the Lockheed Martin in-house physician, Dr. Plotkin. Claimant also showed Dr. Plotkin the type of work she was doing and explained to him what she did every day. She laid out her tools and showed him her daily use at her workstation. Claimant ascribed her symptoms to use of a small wire cutter up to use of the big crimper. The small cutter was used in the right hand. But, sometimes she would use it in the left hand.
30. Allison M. Fall, MD, performed an IME and testified at hearing. Dr. Fall was offered and accepted as a medical expert in physical medicine and rehabilitation and is Level II Accredited. Dr. Fall was familiar with the Colorado Medical Treatment Guidelines (*Guidelines*) regarding cumulative trauma disorders in general and carpal tunnel syndrome in specific.
31. Dr. Fall explained carpal tunnel syndrome is slowing or compression of the median nerve as it passes through the wrist. She also testified that although carpal tunnel syndrome can be caused by a person's activities at work, it is not always caused by work activities.
32. Dr. Fall testified that the *Guidelines* provide a framework for performance of a causation assessment for carpal tunnel syndrome to determine whether or not it is or is not more likely due to work. Dr. Fall explained that the *Guidelines* are very specific because carpal tunnel syndrome is very prevalent in society and has been misconstrued as always being related to repetition when really there are other significant factors that people will just get carpal tunnel syndrome without any history of repetition.
33. Dr. Fall explained the *Guidelines* recognize that the etiology of carpal tunnel syndrome can be based on genetic factors or a Claimant's pre-disposition, as well as other factors that involve inflammation such as diabetes or obesity.
34. Dr. Fall indicated that in order to determine if a patient actually has carpal tunnel syndrome an expert goes on symptoms, physical examination and electrodiagnostic testing.
35. Dr. Fall evaluated Claimant on October 24, 2018 and observed and heard her testify at the hearing.
36. Dr. Fall evaluated Dr. Richardson's November 8, 2018, "To Whom It May Concern" letter. Dr. Fall explained merely because Claimant was diagnosed with carpal tunnel syndrome on December 13, 2017, based on her clinical symptoms does not mean it was due to her job duties at Lockheed Martin because a

causation analysis would need to occur to have the information as to what the exact job duties were and whether those job duties would be consistent with the risks that cause carpal tunnel syndrome if that is truly the diagnosis.

37. Dr. Fall indicated that Dr. Richardson's statement, which is contained in her November 8, 2018 letter, was not a causation analysis as required by Level II training and the cumulative trauma disorder *Guidelines*. She also testified that even if Claimant did work on a project that required working overtime up to 10 to 14 hours per day which required Claimant to use hand tools repetitively does not mean in and of itself ipso facto that her work is the cause of her symptoms that are consistent with carpal tunnel syndrome. Dr. Fall explained causation is based on the specific activities of Claimant's job duties which requires determining the force, duration, how many times per minute, and force or strength that is required to perform each task—and it is less dependent upon the total number of hours performing the tasks.
38. Dr. Fall testified that the testimony Claimant offered at hearing is insufficient, based upon her Level II training, to establish Claimant's physical complaints that are consistent with carpal tunnel were in fact caused by Claimant's job duties because pursuant to the *Guidelines*, there is specific criteria laid out for the time duration of forceful awkward movements with amounts of force listed. Dr. Fall also explained that it does not make sense that Claimant's symptoms would be present on her left wrist, her non-dominant hand.
39. As part of her record review process, Dr. Fall reviewed Dr. Plotkin's records. Dr. Plotkin noted the patient's presentation is quite atypical for a cumulative-trauma-type injury given the sudden onset of symmetrical bilateral upper extremity pain and paresthesia. Dr. Fall agreed with Dr. Plotkin's opinion and explained typically if there is going to be a cumulative trauma problem - especially with the type of work Claimant did - you would expect different symptoms on the two sides. In addition, Claimant's claim of "sudden onset" is also inconsistent with a work etiology because typically with a cumulative-trauma-type of injury the condition gradually increases over time in correlation with the work being done.
40. When Dr. Fall met and evaluated Claimant, she specifically asked Claimant whether or not something changed with her job duties before the onset of her symptoms. Claimant told Dr. Fall nothing had changed regarding her job duties. Such answer was correct. Claimant's tasks were the same, however, Claimant was doing the same tasks for longer periods of time each day.
41. Dr. Fall testified that non-work-related causes of carpal tunnel syndrome include, genetic predisposition, diabetes, anything that increases fluid volume in one's body or is a toxin to the nerves. She also testified that being overweight is a space limiting issue with more fluid in the body and that carpal tunnel syndrome is also more common in females and as one gets older.
42. Dr. Fall specifically testified there is no objective medical evidence the crimping work Claimant performed at work caused, which required the forceful use of manually operated hand tools, aggravated, accelerated or exacerbated Claimant's alleged carpal tunnel syndrome. She also testified that Claimant's

initial electrodiagnostic test, which occurred on February 22, 2018, was negative. However, the first electrodiagnostic test was described by Dr. Plotkin as merely a screening tool and not as effective as a full electromyography test for carpal tunnel syndrome.

43. The evidentiary deposition of Andrew Plotkin, M.D. was taken on November 30, 2018, and submitted as evidence. Dr. Plotkin was offered and accepted as a medical expert in occupational medicine Level II accredited. Dr. Plotkin is also familiar with the *Guidelines*.
44. Dr. Plotkin explained the causes of carpal tunnel syndrome or risk factors are being female, being older, obesity, diabetes, and other conditions.
45. Dr. Plotkin knew Claimant was an employee at Lockheed Martin because he had evaluated her for her upper extremity symptoms. Based upon Dr. Plotkin's work at Lockheed Martin, he testified that he became familiar with Claimant's job duties. Dr. Plotkin testified that he had been to Claimant's lab, walked through it a few times over the years, and was familiar with the harness shop.
46. Dr. Plotkin reviewed the chart note from New West Physician's dated December 13, 2017, and he explained that based upon Level II training, the *Guidelines*, the matrix as well as his own education, training and experience merely because someone in their mind associates symptoms with work does not mean there is a work etiology because carpal tunnel syndrome in particular has a lot of misinformation and a lot of people believe that really the only way you can get it is through work activities.
47. Dr. Plotkin also testified that although he believed she probably had nerve entrapment in her upper extremities which could be carpal tunnel syndrome, he did not feel he could say within a reasonable degree of medical probability her problem was work related because it was an unusual presentation that it was bilateral, abrupt, symmetric symptoms, and often if someone has abrupt, symmetric and bilateral symptoms it raises the suspicion there is something other underlying or systemic kind of problem something metabolic, hormonal, or inflammatory.
48. As part of his evaluation of Claimant, Dr. Plotkin actively looked for non-work related causes of Claimant's symptoms. In order to investigate other causes, Dr. Plotkin had Claimant undergo various blood tests to see if there was an underlying systemic, metabolic, hormonal, or inflammatory process that was causing Claimant's symptoms. The test results were normal. Therefore, despite his thorough investigation of alternative causes, Dr. Plotkin was unable to find an alternative cause of Claimant's symptoms.
49. Dr. Plotkin also stated that looking at Rule 17, Exhibit 5, of the cumulative trauma treatment guidelines, (the *Guidelines*) and the results of the electrodiagnostic testing in which the NCV done on February 22, 2018 was negative or normal, was not consistent with the development of an occupationally related cumulative trauma disorder.

50. However, subsequent electrodiagnostic testing did reveal carpal tunnel syndrome on the left, but not the right. Moreover, such findings were clearly not symmetric bilaterally. Moreover, even though Dr. Plotkin testified that electrodiagnostic testing is the gold standard, he also testified that a patient can still have a nerve injury which does not show up on electrodiagnostic testing. Dr. Plotkin went on to testify that in his opinion, the findings of the initial electrodiagnostic was reassuring that Claimant did not have a “severe nerve injury or a dying nerve or something like that. This is a reassuring kind of test result.” (Depo. Pg. 25-26). Therefore, Dr. Plotkin merely concluded the initial electrodiagnostic testing merely ruled out a “severe” nerve injury or a “dying” nerve.
51. Based upon a complete review of all the information Dr. Plotkin was provided, his meetings with and conversations with Claimant, Dr. Plotkin testified that it was his opinion within a reasonable degree of medical probability that Claimant’s bilateral upper extremity condition is not work related.
52. On cross examination, Dr. Plotkin explained that in formulating his opinion, he:

[P]ersonally walked through the harness lab, discussed Claimant’s case with April Hillman, her manager, allowed Claimant to show him all the work that she did to show him all the tools that she used, he handled the tools, he watched other employees perform the work duties that [Claimant] performed.

However, despite Dr. Plotkin’s vivid description of his investigation into Claimant’s job duties, which was allegedly undertaken to determine the extent of Claimant’s exposure to the risk factors set forth in the *Guidelines*, Dr. Plotkin’s reports and testimony fail to indicate with sufficient detail what he did find during his investigation regarding the repetition, force, awkward posture, and duration of Claimant’s job duties each day. Moreover, even though Dr. Plotkin indicated in his initial report that Claimant’s job involved “possible risk factors,” but that he wanted to exclude other potential factors that might be causing her symptoms, he never articulated in a subsequent report or his testimony as to what the possible work risk factors were - after the other causes were ruled out. Therefore, the ALJ finds that there is a very large analytical gap between Dr. Plotkin’s testimony regarding his alleged investigation into possible work related risk factors and his ultimate conclusion that Claimant’s work did not cause, aggravate, or accelerate her upper extremity condition.

The ALJ further finds that Dr. Plotkin did not perform an impartial causation analysis. This finding is demonstrated by the following exchange during his deposition when he was asked whether Claimant’s contention that she was working 10-14 hours a day towards the end of 2017, when her symptoms developed, would make a difference in his analysis. The exchange is as follows:

Q. Now, hypothetically, if Ms. Moua were to testify before an administrative law judge that her symptoms started after an intense project requiring working overtime up to 10 to 14 hours per day for several months, does that, in and of itself,

pursuant to the matrix, establish a work-related etiology for carpal tunnel syndrome?

- A. I do know that they work overtime often and I do know that the work hours, you know, can be increased over there. I would want to know really what the what the numbers were and try to figure out how that type of exposure and the timing of her symptoms and everything else fit together. So it's something that I would consider, and it is the reason that I had talked with her manager on two or three occasions. So I did go over there, and I wasn't -- I wasn't told that there was any kind of significant changes in the work stresses that she was exposed to. So that was my understanding when I made my determination.

As demonstrated above, Dr. Plotkin admitted that he knew Claimant often worked overtime and admitted that it would be important in determining causation if the extent and type of her exposures corresponded with her symptoms. Yet, despite these admissions, there is a lack of credible and persuasive evidence that he analyzed these factors in any sufficient detail in support of his opinion that Claimant's condition is not related to her work activities. In other words, his ultimate opinion appears highly conclusory.

53. Dr. Richardson's evidentiary deposition was taken on December 19, 2018 and submitted as evidence. Dr. Richardson testified she is a family practitioner of 21 years. Dr. Richardson is not board certified in physical medicine or rehabilitation and is not Level II accredited by the Division of Workers' Compensation. Dr. Richardson admitted she is not an expert in carpal tunnel syndrome. However, Dr. Richardson is a licensed physician and evaluated Claimant on a number of occasions. As part of her examination, she took a history and performed various diagnostic testing to diagnose Claimant's bilateral hand condition. Her testing included Phalen's and Tinel's tests. Such testing demonstrates that although Dr. Richardson is not an "expert in carpal tunnel syndrome," she is competent to assess such a condition and render an opinion as to the cause of such condition. And, in this case, Dr. Richardson concluded Claimant has carpal tunnel syndrome and the condition was caused by Claimant's work duties, after she ruled out other potential causes.

54. According to the *Guidelines*, the following Primary and Secondary Risk Factors are relevant when determining the cause of carpal tunnel syndrome:

Force & Repetition /Duration

Primary Risk Factors, include the following:

6 hours of use of 2 pounds of pinch force or 10 pounds hand force 3 times or more per minute, or

6 hours of lifting 10 pounds greater than 60 times per hour.

Secondary Risk Factors, include the following:

3 hours of use of 2 pounds of pinch force or 10 pounds hand force 3 times or more per minute, or

3 hours of lifting 10 pounds greater than 60 times per hour.

Awkward Posture & Repetition/Duration

Primary Risk Factors, include the following:

4 hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees, or ulnar deviation greater than 20 degrees.

6 hours of elbow flexion of greater than 90 degrees.

4 hours of supination/pronation with task cycles 30 seconds or less or posture is used for at least 50% of a task cycle.

Secondary Risk Factors include the following:

3 hours of elbow flexion of greater than 90 degrees.

3 hours of supination/pronation of 45 degrees with power grip or lifting.

See Guidelines, Rule 17, Exhibit 5.

55. None of the physicians who offered opinions in this case documented the physical requirements of Claimant's job duties with the specificity required by the *Guidelines*. Therefore, they were unable to determine whether Claimant's job duties met the primary and/or secondary risk factors set forth in the *Guidelines*.
56. However, the *Guidelines* also indicate that there are other risk factors for the development of cumulative trauma disorders such as carpal tunnel syndrome. These include, but are not limited to, age, obesity - BMI (body mass index), diabetes, gender, and wrist depth/ratio. The *Guidelines* also indicate that preexisting conditions may be aggravated by, or contribute to, exposures lower than those listed in the *Guidelines*. Therefore, because Claimant has a high BMI, is female, and is over 50 (and considered older) it does not appear to this ALJ that Dr. Plotkin or Dr. Fall considered those factors which could have predisposed Claimant to develop carpal tunnel syndrome with lower exposure levels than those described in the *Guidelines*.
57. Claimant is found to be credible regarding the hours she worked, the description of her job duties, and the onset of her symptoms.
58. The ALJ finds that Claimant's job required the repetitive and forceful use of her hands at work in order to cut, strip, and crimp wires used for various products built by Employer. The ALJ finds that during the latter part of 2017, Claimant worked overtime and the overtime resulted in an increase in the amount of repetitive and forceful work performed by Claimant with her hands on daily basis.
59. The ALJ finds that the increase in repetitive and forceful work with her hands corresponded with the development of symptoms in her upper extremities and which has been diagnosed by many physicians as being carpal tunnel syndrome.

60. The ALJ finds that Claimant's work activities necessitated the need for medical treatment as of December 13, 2017, and resulted in disability which has precluded Claimant from performing her regular job duties for more than three days.
61. The ALJ does not find the opinions offered by Dr. Fall in her report and testimony to be persuasive in resolving the issues of causation in this case. Dr. Fall focused predominately on the risk factors and exposure levels set forth in the *Guidelines*. However, Dr. Fall did not adequately address the fact that the *Guidelines* indicate that exposure levels can be lower, when other risk factors are present such as Claimant's age, BMI, gender, and possibly her pre-diabetic state, as discussed by Dr. Fall. Therefore, the ALJ finds that Dr. Fall did not persuasively and credibly address causation pursuant to the *Guidelines*.
62. The ALJ credits the opinions of Dr. Richardson and Dr. Froelich that Claimant has bilateral carpal tunnel syndrome.
63. The ALJ also credits the opinion of Dr. Richardson that Claimant's carpal tunnel syndrome was caused her work activities.
64. Claimant has established by a preponderance of the evidence that she sustained an occupation disease and a compensable injury involving her wrists.
65. Claimant has established by preponderance of the evidence that she is entitled reasonable and necessary medical treatment to cure her from the effects of her occupational disease.
66. There is no dispute between the parties that Dr. Plotkin is an authorized treating physician. The medical treatment provided by Dr. Plotkin is found to be reasonable and necessary to treat Claimant's occupational disease.
67. The onset of disability is December 13, 2017, when Claimant first sought medical treatment for her symptoms.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in

favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO, 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. 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.

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).

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).

Where the medical evidence is subject to conflicting inferences, it is the ALJ's sole prerogative to resolve the conflict. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

Compensability

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

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

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra.* In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

When determining the issue of causation, the ALJ may consider the provisions of the Medical Treatment Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the *Guidelines* are not dispositive of the issue of causation. Rather, the ALJ may decide the weight to be assigned the provisions of the *Guidelines* upon consideration of the totality of the evidence. See *Cahill v. Patty Jewett Golf Course*, WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services*, WC 4-535-290 (ICAO November 21, 2006).

The Division of Worker's Compensation Rule 17, Exhibit 5, Cumulative Trauma Conditions Medical Treatment Guidelines specifically provides that "acceptable medical practice may include deviations from these guidelines as individual cases dictate." The *Guidelines* themselves indicate that the opinion provided by Dr. Richardson in determining causation is in line with the intent of the *Guidelines* which state:

Mechanisms of injury for the development of cumulative trauma related conditions have been controversial. However, repetitive awkward posture, force, vibration, cold exposure, and combinations thereof are generally accepted as occupational risk factors for the development of cumulative trauma related conditions.

As found, Dr. Richardson reasonably attributed Claimant's bilateral carpal tunnel syndrome to her work activities which were found to be repetitive and forceful. The ALJ finds and concludes that the opinion of causation offered by Dr. Richardson in the medical records and her testimony, certain statements made by Dr. Plotkin, Claimant's medical records, and Claimant's credible testimony supports the ALJ's conclusion that Claimant's bilateral carpal tunnel syndrome is causally related to her work activities. Dr. Plotkin's opinions to the contrary are not persuasive. As found above, Dr. Plotkin attempted to demonstrate that he critically evaluated Claimant's job duties and Claimant's overall clinical presentation and determined that Claimant's work activities did not cause her carpal tunnel syndrome. However, as found by the ALJ, Dr. Plotkin really did not analyze Claimant's job duties to determine whether they met the primary and/or secondary risk factors set forth in the *Guidelines*. Dr. Plotkin spent more time focusing on and investigating the possibility of non-work-related factors than work related factors. And, despite not finding any non-work-related factors that were the cause of Claimant's symptoms and/or condition, he summarily and unconvincingly concluded Claimant's job did duties did not cause her condition and need for medical treatment.

Moreover, even though the *Guidelines* indicate that other preexisting conditions – and risk factors - can predispose a worker to develop carpal tunnel syndrome with exposure levels which are less than those levels set forth in the *Guidelines*, neither Dr. Plotkin nor Dr. Fall addressed how Claimant's BMI, age, gender, and history of family diabetes and her own borderline glucose levels, might have predisposed Claimant to develop bilateral carpal tunnel syndrome at lower exposure levels than those set forth in the *Guidelines*.

Moreover, even though Claimant's job duties were not quantified in sufficient detail to assess whether they met the primary or secondary risk factors outlined in the causation matrix of the *Guidelines*, the ALJ finds and concludes that the particular facts in this case based upon the totality of the evidence presented makes it more likely than not that Claimant's bilateral carpal tunnel syndrome was caused by her exposure to forceful and repetitive bilateral hand activities at work. While the *Guidelines* provide specific steps in analyzing whether there is sufficient proof to causally connect Claimant's condition and need for treatment to her job activities, the Court is not bound by the *Guidelines* in deciding individual cases on the *Guidelines* or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or

administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

Respondent's position regarding compensability and Claimant's entitlement to medical benefits is based primarily upon a rigid application of the *Guidelines* causation matrix. Respondent's argument primarily rests upon the assumption that the causation matrix is absolute, and provides the only source of information to which we should turn to determine causation in this case. Such assumption is misplaced. Here, the opinion of Dr. Richardson regarding the cause of Claimant's bilateral carpal tunnel syndrome is credible and persuasive. The majority of Claimant's testimony regarding her job duties, symptomatology and onset of symptoms is similarly credible, persuasive, and consistent with the development of her occupational disease. The totality of the evidence presented persuades the ALJ that Claimant has established a causal connection between her work duties and her bilateral carpal tunnel syndrome. Accordingly, the ALJ concludes that Claimant has proven by a preponderance of the evidence that she suffered an occupationally induced disease occasioned by the nature of her work, which did not come from a hazard to which she was equally exposed outside of her employment. Consequently, the injury is compensable.

Claimant has proven by a preponderance of the evidence that she suffered an occupational disease to her bilateral upper extremities in the form of bilateral carpal tunnel syndrome.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury and occupational disease. Section 8-42-101(1)(a), C.R.S. The question of whether 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).

The medical record establishes Claimant is in need of medical treatment for her occupational disease. The ALJ finds the reports of Dr. Richardson and Dr. Froehlich to be credible and persuasive and support a finding that Claimant is in need of medical treatment for her occupationally caused carpal tunnel syndrome. Therefore, the ALJ concludes Claimant has established by a preponderance of the evidence that she is entitled to medical treatment to cure and relieve her from the effects of her occupational disease. Claimant has also established by a preponderance of the evidence that the treatment provided by Dr. Plotkin was reasonable and necessary.

ORDER

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

1. Claimant has proven by a preponderance of the evidence she suffered a compensable occupational disease in the form of bilateral carpal tunnel syndrome.
2. Claimant is entitled to reasonable and necessary medical treatment to cure and relieve her from the effects of her bilateral carpal tunnel syndrome.
3. Dr. Plotkin is an authorized provider and Respondents shall pay for the treatment provided by Dr. Plotkin.
4. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: February 15, 2019.

/s/ Glen B. Goldman _____

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

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that her incisional hernia is causally related to her work injury which occurred on 5/16/2018?

STIPULATIONS

The parties stipulated that a work injury occurred on the above date which injured Claimant's neck and shoulder; the sole issue before the ALJ is causation of this admitted work injury for Claimant's incisional hernia. While other issues were deferred for this hearing, the ALJ finds that implicit in this issue is the awarding of any reasonable, necessary, and related medical expenses for the incisional hernia.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant suffered an injury on May 16, 2018 while working for Employer. According to the "Associate Incident Report Form" of Employer, Claimant was "preventing a resident from falling went to grab resident while on the toilet, felt tightness to left lower portion of neck and shoulder." (Ex. D, p. 44) (*note-all page numbers for Respondents' Exhibits are referenced from bottom center bates numbers of said Exhibits). Claimant signed this report.
2. The report identifies the left shoulder and lower neck as the body parts injured in the incident. At hearing, Claimant testified that she "felt like she ran a marathon" and referred to her whole body being injured, although such description is not reflected in this initial report.
3. Claimant was initially evaluated by Dr. Jessica Fisher with UC Health on 5/17/2018. The reason for visit was noted as "trying to stop pt from falling, she injured her left shoulder, neck pain." Claimant stated to Dr. Fisher that she "used her left arm at the front of the resident" and "noted subsequent s/s neck pain (L>R), left shoulder pain." The initial diagnosis of Dr. Fisher was "cervical strain, left shoulder pain." (Ex. B, p. 8). These initial reports do not reference hernia pain or lower body pain at this visit to Dr. Fisher.
4. Claimant returned to visit Dr. Fisher on May 24, 2018. Diagnosis continued as "cervical strain, left shoulder strain." (Ex. B, p. 16).
5. Hernia pain or lower body pain at the May 24, 2018 visit to Dr. Fisher are not referenced in the reports. Claimant was restricted from overhead reaching, and

limited use of left shoulder, and no crawling or climbing. MMI was anticipated to occur on 6/14/2018. (Exhibit B, p. 16). In her medical history, Claimant was noted to have had two cesarean sections, along with a cholecystectomy. *Id*

6. Claimant returned to see Dr. Fisher on 6/7/2018. At this visit, Claimant was noted to have been evaluated “via “PCP” for upper abdominal “bulge” *just noted last week.*” Dr. Fisher opined that it was “<50% probability for causation (re: incisional hernia).” Further, Dr. Fisher noted that “Findings consistent with incisional hernia as reviewed with IW. Work-related mechanism . . . unlikely as discussed.” Claimant was to resume follow up with her “PCP.” (Ex. B, p. 25) (emphasis added).
At no point in this visit does Dr. Fisher note that Claimant was in any *pain* from this bulge; she merely noted its presence, and marked its location on a diagram. *Id* at p. 28. The ALJ notes further than *pain* was not mentioned by Claimant until her IME with Dr. Hall in December, 2018.
7. Claimant returned to Dr. Fisher on 6/21/2018. It was noted that she was improving but the incisional hernia noted on 6/7/2018 was again noted in this report. MMI was now anticipated to occur on 7/19/2018. (Ex. B, p.32).
8. The next visit to Dr. Fisher in the available records is referenced on August 22, 2018. The incisional hernia noted on June 7, 2018 is not noted in this report. (Ex. B, p. 38). It was noted that before her termination from employment that she was tolerating work well without complaint/concern. MMI was now anticipated for 9/12/2018).
9. Claimant’s medical records were reviewed by Dr. Carlos Cebrian at Respondents’ request. Dr. Cebrian produced a report dated November 6, 2018. Dr. Cebrian noted that Dr. Fisher’s June 7, 2018 report noted a small reducible incisional hernia, related to remote laparoscopy site. (Ex. A, p. 2).
10. Dr. Cebrian also noted that Dr. Fisher had expressed her concern that the hernia “symptoms were not present at the initial visits and were only noted on her acute visit with her primary care physician when she was seen for upper respiratory infection and believed the hernia was related to her old laparoscopy site.” Dr. Cebrian also noted that Dr. Fisher also believed Claimant’s “body habitus” was a factor. (Ex. A, p.4) (*note-This note from Dr. Cebrian references Dr. Fisher’s report dated 7/23/2018. Dr. Cebrian also references reports from Dr. Fisher from 7/12/18, 7/31/18, 8/8/18, and 9/5/18-none of which were presented as exhibits at hearing).
11. Dr. Cebrian opined that Claimant was diagnosed with an incisional abdominal hernia, which develops at a site where a surgery had previously been performed. He further indicated that there “was a temporal delay in the development of the incisional hernia” and that Claimant was evaluated ‘multiple’ times before there were complaints. He further explained that Claimant would have had

“immediate pain” and tearing of the muscles which would have “resulted in acute pain.” (Exhibit A, p.7).

12. Dr. Cebrian concluded, “Ms. Sotelo is obese and the constant increased intra-abdominal pressure is a risk factor for the development of an incisional hernia.” *Id.*

13. Claimant was also evaluated by Dr. Timothy Hall at Claimant’s request, and a report was issued on 12/17/2018. (Ex. 5). Dr. Hall only referenced visits with Dr. Fisher from 5/24/18, 6/7/18, and 6/21/18. No subsequent visits to Dr. Fisher are noted. Dr. Hall does note in the history of the incident that Claimant told him:

She hurt primarily, the left shoulder, upper back and neck, but reports she was hurting all over for a time following this event. She, a week later or so, noticed this deformity in her upper abdomen and went to Peak Vista. The Peak Vista provider told her she should go tell Work Comp about it. She did that and reports that Dr. Fisher told her it was not related. (Ex. 5, p. 18).

14. Dr. Hall further noted:

I went over the medical history. ***She had a gallbladder surgery involving that area in 2003 due to stones. She has had no problems since.*** She had a back injury in 2012. She had a car accident in 2011. In 2013, she was diagnosed with diverticulosis and had an upper and lower GI done. (Ex. 5, p. 18) (emphasis added).

15. Dr. Hall concluded his report:

.....At issue here is causation. ***The question is whether it is more likely that this hernia occurred spontaneously with no particular precipitating event or if it is the consequence of this straining maneuver while catching the patient.*** It is my opinion within a reasonable degree of medical probability it is the latter. It is clear from the patient’s history that she was bent over trying to hold the patient up and then lowered her to the ground. This would create a lot of muscle activity through the rectus abdominis, which is the area of the tear, probably through the previous surgical scar. This would represent a weak section of the abdominal wall/muscle, which simply could not carry the load of this event. ***I find it extremely unlikely that it would be simply a coincidence*** that she had this event at work and then the development of this rather obvious finding on her abdomen, which she would not have missed if it existed previously. I disagree with Dr. Fisher’s causation opinion. (Ex. 5, pp. 18-19). (emphasis added).

16. Claimant testified at hearing. She testified that while she “hurt all over” as a result of this work incident, her primary focus at the time was her neck and shoulder. She believes she noticed the hernia bulge ‘about a week’ after the incident, and may have told Dr. Fisher about it on the 5/24/2018 visit, but was told it was not work-related. Claimant testified that she had not noticed this bulge before, and had not engaged in any strenuous activity after the work injury which might have precipitated this injury. Claimant also recounted that since Dr. Fisher dismissed the work-relatedness of the bulge, there was little time spent on it after that.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers’ Compensation Act of Colorado is to assure 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)*. 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).

B. 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. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int’l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); see also *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, the ALJ finds that Claimant, while an imperfect historian, has testified in good faith, and provided her medical providers the best information she could, in an effort to be medically assisted.

C. In accordance with *Section 8-43-215, C.R.S.*, this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals*

Office, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When the Incisional Hernia was first Reported

D. Claimant has indicated that she first noticed this hernia “about a week” after the work incident. The lack of reference to this in Dr. Fisher’s 5/24/2018 report suggests that Claimant did not *report* the hernia until she saw her PCP the week following this 5/24/2018 visit. While Claimant’s PCP’s report is not in evidence, Dr. Fisher did note in her 6/7/2018 report that Claimant had reported it to her own PCP “just last week” - which would place this PCP visit the week of May 28-June 1. The ALJ does conclude that this is the most likely time that Claimant *reported* this symptom to any medical provider – a period of approximately two weeks from the injury date. It is less clear when Claimant first began to *notice* the bulge herself, but the ALJ credits her testimony that she was primarily focused on the shoulder and neck *pain* at the beginning. Regardless of her causation analysis, Dr. Fisher felt that Claimant’s neck and shoulder injuries were serious enough to eventually move her MMI date back to at least 9/22/2018 – two months past the original MMI date.

E. Dr. Cebrian has opined, and not entirely without reason, that Claimant ‘should have’ felt pain immediately after this work incident, and not at some later point in time. However, delayed pain appears to be what occurred. Even at the 6/7/2018 visit, when it was first brought to Dr. Fisher’s attention, *pain* was not mentioned- just the bulge. Claimant detailed at hearing that Dr. Fisher was not interested in this hernia, and referred her back to her PCP. *Pain* was never documented until Claimant’s IME with Dr. Hall in December. The inference the ALJ draws from this evidence is that *this untreated incisional hernia has gotten worse with time*, now manifesting itself painfully, and is no longer a mere bulge.

Claimant Aggravated a Pre-Existing Condition due to this Work Injury

F. The mere fact that a Claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and 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. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The Claimant must prove by a preponderance of the evidence that her symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009). The ALJ finds that Claimant’s gallbladder incision site was, in effect, a preexisting condition which

rendered her more susceptible to a re-aggravation, and possible herniation, if sufficient force were applied.

G. While the onset of *pain* was apparently delayed, the above analysis does not change. Claimant first *reported* this bulge about two weeks after her work injury. She apparently *noticed* it sometime between 5/24/18 and her PCP visit. She is adamant that there was not a separate incident, away from work and after 5/16/2018, which caused her to strain. Given the pain Claimant was already in from the shoulder and neck injuries, it is easy enough to conclude that she was not engaging in *extra-employment* strenuous activities, post 5/16/2018.

H. The ALJ simply cannot accept Dr. Cebrian's analysis - and apparently that of Dr. Fisher - that Claimant's weight was the likely cause of this hernia manifesting itself. Claimant had her gallbladder removed **15 years** prior - apparently without incident, despite, presumably being overweight to some degree that whole time. She even had some sort of back injury in 2012, and a car accident in 2011, without herniating either time. This was no mere natural progression of an underlying pathology. It was an *event*.

I. The ALJ is more persuaded by Dr. Hall's position that Claimant's abdominal wall -weakened by her prior surgery - could not carry the strain of this work incident. It was not a mere coincidence that her symptoms coincided with the work incident; there was a cause-and-effect relationship, and the ALJ so finds, by a preponderance of the evidence.

Medical Benefits

J. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office*, 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.*, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co.*, *supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

K. In this case, Claimant has shown that the incisional hernia proximately flowed from her admitted work injury which occurred on May 16, 2018. While the onset of *pain* did not occur until later, a sufficient nexus has been established between her

work injury and her need for treatment. Respondents are responsible for all medical care that is reasonable, necessary, and related to her work injury, and this includes the incisional hernia repair.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for all reasonable and necessary medical costs for the repair of Claimant's incisional hernia.
2. All matters not determined herein are reserved for future determination.

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

DATED: February 15, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-085-075-001**

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury on August 2, 2018.
2. Whether Claimant has established by a preponderance of the evidence an entitlement to a general award of reasonable and necessary medical benefits causally related to his August 2, 2018 injury.

7FINDINGS OF FACT

1. Claimant is employed by Employer as a transportation maintenance worker and has been so employed for approximately five years.
2. Claimant's job duties include operating equipment on roadways and in that capacity he performs road painting, sign work, and snow removal. Claimant also performs repairs and details on the trucks operated by Employer. Claimant typically works 8-10 hours per day.
3. On August 2, 2018, Claimant was so employed. On that day, Claimant and the rest of the paint crew had to shut down operations and return from their worksite to the shop when a piece of equipment on their paint truck malfunctioned and was leaking a substantial amount of coolant.
4. When the crew arrived back to the shop, Claimant was tasked with identifying where the leak was coming from, taking the defective part off the truck, and replacing it with a new part.
5. Claimant discovered that the leak was coming from the coolant pump. Claimant climbed onto the truck and began the process of removing the coolant pump.
6. Claimant testified that in order to reach the coolant pump, he had to bend down in a crouched position with most of his body weight on his left leg. Claimant testified that he remained in that crouched position for approximately 40 minutes while he removed the pump. Claimant was not kneeling at any point but was crouched with his legs apart in an awkward position. Claimant used his hand tools while crouched to remove the part and was offered a minimal degree of assistance from his coworkers, but largely worked alone since only one person could fit in that space to remove the coolant pump.
7. After the pump was removed, Claimant and his supervisor Dave Fulbright drove to purchase and pick up a new coolant pump. The trip took approximately one

hour. Claimant testified that he felt no pain or symptoms in his left knee during the trip or prior to the trip.

8. When they arrived back to the shop, Claimant climbed back onto the truck and began installing the new coolant pump. Claimant returned to the crouched position to install the pump. Claimant testified that he was again in the crouched position with his legs apart in an awkward position for approximately 40 minutes during the install of the new pump. Again, Claimant largely worked alone during the install.

9. Claimant testified that approximately halfway through the installation, he felt a numbness and tingling in his left knee and tried to shift his weight to his right knee. Claimant testified that when he arose from the crouched position after the install was complete, he had a sore and fatigued feeling in his left knee. Claimant testified that he had pain in his left knee, was sore in his left knee, and was limping while at work but that he didn't have any pains in his left knee until later.

10. Claimant told his supervisor that his knee was feeling sore and he went home when he finished the repair job on the truck.

11. Claimant rode his bicycle home from work that day, a distance of approximately 1.2 miles. Claimant regularly rode his bicycle to/from work. Claimant testified that he felt some soreness in his left knee while riding his bicycle but no sharp pains during the ride. Claimant testified that he had to take the ride slower than normal due to his left knee and that although he usually rode in 6th gear, that day he rode in 2nd gear.

12. When Claimant dismounted the bicycle at his home, he testified that he felt a sharp pain on the outside of his left knee. Claimant testified that the pain he felt on dismount was different than the dull soreness he felt at work and while riding his bicycle home, and that it was a sharp pain like he had never experienced before.

13. Claimant called his supervisor after arriving home to inform him that he may not be able to come into work the next morning because of his knee pain. Claimant's supervisor instructed Claimant to come into work the next morning so Claimant could be sent to the doctor. That evening, Claimant treated his left knee with ice and over the counter pain medication.

14. On August 3, 2018, Emily Crockett, M.D. evaluated Claimant at Concentra. Claimant reported that he was on top of a fuel tank working on a part for 45 minutes the day prior and that when he got up he had pain on the outside of his left knee. Claimant reported no history of past knee injury and that he rode his bike to work every day. Claimant reported symptoms in the left lateral knee constant with moderate pain and aching. Claimant reported tenderness and painful walking. Claimant reported exacerbating factors included kneeling, direct pressure, squatting, and using stairs. On examination, Dr. Crockett found tenderness diffusely over the lateral knee. Dr. Crockett assessed left knee strain and recommended physical therapy. See Exhibit 1.

15. On August 6, 2018, Dr. Crockett evaluated Claimant. Claimant reported having difficulty walking up and down stairs and that his symptoms were unchanged. On August 9, 2018, Dr. Crockett evaluated Claimant. Claimant reported that his knee was not improving. Dr. Crockett recommended an MRI of the left knee and recommended Claimant continue with physical therapy. See Exhibit 1.

16. On August 15, 2018, Claimant underwent an MRI of his left knee. The findings noted mild articular cartilage fissuring in the lateral patellar facet of the patellofemoral compartment without thinning or subchondral bone marrow edema. A small joint effusion was noted in that compartment. The lateral compartment showed a normal meniscus. Fragments showed edema and extensive surrounding edema was found in the bone marrow. The impression given was osteochondral lesion in the posterior aspect of the lateral femoral condyle with extensive surrounding bone marrow edema with the fragment not loose and mild degenerative cartilage changes in the lateral patellar facet. See Exhibit B.

17. On August 21, 2018, Dr. Crockett evaluated Claimant. Dr. Crockett noted that the MRI showed an osteochondral lesion in the posterior aspect of the lateral femoral condyle as well as degenerative changes in the lateral patellar facet. Dr. Crockett noted there was no loose body. Claimant continued to have symptoms in the left knee and left lateral knee. Dr. Crockett assessed muscle strain of left knee and osteoarthritis of left knee. Dr. Crockett noted that the MRI confirmed osteoarthritis and that they would continue physical therapy and do a steroid shot at the next visit if Claimant was not improving. See Exhibits 1, C.

18. On August 31, 2018, Dr. Crockett evaluated Claimant. Dr. Crockett noted that Claimant was there to get a steroid injection into his left knee. Dr. Crockett noted that Claimant had underlying osteoarthritis that was aggravated by his knee strain. Dr. Crockett injected Claimant's left knee with lidocaine and kenalog and noted they would see Claimant back in 1 to 2 weeks. See Exhibits 1, C.

19. On September 6, 2018, Dr. Crockett evaluated Claimant. Claimant reported less pain and increased range of motion after the steroid shot. Claimant reported symptoms in the left lateral knee and left anterior knee. Dr. Crockett spoke to Claimant's physical therapist and noted Claimant was strong enough to step on his truck step and get inside his work truck. Dr. Crockett assessed muscle strain of the left knee and unilateral primary osteoarthritis of the left knee. Dr. Crockett noted that they could consider viscosupplementation in the future if needed, and that at some point in time Claimant may need a knee replacement. Dr. Crockett ordered more physical therapy and noted that Claimant would follow up with Dr. Hewitt. Dr. Crockett opined that Claimant could return to full work activity. See Exhibits 1, C.

20. On September 11, 2018, Dr. Crockett evaluated Claimant. Claimant reported that he was having difficulty getting up one step to get into his work truck. Dr.

Crockett noted on examination tenderness diffusely over the anterior knee and the lateral knee. Dr. Crockett referred Claimant to orthopedics and to Dr. Hewitt. See Exhibit 1.

21. On September 13, 2018, orthopedist John Papillion, M.D. evaluated Claimant. Dr. Papillion noted that Claimant sustained an acute injury to his left knee on August 2 when he was working on his truck and was squatting onto his left knee in an awkward position for about 40 minutes. Dr. Papillion noted that Claimant developed significant pain in the lateral and posterolateral aspect and also developed swelling within 24 hours. Claimant reported that since, he had constant dull achy pain in the posterolateral aspect as well as episodes of sharp catching with certain motions. Dr. Papillion noted that Claimant had no previous problems with his left knee. Dr. Papillion noted that the MRI revealed an osteochondral lesion on the far posterolateral aspect of the lateral femoral condyle with no obvious detachment but significant surrounding marrow edema. On exam, Dr. Papillion found some antalgic gait, 2+effusion, good patellar mobility, no patellar crepitus, no real tenderness on the patellar facets, and marked tenderness over the posterolateral femoral condyle, minimally over the lateral joint line. Dr. Papillion assessed osteochondral lesion, posterolateral femoral condyle and bone marrow lesion with extensive marrow edema, lateral femoral condyle. Dr. Papillion opined that it was reasonable to proceed with exam under anesthesia, arthroscopy, possible in situ drilling and pinning of the OCD lesion with concomitant fluoroscopic guidance subchondroplasty to the lateral femoral condyle. Dr. Papillion noted that Claimant was quite miserable and unable to perform his job duties and wished to proceed with surgery. See Exhibit 1.

22. On September 14, 2018, Dr. Crockett evaluated Claimant. Claimant reported that he wanted to have arthroscopic surgery since he still had pain after the steroid injection. Claimant reported continued symptoms on the left lateral and left anterior knee. On exam, Claimant had tenderness diffusely over the anterior knee and diffusely over the lateral knee. Dr. Crockett assessed muscle strain of left knee and unrelated primary osteoarthritis of the left knee Dr. Crockett encouraged Claimant to stay active and noted that they would see Claimant back after surgery. See Exhibits 1, C.

23. On September 25, 2018, Claimant was evaluated at Kaiser by Loukas Koyonos, M.D. Claimant reported that he was working in an awkward position for 40 minutes two times in a row and that afterwards he had significant pain in the left knee. Claimant reported that physical therapy and a steroid injection helped a bit but that he still had the pain and couldn't climb stairs. Claimant pointed to the lateral joint line and to the patella. Claimant reported that surgery was considered but that his claim was denied. On exam, Dr. Koyonos found tenderness on the left lateral joint line and the left peripatellar. Dr. Koyonos noted that the MRI showed a large amount of edema in the lateral femoral condyle and opined that there may be osteochondral damage far posterior lateral femoral condyle. Dr. Koyonos opined that he was not convinced surgery was the best answer and that bone bruises could take months to feel 100% better. Dr. Koyonos noted that Claimant was still smoking 1 pack per day which could slow the bone healing process. Dr. Koyonos recommended physical therapy for strengthening and work

hardening and noted they would hope that the medial femoral condyle would heal. See Exhibit 2.

24. On September 27, 2018, Paul Hautamaa, M.D. evaluated Claimant. Dr. Hautamaa noted that Claimant was there for a second opinion. Claimant reported an injury at work where he was in a bent knee position for several hours that seemed to irritate his knee. Dr. Hautamaa noted Dr. Koyonos' opinion that Claimant had bone bruising involving the left knee and recommended physical therapy and time for the bruise to heal. Dr. Hautamaa noted on examination some patellofemoral crepitus, lateral joint line tenderness, and no medial joint line tenders. Dr. Hautamaa noted that the x-rays showed no significant fracture or arthritic changes and that the MRI showed bone bruising of the lateral femoral condyle. Dr. Hautamaa noted that the chondral surfaces over the meniscal area looked satisfactory. Dr. Hautamaa noted that there might be some wear on the far posterior aspect of the lateral femoral condyle but that he could still see intact articular cartilage. Dr. Hautamaa found some chondral wear in the patellofemoral joint. Dr. Hautamaa opined that he did not see how surgery would be beneficial for Claimant based on a lack of ligamentous or meniscal pathology and because Claimant had coverage of the articular surface. Dr. Hautamaa also noted that recovery from bone bruising could take 3-4 months and recommended conservative management including physical therapy. See Exhibit 2.

25. On October 10, 2018, Claimant underwent physical therapy. Claimant reported that he started to have left knee pain after being in an awkward squat position for a prolonged period of time at work on August 2. Claimant reported that he continued to have pain with going down stairs, minimal soreness going up stairs, and that he was fine walking. Claimant reported his pain level at a 3/10 and that he had initial visible swelling that had resolved. See Exhibit D.

26. On October 24, 2018, Claimant underwent physical therapy. Claimant reported he was making good progress and had minimal pain but just a little bit of patellofemoral pain. Claimant reported that his lateral pain had resolved. See Exhibit D.

27. On October 24, 2018, Claimant also was evaluated by Dr. Koyonos. Claimant reported that he had been going to physical therapy and doing his exercises. Claimant reported that he was making good progress and that his lateral pain had resolved and that he had just a little bit of patellofemoral pain now. Dr. Koyonos assessed healed left knee bone bruise. Dr. Koyonos cleared Claimant to return to full duty work and opined that Claimant could go back to physical therapy 1-2 more times and do a maintenance program on his own. See Exhibit 2.

28. On November 5, 2018, orthopedic surgeon William Ciccone, M.D. performed an independent medical evaluation. Claimant reported that he had injured his left knee when working on a paint truck in an awkward position. Claimant reported that he was standing on a chassis and leaning over a barrel working on a coolant pump and that his knee was bent as he was leaning for approximately 40 minutes. Claimant reported that he did not fall or twist his knee. Claimant reported that he had increased

pain mostly over the anterolateral aspect of the knee and noted some increased pain while riding his bike home. Claimant reported that physical therapy had helped some and that a knee injection helped decrease swelling and increase motion. Claimant reported that his pain was much improved and that initially it was anterolateral but that the anterolateral pain is now gone and that now he had pain over the anteromedial aspect of the knee. Claimant denied any prior history of injuries to the knee. Claimant reported that his pain was at a 3/10 and that his symptoms included achiness, soreness, and stiffness. See Exhibit A.

29. Dr. Ciccone performed a physical examination and reviewed medical records. On exam, Dr. Ciccone noted that Claimant ambulated with a normal appearing gait, that Claimant had 5/5 strength, no pain with palpation on the posterior knee, no joint line pain, and mild pain along the patellofemoral joint. Dr. Ciccone provided the impression of left knee patellar degenerative changes. Dr. Ciccone noted that the MRI revealed an osteochondral (OCD) lesion in the posterior aspect of the lateral femoral condyle and that it was felt by orthopedics that Claimant was suffering from a symptomatic OCD lesion requiring surgery. Dr. Ciccone noted that Claimant's pain initially on the anterolateral aspect of the knee was gone and that now the pain was more over the anteromedial knee. Dr. Ciccone noted that he had reviewed pictures of the work position and the degree of left knee bend that Claimant was working at on August 2. Dr. Ciccone opined that Claimant did not suffer a work related injury. Dr. Ciccone noted that there was no slip, fall, or twist involving the left knee and that Claimant had mild degenerative changes on the patella that he believed were the cause of Claimant's pain. Dr. Ciccone opined that the OCD lesion on the MRI was pre-existing and unrelated to the Claimant's complaints. Dr. Ciccone noted that Claimant's symptoms were on the anterior aspect of the knee and not on the posterior aspect where the OCD lesion resided. Dr. Ciccone noted that an OCD lesion generally develops mechanical complaints when the lesion becomes loose and Claimant had no loose fragments or cartilage. He opined thus that the OCD lesion that was not loose did not require surgical management. Dr. Ciccone opined that Claimant's pain going up and down the stairs was related to the degenerative changes on the patella and not the OCD lesion. Dr. Ciccone also noted Claimant's reports that the initial pain after the work event had resolved and that now the pain was over the anteromedial aspect of the knee. Thus, Dr. Ciccone opined that Claimant did not sustain a work related injury, that there was no acute injury seen on MRI, and that Claimant's symptoms were due to his degenerative changes on his patella and not due to an injury. See Exhibit A.

30. On November 13, 2018, Claimant underwent physical therapy. Claimant reported that he was back to work without restrictions and doing okay. Claimant reported that he was careful with his left knee but could do everything. Claimant again reported a little soreness at the inside of his left knee when going down stairs and ladders but no pain with walking. See Exhibit D.

31. Dr. Ciccone testified by deposition consistent with his independent medical evaluation report. Dr. Ciccone noted that Claimant had showed him at the evaluation how he was positioned on August 2, 2018. Dr. Ciccone noted that Claimant had reported that

the pain was initially on the lateral or outside part of the knee. Dr. Ciccone noted that at the evaluation, Claimant explained that his pain was over the anteromedial aspect of the knee and the front of the kneecap on the inside part and in a different location than where Claimant initially had the onset of pain on August 2. Dr. Ciccone testified that on his physical examination of Claimant, Claimant had no pain along the lateral side of the knee. Dr. Ciccone opined that there were no objective findings on physical examination consistent with an injury on August 2.

32. Dr. Ciccone opined that Claimant had some mild degenerative changes along the patella shown by MRI. Dr. Ciccone opined that usually with a mild degenerative patella condition, there would be some softening of cartilage right up underneath the kneecap that would hurt with stairs and that was not usually due to an injury but just kind of occurs as one ages. Dr. Ciccone opined that mild degenerative patella findings would be consistent with somebody in their low 50's.

33. Dr. Ciccone also opined that Claimant's MRI showed an osteochondral lesion. He opined that those could be related to trauma, but opined that the lesion was not caused by Claimant's work activities on August 2 since there was no traumatic injury on that day. Dr. Ciccone opined that the knee is designed to support body weight in a bent position and that it would be unlikely that a static position would cause traumatic injury to the cartilage. Dr. Ciccone opined that if the lesion were a pain generator, he would expect the pain to be on the lateral aspect of the knee. Dr. Ciccone opined that Claimant's bent knee position while working would not have sufficient force to cause an osteochondral lesion. Dr. Ciccone opined that Claimant's pain generator was not the osteochondral lesion but was the degeneration under Claimant's kneecap. Dr. Ciccone opined that there was no new tissue breakage or damage done to the knee while Claimant was working on the pump and holding his knee static. Dr. Ciccone opined that Claimant's degenerative patella condition was not aggravated by work activities on August 2. Dr. Ciccone noted that Claimant did not have complaints at the beginning of August under the kneecap, like he would have if he had aggravated that degenerative condition.

34. Claimant testified at hearing that his knee was painful when walking down stairs and that he was being more careful with his knee. Claimant testified that he believed his left knee was injured because of the weight on that knee for so long while he was crouched doing the repair. Claimant testified that he had no prior problems with his knee before August 2, 2018.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find

that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.*, WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection

is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

Claimant, has established by a preponderance of the evidence that he sustained a work related injury on August 2, 2018 to his left lateral knee. Although studies showed that Claimant had pre-existing degenerative issues in his knee, Claimant was asymptomatic in his knee prior to his work on Employer's truck in a sustained crouched position on August 2. On August 2, 2018 after working on the truck, Claimant's left lateral knee was sore, caused him to limp while still at work, and later developed more sharp pain and swelling. Respondents argument that Claimant was injured outside the course and scope of employment while riding his bike home is not persuasive. Rather, the credible evidence establishes that his left knee had symptoms at work that included pain and soreness affecting Claimant's gait. The ALJ concludes, more likely than not, that the symptoms of soreness in the knee at work and the duties involved in repairing the vehicle caused Claimant's symptoms in his left knee and aggravated Claimant's underlying knee condition. As found above, at a visit on August 3, Claimant reported pain and tenderness in the left lateral knee and Dr. Crockett found diffuse tenderness over the lateral knee. Claimant, who had been working full duty up to that point, had acute trouble with walking, squatting, and using stairs. Dr. Crockett's opinion that Claimant had sustained a knee strain and an aggravation to underlying osteoarthritis is credible, persuasive, and consistent with the weight of the evidence. Dr. Crockett's opinion is also consistent with the opinion of orthopedic surgeon Dr. Papillion noting that Claimant had sustained an acute injury after squatting in an awkward position for 40 minutes. These opinions are found persuasive, consistent with Claimant's testimony, and consistent with the significant edema found in the lateral left knee on imaging. Dr. Ciccone's opinions are not found as credible or persuasive. Claimant has established a causal connection between his work duties and his acute onset of left knee pain on August 2, 2018 and has established that he sustained a compensable injury to his left lateral knee.

Medical Benefits

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). Claimant is entitled to a general award of medical benefits to treat his left lateral knee as he has established that his claim is compensable. The issue of specific benefits, including surgery, was not before the ALJ but the ALJ notes that the records establish that Claimant reported his left lateral knee pain had mostly resolved by October of 2018.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that he sustained a compensable work related injury to his left lateral knee on August 2, 2018.

2. Claimant is entitled to a general award of reasonable and necessary medical benefits to treat his left lateral knee injury from August 2, 2018.

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

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

DATED: February 19, 2019

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained both a compensable injury to his neck or low back on September 26, 2017, in W.C. No. 9-085-312-001?
2. Whether the Claimant has proven by a preponderance of the evidence that he sustained both an “accident” and a resulting compensable “injury” to his neck, low back or shoulder on July 26, 2018?
3. If the Claimant has proven he sustained a compensable injury on September 26, 2017 or July 26, 2018, whether the Claimant has proven, by a preponderance of the evidence, an epidural steroid injection/spinal block recommended by Dr. John Sacha is reasonable and necessary to cure and relieve the Claimant from the effects of the industrial.

FINDINGS OF FACT

1. In May 2002, Claimant was involved in a motor vehicle accident in the course and scope of his employment. This resulted in a cervical strain that was initially conservatively treated by Concentra.
2. Although he was released from care in July 2002 after a brief course of physical therapy, Claimant’s symptoms persisted.
3. Claimant underwent a Division independent medical examination (DIME) with Dr. Lynn Parry in October 2002. Dr. Parry documented Claimant’s current complaints included burning in his right shoulder, persistent pain in his neck and difficulty in lifting his right arm. Dr. Parry opined the Claimant had a cervical strain, but that she was unable to assess whether there was further structural damage due to the lack of cervical x-rays, CT scans, or MRI. She recommended further care to include physical therapy and orthopedic evaluation while providing a 15% whole person impairment under the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*, Table 53(II)(B), and range of motion loss.
4. On February 26, 2003, the claim was reopened to address worsening symptoms. X-rays performed on this date established degenerative changes. The ATP opined Claimant was no longer at MMI due to ongoing neck pain that radiated into the Claimant’s right shoulder. A cervical MRI was performed on April 7, 2003. The study established anterior epidural defects at C4-C5 and C5-C6 due to a disc protrusion, marked neural foraminal stenosis on the right at C4-C5 and C5-C6, a small central protrusion at C6-C7, and anterior degenerative spondylosis at C4-C5 and C5-C6. Additional testing, specifically a CT myelography, was recommended due to the degree of foraminal encroachment at C6-C7.
5. Dr. James Ogsbury, a neurosurgeon, evaluated Claimant on April 18, 2003. Claimant reported ongoing right sided symptoms, which were now increasing into the left

side of the spine. Dr. Ogsbury diagnosed Claimant with cervical spondylosis, foraminal narrowing at C4-C5, C5-C6, and likely at C6-C7, and apparent C7 radiculopathy.

6. On June 9, 2003, Claimant received a C6-C7 foraminal block at Dr. Ogsbury's recommendation with good relief.

7. At a follow-up appointment post-block, on June 19, 2003, Dr. Ogsbury noted Claimant would obtain a facet injection to determine Claimant's candidacy for surgery.

8. Facet injections were performed, and although there are no subsequent records, Claimant reported to Dr. Bird in September 2017 that a neck fusion was offered to him, but he declined.

9. Claimant testified that it was recommended that he undergo a cervical fusion, but that he did not pursue that option.

10. Dr. Brian Reiss, an expert in orthopedics and disorders of the spine, testified Claimant had significant symptomatology in his cervical spine from the early 2000s that would have continued in some form to present. He specifically testified diagnostic testing established this was degenerative pathology that would be expected to progress over time.

11. At his initial appointment for the alleged September 26, 2017 injury, Claimant reported that "he has had stiff neck and headaches frequently with pain 2-3/10" prior to the injury. Claimant reported he "takes Tylenol every night for it."

12. In direct contradiction to the information provided to Dr. Bird, Claimant testified he had only "occasional" soreness in his neck. He later testified he did not take Tylenol every night for a stiff neck and headaches, as documented.

13. In August 2013, Claimant sustained a work-related low back injury and was diagnosed with a lumbar strain.

14. As part of that claim, Claimant reported radicular numbness and tingling down his left leg. As a result, he was diagnosed with radiculopathy and he was referred for a MRI to determine any disc pathology.

15. In October 2013, Claimant's complaints included numbness and burning that radiated to his left lower extremity, from the lateral thigh and lateral calf to the ball of his left foot. He reported the majority of the pain was in the ball of his foot.

16. In October 2013, a lumbar MRI was performed and it established a L1-L2 disc herniation causing foraminal stenosis, and annular disc bulges at L3-L4, L4-L5, and L5-S1 causing bilateral neural foraminal stenosis. The reviewing doctor, Dr. Samuel

Chan, opined the findings were consistent with radiculitis/radiculopathy of the left lower extremity.

September 26, 2017, Alleged Injury (W.C. No. 5-085-312.001)

17. Claimant alleges, on September 26, 2017, he stepped off a platform onto a rebar, falling down and landing on his buttocks. He reported that this resulted in pain to his low back, neck, and right shoulder.

18. The physical examination performed on the date of injury established he had full range of motion in his right shoulder, neck, and back, and that radiology was negative for bony abnormalities. Dr. Bird did not recommend any medications or other treatments after evaluating Claimant. Claimant was permitted to return to work full duty.

19. Two days later, on September 28, 2017, Claimant was re-evaluated, noting he was feeling better and that he was ready to be released. The physical examination echoed this: there was no tenderness in the cervical spine. Claimant was released from care. No additional care was contemplated or documented.

20. Claimant testified he did not agree with Dr. Bird's medical record that he requested to be released from care. Rather, Claimant testified after his discharge, he continued to have neck and low back pain, numbness in his hand, tingling in his legs that was worse in the ball of his foot, and frequent headaches.

21. However, Claimant conceded in testimony he did not seek any medical treatment after the September 2017 incident until July 16, 2018 with his primary care physician.

22. Despite his testimony that his pain symptoms allegedly continued, the Claimant conceded he had no work restrictions from September 26, 2017 through the second incident in July 2018.

23. Claimant conceded that, during the time period between September 26, 2017, and July 2018 his job duties included lifting up to 40-50 pounds, which he was able to do.

24. Claimant also conceded that he was able to perform recreational activities, like going snowboarding in the winter of 2017-2018.

25. Dr. Reiss, who heard Claimant's testimony, credibly testified it would be very "unusual" for an individual to have significant pain as described by Claimant, but not seek medical treatment or to continue to work full time at a physically strenuous job.

26. The ALJ infers Claimant's failure to seek medical care and continued work at full time at a physically strenuous job without restriction is inconsistent with Claimant's

testimony he experienced ongoing symptoms during this time. The ALJ finds and determines Claimant's ability to work full time and without medical care is suggestive that no injury requiring medical treatment or need for disability occurred on September 26, 2017.

27. Ten months after the alleged September 2017 incident, on July 16, 2018, Claimant presented to Aspen Family Care for evaluation of back pain, neck pain, and shoulder pain. In the history of present illness, Dr. Mata documented the lumbar and shoulder conditions arose "gradually" and "without injury." With regard to the neck condition, it again was documented the onset was "gradual" and the only reference to injury was a "car accident awhile back ago" where he got severe whiplash. There is no mention in the July 16, 2018, record of a work injury in September 2017 or to ongoing symptoms after a fall.

28. Claimant testified Dr. Mata's record was incorrect as he told her about the 2017 incident.

29. The ALJ infers the history of present illness as documented by the primary care physician is inconsistent with the Claimant's assertion that the need for medical treatment on July 16, 2018, was in any way related to an alleged injury occurring on September 26, 2017.

30. The ALJ finds Claimant did not obtain treatment beyond these two brief evaluations at the time of the alleged September 26, 2017, incident and he did not seek out additional care for ten months. The ALJ finds persuasive that even when the Claimant sought treatment in July 16, 2018, there was no mention of a 2017 incident. The ALJ finds Claimant did not have any treatment, medications, or restrictions assigned as a result of the reported incident of September 2017.

31. The ALJ finds that Claimant's testimony that he did not request a release from care on September 28, 2017, was not credible or persuasive. The ALJ infers the Claimant's testimony that he did not agree with Dr. Bird's release is inconsistent with his failure to obtain additional care on his own had he believed additional medical care was needed.

32. The ALJ finds Claimant failed to meet his burden to establish he sustained an acute compensable injury on September 26, 2017. The ALJ finds there is insufficient objective evidence to support a finding that the need for medical treatment or disability after the alleged incident was causally related to an incident occurring on September 26, 2017. In so finding, the ALJ finds the lack of treatment and ability to work full time in a physically strenuous job persuasive.

33. The ALJ additionally finds that Claimant presented insufficient evidence that any incident occurring on September 26, 2017, aggravated, accelerated or combined with a pre-existing condition to cause the need for medical care or disability. In so finding, the

ALJ found the Claimant's actions of not seeking out additional care and working full time in a physically strenuous job persuasive.

Claimant's condition immediately prior to the July 26, 2018, Alleged Injury (W.C. No. 5-084-933):

34. On July 16, 2018, ten days prior to the reported injury of July 26, 2018, Claimant reported worsening low back, neck and right shoulder pain that was persistent, constant, and occurred daily. Specifically, Dr. Mata documented the following symptoms:

Back Pain: pain described as an "ache, shooting, and stabbing" with no relieving factors that occurs persistently and is worsening; the Claimant reported left ball of the foot feels numb and tingling that occurs "pretty constant now;" Claimant reported that leaning back would cause an electric shock that shoots to the groin.

Neck Pain: pain described as "burning, shooting, and throbbing" in the bilateral posterior neck that occurs daily and is worsening; Claimant reported numbness and tingling in the fourth and fifth digit of the left hand and headaches;

Shoulder Pain: pain described as burning that occurs constantly and is worsening in both shoulders; he also described burning in the bilateral deltoids.

35. Due to these complaints, Dr. Mata diagnosed Claimant with cervicalgia, cervical radiculopathy, low back pain, lumbar radiculopathy, and impingement of the left shoulder. She recommended Claimant consider physical therapy versus a consult with an orthopedic surgeon and that further diagnostic testing be performed of the lumbar spine and cervical spine.

36. Also, on July 16, 2018, Claimant received the recommended x-rays of the cervical spine and lumbar spine. On the clinical screening form for those tests it is documented that the Claimant's "current problem & patient story" was "neck pain x15-20 yrs" and "lower back pain rt sided x yrs progressing."

37. The lumbar x-ray performed on July 16, 2018, established mild to moderate lumbar spondylosis.

38. The cervical x-ray performed on July 16, 2018 established moderate to advanced degenerative disc disease at C4-C5 and C5-C6.

39. Claimant had a MRI of his cervical spine scheduled prior to seeking out his initial care with Concentra. The indication for the MRI is for "chronic neck pain with increase in severity over the past few months."

40. Ten days later on July 26, 2018, Claimant reported pain down his left leg and left ulnar nerve area. On August 1, 2018, Claimant reported the pain as 6/10 in the

neck and low back with tingling in the left arm, tingling in the left lateral leg to the sole of his foot, with headaches.

41. On August 1, 2018, Claimant reported neck and low back pain, constant headaches, left side numbness and tingling in the left upper extremity, and numbness and tingling in the left lateral leg into his heel.

42. Dr. Rauzzino documented Claimant's current symptoms on August 21, 2018, included tingling and numbness in the left arm into the fourth and fifth digits of his left hand, tingling and numbness into the left lateral leg and into the ball of his foot, and headaches.

43. Despite this documentation, Claimant testified his symptoms were different than prior to July 26, 2018. Specifically, he testified that prior to July 26, 2018, he did not have "constant" numbness or tingling, but rather it was intermittent. He also testified that prior to July 26, 2018, he did not recall having numbness in the ball of his foot or tingling in his left digits or left hand.

44. The ALJ finds based on a totality of the medical record that Claimant's complaints immediately prior to the alleged July 26, 2018 injury were identical in character to those raised by Claimant after the alleged injury. The ALJ finds Claimant's testimony that the nature of the complaints changed after July 26, 2018, is not credible, especially in light of the July 16, 2018, record that documents his symptoms were not intermittent but rather constant immediately prior to the incident and that, despite his testimony, he specifically reported numbness in the ball of his left foot and tingling into his left digits and hand ten days prior to the reported incident.

The July 26, 2018, Alleged Injury (W.C. No. 5-084-933):

45. Claimant reported he sustained an unwitnessed injury on July 26, 2018, to his cervical spine and low back while carrying a ladder on his left shoulder in a forested, hilly area. He testified that an end of the ladder rubbed against a branch and caused him to rotate his neck and tumble. Claimant conceded he did not fall.

46. On July 16, 2018, the Claimant's primary care doctor diagnosed him with cervicgia, cervical radiculopathy, low back pain, lumbar radiculopathy, and impingement of the left shoulder. She recommended the Claimant consider physical therapy versus a consult with an orthopedic surgeon and that further diagnostic testing be performed of the lumbar spine and cervical spine.

47. The cervical x-rays performed just days prior to the reported incident were performed to evaluate neck pain that had been present for 15-20 years

48. On July 27, 2018, Claimant was seen for the July 26, 2018, injury at Concentra. Claimant was referred to physical therapy for a cervical strain and lumbosacral strain.

49. The cervical and lumbar MRIs performed on July 31, 2018, were at the referral and request of Dr. Mata rather than an authorized treating physician (ATP). The reason for the MRI was “chronic neck pain with an increase in severity over the past few months,” confirming the need for diagnostic tests preexisted Claimant’s July 26, 2018, alleged work injury.

50. Dr. Bryan Reiss, Respondents’ expert witness, credibly testified he personally reviewed the cervical MRI film performed on July 31, 2018. He testified it did not show acute findings, only degenerative findings, that he opined were present in 2003 based on his review of the prior record. He explained the 2018 MRI showed a chronic degenerative process without any fracture or acute herniation. He testified the changes he viewed in the 2018 film were the advancement of degenerative process which was the expected change over the 15 years since the 2003 MRI

51. Claimant was referred for an “orthopedic spine referral” for cervical radiculopathy and lumbar radiculopathy on August 1, 2018.

52. Dr. Reiss testified Claimant would have received the same medical treatment (medication and physical therapy to start) irrespective of an incident occurring on July 26, 2018, and that the need for that treatment was “more likely than not... a continuation of his preexisting symptomatology.”

53. The ALJ finds the course of treatment pursued by the ATPs after the alleged July 26, 2018, was substantially identical to that recommended by Dr. Mata on July 16, 2018.

54. The ALJ also finds the cervical MRI performed just days after the alleged injury does not support a finding Claimant sustained any acute injuries or aggravations to his cervical spine on July 26, 2018.

55. Claimant conceded he has not missed any work and has been able to work full time since the July 26, 2018, incident.

56. The ALJ finds Claimant failed to meet his burden to establish he sustained an acute compensable injury on July 26, 2018. The ALJ finds there is insufficient objective evidence to support a finding that the need for medical treatment or disability after the alleged incident was causally related to an incident occurring on July 26, 2018. In so finding, the ALJ finds the primary care record just days prior to the incident persuasive in that it documents significantly similar complaints as those reported after the incident.

57. The ALJ additionally finds Claimant presented insufficient evidence that any incident occurring on July 26, 2018, aggravated, accelerated, or combined with a pre-existing condition to cause the need for medical care or disability. In so finding, the ALJ finds the testimony of Dr. Reiss that the treatment would have been the same irrespective

of any incident on July 26, 2018, to be persuasive and credible. The ALJ also finds persuasive a comparison of Dr. Mata's treatment plan on July 16, 2018 against the treatment plan of the ATPs.

CONCLUSIONS OF LAW

General Legal Principles

1. 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 litigation. Section 8-40-201, C.R.S. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. Section 8-43-301(1), C.R.S.

2. The claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment with the employer. Section 8-41-301(1)(b) and (c), 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).

3. An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. See *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The arising out of element is narrower and requires the Claimant to show a causal connection between the employment and the injury such that the injury had its origins in the employee's work related functions and is sufficiently related to those functions to be considered part of the employment contract. See *Triad Painting Co. v. Blair*, *supra*.

4. In rendering a decision, the ALJ must make credibility determinations, draw plausible inferences from the record, and resolve essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). In determining credibility, the ALJ considers 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.

Compensability

5. The ALJ concludes Claimant's testimony regarding his medical records and symptomatology is not credible or consistent with the totality of the evidence. The ALJ weighs the testimony of the claimant accordingly.

The alleged September 26, 2017, work related injury

6. A compensable industrial accident is one that results in an injury requiring formal medical treatment or causing disability. As a result, there needs to be both an “accident” and compensable “injury” which requires the need for formal medical care. *Wherry v. City and Cty. of Denver*, W.C. No. 4-475-818 (I.C.A.O., March 7, 2002). 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); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990).

8. As found, even if an “accident” occurred on September 26, 2017, Claimant has not proven by a preponderance of the evidence he sustained a compensable “injury” arising out of and in the course of his employment with the employer. Specifically, Claimant has failed to establish by a preponderance of the evidence that the incident at work on September 26, 2017, caused an injury that resulted in the need for medical treatment or caused disability. *Wherry, supra*.

9. The ALJ finds and concludes that it is persuasive that Claimant only presented for evaluation twice over three days, did not obtain any medication or treatment (i.e. physical therapy or medication) at the time of the incident, was not provided with work restrictions, and asked for discharge from care on the third day. The ALJ further finds and concludes that it is persuasive that Claimant was able to work a strenuous job for ten months without need for medical care or restrictions. Further, as found, there is no indication in the medical records that any incident or injury of September 26, 2017, aggravated, accelerated, or combined with a pre-existing condition to cause the need for medical care or disability. *Id.* Therefore, Claimant’s claim for benefits for a September 26, 2017, incident is denied and dismissed.

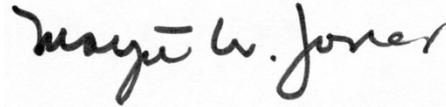
The alleged July 26, 2018, work related injury

9. As found, there is insufficient evidence in the medical records that an acute injury or an incident occurring on July 26, 2018 aggravated, accelerated, or combined with a pre-existing condition to cause the need for medical care or disability. *Merriman v. Indus. Comm’n*, 210 P.2d 448 (Colo. 1949). In so finding, the ALJ specifically credits the testimony of Dr. Reiss that there were no radiographic findings on the MRI taken just days after the incident that would suggest an acute injury or aggravation of the neck. As found, the totality of the record establishes that Claimant’s presentation and symptomatology was sufficiently identical in character and quality both in the days prior to the reported July 26, 2018, incident and thereafter. Further, the ALJ credits the testimony of Dr. Reiss that Claimant’s treatment after July 26, 2018, would have been the same irrespective of any event occurring on July 26, 2018. The ALJ specifically credits this testimony as it is consistent with the report of Dr. Mata on July 16, 2018. Claimant’s claim for benefits related to an alleged July 26, 2018, injury or aggravation is denied and dismissed.

ORDER

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

This 20th day of February, 2019.



Margot W. Jones

Administrative Law Judge

Office of Administrative Court

1525 Sherman Street, 4th Floor

Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

ISSUES

- Whether the respondent has demonstrated by a preponderance of the evidence that the claimant no longer needs maintenance medical treatment to prevent further deterioration to her physical condition pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), thereby allowing the respondent to withdraw the admission for those benefits related to this claim; WC Number 5-019-122. ¹

FINDINGS OF FACT

1. On June 14, 2015 the claimant was injured while working for the respondent. The injury occurred when the claimant was on her hands and knees reaching under a table. While the claimant was in that position a client struck the claimant's midback with his forearm. The June 14, 2015 injury (and related medical treatment) is the only injury at issue in this order.²

2. The claimant's authorized treating provider (ATP) for this claim is Work Partners. The claimant first treated at Work Partners on June 29, 2015 and was seen by Daniel Meyer, PA, under the supervision of Dr. Craig Gustafson. On that date the claimant reported pain in her thoracic spine. In addition, the claimant complained of "nerve type pain" along her left shoulder blade. On exam the claimant had active range of motion in both upper extremities. Mr. Meyer diagnosed contusion of the interscapular region and myofascial syndrome of the thoracic spine.

3. On July 13, 2015, the claimant returned to Work Partners and was seen by Mr. Meyer. At that time, the claimant reported continued pain in her thoracic spine. Mr. Meyer noted that he did not find any pathology on exam that would "warrant further diagnostic or specialist attention." He referred the claimant for deep tissue massage and use of a TENS unit. Mr. Meyer opined that at the conclusion of the claimant's recommended treatments she would reach maximum medical improvement (MMI) "for her bumps and bruises injury."

4. On September 15, 2015, the claimant returned to Work Partners and was seen by Dr. Robert Boyer. Dr. Boyer noted that the claimant had improved range of motion in her left shoulder. On that date, Dr. Boyer recommended the claimant undergo six sessions of acupuncture.

¹ The maintenance medical treatment at issue at this time relates to treatment of the claimant's thoracic spine and the claimant's left shoulder.

² The claimant suffered a different injury at work on July 25, 2015 (WC Number 5-019-121). That July 25, 2015 injury and related medical treatment were not at issue at the January 23, 2019 hearing and are not addressed in this order.

5. On November 3, 2015, the claimant was again seen by Dr. Boyer. At that time, Dr. Boyer noted that pain in the claimant's thoracic spine was "resolved and minimal". On that same date, Dr. Boyer opined that the claimant was nearing MMI.

6. On November 16, 2015, Mr. Meyer and Dr. Gustafson placed the claimant at MMI and made recommendations regarding maintenance medical treatment. Those recommendations included a six-month gym membership, complete the previously recommended acupuncture treatments, use of a TENS unit, and follow up treatment with Work Partners, as needed, for up to four months.

7. The respondent has admitted for the claimant's June 14, 2015 work injury. On June 12, 2017, the respondent filed a Final Admission of Liability (FAL) with regard to this claim. In the FAL the respondent admitted for reasonable, necessary, and related post-MMI medical treatment "per Dr. Gustafson's 11/16/15 report."

8. In December 2017 a magnetic resonance image (MRI) of the claimant's left shoulder³ showed a small joint effusion with a subchondral cyst in the inferior glenoid; some cartilaginous irregularity in the anterior humeral head from a reverse Bankart lesion; a small amount of bursitis in the subacromial subdeltoid bursa; and mild degenerative joint disease at the AC joint. The rotator cuff was found to be intact without tearing or tendinopathy.

9. On March 30, 2018, the claimant was seen at Work Partners by Erica Herrera, PA. At that time, Ms. Herrera noted that the claimant had recently sought treatment at the emergency room because of increased pain in her left shoulder. Ms. Herrera further noted that the claimant's shoulder issues came on "without any report of acute injury and it started 2 weeks ago when she was washing dishes."

10. On April 11, 2018, the claimant returned to Work Partners and was seen by Ms. Herrera. With regard to the claimant's left shoulder Ms. Herrera noted that following her injury the claimant initially reported pain in her posterior left shoulder girdle and thoracic spine. Ms. Herrera also noted that the claimant's left shoulder active range of motion was documented as normal at all of her visits. Ms. Herrera found it "somewhat odd that if [the claimant] sustained a shoulder injury and furthermore a posterior dislocation, the [active range of motion] of the shoulder joint would have been hindered".

11. On June 13, 2018, the claimant attended an independent medical examination (IME) with Dr. Tashof Bernton. In connection with the IME, Dr. Bernton reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Bernton opined that the claimant suffered a thoracic strain at the time of the June 14, 2015 work injury. Dr.

³ The medical records entered into evidence do not specifically include the MRI report. However, a summary of the MRI findings is included in the Work Partners report dated April 11, 2018 and in Dr. Bernton's IME report.

Bernton agreed with Mr. Meyer and Dr. Gustafson that the claimant reached MMI for the June 14, 2015 injury on November 16, 2015.

12. Dr. Bernton also opined that the claimant's current symptoms are not related to or due to or caused by her work injury. Dr. Bernton specifically opined that the claimant did not injure her left shoulder in the June 14, 2015 injury. In support of this opinion, Dr. Bernton noted that the claimant had normal range of motion following the injury, which is substantially different from Dr. Bernton's examination findings. In addition, Dr. Bernton noted that the left shoulder MRI showed a Bankart lesion in the *anterior* aspect of the shoulder, yet the mechanism of the June 14, 2015 work injury would not cause an anterior shoulder dislocation.

13. With regard to post-MMI medical treatment Dr. Bernton opined that no further treatment is necessary to treat the claimant's thoracic spine. Likewise, Dr. Bernton opined that there is no medical treatment necessary to treat the claimant's left shoulder as it is not related to the claimant's work injury. Dr. Bernton's testimony at hearing was consistent with his written report.

14. In his testimony Dr. Bernton reiterated his opinion that the claimant did not suffer an injury to her left shoulder on July 14, 2015. He further testified that the imaging of the claimant's left shoulder indicates an *anterior* dislocation, whereas the claimant's mechanism of injury could only cause a *posterior* dislocation. Dr. Bernton also testified that the claimant did not suffer a shoulder dislocation on June 14, 2015.

15. The claimant provided extensive testimony regarding her activities before and after the June 14, 2015 work injury. Specifically, the claimant testified that since the June 14, 2015 work injury she has experienced limited function in her all of her activities. The claimant also testified that she worked in the construction industry for 17 years and was a gymnast for 40 years.

16. The ALJ credits the medical records and the opinions of Dr. Bernton and finds that the respondent has demonstrated that it is more likely than not that the claimant did not suffer a left shoulder injury on June 14, 2015.

17. The ALJ credits the medical records and the opinions of Dr. Bernton and finds that the respondent has demonstrated that it is more likely than not that there is no further medical treatment necessary to maintain the claimant at MMI related to the June 14, 2015 work injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (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.

2. Typically, a claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. However, in this case the respondent issued an FAL for claimant's June 14, 2015 work injury admitting for post-MMI medical treatment. Section 8-43-201 C.R.S. provides, in part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification". Therefore, in this case the burden shifts to the respondent to prove by a preponderance of the evidence that the claimant no longer needs post-MMI medical treatment.

3. 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, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

4. 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 (2010).

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

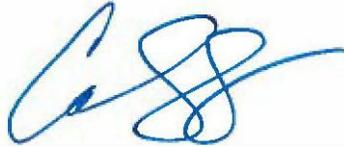
6. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra*.

7. As found, the respondent had demonstrated, by a preponderance of the evidence, that there is no further medical treatment necessary to maintain the claimant at MMI related to her June 14, 2015 work injury. As found, the medical records and the opinions of Dr. Bernton are credible and persuasive.

ORDER

It is therefore ordered that respondent may withdraw authorization for maintenance medical treatment related to the June 14, 2015 work injury.

Dated February 21, 2019



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that the C5-6 and C6-7 anterior cervical discectomy and instrument fusion (which was performed on December 18, 2018 by Dr. Basheal Agrawal) constitutes reasonable medical treatment that is necessary to cure and relieve the claimant from the effects of the admitted November 16, 2016 work injury.
- Whether the claimant has demonstrated, by a preponderance of the evidence, that massage therapy and acupuncture recommended by Dr. Lori Fay constitute reasonable medical treatment that is necessary to cure and relieve the claimant from the effects of the admitted November 16, 2016 work injury.

FINDINGS OF FACT

1. The claimant has worked for the employer since October 2014. The claimant is a Special Events Manager. Her job duties include planning and executing fundraising events for the employer. She supervises all aspects of these events and assists her staff with installation of all decorations.

2. On November 16, 2016, the claimant was working at the employer's warehouse when she tripped and fell. The claimant testified that she fell to her hands and knees and in doing so snapped her head back to avoid hitting her face on the ground. The claimant testified that she injured both hands, both wrists, both knees, her neck, low back, and suffered whiplash.

3. Prior to the November 16, 2016 injury, the claimant sought chiropractic treatment. The claimant credibly testified that she was first taken to the chiropractor as a teenager and has included chiropractic care as part of her overall wellness. The claimant also testified that she has sought treatment for general aches and pains, when she has a crick in her neck, or joint stiffness. The claimant also testified that prior to her November 16, 2016 work injury her neck issues would be described as a stiffness that was relieved by chiropractic treatment. The claimant credibly testified that since her work injury she has neck pain that has radiated into her arms, and she could not get relief from chiropractic care.

4. Since the November 16, 2016 injury at work, the claimant's authorized treating provider has been Work Partners. The claimant has treated at Work Partners with Dr. Lori Fay and Erica Herrera, PA. The claimant first treated at Work Partners on November 21, 2016 and was seen by Dr. Fay. At that time, the claimant reported pain in both hands, both wrists, both knees, her low back, and neck. With regard to the

claimant's low back and neck, Dr. Fay opined that the claimant suffered muscle strains of the cervical and lumbar paraspinal muscles.

5. During this claim the claimant has undergone a number of treatment modalities including splinting her wrists, x-rays, a cortisone injection to her left wrist, an electromyography (EMG) study of her left upper extremity, magnetic resonance imaging (MRI) of her cervical spine, use of a TENS unit, consultation and testing with an ENT specialist (Dr. Duane Hartshorn) vestibular therapy, physical therapy, and cervical spine traction.

6. On March 23, 2017, the claimant was seen by Dr. Joel Dean regarding her left hand and wrist symptoms. On that date, Dr. Dean conducted EMG testing of the claimant's left upper extremity. Dr. Dean opined that the claimant had moderate carpal tunnel in her left wrist and myelopathy. With regard to the myelopathy, Dr. Dean noted that it was possibly stemming from the cervical spine.

7. On April 14, 2017, x-rays of the claimant's cervical spine showed degenerative disc disease with degenerative facet disease at the C5-6 and C6-7 levels.

8. On April 14, 2017, Ms. Herrera indicated that the claimant may have suffered a "whiplash type injury" to her cervical spine when she fell on November 16, 2016. Ms. Herrera recommended the claimant undergo a cervical spine MRI.

9. On May 5, 2017, Dr. Fay opined that the claimant's balance and dizziness could be caused by vestibular dysfunction.

10. On May 25, 2017, Dr. Fay noted that x-rays of the claimant's cervical spine and Dr. Fay's clinical findings on exam suggested radiculopathy/myelopathy. Dr. Fay also recommended a cervical spine MRI.

11. On April 30, 2018, an MRI of the claimant's cervical spine showed severe disco osteophytic bulges at the C5-6 and C6-7 levels with moderate to severe central canal stenosis at the left C6-7, and moderate bilateral foraminal stenosis.

12. Subsequently, Dr. Fay referred the claimant to Dr. Basheal Agrawal for surgical consultation. The claimant was first seen by Dr. Agrawal on June 21, 2018. At that time, the claimant reported neck and arm pain with worsening balance. Dr. Agrawal diagnosed cervical disc disorder. He also noted that the claimant presented with signs and symptoms of cervical stenosis with myelopathy. Dr. Agrawal noted that he was unsure of the etiology of the claimant's symptoms, but noted that the claimant has had her symptoms since her fall in November 2016. Dr. Agrawal recommended the claimant undergo a C5-6 and C6-7 anterior cervical discectomy and instrument fusion.

13. On June 26, 2018, the insurer sent a letter to Dr. Fay asking her to respond to a number of questions related to Dr. Fay's treatment of the claimant. Accompanying that letter were records from the claimant's chiropractic treatment dates of August 15, 2013 through November 17, 2016.

14. On July 25, 2018, Dr. Fay authored her response to the insurer's questions. With regard to the claimant's prior medical history, Dr. Fay noted that initially the claimant indicated "none" for prior medical history. Dr. Fay also noted that beginning on May 11, 2018, the claimant noted that she had a prior history of back pain, but that her current symptoms were "more constant and severe". In regard to the insurer's question regarding Dr. Fay's diagnosis of a whiplash type injury, Dr. Fay noted her opinion that the claimant suffered a strain of the cervical spine. Prior to providing any comment related to the claimant's "extensive history of chiropractic visits" Dr. Fay indicated that she wanted to discuss this treatment history with the claimant.

15. At the request of the respondents, the claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak on July 25, 2018. In connection with the IME, Dr. Lesnak reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report Dr. Lesnak opined that the claimant's current symptoms are not related to the November 16, 2016 work incident. Dr. Lesnak noted that the claimant's various medical providers for the November 16, 2016 injury were not provided with information regarding the claimant's long term chiropractic treatment. Dr. Lesnak also opined that the claimant did not suffer a whiplash injury on November 16, 2016. In support of his opinion, Dr. Lesnak pointed to the claimant's mechanism of injury and her long term complaints of similar chronic symptoms. Dr. Lesnak's testimony at hearing was consistent with his written report. Based upon Dr. Lesnak's opinions, the respondents denied authorization for the recommended cervical surgery.

16. On August 23, 2018, the claimant was seen by Dr. Fay and reported continued pain in her neck and low back. In the medical record of that date, Dr. Fay addressed the claimant's history of chiropractic treatment. Dr. Fay noted that although the claimant has a history of prior neck pain, Dr. Fay was unable to find evidence of prior symptoms of myelopathy. Similarly, Dr. Fay noted that she did not see prior reports of dizziness. Also in that August 23, 2018 record, Dr. Fay opined that the claimant's myelopathic symptoms (including dizziness and right sided radiculopathy) are the result of the November 2016 work injury. Dr. Fay opined that the claimant's preexisting cervical spine and low back pain were aggravated by the work injury. Finally, Dr. Fay opined that the surgery recommended by Dr. Agrawal should be approved as part of the claimant's workers' compensation treatment because the surgery addresses the claimant's myelopathic and radicular symptoms.

17. Thereafter, the claimant continued to treat with Dr. Fay. In each medical record, Dr. Fay has continued to opine that the claimant's symptoms of cervical radicular symptoms and cervical spine stenosis with myelopathy and related dizziness are related to the claimant's November 16, 2016 work injury. Based upon that opinion,

on October 30, 2018, Dr. Fay recommended the claimant undergo six treatments of acupuncture and four sessions of massage therapy for her neck.

18. The respondents asked Dr. Albert Hattem to review the claimant's medical records and opine regarding the recommended acupuncture and massage therapy treatment. On November 7, 2018, Dr. Hattem issued his opinion that any treatment of the claimant's cervical spine would not be related to the work injury, including any massage or acupuncture treatment. In support of his opinion, Dr. Hattem noted that Dr. Lesnak opined that the claimant's cervical spine complaints are not related to the November 16, 2016 work injury. Dr. Hattem agreed with that assessment. Based upon Dr. Hattem's report, the respondents denied authorization for acupuncture and massage therapy.

19. On December 18, 2018, Dr. Agrawal performed the recommended cervical discectomy and instrument fusion, despite respondents' denial of authorization. The surgery was paid for by the claimant's private insurance, Rocky Mountain Health Plans. In addition, the claimant paid a deductible related to the surgery.

20. The claimant testified that since the surgery she has had less pain and feels better. Specifically, the claimant noted that the radiating pain into her arms is almost gone. At the time of her testimony, the claimant was not yet sure if the surgery has reduced her feelings of imbalance and dizziness.

21. The ALJ credits the claimant's testimony, the medical records, and the opinions of Dr. Fay over the contrary opinions of Drs. Lesnak and Hattem and finds that the claimant has demonstrated that it is more likely than not that the claimant suffered an injury to her cervical spine at the time of the November 16, 2016 work injury. The claimant has also demonstrated that it is more likely than not that treatment of her cervical spine constitutes reasonable medical treatment necessary to cure and relieve her from the effects of the work injury.

22. Specifically, the claimant has demonstrated that the December 18, 2018 surgery performed by Dr. Agrawal is reasonable medical treatment necessary to cure and relieve her from the effects of the work injury. The claimant has also demonstrated that the recommended acupuncture and massage therapy is reasonable medical treatment necessary to cure and relieve her from the effects 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 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page*

v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. 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 (2016).

3. 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).

4. As found, the claimant has demonstrated by a preponderance of the evidence that she suffered an injury to her cervical spine at the time of the November 16, 2016 work injury. As found, the claimant's testimony, the medical records, and the opinions of Dr. Fay are credible and persuasive.

5. As found, the claimant has demonstrated by a preponderance of the evidence that the December 18, 2018 surgery performed by Dr. Agrawal is reasonable medical treatment necessary to cure and relieve her from the effects of the work injury. As found, the claimant's testimony, the medical records, and the opinions of Dr. Fay are credible and persuasive.

6. As found, the claimant has demonstrated by a preponderance of the evidence that the recommended acupuncture and massage therapy is reasonable medical treatment necessary to cure and relieve her from the effects of the work injury. As found, the claimant's testimony, the medical records, and the opinions of Dr. Fay are credible and persuasive.

ORDER

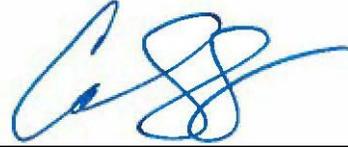
It is therefore ordered:

1. The respondents shall pay for the C5-6 and C6-7 anterior cervical discectomy and instrument fusion that was performed by Dr. Basheal Agrawal on December 18, 2018, subject to the Colorado Medical Fee Schedule.

2. The respondents shall pay for massage therapy and acupuncture recommended by Dr. Lori Fay, subject to the Colorado Medical Fee Schedule.

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

Dated February 25, 2019



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-075-667-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 29, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 1/29/19, Courtroom 3, beginning at 8:30 AM, and ending at 11:45 AM).

Claimant's Exhibits 1 through 8 were admitted into evidence, without objection. Respondents' Exhibits A through P were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on February 7, 2019. On February 8, 2019, Respondents indicated no objection to the proposed decision. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern; compensability of an April 21, 2018 low back injury; medical benefits; average weekly wage (AWW); and, temporary partial disability (TPD) benefits.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The parties stipulated, and the ALJ finds that the treatment Claimant received at St. Joseph's Hospital (Respondents' Exhibit K) and with Charles Wenzel, D.O. at Colorado Occupational Medicine Physicians (COMP) and their referrals are authorized, reasonably necessary and causally related. The parties further stipulated, and the ALJ finds, that the authorized treating physician (ATP) placed the Claimant at maximum medical improvement (MMI) on August 1, 2018.

2. The Claimant has worked for the Employer as a Material Specialist since 2010. In this position, he operates a reach truck – a standing operating forklift – to pick and store parts for the Employer.

3. The Claimant suffered a non-occupational motor vehicle accident (MVA) to his lower back on June 7, 2017. Claimant treated for this injury from June 16, 2017 through December 13, 2017.

4. On January 2, 2018, Physician's Assistant (PAC) Diana N. Kelling with Arbor Family Medicine saw the Claimant for an upper respiratory infection. Of note, PAC Kelling documented that back pain was not present.

5. On February 5, 2018, the Claimant returned to Arbor Family Medicine for a health maintenance exam and physical. PAC Sara E. Galio documented that back pain was absent, and that spine had normal movements without pain and normal strength and tone.

The Claimant's Job

6. The Material Specialist position requires the Claimant to assure that he is picking or storing the correct item by stepping off the reach truck with a scanner to ensure that the part number on the scanner matches the identification number on the item.

7. The step down on the truck is about 9 inches to 9.75 inches to the ground depending upon the model.

8. It is undisputed that the Employer has a policy directing employees to exit

the reach truck utilizing “three points of contact” meaning that three of the worker’s four extremities must be touching either the truck or the ground or both. As a result of this reasonable safety policy, the Claimant must exit the truck backwards as demonstrated in Respondents’ Exhibit P.

The Injury

9. On April 21, 2018, the Claimant was working as a Material Specialist and he exited his truck at 8:33 AM. The Claimant credibly testified that as he descended the reach truck his head and torso were twisted to the left. When the Claimant stepped down on his left foot he felt an immediate onset of low back pain.

10. According to the Employee Incident Report, the Claimant reported the incident immediately afterwards at 8:35 AM. His incident report is consistent with his testimony concerning the mechanism of injury. The Claimant also disclosed the earlier motor vehicle accident and noted that he had been cleared and pain free since November 2017.

Medical

11. The Claimant initially treated with SCL Health, St. Joseph Hospital. He was removed from work until April 25, 2018. Charles Wenzel, D.O., attended the Claimant and imposed 20-lbs. lifting restrictions. These restrictions eventually were increased on April 30, 2018 to no lifting over 10 lbs., and eventually included restrictions on the amount of hours per shift the Claimant could work.

Job Description

12. According to the Claimant, his regular employment with the Employer involves ten-hour shifts and lifting up to 50 lbs. The ALJ finds this job description undisputed and credible.

Average Weekly Wage (AWW)

13. The Claimant earns \$18.38 an hour and also earns occasional overtime, and performance bonuses quarterly. Considering his testimony as well as the payroll records, the ALJ finds and concludes that a fair AWW is \$735.20.

Temporary Partial Disability (TPD)

14. Based upon the payroll records (Claimant’s Exhibit 7), the Claimant is entitled to aggregate TPD benefits of \$1,244.94 from April 23, 2018 to July 29, 2018 as follows

Start	End	Earnable	Earned	Wage Loss	TPD Due
4/30/18	5/6/18	\$735.20	\$384.14	\$351.06	\$234.04
5/7/18	5/13/18	\$735.20	\$385.98	\$349.22	\$232.81
5/14/18	5/20/18	\$735.20	\$404.36	\$330.84	\$220.56
5/21/18	5/27/18	\$735.20	\$385.98	\$349.22	\$232.81
5/28/18	6/3/18	\$735.20	\$652.49	\$82.71	\$55.14
6/4/18	6/10/18	\$735.20	\$551.40	\$183.80	\$122.53
6/18/18	6/24/18	\$735.20	\$661.68	\$73.52	\$49.01
7/23/18	7/29/18	\$735.20	\$588.16	\$147.04	\$98.03
					\$1,244.94

Lawrence Lesnak, D.O., Respondents' Independent Medical Examiner (IME)

15. Dr Lesnak evaluated the Claimant on September 25, 2018 and produced a report (Respondents' Exhibit E). Dr. Lesnak stated the opinion that Claimant's current condition is related to his prior MVA. Dr. Lesnak stated, "The mere act of stepping backward off a platform from approximately 1 ½ feet high is not an activity that would be sufficient enough to cause a low back strain of aggravate pre-existing pathology. Unfortunately, the patient had ongoing occasional low back pains even after +6 months of treatment that included more than 43 chiropractic treatment sessions, physical therapy treatments, and massage therapy treatments, and a right-sided L3-L4 facet joint injection performed on 10.02/2017. Even when he was discharged from the motor vehicle collision, the patient continued to have ongoing occasional low back pains; and Dr. Higgins, his then treating chiropractor, noted that he most likely would have aggravation of these symptoms in the future that would require treatment. (Respondents' Exhibit E). The ALJ finds that the causality opinion of Dr. Lesniak lacks credibility, primarily for lack of a persuasive underlying rationale or explanation for the alleged "inadequacy" of the mechanism of injury.

Sander Orent, M.D.

16. Dr. Orent evaluated the Claimant on November 29, 2018 and produced a report (Claimant's Exhibit 5). Dr. Orent was of the opinion that the Claimant did, in fact, sustain an acute event leading to a low back strain as a result of the April 21, 2018 incident. Dr. Orent stated the following opinion: "This patient actually had a twisting injury of the spine and was attempting to fulfill a new training requirement of 3 points of contact on the machine as he stepped off it. This was a jarring event that occurred to his spine and caused immediate pain such that he required an emergency department visit. The concept that this mechanism was not adequate to cause the pain is obviously inaccurate not just mechanistically, but the fact

is the patient went to the emergency room after this acute event which caused the immediate onset of his back pain.”

Assessment of the Evidence

17. The medical records reflect that the Claimant had two medical appointments between December 2017 up until the time before this incident at work. In both appointments, there was never a mention of back pain in those medical records. The ALJ finds this is consistent with the Claimant's testimony that he was released after the MVA, a serious accident, and the Claimant returned back to work full steam with no problems.

Ultimate Findings

18. Respondents' theory is that the Claimant had an underlying condition that was ready to surface as soon as the facet injection wore off is not credible considering the totality of the facts. The Claimant had basically recovered substantially from the effects of the MVA by the day before the incident.

19. Following the incident of April 21, 2018, the Claimant reported feeling pain immediately. He was taken to the emergency room (ER). Thereafter the Claimant was restricted to 10 lbs. no lifting for months, which he was not before. Dr. Lesnak's opinion that the April 21, 2018 incident was coincidental, and that the Claimant's back pain resulted suddenly because the effects of the facet injection wore off and the Claimant's preexisting back condition surfaced "with a vengeance" is un-persuasive and lacks credibility.

20. Dr. Orent's opinions are credible, persuasive and supported by the Claimant's testimony and the previous lack of back complaints before the incident even after the Claimant returned to work in November 2017.

21. Between conflicting testimonies and opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Orent concerning causality, and to reject opinions to the contrary, including the opinion of Dr. Lesnak.

22. The Claimant has demonstrated that it is more probably true than not that he sustained a compensable injury to his low back on April 21, 2018, with the combination of his stepping down nine-and-a-half inches in a twisting motion. The Employer directed the Claimant to exit the reach truck using three points of contact and this means that the Claimant is turning, doing something a little bit unusual and he is twisting. For this reason, the ALJ finds that this incident does not involve a ubiquitous condition (as argued by the Respondents). The Claimant's testimony was credible, persuasive and supported by Dr. Orent's opinions.

23. All of the Claimant's medical care the treatment that the Claimant received at St. Joseph's Hospital (Respondents' Exhibit K) and with Charles Wenzel, D.O. at Colorado Occupational Medicine Physicians (COMP) and their referrals are authorized, reasonably necessary and causally related.

24. The Claimant's authorized treating physician (ATP) placed the Claimant at maximum medical improvement (MMI) on August 1, 2018.

25. The Claimant's AWW is \$735.20.

26. The Claimant is entitled to TPD benefits (2/3 of his temporary wage loss) as follows:

Start	End	Earnable	Earned	Wage Loss	TPD Due
4/30/18	5/6/18	\$735.20	\$384.14	\$351.06	\$234.04
5/7/18	5/13/18	\$735.20	\$385.98	\$349.22	\$232.81
5/14/18	5/20/18	\$735.20	\$404.36	\$330.84	\$220.56
5/21/18	5/27/18	\$735.20	\$385.98	\$349.22	\$232.81
5/28/18	6/3/18	\$735.20	\$652.49	\$82.71	\$55.14
6/4/18	6/10/18	\$735.20	\$551.40	\$183.80	\$122.53
6/18/18	6/24/18	\$735.20	\$661.68	\$73.52	\$49.01
7/23/18	7/29/18	\$735.20	\$588.16	\$147.04	\$98.03
					\$1,244.94

27. The Claimant has proven compensability, entitlement to medical benefits, AWW, and entitlement to TPD benefits as herein above specified by preponderant evidence.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183

(Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office*, 297 P.3d 964, 2012 COA 85. 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); also see *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). 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). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. See § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). As found, following the incident of April 21, 2018, the Claimant reported feeling pain immediately. He was taken to the emergency room (ER). Thereafter the Claimant was restricted to 10 lbs. no lifting for months, which he was not before. Dr. Lesnak's opinion that the April 21, 2018 incident was coincidental, and that the Claimant's back pain resulted suddenly because the effects of the facet injection wore off and the Claimant's preexisting back condition surfaced "with a vengeance" is unpersuasive and lacks credibility. As further found, Dr. Orent's opinions are credible, persuasive and supported by the Claimant's testimony and the previous lack of back complaints before the incident even after the Claimant returned to work in November 2017. The Claimant's testimony was credible, persuasive and supported by Dr. Orent's opinions.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005). Also see *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). 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). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett*, 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies and opinions, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Orent concerning causality, and to reject opinions to the contrary, including the opinion of Dr. Lesnak.

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office*, 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of" employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." See *City of Brighton v. Rodriguez*, 318 P.3d 496, **2014 CO 7** (presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment.) Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. See *Faulkner v. Indus. Claim Appeals Office*, 24 P.3d 844 (Colo. App. 2000); *Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office*, 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained a compensable injury on April 21, 2018, arising out of the course and scope of his employment.

d. Employment risks are distinguished from entirely personal risks (which do not "arise out of" employment), for instance, a preexisting idiopathic illness or medical condition that is completely unrelated to employment, such as fainting spells, heart disease, or epilepsy. See, e.g., *Irwin v. Indus. Comm'n*, 695 P.2d 763 (Colo. App. 1985); *Gates Rubber Co. v. Indus. Comm'n*, 705 P.2d 6 (Colo. App. 1985). Such "personal risks" also include an assault at work arising solely from an employee's private, not professional, life. See, e.g., *Velasquez v. Indus. Comm'n*, 41 Colo. App. 201, 581 P.2d 748 (1978). As found, the ALJ rejected Respondents' argument that stepping down from the Reach machine was a ubiquitous condition. Indeed, it was a specific risk of employment.

Medical

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). As found, Claimant’s medical treatment is causally related to the compensable low back injury of April 21, 2018.. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt*, 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). As found, the Claimant’s medical care and treatment was and is reasonably necessary. to cure and relieve the effects of his compensable low back injury, specifically, care and treatment received at St. Joseph’s Hospital (Respondents’ Exhibit K) and with Charles Wenzel, D.O. at Colorado Occupational Medicine Physicians (COMP) and their referrals are authorized, reasonably necessary and causally related.

Average Weekly Wage (AWW)

f. An AWW calculation is designed to compensate for **total or partial** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office*, 18 P. 3d 867 (Colo. App. 2001). See § 8-42-102, C.R.S. As found, the Claimant’s AWW is \$735.20, the baseline for calculating temporary wage loss.

Temporary Partial Disability

g. As found, Claimant partially lost wages from the Employer as follows:

Start	End	Earnable	Earned	Wage Loss	TPD Due
4/30/18	5/6/18	\$735.20	\$384.14	\$351.06	\$234.04
5/7/18	5/13/18	\$735.20	\$385.98	\$349.22	\$232.81
5/14/18	5/20/18	\$735.20	\$404.36	\$330.84	\$220.56
5/21/18	5/27/18	\$735.20	\$385.98	\$349.22	\$232.81
5/28/18	6/3/18	\$735.20	\$652.49	\$82.71	\$55.14
6/4/18	6/10/18	\$735.20	\$551.40	\$183.80	\$122.53
6/18/18	6/24/18	\$735.20	\$661.68	\$73.52	\$49.01
7/23/18	7/29/18	\$735.20	\$588.16	\$147.04	\$98.03
					\$1,244.94

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. See *City of Boulder v. Streeb*, 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office*, 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). 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 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. Also see *Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001). “Preponderance” means “the existence of a contested fact is more probable than its nonexistence.” *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on compensability, medical benefits, AWW, TPD, and lack of an ubiquitous syncopal event.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of all authorized, causally relate and reasonably necessary medical care and treatment for the Claimant’s low back injury of April 21, 2018, including care and treatment received at St. Joseph’s Hospital (Respondents’ Exhibit K) and with Charles Wenzel, D.O. at Colorado Occupational Medicine Physicians (COMP) and their referrals which are authorized, reasonably necessary and causally related, subject to the Division of Workers’ Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant aggregate temporary partial disability benefits in the amount of \$1,244.94, which is payable retroactively and forthwith.

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

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

DATED this 25th day of February 2019.

A rectangular box containing a digital signature. The text "DIGITAL SIGNATURE" is printed in the top left corner of the box. The signature itself is a cursive script that appears to read "Edwin L. Felter, Jr." followed by a stylized flourish.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 S. Circle Drive, Suite 810, Colorado Springs, CO 80906	<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
In the Matter of the Workers' Compensation Claim of: Claimant, _____, v. Employer, and _____, Insurer, Respondents.	
CASE NUMBER: WC 5-050-678-001	
SUPPLEMENTAL ORDER FOLLOWING RESPONDENTS' MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE TO REOPEN THE RECORD FOR NEWLY DISCOVERED OUTCOME DETERMINATIVE EVIDENCE	

The above captioned matter is before Administrative Law Judge (ALJ) Richard M. Lamphere on **RESPONDENTS' MOTION FOR RECONSIDERATION OF AN ORDER OR IN THE ALTERNATIVE, MOTION TO REOPEN THE RECORD FOR NEWLY DISCOVERED OUTCOME DETERMINATIVE EVIDENCE**, Claimant's response filed thereto and Respondents' **PETITION TO REVIEW** filed December 12, 2018. The ALJ is fully advised in the premises of Respondents' motion and the particular errors raised by Respondents in the Petition to Review having reviewed the recitation of relevant facts contained in his November 21, 2018 Order and a Prehearing Conference Order issued by Prehearing Administrative Law Judge (PALJ) Michael J. Barbo issued January 2, 2019. This Supplemental Order supplants the Findings of Fact, Conclusions of Law and Order issued by the undersigned ALJ on November 21, 2018.

PROCEDURAL HISTORY

Hearing in the above captioned matter was held on October 4, 2018, before Administrative Law Judge (ALJ), Richard M. Lamphere. The ALJ digitally recorded the proceeding in the Courtroom of the Office of Administrative Courts located on the campus of the Colorado Mental Health Institute Pueblo (CMHIP), in Pueblo, Colorado between the hours of 12:45 and 1:00 p.m.

Claimant was not present at hearing, but her interests were represented by _____, Esq. Respondents were represented by _____, Esq. At the commencement of the hearing, the parties agreed to submit the matter to the ALJ for an order on exhibits and written position statements. The ALJ admitted the following

exhibits into the evidentiary record: Claimant's Hearing Exhibits 1-7 and Respondent's Hearing Exhibits A-B.

The ALJ held the record open through October 19, 2018 to allow counsel time to submit their written argument. Respondent's subsequently filed an unopposed motion to extend the position statement deadline to October 24, 2018. The motion to extend the filing deadline for position statements was granted and the parties position statements were timely received via electronic transmission on October 24, 2018, prompting the ALJ to issue his Order on November 21, 2018.

On December 10, 2018, a prehearing conference was held before PALJ Michael J. Barbo on Claimant's motion to stay the Division Independent Medical Examination (DIME) process. Claimant's request for a prehearing conference followed Respondents' filing of a final admission of liability (FAL) on October 23, 2018, based upon a report issued by Claimant's authorized treating physician (ATP), Dr. Michael Dallenbach on October 2, 2018, placing Claimant at maximum medical improvement (MMI) on August 7, 2018. At the prehearing conference, the parties were afforded the option of submitting position statements prior to the entry of PALJ Barbo's order. Given the holidays, the deadline for the filing of position statements was set for December 28, 2018. As part of the position statements, PALJ Barbo was made aware that Dr. Dallenbach had issued the aforementioned October 2, 2018, placing Claimant at MMI as of August 7, 2018 with impairment. Neither, Claimant nor Respondents were aware of the existence of this report prior to proceeding to hearing on October 4, 2018. PALJ Barbo also received a report from Dr. Dallenbach dated December 20, 2018, noting that he reviewed the November 21, 2018 Order of the ALJ, noting further that if he had known that responsibility for payment of a right total hip arthroplasty was going to fall to Respondents, he would not have placed Claimant at MMI.

On December 12, 2018, Respondents filed a Petition to Review the November 21, 2018 Order contending that it is "not supported by the facts or the applicable law. . . because, unbeknownst to the parties, the claimant had been declared at MMI on August 7, 2018 for her knee injury". Because Claimant was post MMI before the hearing, which only addressed her request for pre-MMI surgery, Respondents also contend that the November 21, 2018 order is contrary to law. Along with their Petition to Review, Respondents filed a motion for reconsideration or in the alternative, a motion to reopen the record for newly discovered outcome determinative evidence. The ALJ convened a status conference with the parties on December 19, 2018 in light of Respondents' filings. The ALJ requested the reports which were presented to PALJ Barbo as part of their December 28, 2018 position statements following the December 10, 2018 prehearing conference. On December 21, 2018, the ALJ received the requested materials along with Claimant's response to Respondents' motions for reconsideration and reopening the record for newly discovered outcome determinative evidence.

On January 2, 2019, PALJ Barbo issued his order following review of the parties' December 28, 2018 position statements. In his order PALJ Barbo notes:

Pursuant to *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo.App. 2002), if the ATP has made a determination that the claimant is at MMI, the issue cannot be further litigated unless the party disputing the issue obtains a DIME. However, 'Ignacio' also holds that a DIME is not a prerequisite to an ALJ's determination of whether the ATP has actually determined the claimant to be at MMI. *MGM Supply Co v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo.App. 2002), *Loyda v. Greg Farthing DDS*, W.C. 4-467-593 (Jan. 21, 2005). In the view of this PALJ, the absence of a resolution by Dr. Dallenbach regarding whether other medical treatment is reasonable and necessary in this instance to "optimize" the treatment for the claimant's work-related injury, coupled with the statement that she may need a total knee arthroplasty creates an ambiguity as to whether Dr. Dallenbach actually considers the claimant to be at MMI, regardless of his later statement about Judge Lamphere's order.

PALJ Barbo held the DIME process held in abeyance and ordered the parties to return to the Colorado Springs Office of Administrative Courts (OAC) for a determination of "whether Dr. Dallenbach actually placed Claimant at MMI". After careful consideration of Respondents' motion and Petition to Review, the FAL and the additional medical records authored by Dr. Dallenbach, the ALJ concludes that, in addition to the issue surrounding Claimant's entitlement to medical benefits, a question exists as to whether Dr. Dallenbach actually considered Claimant to be at MMI when he opined as such in an August 7, 2018 closing report and again on October 1, 2018 in his report of MMI and impairment. Because the ALJ finds the additional medical records authored by Dr. Dallenbach potentially outcome determinative, it is appropriate to reopen the record for consideration of this evidence and analyze any impact this evidence may have on the additional medical benefits previously ordered by the undersigned on November 21, 2018. Accordingly, the ALJ issues this Supplemental Order pursuant to Section 8-43-301(5), C.R.S. 2013. As noted, this order supplants the November 21, 2018 order.

In this order, _____ will be referred to as "Claimant" and _____, will be referred to as "Respondent- Employer" All others shall be referred to by name. Also in this order, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2016); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-050-678-001**

ISSUES

The issues raised by the evidence presented concerns: 1) Claimant's entitlement to additional medical benefits and; 2) Whether Claimant was actually placed at MMI by Dr. Dallenbach on August 7, 2018 by closing report and reiterated in his October 1, 2018 impairment rating report, thereby depriving the ALJ of jurisdiction to resolve the medical benefits question. The precise question concerning medical benefits is whether Respondent's are liable to provide and pay for a nonindustrial right hip surgery, which Claimant contends is necessary to optimize her treatment for and recovery from her compensable left knee injury.

FINDINGS OF FACT

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

1. Claimant suffered an injury to her left knee on November 18, 2016, when "she was loading 50 lb. mortar into a customer's vehicle. She was on the 3rd bag and turned to the left and heard a pop in her left knee." Liability for the injury was admitted and Claimant was referred for treatment.

2. Claimant was initially seen by Brian Sefcik, DO, on November 19, 2016. [Claimant Exhibit 7, p. 198]. X-rays of the knee were obtained and were interpreted as "showing minimal degenerative changes and preservation of joint spaces."

3. Claimant was referred to physical therapy (PT), which she started on December 20, 2016.

4. During the initial PT visit on December 20, 2016, besides reporting posterolateral knee pain, Claimant reported "pain beginning at anterior left hip/groin in the past 3 weeks" which she believed was related to "walking different due to pain in knee". There were findings of antalgic gait and left knee strain with "suspected involvement of the hamstring muscles".

5. Claimant was seen by Douglas Bradley, MD, at Emergicare on December 23, 2016. There was documentation of the physician records of dull ache to the left hip without associated symptoms. The left hip pain was not addressed at this visit. It was also noted that she was no longer having antalgic gait.

6. Claimant returned to Emergicare in follow-up on January 7, 2017, at which time it was noted she had "intermittent L hip pain as well with a pain intensity of 2/10 in severity."

7. Claimant underwent MRI of the left knee on February 11, 2017. The imaging revealed “mild osteoarthritis of the left knee with chondromalacia patellae type III, lateral patellofemoral spurring, lateral patellar tracking, moderate joint effusion, a “small horizontal tear on the body of the lateral meniscus” and a mild strain versus mucoid degeneration of the ACL. No Tear.”

8. Claimant was seen at Emergicare on February 25, 2017. The record generated from this date of visit is devoid of any mention of complaints regarding her hips specifically. Physical examination revealed edema in the legs bilaterally, left greater than right.

9. Claimant returned to Emergicare on March 18, 2017, with continued complaints of “achy” pain in the left knee and with a new report that her “right knee and hip [were] also starting to feel sore as well”. Claimant’s right hip was “tender” to palpation as were both of her knees. Claimant was referred to Dr. David Walden for an orthopedic evaluation.

10. Claimant presented to the offices of Dr. Walden on April 17, 2017 where she was evaluated by Physician Assistant (PA), Rachel Cerchia. In the history of present illness provided by Claimant it is documented that she reported radiating pain “down the outside lateral portion of her left leg and now her opposite hip is bothering her.” Claimant was assessed with “primary osteoarthritis of left knee.” Claimant’s MRI imaging was reviewed which, according to PA Cerchia, demonstrated osteoarthritic changes in the patellofemoral joint and a meniscal tear. PA Cerchia recommended MRI review with Dr. Walden.

11. Dr. Walden evaluated Claimant on April 25, 2017, after which he recommended arthroscopic surgery of the left knee. Dr. Walden noted: “I talked to her about a possible arthroscopic partial lateral meniscectomy versus repair. She understands that arthritis is not curable by arthroscopy.” It was also noted motion at the right hip was painful and she had a slight antalgic gait.

12. Claimant underwent a partial lateral meniscectomy and chondroplasty of both the patellofemoral joint and medial femoral condyle with Dr. Walden on June 28, 2017. She was referred to post-surgical PT.

13. Claimant returned to Emergicare on August 17, 2017, with complaints of constant sharp pain affecting her pain along with an associated “locking” sensation in the hip. An injection of lidocaine mixed with 20 mg of Decadron was administered to the right hip (bursa) and SI joint.

14. Claimant was seen at Emergicare for follow-up on her left knee on September 7, 2017. During this visit, Claimant reported that her knee was not feeling “good” and her condition was otherwise unchanged since her last appointment. She also reported that her “gait [was] still off” along with continued pain to her right hip. Physical

examination revealed an antalgic gait and tenderness over the right hip. Claimant was assessed with, among other diagnoses, sprain of the right hip for which an MRI was ordered.

15. The aforementioned MRI was performed on September 23, 2017. The MRI demonstrated the following right hip findings: Severe right hip degeneration; large hip effusion; marginal osteophytes; maceration of the labrum and bilateral trochanteric bursitis

16. Claimant returned to Dr. Walden's care on October 3, 2017, during which appointment Dr. Walden documented the following: ". . . she reports that her hip is become (sic) significantly worse (no pain prior to injury) and she believes that it is due to her left knee". Dr. Walden noted that Claimant's MRI "showed severe right hip degeneration, cam femoral acetabular impingement and trochanteric bursitis". Dr. Walden also noted that Claimant felt as though an altered gait "exacerbated her right hip". Finally, Dr. Walden stated:

Although her knee is somewhat better, she is still getting some muscular pain around the leg. Hopefully these will improve with independent exercises but it is difficult to know... At this point, I would recommend that the patient utilize independent exercises for stretching and strengthening and over the counter remedies for her left knee. No further orthopedic care is indicated at this point with regard to the left knee. She can be placed at maximum medical improvement after her workup is complete with regard to her additional problems.

17. Based upon the evidence presented, the ALJ finds that Dr. Walden's mention that Claimant could be placed at MMI after workup of her "additional problems" is, more probably than not, a reference to her right hip condition.

18. The claimant was referred from Emergicare to Scott Primack, DO, who saw her on November 10, 2017, for a comprehensive consultation of her left knee pain and right hip discomfort. Upon completion of his workup, Dr. Primack stated:

This is a very complicated case. There are work-related issues and non-work-related issues. First and foremost, from a causality prospective, as I reviewed with Ms. Houston, her right hip OA is not work-related. This is due to the mechanism of injury, the clinical examination, the imaging studies, and the pathophysiology of osteoarthritis of the hip. Therefore, treatment would not be considered work-related. She has been through a hip injection, but this did not give her significant pain control. This would make sense; in that her OA is rather severe. Her final common pathway at right hip

would be a hip replacement. However, as I reviewed with Mr. and Mrs. Houston, this would not be considered work-related.

In reference to the work-related left hip¹ problem, the claimant's options include an impairment rating versus viscosupplementation versus regeneration options such as mesenchymal stem cells or plasma—rich protein. A knee replacement would not be considered work-related given the mechanism of injury and degree of degenerative changes. The patient will weigh out her options for the left knee. . . . Another option would be for her to undergo her non-work-related hip replacement and see what that “does to her left knee”.

19. Claimant was evaluated by Dr. Nakamura on February 23, 2018. X-rays of the right hip showed “advanced degenerative changes of the right hip with bone—on bone arthritis.” After evaluation, Dr. Nakamura recommended a right total hip replacement “at some point” and “noted that she could also have a right hip steroid injection.” He recommended the arthroplasty. At the left knee, he noted that she had degenerative joint disease and some point would need a total knee replacement. He added, “At this time, her hip is much worse than her knee. I recommend she hold off on treatment for her knee symptoms. She is going to have some stem cell therapy done in Denver, and I recommend that she continue with stem cell therapy in Denver.”

20. Dr. Primack authored a letter concerning Claimant's condition on April 30, 2018. In his April 30, 2018 letter, Dr. Primack notes that Claimant suffers from a non-work-related right hip problem secondary to “osteoarthritis”. He went on to state, “As a rehabilitation position, wanting to optimize Ms. Houston's recovery, I would recommend the right hip arthroplasty, gets done first.” He goes on to state, “Once she recovers, we can talk about the care and treatment for her work-related left knee injury. This may include regenerative medicine as option”.

21. Dr. Nakamura issued a similar letter on May 9, 2018, which stated:

It is my medical opinion, that the patient, Erma Houston, date of birth 4-24-1967, should have a right total hip arthroplasty. From a rehabilitation position, we want to optimize Ms. Houston's recovery process. I recommend that she have a right hip arthroplasty procedure first, before addressing the left knee-work-injury issue. The patient's non-work-related right hip osteoarthritis is significant enough to be addressed initially. After patient has recovered from the hip procedure, we can discuss care and treatment for her work-related left knee injury.

¹ The ALJ finds that reference to “left hip” in the note is likely an error and that Dr. Primack probably meant to reference Claimant's “work-related left knee problem.”

22. Respondents requested an independent medical examination (IME) with Dr. Eric Ridings. Dr. Ridings performed his IME on August 27, 2018, and he noted that “[Claimant] complained that her right hip pain is much more severe than her left knee pain and is progressively worsening”. He agreed with Dr. Primack and Dr. Nakamura that Claimant’s right hip pain is due to non-work-related severe end stage osteoarthritis and concurred that the appropriate treatment for that would be a right hip replacement surgery.

23. Dr. Ridings concluded that Claimant’s left knee osteoarthritis was not caused, aggravated or accelerated by her meniscal injury and that the severity of her right hip arthritis is a contributor to the severity of her left knee complaints. Because the right hip arthritis is unrelated to Claimant’s work duties and is, according to Dr. Ridings, a contributor to the severity of the osteoarthritic complaints in the left knee, he concluded that “any and all treatment directed toward the osteoarthritis of the left knee is also, therefore, not work related. Accordingly, Dr. Ridings concluded that any request for additional injection therapy is unrelated to this claim and should be performed outside of the workers’ compensation system.

24. While Dr. Ridings provided a thorough analysis concerning the relatedness of Claimant’s need for additional left knee treatment, to the original injury this case, the ALJ finds that his report does not address the precise medical question presented here. Indeed, Dr. Ridings report is devoid of any analysis concerning whether Claimant should be afforded a right hip arthroplasty on the theory that it is necessary to optimize the treatment of and recovery from her work-related left knee injury. Rather, Respondents argue that because Dr. Ridings opined that the only treatment recommended for the left knee relates to Claimant’s personal degenerative condition, there is no causal connection between her need for the right hip surgery and her admitted left knee injury nor is there a medical basis to address Claimant’s right hip condition before placing her at MMI for her left knee condition. Accordingly, Respondents urge the ALJ to deny the requested right hip arthroplasty.

25. On November 21, 2018, the ALJ rejected the opinions of Dr. Ridings to find that the Claimant was not currently at MMI and remained a candidate for additional treatment designed to cure and relieve her of ongoing injury related pain and dysfunction. Moreover, the evidence presented persuaded the ALJ that Dr. Primack and Dr. Nakamura were of the opinion that the efficacy of this treatment and Claimant’s recovery from her knee injury could not be optimized without first treating Claimant’s right hip condition. Consequently, while Claimant’s right hip arthritic condition is non-work-related in origin, the ALJ was convinced that her right hip condition must be addressed surgically, as ancillary to the work-related injury in this case, in order for her to achieve optimum treatment for and recovery from her compensable left knee injury. Accordingly, the ALJ found Respondents liable for the recommended right hip arthroplasty.

26. As noted above, on December 12, 2018 Respondents' counsel filed their Motion for Reconsideration or Order or in the Alternative, Motion to Reopen the Record for Newly Discovered Outcome Determinative Evidence along with a Petition to Review. The ALJ finds Respondents' motion for inclusion of Dr. Dallenbach's medical reports from August 7, 2018, October 1, 2018 and December 20, 2018 to constitute a request to reopen the record for the submission of additional evidence. After careful consideration of the motion, the ALJ finds it meritorious for the following reasons: First, the ALJ agrees with Respondents that the aforementioned reports constitute relevant evidence, which could not have been produced/presented at the October 4, 2018 and, second, the reports address a material issue in the case, namely whether the ALJ has jurisdiction to resolve the medical benefits issue in question. Accordingly, the ALJ finds the reports have the potential to be "outcome determinative" and hereby grants Respondents' motion to reopen the record in this case. Consequently, the August 7, 2018 "closing report", the October 1, 2018 report of MMI and permanent impairment and the December 20, 2018 report of Dr. Dallenbach are considered evidence.

27. Having admitted the aforementioned records into evidence, the ALJ enters the following supplemental factual findings:

- a. Regardless of Dr. Ridings opinions, the additional records submitted by Respondents as part of their motion for reconsideration support a finding that Dr. Dallenbach placed Claimant at MMI on August 7, 2018. Indeed, the "closing" report attached as part of "Exhibit A" to Respondents' motion provides that Claimant was evaluated on August 7, 2018, at which time Dr. Dallenbach placed her at MMI indicating that a report of permanent partial impairment (PPI) was due on August 21, 2018. Although Dr. Dallenbach noted that the PPI report was due on August 21, 2018, he delayed in preparing the report until October 1, 2018. Based upon the evidence presented at hearing and the statements of counsel at the post hearing status conference, the existence of this report was unknown at the time of the October 4, 2018 hearing. Respondents did not receive Dr. Dallenbach's October 1, 2018 report until October 23, 2018, well after the hearing.
- b. In his October 1, 2018 report, Dr. Dallenbach placed Claimant at MMI noting that his analysis was "based upon the currently available information within a reasonable degree of medical probability" including, the "history given by [Claimant]; the physical findings; the medical records and tests". He also opined that Claimant would need maintenance treatment including a possible left knee arthroplasty as maintenance care "inasmuch as her work-related injury, within a reasonable degree of medical probability led to a significant aggravation of a pre-existing previously asymptomatic condition".
- c. Careful review of Dr. Dallenbach's report of MMI and impairment supports a finding that he had no reservations about placing Claimant at MMI as of August 7, 2018. The suggestion that Dr. Dallenbach simply placed Claimant at MMI because the parties were litigating the relatedness of

Claimant's need for right hip treatment to the left knee injury and because this treatment, including surgery was not being covered by workers' compensation is speculative and unpersuasive. Based upon the report presented, the ALJ finds that Dr. Dallenbach unequivocally placed Claimant at MMI after his August 7, 2018 evaluation without any opinion regarding her need for right hip treatment related to the left knee injury. Indeed, Dr. Dallenbach was without an opinion regarding Claimant's need for right hip treatment related to the left knee injury until December 20, 2018 when the issue was brought to his attention by Claimant. The ALJ interprets Dr. Dallenbach's December 20, 2018 report to indicate had he known that the ALJ was going to find Respondents liable for the recommended right hip surgery, he would not have placed Claimant at MMI as of August 7, 2018. This subsequent opinion fails to convince the ALJ that Dr. Dallenbach did not opine that Claimant was at MMI as of August 7, 2018, as outlined in M164 form and the October 1, 2018 report of MMI and impairment attached collectively to Respondents' motion as Exhibit A.

- d. Although the ALJ rejects Dr. Ridings opinions as unconvincing, the new outcome determinative evidence, i.e. Dr. Dallenbach's August 7, 2018, October 1, 2018 and December 20, 2018 reports, presented post hearing, persuade the ALJ that he actually placed Claimant at MMI prior to the October 4, 2018 hearing. Accordingly, the ALJ finds that, lacking a DIME, he has no jurisdiction to resolve the issue of the relatedness of Claimant's need for additional right hip treatment to her left knee injury. Claimant must avail herself to the DIME process currently being held in abeyance pending the issuance of this order.

CONCLUSIONS OF LAW

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

Respondents' Motion for Submission of Post-Hearing Evidence

A. The ALJ has discretion whether to permit the admission of post-hearing evidence. *IPMC v. Industrial Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988). In deciding whether to receive additional evidence after a party has rested his/her case, the ALJ should consider whether the evidence could have been obtained and presented at the hearing through the exercise of due diligence. *Aspen Skiing Co. v. Peer*, 804 P.2d 166 (Colo. 1991); *Kennedy v. Bailey*, 169 Colo. 43, 453 P.2d 808 (1969). Further, the ALJ should consider whether the evidence involves a material issue and; and whether it has the potential to be outcome determinative. See *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000); *Potomac Insurance Co. v. Industrial Commission*, 744 P.2d 765 (Colo. App. 1987). The ALJ should consider these factors and balance them against the competing interests, i.e. the expense and inconvenience, of the party opposing receipt of the additional evidence so as to guard against the potential for injustice arising from giving finality to an erroneous result. *IPMC v. Industrial Claim*

Appeals Office, supra; Renz v. Larimer County School District Poudre R-1, 924 P.2d 1177 (Colo. App. 1996)(reopening authority is evidence of legislative policy that goal of achieving fair and just result overrides litigants' interests in finality); *Gurule v. Board of Developmentally Disabled*, W.C. No. 3-595-093 (February 9, 1995). In this case, the balance for admission of the additional medical records tips in favor of Respondents as the evidence likely could not have been previously discovered and presented at hearing through the exercise of due diligence since Dr. Dallenbach authored the MMI and impairment rating report giving rise to the existence of the August 7, 2018 MMI report on October 1, 2018, three days prior to hearing. More importantly, the new evidence addresses a material issue in the case, specifically the ALJ's jurisdiction to resolve the issues presented for determination. As such, the ALJ concludes that new evidence is potentially outcome determinative. Consequently, Claimant's interest in finality is outweighed by the injustice, which may result from giving final effect to an erroneous result. For these reasons, the ALJ concludes that Respondents' motion is meritorious and is, therefore GRANTED.

Supplemental Order & Other General Legal Principles

B. Section 8-43-301(5) provides that in ruling on a petition to review, the ALJ may issue a supplemental order limited to the "matters raised in the petition to review, and, as to those matters, . . . may amend or alter the original order or set the matter for further hearing." Here the ALJ concludes that a Supplemental Order is necessary to address Respondents' motions and the assertion that the ALJ erred as a matter of law because the November 21, 2018 Order failed to address the jurisdictional question raised by Dr. Dallenbach's declaration of MMI in this case.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

D. Assessing the weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness'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); *Bodensieck v. Industrial Claim*

Appeals Office, 183 P.3d 684 (Colo. App. 2008). When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Dr. Dallenbach placed Claimant at MMI on August 7, 2018 and deferred the preparation of his impairment rating report to August 21, 2018. Unfortunately, Dr. Dallenbach failed to finalize this report until October 1, 2018, three days prior to hearing in this case.

Claimants' Request for Additional Medical Benefits

E. Given the procedural posture of the claim, the ALJ concludes that he does not have jurisdiction to resolve the question regarding Claimant's entitlement to additional medical benefits. In concluding as much, the ALJ finds the case of *May B. McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (ICAO January 27, 2006) instructive. In *McCormick*, the Panel held that in the absence of a completed DIME, an ALJ lacks jurisdiction to award or deny medical benefits to cure and relieve a claimant's condition after he/she has been placed at MMI. In reaching this conclusion the Panel noted:

Pursuant to § 8-42-107(8)(b)(I), C.R.S. 2005, an authorized treating physician shall make the initial determination concerning the date of MMI. Once an authorized treating physician makes a determination of MMI, the termination of medical care is triggered and the ALJ lacks jurisdiction to conduct a hearing concerning the accuracy of the authorized treating physician's determination until a DIME is conducted. §8-42-107(8)(b)(III), C.R.S. 2005; *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995). The Colorado Supreme Court has noted that the DIME procedure is "the only way for an injured worker to challenge the treating physician's findings -- including MMI, *the availability of post-MMI treatment*, degree of non-scheduled impairments, and whether the impairment was caused by an on-the-job injury...." *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003) (emphasis added).

* * *

Consistent with this principle, we have stated that "once an authorized treating physician places the claimant at MMI, an ALJ lacks jurisdiction to award additional medical benefits for the purposes of curing the industrial injury and assisting the claimant to reach MMI unless the claimant undergoes a DIME." *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (February 14, 2001). See also *Anderson-Capranelli v. Republic Industries, Inc.*, W.C. No. 4-416-649 (November 25, 2002) (following MMI, "In the absence of a DIME the ALJ lacks jurisdiction to adjudicate a request for additional medical benefits to cure the effects of the injury."); *Toledo-Zavala v. Excel Corp.*, W.C. Nos. 4-534-398, 4-534-399 (November 14, 2003) (same); *Cass v. Mesa County Valley School District*, W.C. No. 4-629-629 (August 26, 2005) ("[I]f an ATP places the claimant at MMI, an ALJ lacks jurisdiction to award additional medical benefits to improve the claimant's condition unless a DIME has been conducted on the issue of MMI.").

This result is grounded in the principle that a treating physician's finding of MMI necessarily reflects the physician's determination that no further treatment is reasonably expected to improve any of the *compensable components* of the injury, and the authorized treating physician's opinion on the cause of the claimant's condition is inherent to the physician's determination of MMI. See *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App.1998) We have previously stated that "[d]etermining MMI necessarily requires a physician to ascertain the cause or causes of the claimant's condition in order to decide whether the claimant warrants additional treatment for any work-related problem. Consequently, the issues of whether all work-related conditions are stable and do not require additional treatment are an inherent part of the DIME process...." *Ayala v. Conagra Beef Company*, W.C. No. 4-579-880 (July 22, 2004).

F. Because the current version of the statute in question has not changed and because Dr. Dallenbach is an authorized treating provider (ATP) who effectively placed Claimant at MMI, the principals announced by the Panel in *McCormick* apply to the facts of this case. Consequently, the ALJ concludes that he does not have jurisdiction to resolve questions regarding the relatedness of Claimant need for right hip surgery to her admitted left knee injury or for that matter the need for additional medical treatment to cure and relieve her of any ongoing symptoms related to her left knee injury until completion of the DIME he has requested.

ORDER

It is therefore ordered that:

1. Questions regarding the relatedness of Claimant need for right hip surgery to her left knee injury and in general, her entitlement to additional medical treatment benefits are reserved for future determination after completion of the DIME process currently being held in abeyance as the ALJ does not have jurisdiction to resolve these issues.

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

DATED: February 25, 2019

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that she sustained an injury arising out of and in the course and scope of her employment with the employer on August 1, 2017.
- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that medical treatment she received was reasonable and necessary to cure and relieve her from the effects of the injury.
- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that the medical treatment she received was authorized.
- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits.
- If the claimant proves a compensable injury, what is her average weekly wage (AWW)?
- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that she is entitled to a change of physician.

FINDINGS OF FACT

1. The claimant worked for the employer as a housekeeper. She typically worked full-time and was paid \$12.60 per hour. The claimant's job duties included cleaning hotel rooms and condominiums. This included changing the beds, cleaning bathrooms, vacuuming, and dusting.
2. On August 1, 2017, the claimant was assigned to clean condominiums at The Charter in Beaver Creek, Colorado. The Charter was not the claimant's employer. The claimant testified that while she was walking down a dark stairwell she missed a step and fell. The claimant also testified that she injured her right hip and right ankle in the fall.
3. The claimant testified that she notified a coworker, Valeria, of the fall. Valeria and a supervisor from The Charter, Billy, assisted the claimant with ice and Advil.

4. On that date, the claimant did not notify the employer of the August 1, 2017 fall. In addition, the claimant did not seek medical treatment related to the August 1, 2017 fall. The claimant continued to work her normal hours and complete her normal job duties.

5. The claimant testified that she did not pursue medical treatment related to the August 1, 2017 fall at work because she did not have insurance, was afraid she would lose her job, and was fearful because of her undocumented status.

6. On October 9, 2017, the claimant was seen at Doctors on Call, by Dr. Guy Kovacevich. At that time, the claimant was seeking treatment for pain in her right lower back. The claimant testified that she sought treatment when she did because she believed she was having kidney issues. The claimant also testified that she told Dr. Kovacevich that she fell at work. However, the October 9, 2017 medical report does not address any work related issues or right ankle complaints.

7. The claimant testified that it was due to her discussion with Dr. Kovacevich that she decided to report the August 1, 2017 incident to the employer as a work incident/injury.

8. On October 9, 2017, the claimant notified Crystal Calixto, Office Manager for the employer of the August 1, 2017 incident. Based upon the information provided by the claimant, the employer completed a First Report of Injury or Illness on October 10, 2017.

9. Ms. Calixto testified that the claimant worked from August 1, 2017 to October 9, 2017. During that time the claimant did not request time off from work. During that time, the claimant did not report any pain or limitations.

10. When the claimant reported the incident to the employer, she was provided with a list of designated medical providers. The claimant sought treatment with Colorado Mountain Medical in Avon, Colorado.

11. The claimant first treated with Colorado Mountain Medical on October 10, 2017 and was seen by Lindsey Larson, PA-C. At that time, the claimant described the August 1, 2017 incident at work and that she hurt her back and right ankle. In the medical record of that date, Ms. Larson noted that the claimant was complaining of low back pain that radiated into her right leg. The claimant also told Ms. Larson that "the pain was not 'too bad' but worsened yesterday." Ms. Larson diagnosed a lumbar strain and recommended the claimant undergo physical therapy. With regard to the claimant's right ankle, Ms. Larson opined that the claimant was "most likely on the tail end" of a mild ankle sprain. Ms. Larson placed the claimant on "light duty" with work restrictions of no lifting, carrying, pushing, or pulling over 10 pounds, with no crawling, kneeling, squatting, or climbing. In addition, the claimant was limited to walking and standing four hours per day.

12. The claimant began physical therapy treatment on October 13, 2017 at Joint Worx with Jennifer Martin, PT. On that date, the claimant reported to Ms. Martin that on August 1, 2017 she “fell while working cleaning houses. Has worked consistently since that time, but 5 days ago [symptoms] got worse for no apparent reason”.

13. On October 17, the claimant returned to Colorado Mountain Medical and was seen by Dr. Eric Olson. Dr. Olson noted that the claimant was able to ambulate but had to “hold on to the wall to get around”. On that date, Dr. Olson opined that the claimant’s description of the incident, her level of pain, and her delay in seeking treatment “seemed inconsistent”. Dr. Olson recommended that the claimant only work four days per week and continued the 10 pound work restrictions.

14. On October 18, 2017, the claimant again treated at Colorado Mountain Medical and was seen by Andrea Hutchinson, NP-C. In the medical record of that date, Ms. Hutchinson noted that the physical therapist had given the claimant crutches. With specific focus on the claimant’s low back pain, Ms. Hutchinson noted the claimant’s report that her back pain was “not bad” “maybe one time a week”. The claimant also reported that “the weekend before [the claimant] went Dr. Kovacevich she had been in Denver, she is unsure what activity she may have participated in, but she slept at her brother’s house and the next morning she woke up with severe back pain.” Ms. Hutchinson noted that the claimant seemed to change her story frequently during the exam. Ms. Hutchinson diagnosed low back pain with “unclear etiology” and took the claimant off of all work for two days.

15. On October 20, 2017, the claimant was again seen by Dr. Olson. At that time, Dr. Olson noted that the claimant was reporting radicular low back pain that had developed 10 weeks after the August 1, 2017 fall. Dr. Olson also noted that it was difficult to attribute the claimant’s pain symptoms with an injury that had occurred more than two months prior. Dr. Olson took the claimant off of all work for an additional seven days.

16. On October 26, 2017, the claimant was seen at Colorado Mountain Medical by Ms. Larson. The claimant denied any change to her symptoms. Ms. Larson noted in the medical records that she and Dr. Olson discussed the claimant’s return to light duty. Based upon that, Ms. Larson placed the claimant under a 5 pound work restriction beginning October 26, 2017. In that same medical record, Ms. Larson noted that Dr. Olson was “unsure if this is work related.”

17. On October 27, 2017, the claimant was seen at Joint Worx by Sara Manwiller, PT. Ms. Manwiller noted that the claimant exhibited a “pronounced [right] sideways lean present when sitting” and the claimant was unable to walk without crutches.

18. On November 2, 2017, the claimant returned to Dr. Olson and continued to complain of right low back pain. Dr. Olson ordered a magnetic resonance image (MRI) of the claimant’s lumbar spine. On November 16, 2017, Dr. Olson noted that the

respondents denied authorization of the MRI. On that date, Dr. Olson opined that the claimant may have an underlying psychological component of her pain complaints.

19. At the direction of her attorney the claimant attended an independent medical examination (IME) with Dr. David Yamamoto on July 20, 2018. In connection with the IME, Dr. Yamamoto reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Yamamoto listed a number of diagnoses that included: lumbar strain; possible facet syndrome; a resolved lumbar contusion; bilateral sacroiliac joint dysfunction; right ankle sprain (with ongoing pain); a history of cramping in the right foot and ankle; and anxiety and depression secondary to the August 1, 2017 injury.

20. Dr. Yamamoto opined that, as of the date of the IME, the claimant had not reached maximum medical improvement (MMI). In his IME report, Dr. Yamamoto assigned a permanent impairment rating of 15% whole person related to the claimant's lumbar spine and right ankle. Dr. Yamamoto also recommended that the claimant undergo a "lifting analysis" to determine appropriate work restrictions. With regard to specific medical treatment, Dr. Yamamoto recommended that the claimant undergo MRIs of her lumbar spine and her right ankle and consult with an orthopedic specialist and a foot/ankle specialist.

21. Dr. Yamamoto's testimony at hearing was consistent with his written report. Dr. Yamamoto testified that the claimant had no history of similar symptoms or injuries to her low back and right ankle. He also testified that he believes that the claimant's symptoms are related to the August 1, 2017 fall at work.

22. On cross examination it became apparent that Dr. Yamamoto was not provided with all of the claimant's medical records related to the alleged August 1, 2017 incident in preparation for his IME of the claimant. Dr. Yamamoto was not provided records of the claimant's treatment at Colorado Mountain Medical on October 18, 2017; October 20, 2017; October 26, 2017; and November 2, 2017. As described above, these four records are those in which the claimant's medical providers voiced concerns regarding whether the claimant's symptoms were work related.

23. The claimant testified that she wishes to change her authorized treating provider (ATP) from Colorado Mountain Medical to Dr. Yamamoto. The claimant testified that she would like to change providers to Dr. Yamamoto because she still has pain and believes that she continues to need medical treatment.

24. At the request of the respondents, the claimant attended an IME with Dr. John Raschbacher on November 20, 2018. In connection with the IME, Dr. Raschbacher reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report Dr. Raschbacher opined that the claimant's low back and ankle symptoms are not related to the alleged August 1, 2017 fall at work. In support of his opinion, Dr. Raschbacher noted that there was a delay of two months between the date of the alleged injury and the date of the claimant's first attempt to seek medical treatment. Dr. Raschbacher also points to the

October 13, 2017 physical therapy report in which the claimant stated that the pain began five days prior to that appointment. Dr. Raschbacher also opined that the claimant is able to work without restrictions. Dr. Raschbacher's testimony at hearing was consistent with his written report.

25. Dr. Raschbacher testified that it is not clear to him that the claimant was injured at work on August 1, 2017. Dr. Raschbacher noted in his testimony that there was a two-month delay between the alleged incident and the claimant's first medical treatment. In addition, he noted that there are no subjective findings of the claimant's complaints. Dr. Raschbacher also testified that during the same period of time that the claimant was receiving medical treatment related to the August 1, 2017 incident, she sought medical treatment for other issues and there is no mention in those records of a work injury and/or back and right ankle pain.

26. The ALJ does not find the claimant's testimony to be credible or persuasive. The ALJ notes that the claimant failed to report the alleged incident to the employer for more than two months. She initially sought treatment for what she believed to be related to her kidneys and did not report a work related incident.

27. The claimant's medical providers expressed suspicion of the claimant's report of her injury and pain behaviors inconsistent with her described symptoms. Four specific medical records demonstrate these provider concerns, yet these were not provided to Dr. Yamamoto. in preparation for his IME.

28. The ALJ credits the medical records and the opinion of Dr. Raschbacher over the contrary opinion of Dr. Yamamoto and finds that the claimant has failed to demonstrate that she suffered an injury on August 1, 2017 arising out of the and in the course and scope of her employment with the employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

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

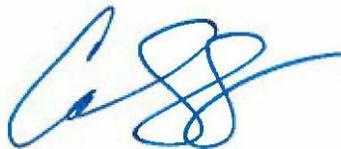
4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability 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*.

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence that she suffered an injury that arose out of and in the course and scope of his employment with the employer. As found, the opinion of Dr. Raschbacher and the medical records are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits is denied and dismissed.

Dated February 27, 2019



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it

within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-062-858-001**

ISSUES

The issues set for determination included:

- (1) Was Claimant an "employee", as that term is defined by 8-40-203(1) at the time he was injured at Respondents' residence on January 22, 2016?
- (2) Are Respondents an "employer", as that term is defined by the Colorado Workers' Compensation Act?
- (3) If Claimant was an employee at the time he was injured, is he entitled to medical benefits to cure and relieve the effects of said injury?

PROCEDURAL STATUS

The Court issued a Summary Order on or about November 14, 2018 (mailed on November 19, 2018). Claimant filed a Request for Full Order on or about November 26, 2018, (received by the undersigned on December 3, 2018) and this Order follows.

STIPULATIONS

The parties stipulated to the following: (a) Claimant was injured on January 22, 2016; (b) Respondents Reinaldo and Marianne Gallegos did not have workers' compensation insurance coverage in place at the time Claimant was injured on January 22, 2016. The Stipulations were accepted by the Court and are made part of this Order.

FINDINGS OF FACT

1. Respondent Reinaldo Gallegos testified he owned commercial and residential properties. He did not employ any individuals to perform maintenance and repair work. Mr. Gallegos did not hire employees to perform work on these properties, including mowing the grass and the like.
2. Mr. Gallegos testified his residence was located at 14970 Clinton Street. He lives at that address, with his wife. Mr. Gallegos performed work there, including managing various properties he owned.
3. Mr. Gallegos testified he hired contractors to perform work on the Clinton Street property.
4. Respondents' tax return for 2016 confirmed they received income from

real estate rentals. Expenses were taken for cleaning and maintenance, as well as repairs on these properties. There were no employee expenses listed on the tax return for the rental properties.¹ Mr. Gallegos used 14970 Clinton Street as the address for the Gallegos Family Properties LLC, of which he was a partner.² There was no evidence Respondents employed other individuals were subject to the provisions of the Colorado Worker's Compensation Act.

5. Claimant testified he met Mr. Gallegos in Lochbuie, Colorado. He had finished mowing the lawn at the house of a friend of his and asked Mr. Gallegos if he needed any yard work done. Approximately a day or two after they met, Mr. Gallegos drove Claimant to the Clinton street house and he cut the grass. Claimant did not recall the exact month this occurred, but thought it was during the summer when grass was growing and there was yard work to be done. Claimant testified he had memory issues and had trouble recalling specific dates.

6. Claimant testified he did various types of jobs at Mr. Gallegos' house, located on Clinton Street. Claimant testified his son would drive him to work and initially this was at 6:00 a.m., then at 9:00 a.m. Claimant said Kimberly Helbok and her son would pick him up at 5:00 or 6:00 p.m., depending on how long the job took and if he need to take time off.³

7. Claimant testified the work he performed at the Clinton Street address included landscaping, plumbing, electrical, insulation, tile work in the basement, repairing the water heater, as well as work on the roof. They leveled the air conditioners on the roof and put down roofing paper. He worked weekdays and would start at 9:00 a.m. Claimant said they would work five days per week. Claimant testified he was paid \$10.00 per hour.

8. Claimant testified Mr. Gallegos hired individuals to work on the Clinton street house, including a man who did framing. There were also individuals who worked on the siding, but were fired because they did not do a good job. Claimant did not know whether these individuals worked for a company.

9. Claimant also worked on other properties owned by Mr. Gallegos, including 1326 Allison St., which he thought was related to an air-conditioning problem. That job took only a few hours. He also worked at 6401 W. 44th Pl., but could not recall what he did at that location. He worked at 5846 Newport St. in Commerce City and dug a 6-foot hole because there was water seeping into the basement. Claimant testified he worked until 8:00 p.m. on that job. He also worked at 6750 and 6771 Lowell Blvd., doing cleaning and plumbing.

¹ Exhibit 3.

² Exhibit 4.

³ Hearing Transcript ("Hrg. Tr.") p.24:16-24.

10. Tax assessor printouts for the various properties owned by Respondents were admitted into evidence.⁴ This included houses located at 1326 Allison St., 6401 W. 44th, 6411 W. 44th, 5846 Newport St., 6796 Laurel Blvd., 6750 Lowell Blvd., 6771 Lowell Blvd. and 14790 Clinton St. This totaled eight properties, including Respondents' Clinton Street residence. The assessor records included handwritten notes by Claimant, describing tasks done at various properties. The ALJ was unable to conclude how long the various projects took for Claimant to complete, however, the ALJ inferred the work did not require forty hours per week.

11. Claimant thought there were other properties where he worked, but did not recall specifically the number of places he worked. Claimant testified he did not recall the dates on which he worked at those properties. Mr. Gallegos would drive him to the various houses and would supervise his work at those properties.

12. Exhibit 8/Exhibit E⁵ was a summary which purported to show the dates Claimant worked. This document was prepared on behalf of Respondents and attached to discovery responses. It listed the following payments to Claimant:

- Oct. 5-\$50.00
- Oct. 6-\$20.00
- Oct. 9-\$90.00
- Oct. 15-\$80.00
- Oct. 20-\$90.00
- Oct. 27-\$100.00
- Oct. 30-\$75.00
- Nov. 13-\$100.00
- Nov. 25-\$85.00
- Nov. 27-\$80.00
- Dec. 7-\$100.00
- Dec. 18-\$95.00
- Dec. 22-\$100.00
- Dec. 31-\$90.00
- Jan. 5-\$85.00
- Jan. 9-\$65.00
- Jan. 22-doesn't recall.

This document showed Claimant worked seven days in October, three days in November, four days in December and three days in January. This evidence was not rebutted.

13. Mr. Gallegos testified Claimant did not work 40 hours per week at any time

⁴ Exhibit 14.

⁵ This document was provided in conjunction with discovery responses.

at his residence, nor did he work five days/40 hours/week at any rental property. When reviewing Exhibit E, Mr. Gallegos testified this document reflected the days Claimant worked for him and that he started in October. Mr. Gallegos said when Claimant worked at the rental properties, these were tasks that took a couple of hours.

14. Mr. Gallegos stated Claimant was not paid more than \$2,000.00 for any kind of work he performed 2015. Mr. Gallegos testified Claimant also helped Ms. Helbok clean office buildings at night. Mr. Gallegos testified a separate contractor did the framing and the siding work at the Clinton Street house. He did not provide workers' compensation coverage for those workers. Mr. Gallegos testified not employ other individuals to perform maintenance work for the rental properties, as he did the work himself. Claimant was not employed in the usual and business or profession of Respondents, which was listed ranching, cattle and hay (partnership tax return), as well as management of rental properties (personal income tax return).

15. The ALJ noted Exhibit E showed a total of \$1,305.00 was paid to Claimant, of which \$1,155.00 was paid in 2015. No other written documentation of Claimant's earnings was introduced into evidence. The ALJ was unable to conclude the precise month when Claimant began working for Respondents, but Exhibit E documented the first cash payments were in October 2015. No further documentation was introduced into evidence which documented Claimant's earnings.

16. Claimant testified he thought he was paid more than 15 times by Mr. Gallegos, as there were times he was paid every day. He was paid mostly in cash, but recalled being paid approximately three times with a check. He cashed the check at a Key Bank between Mr. Gallegos' house and his son's house. Claimant also testified that he received advances on occasion for which he then worked. He also was given a trailer and bought a car from Mr. Gallegos.⁶ He never received a W-2 or 1099 form from Mr. Gallegos.

17. Claimant testified he was paid for work done at Respondents' son's house by Respondent. Claimant testified he had done yard work for elderly people in the neighborhood where he met Mr. Gallegos. He understood that he did not have to report the income, as long as it wasn't \$1,300.00 per month. Claimant did not proffer any written documents which memorialized his earnings while working for Respondents. Claimant testified his son picked him up by the flea market one time and Kimberly (Ms. Helbok) picked him up a couple of times.⁷ The ALJ inferred from this testimony that Claimant worked less than five days per week.

18. The ALJ credited Claimant's testimony that he worked on Mr. Gallegos' rental properties and the family home on Clinton street, as well as the specific jobs he did on those properties. The ALJ concluded Claimant's testimony did not establish that

⁶ The ALJ noted it was unclear from the record whether this constituted some sort of remuneration.

⁷ Hrg. Tr. p. 35:21-36:6.

he received \$2,000.00 during the calendar year of 2015 working for Mr. Gallegos.

19. Claimant's son, Jesus Chacon, testified at hearing. Mr. Chacon was living with his father in the summer of 2015, as he was going to school at the time. He said he dropped Claimant off and picked him up at Respondent's property on Clinton Street. He went there on multiple occasions. There was one occasion when he picked Claimant up by the flea market. Mr. Chacon testified his father worked more than one day a week and it could have been as many as five times per week, although he would leave the house before Claimant did.⁸ The ALJ inferred Claimant's son was not able to confirm the number of days per week his father worked. He also testified that his younger brother occasionally took Claimant to work.

20. Ms. Helbok testified at hearing. She has known Claimant for approximately five years. She also knew Mr. Gallegos, as she did some work for his wife and some housecleaning for his sister. The work she did for the Gallegos was at the Clinton Street house.

21. Ms. Helbok testified that Claimant worked from approximately July 2015 to January, 2016. She picked Claimant up from the Commerce City address (approximately 62nd and Monaco), from different places over at Lowell, at Jonathon Gallegos' house (144th and I-25), and at the Clinton Street house. She testified Claimant worked pretty much every day, but could not remember any other locations where she picked Claimant up. She overheard Claimant talking to Mr. Gallegos about what tasks were going to be done the next day. Ms. Helbok said she saw Claimant paid one time in cash.

22. Jonathon Gallegos testified at hearing. He is Respondents' son and had Claimant perform work on his residence. Claimant built basement shelving in the storage area. This job took place in November 2015 and took a couple of days. He paid Claimant \$200.00 in cash.

23. On January 20, 2016, Claimant was injured at Respondents' residence, located at 14970 Clinton Street. He fell from a ladder while working on siding at the house.

24. Ms. Helbok testified Claimant initially wanted to go home, but she said he was in no condition to make that decision. Claimant did not want Mr. Gallegos to call an ambulance. She took Claimant to the hospital.

25. Claimant was initially evaluated at Platte Valley, at which time x-rays were taken. He was then taken to the University of Colorado hospital and evaluated in the emergency department by Vikhyat Bebarta M.D. and Travis Smith, M.D. Dr. Bebarta's impression was in the thoracic spine fracture; calcaneal fracture; back pain; 25.

⁸ Hrg. Tr. p. 71:14-21.

Claimant was admitted to the hospital and treated. He was discharged on January 27, 2016.

26. Respondents did not designate an ATP for Claimant's treatment after he was injured.

27. A Worker's Claim for Compensation was admitted into evidence.⁹ This document was completed on or about January 16, 2018. Claimant's average weekly wage was estimated to be \$209.00 per week. The ALJ inferred that, by Claimant's own estimate of his AWW, he worked approximately 21 hours per week.

28. The ALJ determined that Claimant did not work at Respondents' Clinton street house or other properties 40 hours or more per week, nor did he work five days per week. The ALJ was unable to conclude from the testimony of the witnesses that Claimant's work for Respondents was anything more than intermittent.

29. Claimant's work for Respondents was casual.

30. Claimant was not an employee of Respondents.

31. Respondents were not the employer of Claimant.

32. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

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

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

⁹ Exhibit 15.

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).

Compensability

To establish a right to compensation under the Colorado Workers' Compensation Act, the employer and employee must be subject to the provisions of the Act and, at the time of the injury, Claimant be performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. *Martin v. Hyams*, W.C. No. 4-781-144 (ICAO November 19, 2009); §§ 8-41-301(1)(b) & (c), C.R.S. (2017).

Stated another way, Claimant must meet the definition of an "employee" under § 8-40-202(1), C.R.S. and the scope of that definition is delimited by § 8-40-301(1), C.R.S. Respondents must be an "employer", as that term is defined in § 8-40-203, C.R.S. and the scope of the term employer is set forth in § 8-40-302, C.R.S. *Roop v. Hallum*, W.C. 4-383-408 (ICAO November 9, 1999). In this regard, §§ 8-40-302(3) and (4) C.R.S. (2017) are statutory exclusions to the general rule of coverage under the Act for those persons who perform work under a contract of hire. Those subsections provide in pertinent part:

"(3) Articles 40 to 47 of this title are not intended to apply to.... employers of persons who do casual maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the place of business, trade, or profession of the employer if such employers have no other employees subject to said articles 40 to 47, if such employments are casual and are not within the course of the trade, business, or profession of said employers, if the amounts expended for wages paid by the employers to casual persons employed to do maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the place of business, trade, or profession of the employer do not exceed the sum of two thousand dollars for any calendar year...."

(4) Articles 40 to 47 of this title are not intended to apply to employers of persons who do domestic work or maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the private home of the employer if such employers have no other employees subject to said articles 40 to 47 and if such employments are not within the course of the trade, business, or profession of said employers. This exemption shall not apply to such employers if the persons who perform the work are regularly employed by such employers on a full-time basis. For purposes of this subsection (4), "full-time" means work performed for forty hours or more a week or on five days or more a week."

First, the ALJ applied the definitional section of § 8-40-202(1)(b), C.R.S., which provides that the term “employee” does not include an individual whose employment “is but casual and not in the usual course of the trade, business, profession, or occupation of the employer”. The ALJ applied this definition when determining whether the exemption in § 8-40-302(3), C.R.S. applied in this case. That section, which has several clauses separated by commas, provides the Act does not apply to individuals who perform “casual” tasks for an employer, if the employer has no other employees subject to the Act and the work is not within the course of the trade, business or profession, and if the employer does not pay more than \$2,000.00 in wages for those tasks. This use of the conjunctive in § 8-40-202(1)(b), C.R.S. is evidence of the Colorado Legislature’s intent that both elements are required to be present for the exemption to apply.

As determined in Findings of Fact 28-29, the ALJ found Claimant’s employment with Respondents was “casual”. This was based upon evidence in the record which showed Claimant worked not on a regular basis, but intermittently. (Finding of Fact 29). The written evidence submitted by Respondents documented 17 occasions on which Claimant worked from October 2015 through January, 2016. Exhibit E also led to the conclusion that Claimant’s work was less than 40 hours per week. (Finding of Fact 12). Mr. Gallegos testified Claimant worked less than 40 hours per week. (Finding of Fact 13). Claimant’s Worker’s Claim for Compensation showed he worked less than 40 hours per week. (Finding of Fact 27). Claimant’s testimony also established there were times when he took off from work while performing tasks for Respondents. (Finding of Fact 6). The Court determined that the evidence proffered by Respondents was not rebutted by Claimant.

Although Claimant testified he thought he worked more than what was shown on Exhibit E, the ALJ unable to conclude that Claimant worked on a regular basis, as there were no documents which supported the claim he worked five days per week. (Finding of Fact 12). The other evidence provided by Claimant did not lead to a different conclusion. Although Claimant’s son thought he might have worked five days per week, the ALJ found the son was not present in the home when Claimant left for work. (Finding of Fact 27). Finally, Ms. Helbok’s testimony did not persuade the ALJ that Claimant worked five days per week.

In the case at bench, the evidence established Claimant did not work on a regular basis and worked less than 40 hours per week. The ALJ was unable to determine that Claimant made more than what was documented in Exhibit E, as that was supported by Mr. Gallegos testimony. This is contrasted with the situation in *Roop v. Hallum, supra*, where Claimant worked for approximately nine years and it was determined Respondent was an employer, despite the fact that Respondent did not own a business at the time.

Under these circumstances, the ALJ found Claimant’s employment was casual. As the Colorado Supreme Court stated: “The word ‘casual’ is the antonym of ‘regular.’ [citing *Lackey v. Industrial Commission*, 249 P.662 (1926)] Casual employment may be

said to be that which is occasional, incidental, temporary, emergent or haphazard". *Heckman v. Warren*, 238 P.2d 854, 860 (Colo. 1951); C.f. *Butland v. Industrial Claim Appeals Office*, 754 P. 2d 411, 414 (Colo. App. 1988).

Further, the ALJ determined Claimant was not employed in the regular business or profession of respondents. When looking at the other clauses of § 8-40-302(3), C.R.S., the ALJ determined Respondents employed no other individuals subject to the Act and Claimant was not paid more than \$2000.00 in wages for those tasks. (Findings of Fact 1-4). Accordingly, the exemption found in § 8-40-302(3), C.R.S. applies in the case at bar. C.f. *Brogger v. Kezer*, 626 P.2d 700, 701 (Colo. App. 1980).

Second, the ALJ considered whether the exemption for work done on a private home [§ 8-40-302(4), C.R.S.] applied in this case. As found, there was no evidence Respondents employed other individuals were subject to the provisions of the Colorado Workers' Compensation Act. (Finding of Fact 4). In addition, Claimant did not establish he worked 40 hours or more per week or five days per week. (Findings of Fact 10,13,17, 27-28). On this subject, Claimant's testimony did not establish he was working full-time, nor did the testimony of his son or Ms. Helbok. More particularly, Claimant's testimony was that his son picked him up on a few occasions and Ms. Helbok picked him up a couple of times. This testimony did not prove Claimant was working 5 days/40 hours per week. Based upon the evidence in the record, the ALJ determined the exemption found in § 8-40-302(4), C.R.S. applied and Claimant was not an employee.

In coming to this conclusion, the ALJ considered Claimant's contentions that Respondents underreported the number of hours he worked and what he was paid. The ALJ also closely evaluated the testimony of Claimant's son, as well as Ms. Helbok, to determine whether the foregoing exemptions applied. Based upon the totality of the evidence, the ALJ determined that he was unable to conclude Claimant was an employee and therefore entitled to workers' compensation benefits.

ORDER

It is therefore ordered:

1. Claimant's claim for benefits under W.C. 5-062-858-001 is denied and dismissed.
2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: February 26, 2019

STATE OF COLORADO



Digital signature

Timothy L. Nemecek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the anterior cervical discectomy and fusion from C3-5 with hardware removal at C5-6 and the posterior cervical fusion at C3-5 undergone on October 16, 2018 and October 19, 2018 was reasonable, necessary, and causally related to his May 16, 2017 work injury.

FINDINGS OF FACT

1. Claimant is employed by Employer with a job title of Fire Chief.
2. On May 16, 2017, Claimant was involved in a work related motor vehicle accident. His Ford Explorer was at a stoplight and was rear ended by a Saab sedan.
3. On May 16, 2017, Claimant was evaluated at Centura by Brian McIntyre, D.O. Claimant reported his current symptoms as stiffness in neck, left shoulder, and arm. Claimant reported four prior neck fusions on his intake form. Claimant reported pain at a 5/10. Claimant reported that he developed neck pain after the accident, but did not go to the emergency department and was able to provide a primary survey of the accident scene and assistance to the driver that struck him. Claimant reported that noticed increased aching-type pain, stiffness, and soreness affecting the neck region into the left upper trapezius and shoulder area and some feeling of numbness and tingling into the hand affecting digits 3-5. Dr. McIntyre noted Claimant's significant cervical surgery history. Claimant reported that after his final cervical surgery, he had been doing relatively well with just the occasional use of a muscle relaxant for symptoms and that he had intermittent symptoms into his left hand region rarely. Claimant reported his medications included trazadone, statin, and rare robaxin. Dr. McIntyre found Claimant's neck motion to be limited bilaterally and with rotation, and limited in flexion and extension. Dr. McIntyre diagnosed strain of muscle, fascia, and tendon at the neck level, strain of muscles and tendons of the rotator cuff of left shoulder, and neuralgia and neuritis. Dr. McIntyre noted that x-rays showed trace retrolisthesis with extension at C3-4, degenerative joint disease, and degenerative disc disease at C3-4, most prominent. No cervical spine fracture was suspected. See Exhibits 13, E.
4. On May 30, 2017, Dr. McIntyre evaluated Claimant. Claimant reported that he was improving slightly but had stiffness and achiness affecting his neck and the muscles of the trapezius and also reported intermittent symptoms of pain radiating to his left upper extremity. See Exhibit E.

5. On June 19, 2017, Claimant underwent physical therapy. Claimant reported some neck pain and radiating symptoms into the left hand as well as pain and tension in the neck and shoulders. Claimant reported that the symptoms improved mildly after the accident but now seemed to be the same and were not getting better. Claimant reported symptoms into the triceps, lower arm, and hand. Claimant reported that his middle finger locked at times and that he had a left hand tremor since the accident. Claimant also reported mid to upper back pain. Claimant reported his pain at a 5/10. Claimant reported that before the accident he lived with a 1-2/10 pain and that he generally had no symptoms into the upper extremity. See Exhibit 32.

6. On June 20, 2017, Dr. McIntyre evaluated Claimant. Claimant reported pain at a 6/10 and that he felt that it was not improving. Claimant reported pain affecting mostly the left sided region muscles of the lower neck and upper back region that were aching, tight, and sore. Claimant also reported radiating symptoms intermittently stabbing and tingling into the hand region. Claimant reported a tremor developing on his left arm with attempts at holding the arm out. Claimant reported that he was using his own supply of Robaxin for the muscle tension and tightness. Dr. McIntyre found on examination, bilateral scapulothoracic and trapezius muscle tenderness, left greater than right. Dr. McIntyre also found a fine tremor affecting the left upper extremity emanating from the arm when in an outstretched arm position. Dr. McIntyre noted that Claimant would stay in touch with them as well as with Claimant's spine surgeon if Claimant's symptoms worsened. See Exhibit 14, E.

7. On July 11, 2017, Dr. McIntyre evaluated Claimant. Claimant reported that he continued to have pain and difficulty with function about the neck and upper back region, radiating into the left upper extremity mostly and that he had some tightness and some tingling into his right hand over the last two days. Claimant reported pain the day prior at an 8-9/10 but that it was mostly at a 5-6/10. Claimant reported that he was taking Robaxin most days and Nurontin nightly. Dr. McIntyre noted that if Claimant was not improving over the next couple of weeks, Claimant would need an MRI or CT scan to evaluate the cervical spine. See Exhibits 15, E.

8. On July 31, 2017, Claimant underwent an MRI of his cervical spine that was interpreted by Sean Bryant, M.D. Dr. Bryant provided the impression of anterior and posterior surgical fusions without evidence of complication, and multilevel disc degeneration and facet osteoarthritis most severe at C3-4 and C4-5. Dr. Bryant found disc osteophytes at C3-4 and at C4-5 and found severe bilateral foraminal narrowing at both C3-4 and C4-5. Dr. Bryant found mild congenital stenosis of the upper cervical canal as well as endplate irregularity and bone marrow changes associated with disc degeneration that were mild to moderate at multiple levels. See Exhibits 11, M.

9. On August 1, 2017, Dr. Fox evaluated Claimant. Claimant reported quite a bit of discomfort in the neck and mid back as well as numbness and tingling in the left arm and hand. Claimant reported that his symptoms had diminished somewhat. Dr. Fox noted that the cervical spine MRI showed postsurgical changes and some mild arthritic

changes but no acute pathology. Dr. Fox noted a possible T6 compression fracture on the thoracic x-rays and Dr. Fox ordered a thoracic MRI. See Exhibit D.

10. On August 22, 2017, Lileya Sobechko, NP evaluated Claimant. Claimant reported continued discomfort in his neck and mid back as well as numbness and tingling in his left arm and hand. Claimant reported that his symptoms had diminished somewhat. NP Sobechko noted that Claimant had completed thoracic spine x-rays and a cervical MRI the day before and she reviewed them. NP Sobechko opined that the cervical spine MRI showed postsurgical changes and some mild arthritic changes but no acute pathology. She also opined that the thoracic spine x-rays showed suspicion for a possible T6 compression fracture and she ordered an MRI of the thoracic spine. NP Sobechko referred Claimant to Dr. Castro and Dr. Barker for opinions on back surgery. See Exhibits 16, D.

11. On August 23, 2017, Bryan Castro, M.D. evaluated Claimant. Claimant reported ongoing neck pain, neck stiffness, peritrapezial, periscapular pain, and upper thoracic pain. Dr. Castro noted Claimant's substantial previous history of surgery including an ACDF at C6-7 in 1998, C7-T1 in 2006, C5-6 in 2010, and a posterior fusion at C5-T1 in 2014. Claimant reported his pain at a 5/10. Dr. Castro noted that Claimant had cervical neck pain with some moderate degenerative changes above previous cervical fusions but did not think that further surgical intervention was going to be required in the cervical spine, although Dr. Castro noted that Claimant may have adjacent segment degeneration at the upper levels of the cervical spine at a later date. See Exhibit K.

12. On September 12, 2017, Dr. Fox evaluated Claimant. Claimant reported that he continued to experience back pain. Dr. Fox found moderate diffuse tenderness of the mid to lower back. Dr. Fox noted that an MRI of the cervical spine was unremarkable except for postsurgical changes but that the thoracic spine x-rays showed an abnormality consistent with a possible compression fracture. See Exhibit D.

13. On September 13, 2017, Samuel Chan, M.D. issued a report. Dr. Chan noted that he had performed EMG studies over Claimant's bilateral lower extremities and bilateral upper extremities. Dr. Chan opined that both studies were within normal limits. Dr. Chan noted that MRIs had shown multilevel degenerative changes with facet hypertrophy and disc osteophyte complexes and a left paramedian disc protrusion at T9-T10. See Exhibit F.

14. On September 18, 2017, Claimant was evaluated by Bryan Castro, M.D. Claimant reported that his pain initially was at a 4/10 but that he had a recent flare-up over the last several days and had been at a 7-8/10. Dr. Castro reviewed the MRI and noted that it showed adjacent segment degeneration above a previous cervical fusion with moderate lateral recess encroachment at C3-4 and C4-5. Dr. Castro also noted a large disk herniation in the thoracic spine causing some cord impingement particularly at T8-9. Dr. Castro assessed left cervical radiculopathy, cervicalgia, and thoracic pain. Dr. Castro opined that the thoracic spine pain was related to a disk herniation and surgical intervention could reasonably be considered. Dr. Castro opined that there was no clear

indication for surgical intervention in the cervical spine other than degenerative changes. See Exhibit K.

15. On September 18, 2017, Dr. Barker evaluated Claimant. Claimant reported that he had been doing fairly well with some baseline chronic neck pain at a 1-2/10 before a motor vehicle accident on May 16, 2017. Claimant reported that since the motor vehicle accident, he had increased neck pain and the new onset of left arm pain radiating into his left hand. Claimant also reported some mid thoracic pain and some intermittent tingling in his legs. Claimant reported that his left arm pain, thoracic pain, and leg pain were not present before the motor vehicle accident. Claimant reported that Dr. Van Buskirk recommended urgent surgery for the thoracic spine and that he wanted another opinion. On exam, Dr. Barker found some pain with cervical extension and a positive Spurling test on the left. Dr. Barker reviewed MRIs of the cervical and thoracic spine. Dr. Barker noted the cervical fusion from C5-T1 as well as some cervical degenerative disc disease with some disc space collapse and foraminal stenosis at C3-4 and C4-5. Dr. Barker noted the thoracic MRI showed a large thoracic disc herniation at the T8-9 level causing severe compression of the thoracic spinal cord. Dr. Barker opined that the thoracic disc herniation was due to the motor vehicle accident, that it appeared acute, and that there were no bone spurs or other chronic changes at that level. Dr. Barker recommended Claimant undergo thoracic surgery. Dr. Barker also opined that the motor vehicle accident flared up Claimant's adjacent level degenerative disease in the cervical spine. See Exhibits 3, C.

16. On September 19, 2017, James Fox, M.D. evaluated Claimant. Claimant reported increased symptoms recently and that over the weekend he did some walking around at a local fair and had quite a bit of pain and decreased sensation on his left side afterwards. Claimant reported that Dr. Barker strongly recommended he proceed with surgical repair before significant neurologic damage occurs which was consistent with what Dr. Buskirk told him. Claimant reported pain at a level of 5/10. See Exhibits 17, D.

17. On October 4, 2017, Kathy McCranie, M.D. performed an independent medical evaluation. Claimant reported being rear ended while his vehicle was stopped and that he did not have any immediate symptomatology but developed pain in his neck and shoulder area later that morning and pain in the mid to low back a few days later. Dr. McCranie reviewed medical records and performed a physical examination. Dr. McCranie opined that as a result of the May 16, 2017 motor vehicle accident, Claimant sustained a new and acute thoracic disc herniation and a cervical strain with myofascial involvement. Dr. McCranie opined that the cervical strain was a temporary aggravation and that Claimant did not sustain a permanent aggravation to his underlying and pre-existing cervical degenerative disc disease. Dr. McCranie opined that the expected natural progression of the spinal condition post cervical fusion would be continued advancement of degenerative disc disease at the levels above and below the surgical fusion levels. Dr. McCranie noted that Claimant had been receiving fusions at sooner intervals, the last one within 3.5 years of the previous and that it was anticipated that Claimant may have required additional surgical intervention to his cervical spine considering his history. See Exhibit A.

18. On December 11, 2017, Dr. Barker evaluated Claimant. Claimant reported doing well following his thoracic spine surgery. Claimant reported some cervical pain as well as some occasional radicular symptoms. See Exhibits 4, C.

19. On December 11, 2017, Dr. Fox also evaluated Claimant. Claimant reported his primary complaint was some pain in his left ribs that began after he lowered himself into a bathtub. Claimant reported his pain at a 4/10. See Exhibit D.

20. On January 8, 2018, Claimant underwent an MRI of his cervical spine. The impression included multilevel cervical spondylosis with degenerative listhesis not significantly changed since July 31, 2017. Claimant's soft tissues were unremarkable, and he had disc osteophytes and uncinated spurring at C3-4 and at C4-5. See Exhibit M.

21. On January 9, 2018, Dr. Fox evaluated Claimant. Claimant reported feeling pretty good but that he still had some pain in his mid to upper back and some tingling in his left hand and fingers. Claimant reported that the tingling had decreased somewhat. Claimant reported that his pain was at a 3/10. See Exhibit D.

22. On January 22, 2018, Dr. Barker evaluated Claimant. Claimant reported that he was still having some muscular pain in his thoracic spine and in his cervical spine. Claimant denied any radicular symptoms in his arms or his legs. Dr. Barker noted that x-rays showed some facet arthritis and early disc space degeneration at C4-5 and provided an impression of anterior posterior C5-T1 cervical fusion with early adjacent level disease and muscular stiffness. Dr. Barker opined that they would like to avoid operative intervention in the cervical spine for the adjacent level disease and planned to send Claimant to cervical physical therapy and massage therapy. See Exhibit C.

23. On February 5, 2018, Dr. Barker evaluated Claimant. Claimant reported that before the motor vehicle accident he had 1/10 arm pain and that now his arm pain was 3-5/10. Claimant also reported that before the motor vehicle accident, his neck pain was 3/10 and that now it was 5-8/10. Dr. Barker opined that Claimant had cervical degenerative disc disease with some stenosis at C3-4 and C4-5 and opined that Claimant had moderate central stenosis with no spinal cord impingement. Dr. Barker wanted Claimant to continue with active range of motion of the cervical spine. Dr. Barker noted that they could hopefully put off an extension of the cervical spine fusion. See Exhibits 5, C.

24. On February 6, 2018, Dr. Fox evaluated Claimant. Claimant reported that he was somewhat fatigued at the end of the workday but otherwise was tolerating his normal activities reasonably well. Claimant reported his pain level at a 2/10. A discussion of possible cervical injections in the future was noted. See Exhibit D.

25. On March 6, 2018, Dr. Fox evaluated Claimant. Claimant reported that he felt okay but continued to have some pain and quite a bit of stiffness in his neck, upper back, and mid back. Claimant reported his pain level was a 4/10. See Exhibits 19, D.

26. On March 21, 2018, Claimant underwent physical therapy. Claimant reported that he had gone fly fishing over the weekend but had neck pain from fly fishing. Claimant reported he had a massage that helped, but that the pain came back with a vengeance last night. Claimant reported pain at a 7/10. See Exhibit 33.

27. On April 10, 2018, Claimant underwent physical therapy. Claimant reported that his cervical spine was always painful. See Exhibit 33.

28. On April 26, 2018, Dr. Fox evaluated Claimant. Claimant reported that he was working regular duty with acceptable tolerance. Claimant reported moderate pain in his neck and upper back with a pain level of 4/10. See Exhibit D.

29. On May 25, 2018, Dr. Fox evaluated Claimant. Claimant reported pain at a 5/10 and that he continued to have some discomfort and tightness particularly in his left upper back. See Exhibit 21.

30. On June 7, 2018, Claimant underwent physical therapy. He reported that he had again gone fly fishing and able to get through two days of fishing, but had increased pain. See Exhibit 33.

31. On June 25, 2018, Claimant was evaluated by Dr. Fox. Claimant reported exacerbation of his lower back pain recently after lifting firewood and that his pain level was at an 8/10. See Exhibits 22, D.

32. On July 26, 2018, Dr. Fox evaluated Claimant. Claimant reported continued mid back pain and reported an episode recently while flying to a conference where he had numbness and tingling in his left hand and fingers that was fairly transient and had since resolved. Claimant reported his pain level at a 4/10. See Exhibits 23, D.

33. July 30, 2018, Claimant underwent an MRI of the cervical spine. The findings included joint space narrowing and osteophytes at C3-4 and C4-5 as well as severe bilateral foraminal stenosis at C4-5. The impression included protrusions at C3-4 and C4-5 levels, severe canal, moderate left and severe right foraminal narrowing at C3-4, moderate canal stenosis and severe bilateral foraminal stenosis at C4-5. See Exhibit M.

34. On August 3, 2018, Claimant underwent physical therapy. Claimant reported that he had increased symptoms in the past 6 weeks in his left upper extremity. See Exhibit 33.

35. On August 20, 2018, Claimant underwent physical therapy. Claimant reported that he had been out of town a lot and that it was hard to be consistent with

therapy, treatments, and home exercise program. Claimant noted that a fusion of C3-5 had been recommended. Claimant reported his neck pain had been up to a 10/10. See Exhibit 33.

36. On August 20, 2018, Dr. Barker evaluated Claimant. Claimant reported that he was having a lot more cervical pain as well as cervical induced headaches. Dr. Barker continued to assess cervical degenerative disc disease and stenosis above Claimant's cervical fusion and at C3-4 and C4-5. Dr. Barker opined that Claimant's thoracic spine had a solid fusion and that Claimant was at maximum medical improvement for the thoracic spine. Dr. Barker opined that Claimant's cervical spine was exacerbated by the motor vehicle accident and noted that from a surgery standpoint, the question would be when Claimant wanted to proceed with a C3-5 extension of his fusion. See Exhibits 6, C.

37. On August 22, 2018, Dr. Fox evaluated Claimant. Claimant reported pain at a 6/10 and that he continued to have quite a bit of pain and limited range of motion in his neck. Dr. Fox noted that now there was a possibility of doing a C3-5 cervical fusion extension being discussed and that Dr. Barker felt the cervical injury was related to the motor vehicle accident. Dr. Fox noted that they would wait to see if the surgery would be authorized. See Exhibits 24, D.

38. On August 29, 2018, Dr. Barker evaluated Claimant. Claimant reported that he was having even more pain than when he was evaluated on August 20 and that he wanted to schedule surgical intervention. Dr. Barker noted that Claimant had developed worsening adjacent level disease and that the plan was to proceed with surgery with an anterior cervical discectomy and fusion from C3-5 with hardware removal at C5-6 on October 16 and then a staged posterior procedure on October 19 with a posterior cervical fusion. See Exhibits 7, C.

39. In August of 2018, a request was made for cervical surgery related to the May 16, 2017 motor vehicle accident. Respondents denied the request for cervical surgery.

40. On September 5, 2018, Claimant underwent physical therapy. He reported that he would be having surgery and that he was getting a lot of neck and left shoulder pain with his neck pain at a 6-9/10. See Exhibit 33.

41. On October 5, 2018, Dr. Fox evaluated Claimant. Claimant reported that he was scheduled to have cervical surgery in a couple of weeks but that it was not approved by workers' compensation. Dr. Fox noted that it was unclear if the surgery would get done or who would pay for it. Claimant reported that his symptoms had been steadily increasing and that he felt he had no other options. Claimant reported pain at a 6/10. Dr. Fox continued to diagnose strain of the muscle, fascia, and tendon at the neck level. See Exhibits 26, D.

42. On October 10, 2018, Claimant was discharged from physical therapy. It was noted that he had attended 40 sessions with good attendance and compliance to the

home exercise program starting in December of 2017. Claimant was noted to have had a slow recovery and variable pain symptoms associated with the thoracic and cervical regions. The therapist noted that Claimant had been making progress, but then had an exacerbation of symptoms, which was now leading to further cervical surgery and intervention and noted a C3-5 fusion set for the next week. See Exhibit 34.

43. Claimant underwent surgery to extend his prior fusions on October 16 and October 19, 2018. On October 20, 2018, Claimant underwent x-rays of his cervical spine. The impression provided by Vernon Chapman, M.D. was postoperative changes with no acute findings. Dr. Chapman noted postoperative changes from interval extension of posterior cervical fusion now extending from C3 through the upper thoracic spine. Dr. Chapman opined that no acute finding was evident. See Exhibit M.

44. On October 22, 2018, Dr. Barker answered questions sent by Claimant's attorney. Dr. Barker opined that the May 16, 2017 motor vehicle accident aggravated, accelerated, or combined with Claimant's pre-existing disease or infirmity to produce the need for Claimant's cervical spine surgeries noting that after the motor vehicle accident Claimant had the new onset of left arm symptoms that were not present before May 16, 2017 on a consistent basis. Dr. Barker also noted that Claimant's cervical pain was drastically worsened from baseline after the motor vehicle accident. Dr. Barker opined that the May 16, 2017 motor vehicle accident drastically accelerated Claimant's need for cervical spine surgery. See Exhibits 10, C.

45. On November 2, 2018, Dr. Fox evaluated Claimant. Claimant reported that he already noticed a significant reduction in the pain that he had been experiencing since the motor vehicle accident following his October 16 and 19 surgeries. Claimant reported a pain level of 3/10. Dr. Fox opined that it certainly seemed plausible that at least some of Claimant's pathology could have been related to or at least aggravated by the motor vehicle accident. See Exhibits 27, D.

46. On November 7, 2018, Dr. Fox responded to questions from Claimant's attorney. Dr. Fox opined that Claimant's pre-existing condition was significantly aggravated by the May 16, 2017 accident based primarily on Claimant's report of symptoms, which began after accident and were not previously present. Dr. Fox believed the need for the cervical spine surgeries were a natural and proximate result of the May 16, 2017 accident. See Exhibits 31, D.

47. On November 7, 2018, Dr. Barker evaluated Claimant. Dr. Barker noted that Claimant was 3 weeks status post an anterior and posterior C3-5 extension of his fusion. Claimant reported that his cervical pain was under good control, that he was very happy with the surgical results thus far, and that the muscles in his posterior cervical spine already felt better than they did pre-operatively. See Exhibits 8, C.

48. On November 16, 2018, Dr. Fox evaluated Claimant. Claimant reported that he was doing reasonably well with some moderate pain and stiffness in his neck. Claimant reported pain at a 3/10. See Exhibits 28, D.

49. On December 3, 2018, Dr. Fox evaluated Claimant. Claimant reported overall improvement with some moderate discomfort at the anterior surgical site and some moderate diffuse stiffness in his neck. Claimant again reported his pain level at a 3/10. See Exhibits 29, D.

50. On December 12, 2018, Dr. Barker evaluated Claimant. Claimant reported no arm symptoms but some pain at the base of his occiput. Claimant reported some pain with range of motion of his cervical spine. See Exhibits 9, C.

51. On December 13, 2018, Dr. Fox evaluated Claimant. Claimant reported his pain level at a 4/10 and again reported moderate discomfort in his neck but no new complaints. See Exhibits 30, D.

52. On December 20, 2018, Dr. McCranie provided an additional report after receiving and reviewing additional medical records. Dr. McCranie provided the impression that Claimant had chronic cervical pain and bilateral upper extremity paresthesia with constant neck and shoulder pain. She found this dated back to December of 2015 and required ongoing therapy and muscle relaxants. She found continued complaints of neck and shoulder pain and bilateral upper hand paresthesias with ongoing therapy through July of 2016 where Claimant reported his pain ratings varying between 3-6/10. Dr. McCranie noted that before the motor vehicle accident Claimant had chronic cervical pain and paresthesias and had undergone four cervical surgeries. She noted that he had progressive degenerative disc disease throughout the cervical spine indicating degenerative change in the adjacent segments. Dr. McCranie opined that Claimant's October 2018 surgeries were addressing the degenerative disc disease and stenosis above the fusion and were an extension of Claimant's prior fusions. Dr. McCranie opined that without the motor vehicle accident, it would still have been expected that Claimant would continue to have advancement of his degenerative disc disease above and below his surgical fusion levels and that it was medically probable that he would have required additional surgical intervention to his cervical spine regardless of the motor vehicle accident. Dr. McCranie opined that the motor vehicle accident did not cause the condition that the surgery focused on and that the motor vehicle accident did not accelerate the degenerative changes in Claimant's cervical spine. Dr. McCranie pointed out that Claimant had progression of his C3-4 and C4-5 changes prior to the motor vehicle accident. See Exhibit A.

53. Claimant has serious and long-standing problems in his cervical spine that pre date the May 16, 2017 motor vehicle accident.

54. Prior to this motor vehicle accident, Claimant had undergone four cervical fusion surgeries, in 1998 (a C6-7 ACDF with left iliac crest allograft), in 2006 (C6-7 revision and a C7-T1 ACDF with a fusion of C6-T1), in 2010 (a C5-6 ACDF and removal of hardware) and in 2014 (a C5-T1 fusion).

55. On February 6, 2006, Cathleen Van Buskirk, M.D. evaluated Claimant. Claimant reported a prior C6-7 anterior discectomy fusion in 1998 and that he did quite well until waking up recently in January of 2006 with some neck pain, shoulder pain, and radiating pain from the shoulder down the left arm into his ring and small fingers. Claimant reported tingling and numbness in his left hand worse with cervical extension and driving. Dr. Van Buskirk requested more testing and believed surgery would be required. Claimant ultimately underwent further surgery, extending his fusion to include C5-T1. See Exhibit L.

56. On September 2, 2010, Claimant underwent a cervical MRI. The findings included uncovertebral osteophytes bilaterally at C3-4, mild broad disc osteophyte complex at C4-5, and significant findings at C5-6 of broad disc osteophyte complex, foraminal stenosis moderate-severe bilaterally, and disc height loss. See Exhibit M.

57. On October 14, 2013, John Barker, M.D. evaluated Claimant. Dr. Barker noted that Claimant had a history of cervical problems for many years with chronic neck and trapezius pain. Claimant reported that he did a daily home exercise program for his cervical spine, that he did not have radicular symptoms in his arms, and that he had not noticed any weakness in his arms. Claimant reported a C6-7 ACDF in 1998, a revision for pseudoarthrosis at C6-7 and the addition of a C7-T1 fusion in 2006, and a C5-6 ACDF in 2010. Dr. Barker noted that fusions were currently from C5-T1. Claimant had a negative Spurling test on examination. X-rays performed showed anterior plate at C5-6, clear pseudoarthrosis at C5-6, a solidly healed fusion at C6-T1, cervical degenerative disease at C3-4 and C4-5 and spondylosis at C3-4 and C4-5. Dr. Barker provided the impression of pseudoarthrosis at C5-6 and cervical degenerative disc disease, spondylosis, and stenosis at C3-4 and C4-5. Dr. Barker noted the pseudoarthrosis and adjacent level disease and noted that if Claimant's symptoms worsened they would possibly do injections and may need to operatively repair the pseudoarthrosis and extend Claimant's fusion but opined that he wanted to put off further operative intervention until Claimant's symptoms worsened. See Exhibits 2, C.

58. On March 20, 2014, Claimant underwent x-rays of his cervical spine. Moderate intervertebral disc space narrowing was identified at C3-4 and mild to moderate disc space narrowing was identified at C4-5. It was noted that the narrowing had progressed since the prior study in December of 2010. The impression was interval progression of degenerative disc disease at C3-4 and C4-5. See Exhibit M.

59. On May 5, 2014, Claimant underwent x-rays of his cervical spine. Degenerative disc disease and anterior degenerative spondylosis was identified at C3-4 and C4-5. See Exhibit M.

60. On June 17, 2014, Claimant underwent x-rays of his cervical spine. The findings noted unchanged moderate degenerative disc disease at C3-4 and mild to moderate degenerative disc disease at C4-5 as well as mild facet joint arthropathy in the upper cervical spine. See Exhibit M.

61. On September 19, 2014, Claimant underwent x-rays of his cervical spine. At C3-4 mild disc space narrowing and small osteophytes were found. At C4-5 small marginal osteophytes were found. It was noted that Claimant had mild spondylosis including C3-4 degenerative disc space narrowing that was unchanged. See Exhibit M.

62. On November 24, 2014, Claimant was evaluated at Arbor Occupational Medicine. On his intake medical history form, Claimant reported neck pain, numbness or tingling, and weakness in arms/legs. Claimant reported that the neck and numbness was due to prior fusions and reported that he had fusions in his neck from T1 to C5. See Exhibit J.

63. On March 20, 2015, Claimant underwent x-rays of his cervical spine. The impression provided noted that Claimant's C5-T1 fusion was stable without change in alignment and that Claimant had disc degenerative change above the fusion site at C3-4 with slight listhesis that was unchanged from prior studies in September of 2014. See Exhibit M.

64. On July 20, 2015, Claimant underwent physical therapy. Claimant reported that he got headaches when his neck gets really tight and that if he overdoes it, i.e. yard work last week, he will get numbness and tingling in the first 3 digits of the right and or left intermittently. Claimant also reported numbness and tingling with certain postures, especially with typing. Claimant reported that when he pushes hard he has some pain but normally just numbness. Claimant reported that the problem had been ongoing since surgery in 2014 and that the problems waxes and wanes. Claimant reported his current pain at a 4/10. It was noted that Claimant's impairments were limiting his functional and recreational mobility as well as his overall quality of life and that he was a good candidate for physical therapy. See Exhibit B.

65. On December 22, 2015, Claimant was evaluated by Julia Essig, M.D. Claimant reported 17 years of constant neck and shoulder pain and that the pain was aching and sharp. Claimant reported that he had 4 different neck fusions and that he would like a muscle relaxant prescription. Claimant reported that he had used Robaxin in the past and it had provided good relief. Claimant reported that he had been undergoing massage therapy and dry needling. Claimant wanted a new treatment provider for massage therapy and dry needling as his provider had recently moved. See Exhibit H.

66. On April 28, 2016, Claimant underwent physical therapy. Claimant was assessed with chronic neck pain and a plan to evaluate, treat, and perform dry-needling was noted. Claimant's active medications included Robaxin 750 mg to take every 12 hours as needed for back/neck pain as well as Trazadone to take every evening. See Exhibit G.

67. On May 23, 2016, Claimant filled out a questionnaire titled Neck Disability Index. Claimant reported his pain was fairly severe, that it limited him from lifting heavy weights off the floor but could manage if the items were conveniently positioned, and that

he had neck pain with most recreational activities. On that date, Claimant also reported chronic neck and shoulder pain with a pain at a level of 6/10. Claimant reported that the problem started post fusion in 2013 and that it was ongoing. Claimant reported that he had numbness and tingling in the last three months. See Exhibit B.

68. On June 20, 2016, Claimant underwent physical therapy. Claimant reported more stiffness than pain. Claimant rated his pain at a 3/10 and his stiffness as a 6-7/10. Claimant reported feeling good after his first dry needling session. See Exhibit B.

69. On June 23, 2016, Claimant underwent physical therapy. Claimant reported that he was doing pretty good until he woke up with a kink in his neck that morning. The treatment focused on calming the pain and tension in the bilateral upper trapezius and lav scap muscles. See Exhibit B.

70. On June 29, 2016, Claimant underwent physical therapy. Claimant reported pain at a 6/10 and difficulty turning with pain worse on the left side of his neck. See Exhibit B.

71. On July 7, 2016, Claimant underwent physical therapy. Claimant reported his chronic neck pain was better at a 2-3/10 when just standing there and at a 4-5/10 when tipping his head to the left. Claimant reported still feeling a lot of tightness and a stuck feeling when tipping head to the left. Claimant reported that the pain was on the left side of his neck.

72. On July 28, 2016, Claimant underwent physical therapy. Claimant reported muscular tightness and headaches that worsened during the day. Claimant reported that he only got arm and hand symptoms after a long day and when his muscles were really knotted up. Claimant reported that his pain at rest was a 1/10 but that with activity his pain was at a 6/10. At discharge, Claimant was noted to have muscular tightness and pain and pain with cervical spine extension. Claimant was noted to continue to have limited cervical active range of motion. On flexion, Claimant had 52 degrees range of motion and with extension he had 31 degrees. Lateral flexion on the right was noted at 31 degrees and at 29 degrees on the left. Lateral rotation was noted at 63 degrees on the right and at 55 degrees on the left. Claimant reported that he knew he would need to live with the chronic pain but wanted to know what exercises to do to make the pain manageable at home and at work. Claimant reported that he wanted to be discharged to an individual home exercise program and that he would be seeing another therapist for level 2 dry needling. See Exhibit B.

73. Claimant, Dr. Barker, and Dr. McCranie testified at hearing.

74. Dr. Barker testified that he had evaluated Claimant in 2013 and noted cervical degenerative disc disease at C3-4 and C4-5 and told Claimant to come see him again if his symptoms worsened. Dr. Barker noted that, at that time, Claimant had a negative spurlings test for foraminal stenosis. He testified that in 2013, he was planning on non-operative care. At the next visit, in 2017, Dr. Barker noted that Claimant reported

increased pain and new left arm pain. Dr. Barker found the spurlings test to be positive for foraminal stenosis in 2017. Dr. Barker opined that by February of 2018, the cervical spine at C3-4 and C4-5 was deteriorating more but that he still hoped not to have to operate. Dr. Barker opined that the motor vehicle accident exacerbated Claimant's cervical spine condition and flared up his underlying disease. Dr. Barker testified that by August of 2018, Claimant had even worse pain and that they decided to operate in October of 2018. Dr. Barker opined that the motor vehicle accident drastically accelerated the need for surgery and drastically worsened Claimant's baseline condition based on Claimant's subjective reports of increased pain and new symptoms after the motor vehicle accident. Dr. Barker opined that the left arm pain was new following the motor vehicle accident and that Claimant's neck pain was increased after the motor vehicle accident. Dr. Barker testified that he did not review reports or evaluations between 2013 and 2017.

75. Dr. Barker's opinions, overall, are not found persuasive. Dr. Barker relies on his view of the differences in pain and arm symptoms between 2013 and 2017 and relies on Claimant's subjective reports. However, various medical reports and physical therapy reports between 2013 and 2017 show differences from Claimant's subjective reports to Dr. Barker. Without reviewing all the information and the pain complaints and reports in this time period, Dr. Barker was without important information to base his opinion.

76. Claimant testified at hearing that prior to the May 16, 2017 motor vehicle accident, his baseline pain in the neck was at a 1-2/10 and that he had rare upper extremity symptoms. Claimant testified that since the summer of 2016 and leading up to the motor vehicle accident, he had been doing relatively well.

77. Claimant, overall, is not found credible or persuasive. Claimant was not doing well during the summer of 2016 nor was he doing well when he asked to be discharged from physical therapy on July 28, 2016, less than 10 months before his motor vehicle accident. Rather, during that time, he had pain complaints at a 6/10 with activity and at a 4-5/10 when tipping his head to the left. Claimant reported pain between a 1-3/10 at rest. At discharge from physical therapy, Claimant was still reporting muscular tightness and headaches that worsened during the day and hand symptoms after a long day. At discharge, Claimant had limited cervical range of motion and Claimant reported that he knew he would need to live with his chronic pain. Claimant wanted to be discharged but wanted to know what exercised to do to make his pain manageable. This is not the picture of someone who is doing relatively well. Claimant had serious problems and continued chronic pain prior to the motor vehicle accident.

78. Dr. McCranie testified at hearing. Dr. McCranie noted that following the motor vehicle accident and in October of 2017, a spurlings test for Claimant was again negative and that cervical spine surgery was not yet recommended. Dr. McCranie noted that Claimant's C3-4 and C4-5 problems were already developing in 2014 with listhesis and radiculopathy present. She opined that the degenerative disc disease was not caused by the motor vehicle accident and that Claimant did not, in fact, have new symptoms to his left extremity following the motor vehicle accident. Dr. McCranie also

opined that Claimant's symptoms in the left extremity and his neck pain were not drastically worse following the motor vehicle accident as opined by Dr. Barker. She noted neck pain ratings ranging from 3-6/10 in 2016 and noted that after the thoracic surgery, Claimant's neck pain ratings came down. Dr. McCranie looked at Claimant's cervical range of motion from 2013 up to the motor vehicle accident and testified that his range of motion had been steadily getting worse before the accident. Dr. McCranie opined that the range of motion after the accident was not as accelerated as before the accident, so although he continued to deteriorate, the accident did not speed up the deterioration. Dr. McCranie opined that there was no objective evidence that the underlying process was sped up by the motor vehicle accident or that there was permanent aggravation. Dr. McCranie opined that a cervical strain had returned to baseline.

79. Dr. McCranie, overall, is found credible and persuasive. Her opinions are consistent with the overall weight of the medical evidence.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

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

Claimant has failed to establish, by a preponderance of the evidence that the October 16, 2018 and October 19, 2018 cervical discectomy and fusion from C3-5 is causally related to his May 16, 2017 work related motor vehicle accident. Although Claimant sustained a temporary cervical strain as a result of the motor vehicle accident, this strain resolved and his neck condition returned to baseline. As found above, Claimant's baseline included significant pre-existing degenerative disease, disc osteophytes, and foraminal narrowing. Claimant had significant adjacent level disease that was progressing, as expected, prior to the motor vehicle accident. Claimant's baseline condition was not aggravated or accelerated nor did the motor vehicle accident combine with his pre-existing disease to produce disability or the need for surgery. Without the motor vehicle accident, Claimant was going to need an extension of his prior cervical fusions due to the degeneration in his cervical spine. The motor vehicle accident did not speed up or accelerate his need for surgery, but as records show, the process and loss of range of motion in the cervical spine continued year after year at an expected pace.

Claimant did not have any acute cervical findings on diagnostic testing following his motor vehicle accident. After Claimant underwent surgery for his acute thoracic spine injury, and after October of 2017, Claimant's pain complaints included some cervical pain and some occasional radicular symptoms. In January of 2018, Claimant reported feeling pretty good with some pain and some tingling into his left hand and fingers with his pain at a 3/10. In February of 2018, Claimant reported his pain at a 2/10 and that he was

fatigued by the end of the work day but otherwise tolerating normal activities reasonably well. In March of 2018, Claimant reported pain at a 4/10 and that he felt okay but continued to have some pain and quite a bit of stiffness. After fly fishing in late March, 2018, Claimant's pain went up to a 7/10. It went back to a 4/10 in April of 2018. In May of 2015, Claimant reported his pain at a 5/10. After lifting firewood in June of 2018, his pain went up to an 8/10. In July of 2018, Claimant's pain was again down to a 4/10 and he reported that he had numbness and tingling again in his left hand and fingers that was fairly transient.

Claimant's pain ratings and reports of pain following his motor vehicle accident are very similar to his pain ratings and reports before the motor vehicle accident. In November of 2014, Claimant had neck pain and numbness/tingling in his arms. In July of 2015, Claimant reported that if he overdid it, he would get numbness and tingling in the first three digits of his hands. Claimant reported when he pushed hard he had some pain and numbness and that his problems since surgery in 2014 waxed and waned. Claimant reported his pain at a 4/10. In December of 2015, Claimant reported that his neck pain was constant, aching, and sharp. In May of 2016, Claimant reported that his chronic neck and shoulder pain was at a 6/10 and that he had neck pain with most recreational activities. Claimant reported that he had numbness and tingling in the last three months. In June of 2016, Claimant rated his pain at 3/10 and his stiffness at 6-7/10. At the end of June, 2016, Claimant reported pain at a 6/10 and reported difficulty with turning with the pain worse on the left side of his neck. In July, 2016, Claimant reported that his chronic neck pain was at a 2-3/10 when standing and at a 4-5/10 when tipping his head to the left. In July of 2016, Claimant reported that his pain at rest as at a 1/10 but that with activity it was a 6/10.

Claimant has failed to show that the motor vehicle accident accelerated his ongoing and chronic cervical spine condition. The pain complaints show that he had varying pain that increased with activity both before and after the motor vehicle accident. Dr. Barker was not provided with the records showing the significant ongoing pain complaints that Claimant had 10 months prior to the motor vehicle accident. Claimant's records, and the persuasive medical evidence, establishes that Claimant had significant dysfunction in his cervical spine prior to the motor vehicle accident that was not aggravated or accelerated by the accident. Rather, Dr. McCranie, who reviewed the full medical records, is found persuasive. The extension of Claimant's prior cervical fusions in October of 2018 is related to his pre-existing and non-work related degenerative condition that was fully symptomatic, restrictive, and was limiting his functional and recreational mobility before the motor vehicle accident. Although doctors hoped both before the motor vehicle accident and after the motor vehicle accident to put off surgery extending the fusion, by October of 2018 the natural progression of the degenerative disc disease made Claimant seek surgery. Claimant has failed to establish, more likely than not, that the surgery is work related or causally related to his motor vehicle accident. Rather, it is more likely due to Claimant's underlying pre-existing significant degenerative disc disease and the natural progression of the disease. The degenerative disease process has not been shown to have been aggravated or accelerated by the motor vehicle accident.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that the anterior cervical discectomy and fusion from C3-5 with hardware removal at C5-6 and the posterior cervical fusion at C3-5 undergone on October 16, 2018 and October 19, 2018 was reasonable, necessary, and causally related to his May 16, 2017 work injury.
2. All matters not determined herein are reserved for future determination.

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

DATED: February 27, 2019

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

The ALJ finds and Concludes as follows:

- I. The **ISSUES** as originally cited in the Findings of Fact and Conclusions of Law, dated November 19, 2019 remain unchanged.
- II. **FINDINGS OF FACT** #s 1 through 46 remain unchanged.
- III. **CONCLUSIONS OF LAW** #s A through P remain unchanged.
- IV. **CONCLUSIONS OF LAW** Q through V are withdrawn, and the ALJ enters the following Conclusions of Law in their place:

CONCLUSIONS OF LAW

Did Respondents waive the Issue of Safety Rule Violation by failing to address it in the Final Admission of Liability?

Q. Respondents argue in their Brief in Support of Cross-Petition to Review that once Claimant timely contested the FAL, he had effectively subjected all ripe issues to a determination by an ALJ at an adversarial hearing. Upon reconsideration, the ALJ concurs with Respondents' position. Respondents cite, among others, *Barela v. CMHIP*, W.C. 4-842-938-03 (ICAO July 29, 2013). The ALJ finds the following language of *Barela* persuasive:

In this case, however, the claimant objected to the respondent's final admission of liability and filed an application for hearing on the issue of permanent partial disability. As we previously have recognized in *Franco v. Denver Public Schools*, W.C. No. 4-818-579 (April 23, 2013), a respondent may controvert its own admission of liability by timely applying for a hearing **or, as here, filing a response to the application for hearing**. See *Id.*; *Bauer v. Boulder County*, W.C. No. 4-020-145, (March 22, 1993). The court of appeals in *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo.App. 1990), held that an admission of liability may be contested by either party, and that the "determination of the matter thus placed in issue is subject to determination by the ALJ at the adversary hearing." *Id.* at 253. The court further stated that **the admission is binding only until the controverted issue is determined and the ALJ issues an order**. See *Pacesetter v. Collett*, 33 P.3d 1230 (Colo.App. 2001); see also *Rodriguez v. Industrial Claim Appeals Office*, 2012 COA 139. (*Emphasis added*).

R. The ALJ therefore concludes that Respondents herein were permitted to litigate all issues otherwise ripe for litigation-*including violation of a safety rule*-once Claimant objected to the Final Admission of Liability. By so objecting, Claimant effectively assumed the risk that other issues otherwise deemed admitted by the FAL could be revisited at hearing.

Does the Equitable Doctrine of Waiver prevent Respondents from now raising the Issue of Violation of a Safety Rule?

S. "Waiver constitutes an intentional relinquishment of a known right." *Campos v. J.C. Penney Co.*, W.C. No. 4-86-186-02 (ICAP Nov. 14, 2013). "Waiver may be explicit or implied from conduct inconsistent with assertion of the right. However, a waiver implied from conduct must unambiguously reveal the party's intention to waive the right." *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. App. 1997). A ruling that a party knowingly waived a right, an application of a legal standard to facts, is subject to de novo review. *People v. Al-Yousif*, 49 P.3d 1165, 1169 (Colo. 2002). The fact that Respondents did not pursue a termination for cause defense does not imply or unambiguously reveal that the Respondents intentionally and knowingly waived their right to assert a Safety Rule Violation offset. As found in Finding of Fact #8, it is unclear from the record if Claimant was terminated for failing to wear his seat belt, or for the simple act of rolling a full cement truck, seat belt or not.

T. The ALJ makes no findings that Respondents were aware at any time prior to Claimant's admission at the DIME that he had willfully failed to wear his seatbelt. At the time of his DIME, Claimant asserted that he did not willfully fail to wear a seatbelt because it was malfunctioning. Respondents did not implicitly or expressly waive a right to assert the Safety Rule Violation offset, since facts concerning the offset were still being revealed through the date of the DIME, and then beyond.

U. The ALJ concludes, therefore, that Respondents did not expressly or impliedly waive their ability to assert the defense of Violation of a Safety Rule under C.R.S. 8-42-112(1)(a).

ORDER

It is therefore Ordered that:

1. The DIME report of Dr. Higginbotham has been overcome. Claimant's Impairment Rating of the Whole Person is 0%.
2. As Claimant willfully violated a safety rule violation, as found, a 50% offset is applicable to all disability benefits, as permitted by law.
3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's Supplemental Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. The Petition to Review shall set forth in detail the particular errors and objections relied upon, and shall be accompanied by a brief in support thereof. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts, and to all other parties. For statutory reference, see section 8-43-301(6), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: March 4, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-078-769**

ISSUES

- Whether Claimant sustained a compensable injury on May 31, 2018 arising out of and in the course and scope of his employment?

STIPULATIONS

The parties stipulated that if the claim were found compensable, Claimant's period of disability lasted from June 1 to August 5, 2018; all treatment Claimant received was provided by authorized treatment providers; and that the parties would stipulate to an average weekly wage within ten days of this order.

FINDINGS OF FACT

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

1. Employer employed Claimant as a concrete worker whose primary duty was building concrete tubs. Claimant alleged that he sustained an injury to his ilioinguinal nerve when he moved a metal cage off a table with a co-worker and the co-worker dropped his side.
2. Claimant suffered two prior injuries to his abdomen and groin.
 - First, on August 21, 2012, Claimant suffered a prior work related hernia. Albert Hattem, M.D. evaluated him for a Division Independent Medical Evaluation on September 11, 2013. Per the report, Claimant was a driver/warehouseman for an oil company. He experienced bilateral groin pain while moving a 500-pound drum. During the course of treatment, Claimant underwent a bilateral inguinal hernia repair with mesh, a right ilioinguinal nerve transection, and suffered right ilioinguinal neuropathy manifest as chronic pain. At the time of the appointment, Claimant complained of right-sided groin pain and abdominal pain. He indicated that his condition had worsened since his discharge from care. Dr. Hattem examined the right inguinal area and noted a normal appearance with no masses or protrusions and no erythema or warmth. He noted diffuse mild tenderness to palpation. He palpated no masses in the scrotum. The left inguinal area was completely normal. Dr. Hattem assigned a 4% lower extremity rating.
 - Claimant sought treatment in the emergency room at St. Anthony North Hospital on November 9, 2013. He complained of abdominal pain that

started 30 minutes prior to arrival. He indicated that he had experienced this pain in the past since undergoing hernia surgery. A CT did not show any acute abnormality and claimant was discharged.

- Second, on June 30, 2014 Claimant sustained another injury to his abdomen and groin. He initially sought treatment with Terrell Webb, M.D. He reported pain secondary to moving a 55-gallon drum of oil that weighed 410 pounds from the back of a truck onto a loading dock. He complained of pain from the right side of his stomach down his right leg. Dr. Webb assessed an abdominal wall strain and an inguinal strain.
- Nikolas Curcija, PA evaluated Claimant on September 25, 2014. Mr. Curcija noted that Claimant underwent an appendectomy in August of 2014. He released Claimant from care for his June 30, 2014 injury.

3. On May 31, 2018, Claimant initially sought treatment for this claim at Afterhours, Inc. He reported that he was moving a heavy object at work and felt a quick stabbing pain that turned into a continuous throbbing pain with a stabbing sensation with movement. He reported swelling initially which had improved significantly since onset. A history of a similar incident in the past was noted, as was a history of an indirect inguinal hernia. The inguinal canal was tender to palpation as was the right testicle. Claimant's provider diagnosed a unilateral inguinal hernia, without obstruction or gangrene and right testicular pain. The provider instructed Claimant to follow-up with Concentra for further treatment and possible surgical repair.

4. On June 1, 2018, Claimant treated with Deana Halat, NP at Concentra Medical Center. He reported that he was pulling a steel cage and felt a pop in his abdomen. "He states it started last night when he was at work and lifted a steel cage. He noticed that he had an immediate sharp pain in his right lower abdomen with swelling of the testicle. He reported a previous hernia in 2014 which was treated through Concentra." He noted that Afterhours, Inc. recommended an ultrasound, which was not performed. Ms. Halat assessed an abdominal wall strain and a groin strain, and referred Claimant for an ultrasound and to a general surgeon.

5. On June 1, 2018, Claimant underwent an abdominal ultrasound. The study was unremarkable.

6. On June 2, 2018, Claimant underwent an ultrasound of the testicles and scrotum. This revealed no evidence of epididymoorchitis, and no acute findings.

7. On June 5, 2018, Claimant treated with Ms. Halat. Per Ms. Halat, "[Claimant] returns to the clinic today for recheck of his right lower abdominal pain and right testicular swelling. He notes that at the Urgent Care he went to they did an ultrasound and told him that his intestine had fallen into his scrotal sac and this is why he

had swelling and this could be an inguinal hernia.¹ The right abdominal US was unremarkable. He is scheduled to see the general surgeon but he was quite angry today that he needed an MRI, and that he has sued us before and he has a lawyer. He left abruptly without an exam.” Ms. Halat noted that there was no indication for an MRI. She assessed an abdominal wall strain and noted that claimant should follow up as previously scheduled.

8. On June 12, 2018, Claimant treated with John Lampe, M.D. Dr. Lampe noted “no hernia on exam” and indicated that he would obtain prior records.

9. On June 13, 2018, Claimant treated with Scott Richardson, M.D. Dr. Richardson noted that Dr. Lampe had called to obtain Claimant’s prior records. He noted that Claimant had a prior work-related bilateral inguinal hernia repair in 2014 with nerve entrapment and an infection. Claimant admitted that he had chronic pain on the right side following the prior hernia, but alleged that his pain was more severe than usual and was higher in the abdomen. Dr. Richardson assessed an abdominal wall strain and prescribed Diclofenac Sodium 1% Transdermal Gel.

10. On August 1, 2018, Claimant treated with Dr. Sacha. Dr. Sacha opined that a one-time right ilioinguinal plus iliohypogastric nerve block under fluoroscopic guidance and conscious sedation was reasonable for diagnosis, treatment, and causality. Dr. Sacha did not perform a causation analysis.

11. On August 7, 2018, Claimant treated with Dr. Richardson. He walked in to the clinic and indicated that he needed his restrictions lightened in order to obtain a new job. Dr. Richardson complied with Claimant’s request and imposed a 90-pound lifting, pushing, and pulling restriction.

12. On October 8, 2018, Alexander Jacobs, M.D. evaluated Claimant for an independent medical examination. Upon examination, Dr. Jacobs noted significant tenderness and some guarding in the right lower quadrant of the abdomen (in the region of the appendectomy). There was less tenderness in the left groin and no tenderness in the testicle. There was a modicum of dysesthesia, without true pain, in the right inner groin region, the suprapubic region, and the distribution of the ilioinguinal and hypogastric nerves. Some right thigh decreased pinprick sensation was noted. Dr. Jacobs noted, “[i]t is important to state that from the time of the original hernia, hernia repair and ilioinguinal nerve ablation he continued to have intermittent symptoms. He had bilateral symptoms on rare occasions. However, his symptoms were usually on the right side and associated with excessive straining or lifting. Sometime he had symptoms with coughing or sneezing. The pain was usually isolated to the right groin and right lower quadrant regions. After the appendectomy his symptoms continued.”

13. Per Dr. Jacobs, “[e]xamination of the groin demonstrates no defect in the inguinal rings, no tenderness with compression of the inguinal area and no hernia

¹ Records associated with Claimant’s May 31, 2018, visit at Afterhours, Inc., do not support a finding that an ultrasound was performed.

whatsoever (even with Valsalva maneuver.) There is no actual muscle tenderness in the right lower quadrant, thigh, or inguinal area. There is no evidence of muscle spasm or inflammation.”

14. Dr. Jacobs stated, “[h]is symptoms are clearly not related to a hernia, because there is none. There is precious little evidence for muscle strain that would cause these symptoms since there is no true muscle tenderness currently. At this time, 5 months after the alleged injury, muscle symptoms should have pretty much dissipated. According to the patient these symptoms have decreased by about 40% (50 % according to his physicians).”

15. Dr. Jacobs stated, “[i]f this, indeed, was a problem with either the ilioinguinal or iliohypogastric nerve, it certainly wasn’t related to the claim of May 31, 2018. Rather it would be related to the original claim of August 21, 2012, when he underwent the herniorrhaphy that resulted in entrapment of those nerves.”

16. Claimant testified at hearing that the only claim he was pursuing in relation to the May 31, 2018 incident was for an injury to his iliohypogastric nerve. He agreed that he did not have a hernia arising out of that incident. He did not indicate he was pursuing a claim for a groin strain or sprain. He stated specifically, and his counsel stated, that the only alleged injury was that of his nerve.

17. With regard to Dr. Sacha’s recommendation for a one-time right ilioinguinal plus iliohypogastric nerve block under fluoroscopic guidance and conscious sedation, Dr. Jacobs stated, “[t]he iliolumbar nerve had already been resected and cauterized by radiofrequency ablation technique. If this was indeed a problem with the iliohypogastric nerve (closely related to the ilioinguinal nerve and a branch of the same parent nerve), it would not be a problem related to the current Worker’s Comp claim. It would be related to the original herniorrhaphy.”

18. Dr. Jacobs concluded, “[n]ot only is it fair to say that the injury of May 31, 2018 didn’t cause any problems with neuropathy but it is unlikely that it aggravated or accelerated conditions that may have pre-existed from his original herniorrhaphies gives the type of symptoms that have persisted since the original surgery. His symptoms may have increased to some extent after his appendectomy.”

19. It is Dr. Jacob’s position that the incident on May 31, 2018 did not cause, aggravate, or accelerate any condition in claimant’s abdomen or groin.

20. No persuasive medical opinion was submitted into evidence that specifically opined the May 31, 2018 incident caused, aggravated, or accelerated any condition in the claimant’s iliohypogastric nerve.

21. Of note, Dr. Sacha’s medical evaluation of July 18, 2018 states, “I do feel this is just a flare of a pre-existing problem.” He does not make any statement the May 31, 2018 incident specifically caused the flare, nor does he state that the May 31, 2018 incident aggravated or accelerated any condition of the iliohypogastric nerve.

CONCLUSIONS OF LAW

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

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. 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 (2007).

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b) C.R.S.; see *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994).

Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related accident and an injury, disease, or condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The Workers' Compensation Act creates a distinction between an "accident" and an "injury". The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1) C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.*, WC 4-650-711 (ICAO February 15, 2007).

The determination of whether claimant proved an injury which required medical treatment is one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The ALJ has the discretion to find an industrial accident resulted in only a non-disabling injury which did not require medical treatment. *Graphman v. Amberwood Court Care Center*, W.C. No. 4-621-138 (I.C.A.O., June 29, 2005).

The persuasive and credible evidence shows that the May 31, 2017 incident did not cause, aggravate, or accelerate any condition in Claimant's abdomen or groin.

Claimant sustained prior injuries to his abdomen and groin on August 21, 2012 and June 30, 2014. Claimant's 2012 injury resulted in right ilioinguinal neuropathy manifested by chronic pain.

Claimant remained symptomatic after his reaching MMI for his August 21, 2012 injury. Per Dr. Jacobs, "[i]t is important to state that from the time of the original hernia, hernia repair and ilioinguinal nerve ablation he continued to have intermittent symptoms. He had bilateral symptoms on rare occasions. However, his symptoms were usually on the right side and associated with excessive straining or lifting. Sometime he had symptoms with coughing or sneezing. The pain was usually isolated to the right groin and right lower quadrant regions. After the appendectomy his symptoms continued."

The ALJ credits the opinion of Dr. Jacob that "[i]f this, indeed, was a problem with either the ilioinguinal or iliohypogastric nerve it certainly wasn't related to the claim of May 31, 2018. Rather it would be related to the original claim of August 21, 2012, when he underwent the herniorrhaphy that resulted in entrapment of those nerves."

The minor incident observed in the video from May 31, 2018 did not cause, aggravate, or accelerate any condition in Claimant's abdomen or groin.

The ALJ notes that Dr. Jacobs is the only physician who performed a causation analysis. This ALJ notes that no persuasive medical opinion supporting a determination that the May 31, 2018 incident caused, aggravated, or accelerated an injury to the iliohypogastric nerve has been submitted into evidence.

The ALJ notes discrepancies in Claimant's accounts of the mechanism of injury in the medical records and in the information provided to claimant's various providers. While the ALJ acknowledges an incident is visible on the video, Claimant is also seen to be moving without apparent difficulty immediately following the incident in question. The ALJ specifically rejects the testimony of Claimant.

ORDER

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

1. Claimant claim for compensation is denied and dismissed.

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

DATED: January 31, 2019

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-052-108-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

,

Claimant,

v.

,

Employer,

and

SELF-INSURED,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 17, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 1/17/19, Courtroom 3, beginning at 8:30 AM, and ending at 11:30 AM).

The Claimant was present in person and represented by -----, Esq. The Respondent was represented by -----, Esq.

Hereinafter ----- shall be referred to as the "Claimant." ----- shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 1 through 10 were admitted into evidence, without objection. Respondent's Exhibits A and C were admitted into evidence, without objection. Respondent's Exhibit B was admitted into evidence, without objection, with the exception of Exhibit B, pp. 170-173 which was rejected.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. It was filed, electronically, on January 25, 2019. Respondent had been given 2 working days within which to file objections. None were timely filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns medical benefits, specifically, the causal relation and reasonable necessity of lumbar fusion surgery, recommended by Michael Drewek, M.D.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. Since 2013, the Claimant has worked as a bus driver for the Employer. On July 7, 2017, he injured his back while exiting a bus during a stop. Initially, he cringed and felt pain in his back. He thought it was a strain and finished his shift. As the day went on, he noticed increased back and left leg pain. The next morning, he was unable to get out of bed; his son had to help him get out of bed and move around the house. On July 8, 2017, the Claimant's son drove him to the Employer so that Claimant could report his injury. On August 8, 2017, Respondent filed a General Admission of Liability (GAL), admitting for medical benefits and temporary total disability (TTD) benefits. (Claimant's Exhibit 1, p. 1). The Claimant continues to receive TTD benefits.

2. On June 29, 2018, Michael Drewek, M.D., requested authorization for L4-5 transforaminal lumbar interbody fusion. On July 10, 2018, Respondent denied the surgery. Wallace K.Larson, M.D., Respondent's retained expert witness, agrees that the recommended surgery is reasonable and necessary. Dr. Larson, however, is of the opinion that the Claimant never sustained an industrial injury and that the recommended surgery is related to the Claimant's preexisting, degenerative condition. At hearing, Respondent conceded that the surgery is reasonable and necessary. Respondent argues that the surgery is not related to the Claimant's admitted, July 7, 2017 industrial injury.

3. Claimant proved by a preponderance of the evidence that the lumbar fusion surgery recommended by Michael Drewek, M.D., is reasonably necessary and causally related to his July 7, 2017 industrial injury.

Brandon Reiter, D.O. - Claimant's initial Authorized Treating Physician (ATP)

4. On July 10, 2017, the Claimant treated at Midtown Occupational Health Services with Brandon Reiter, D.O., and reported that he injured his back while stepping off a bus. The Claimant reported that he had to "twist funny" and when he stepped down off the bus he felt a pop in his back and into his hip. He then went home and his pain worsened throughout the night and the next morning he had difficulty getting up and walking. Dr. Reiter provided the Claimant with work restrictions, prescribed medications, and referred the Claimant to a chiropractor (Claimant's Exhibit 4, pp. 8-11). On July 17, 2017, the Claimant followed up with Dr. Reiter and reported ongoing back pain and increased numbness and tingling in his left leg. Dr. Reiter maintained Claimant's treatment plan and work restrictions (Claimant's Exhibit 4, pp. 12-14). The Claimant's care was transferred to US Health Works, Lori Long Miller, M.D., which later changed to Concentra.

Lori Long Miller, M.D. – US Health Works and Concentra

5. On July 31, 2017, the Claimant first treated with Dr. Long Miller, US HealthWorks, who took over as the Claimant's ATP. The Claimant reported the nature of his injury and that he immediately felt pain. He also reported the nature of his symptoms and treatment. Dr. Long performed a physical examination and placed the Claimant on work restrictions, including 10 pounds lifting and no commercial driving, maintained his treatment plan, and ordered a MRI (magnetic resonance imaging). [Claimant's Exhibit 5, pp. 15-21). On August 17, 2017, Dr. Miller reviewed the Claimant's lumbar MRI and noted it revealed degenerative changes at L4-5. Dr. Long referred the Claimant to Spine West (Exhibit 5, pp. 27-31). On November 3, 2017, the Claimant treated with Dr. Long, who noted that the Claimant's lumbar injection provided only minimal improvement. Dr. Long maintained the Claimant's treatment plan, including second lumbar injection, and work restrictions (Claimant's Exhibit 5, pp. 37-41). On December 4, 2017, the Claimant followed-up with Dr. Long and reported that the second lumbar injection did not provide any relief and that he is now experiencing constant left leg symptoms. Dr. Long referred the Claimant to Bryan Castro, M.D. (Claimant's Exhibit 5, pp. 42-46). On December 21, 2017, the Claimant reported to Dr. Long that the third lumbar injection provided no relief and made his left leg symptoms worse (Claimant's Exhibit 5, pp. 47-51).

6. On February 20, 2018, the Claimant treated with Dr. Long, who noted that his lumbar and left leg symptoms persisted, and Dr. Long maintained the Claimant's treatment plan and work restrictions (Claimant's Exhibit 5, pp. 62-65). On May 4, 2018, the Claimant treated with Dr. Long and reported that Dr. Castro did not want to do

surgery. Dr. Long referred the Claimant to Dr. Drewek (Claimant's Exhibit 5, pp. 79-84). On June 8, 2018, the Claimant reported to Dr. Long that Dr. Drewek wanted to do surgery. Dr. Long agreed with the treatment plan and maintained the Claimant's work restrictions (Claimant's Exhibit 5, pp. 85-89). On October 19, 2018, the Claimant treated with Dr. Long (now at Concentra), who noted that Claimant's surgery was denied. Dr. Long maintained the Claimant's treatment plan and work restrictions (Claimant's Exhibit 5, pp. 95-98).

Lumbar MRIs

7. On August 11, 2017, the Claimant underwent a lumbar MRI, which revealed multilevel degenerative changes, most pronounced at L4-5, where a disc bulge and facet arthropathy result in mild to moderate bilateral neural foraminal narrowing, with probably mass effect on the bilateral L4-5 nerve roots. The radiologist was of the opinion that the MRI did not reveal an acute abnormality (Claimant's Exhibit 9, pp.137-138). On April 16, 2018, the Claimant underwent a second lumbar MRI, which, when compared to the prior MRI, revealed a minimal increase in size of the L4-5 disc extrusion. The MRI revealed mild anterolisthesis at L4-5 with facet joint hypertrophy causing some narrowing of the left neural foramen along the L4 nerve root (Claimant's Exhibit 9, pp. 139-140).

John Tobey, M.D. - Spine West

8. On August 31, 2017, the Claimant first treated with Dr. Tobey, and reported the nature of his injury and ongoing symptoms. Dr. Tobey reviewed the MRI and noted a L4-5 broad based disc bulge with facet arthropathy, resulting in mild to moderate left greater than right foraminal stenosis. Dr. Tobey recommended a few weeks of therapy and medications and a left L5 transforaminal epidural steroid injection (TFESI) (Claimant's Exhibit 6, pp.99-101). On October 18, 2017, the Claimant underwent a left L5 TFESI with Dr. Tobey (Claimant's Exhibit 6, pp.102-103). The Claimant had 25% pain relief (Claimant's Exhibit 6, pp. 104-106). On December 14, 2017, the Claimant underwent a L5 and S1 TFESI with Dr. Tobey (Claimant's Exhibit 6, pp. 107-108). The Claimant did not get any relief from the second injection. Dr. Tobey recommended an EMG (Claimant's Exhibit 6, pp. 109-110.) On January 31, 2018, the Claimant underwent a left leg EMG; the EMG was essentially normal (Claimant's Exhibit 6, p. 111). On February 15, 2018, the Claimant underwent a SI joint injection with Dr. Tobey (Claimant's Exhibit 6, pp. 113-114). He did not get any relief from the injection (Claimant's Exhibit 6, pp. 115-116).

Bryan Castro, M.D. – Cornerstone Orthopaedics

9. On April 4, 2018, the Claimant treated with Bryan Castro, M.D., and reported the nature of his injury and persistent pain, symptoms, and limitations with his lower back and left leg. Dr. Castro reviewed Claimant's lumbar MRI and noted no

obvious signs of neural impingement but that it was a poor MRI. Dr. Castro recommended a repeat lumbar MRI. Dr. Castro also stated that he did not think Claimant would be a surgical candidate (Claimant's Exhibit 7, pp. 117-122). On April 30, 2018, the Claimant followed up with Dr. Castro, who reviewed the more recent MRI and recommended an EMG. Dr. Castro noted that if the EMG does not reveal any nerve dysfunction, then he is not recommending surgery (Claimant's Exhibit 7, pp. 123-127).

Michael Drewek, M.D. – Panorama Orthopedics

10. On June 6, 2018, the Claimant treated with Michael Drewek, M.D., and reported the nature of his injury and persistent pain, symptoms, and limitations with his lower back and left leg. Dr. Drewek noted that the Claimant's treatment related to his injury and reviewed the Claimant's lumbar MRI. Dr. Drewek had the Claimant undergo lumbar x-rays, which revealed findings that he opined explained Claimant's ongoing symptoms. Dr. Drewek recommended Claimant undergo a L4-5 transforaminal lumbar interbody fusion (Claimant's Exhibit 8, pp. 128-134). On June 29, 2018, Dr. Drewek requested authorization for this surgery (Claimant's Exhibit 8, p. 134). On July 10, 2018, Respondent denied the surgery (Respondent's Exhibit B, pp.155-161). On August 2, 2018, the Claimant followed up with Dr. Drewek, who noted Claimant's ongoing lower back and left leg symptoms and that the recommended surgery is denied. Dr. Drewek noted he does not have anything to offer Claimant other than the surgery (Claimant's Exhibit 8, pp.135-136).

Wallace K. Larson, M.D. – Respondent's Independent Medical Examiner (IME)

11. On September 25, 2018, Claimant underwent an IME with Respondent's retained expert witness, Wallace Larson, M.D. Dr. Larson noted Claimant's medical history, the nature of his injury, and his ongoing symptoms. Dr. Larson reviewed Claimant's medical records. Dr. Larson opined Claimant did not sustain a work-related injury because he did not have exposure to any unusual hazard and did not have trauma to his lumbar spine. Dr. Larson opined Claimant does not suffer from an atraumatic condition to the lumbar spine, and, therefore, any treatment required would not be related to Claimant's occupational exposure. Dr. Larson did opined that the surgery recommended by Dr. Drewek is appropriate. *Respondent's Exhibit A, pages 1-9.*

12. At Hearing, Dr. Larson testified consistently with his report. Dr. Larson opined Claimant did not sustain an industrial injury on July 7, 2017. Dr. Larson opined Claimant experienced just a manifestation of his preexisting degenerative lumbar condition and that it is coincidental Claimant started feeling symptomatic around the time of the July 7, 2017 industrial injury. Dr. Larson agreed that that no evidence exists that Claimant had any prior back injuries or treatment and that Claimant was working full duty, without restriction, prior to the July 7, 2017 industrial injury. Dr. Larson opined the surgery recommended by Dr. Drewek is reasonable and necessary but related to Claimant's preexisting, degenerative condition, not his July 7, 2017 industrial injury. The ALJ finds

Dr. Larson's opinion regarding the relatedness of the lumbar surgery neither credible nor persuasive.

The Claimant

13. According to the Claimant he has no prior back injuries or treatment and he was working full duty, without restrictions prior to his July 7, 2017 industrial injury. Prior to his work injury, the Claimant was active and spent a lot of time in the gym lifting weights and working out. He was able to go for long bike rides (even upwards of 50 to 100 miles) without any problems. He rode his motorcycle and was often out on his boat. He did not have any issues doing these activities prior to July 7, 2017. Since July 7, 2017, the Claimant has been unable to do these activities as a result of the July 7, 2017 industrial injury and the associated symptoms. Now, the Claimant has constant lower back pain and symptoms into his left leg, including numbness, tingling, and shooting pain. The ALJ finds that the Claimant's testimony concerning his before and after condition is credible and convincing.

Ultimate Findings

14. The ALJ finds the opinions of Dr. Long Miller and Dr. Drewek especially credible and persuasive. On the other hand, the ALJ finds the opinions of Dr. Larson inadequately based, contrary to the weight of medical opinions in evidence, and lacking in credibility for the reasons herein above stated. Further, the ALJ finds the Claimant's testimony to have been straight-forward, consistent with the weight of the medical evidence and, therefore, credible and persuasive.

15. Between conflicting testimonies and opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Drewek and Dr. Long Miller and to reject opinions to the contrary.

16. The ALJ finds that the Claimant has proven by a preponderance of the evidence that his need for the lumbar fusion surgery recommended by Dr. Drewek is causally related to his July 7, 2017 industrial injury and reasonably necessary to cure and relieve the effects of the compensable injury of July 7, 2017.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See *Bodensleck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office*, 297 P.3d 964, **2012 COA 85**. 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); also see *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). 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). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert’s knowledge, skill, experience, training and education. See § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Long Miller and Dr. Drewek were especially credible and persuasive. On the other hand, the opinions of Dr. Larson were inadequately based, contrary to the weight of medical opinions in evidence, and lacking in credibility. Further, as found, the Claimant’s testimony was straight-forward, consistent with the weight of the medical evidence and, therefore, credible and persuasive.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005). Also see *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). 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). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett*, 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies and opinions, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Drewek and Dr. Long Miller and to reject opinions to the contrary.

Medical Benefits

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 compensable injury of July 7, 2017. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt*, 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. See *City of Boulder v. Streeb*, 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office*, 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). 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 [Indus. Claim Appeals Office (ICAO), March 20,

2002]. Also see *Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001). “Preponderance” means “the existence of a contested fact is more probable than its nonexistence.” *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden concerning the need for the lumbar fusion surgery recommended by Dr. Drewek, as causally related to the July 7, 2017 industrial injury and reasonably necessary to cure and relieve the effects of the injury.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The General Admission of Liability, dated August 8, 2017, shall remain in full force and effect.

B. Respondent shall pay the costs of the the lumbar fusion surgery recommended by Dr. Drewek, and the costs of all other causally related and reasonably necessary medical care and treatment, subject to the Division of Workers’ Compensation Medical Fee Schedule.

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

DATED this 22nd day of February 2019.

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EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-074-721-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

,

Claimant,

v.

,

Employer,

and

,

,

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 20, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 11/20/18, Courtroom 4, beginning at 1:30 PM, and ending at 4:30 PM).

The Claimant was present in person and represented by -----, Esq. The Respondents were represented by -----, Esq.

Hereinafter ----- shall be referred to as the "Claimant." ----- shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 1 through 11 were admitted into evidence, without objection. Respondents' Exhibits A through H were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing

schedule. Claimant's opening brief was filed on December 3, 2018. Respondents' answer brief was referred to the ALJ on January 11, 2019, having been timely filed on December 6, 2018. No timely reply brief was filed and the matter was deemed submitted for decision on January 11, 2019.

ISSUES

The issues to be determined by this decision concern compensability of a left elbow injury/incident of February 17 2017; if compensable, medical benefits and average weekly wage (AWW). At the commencement of the hearing, the Claimant withdrew issues concerning temporary disability, without objection.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

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

The Incident

1. The Claimant is a four-year employee of the Employer. On February 17, 2017, she was engaged in a training exercise related to the safe handling of children. A co-employee was supposed to grab the Claimant's upper left arm, but instead, grabbed her left elbow and pulled down.

2. The incident cited as the cause of injury occurred in the course of employment. The Claimant was at work, during working hours, engaged in a work-related or mandated training exercise. The injury arose out of employment: the training exercise involved another employee grasping Claimant's arm and pulling downwards sharply, which Claimant reports caused the injury to her left elbow. Claimant's injury also satisfies the positional risk doctrine, because the conditions and obligations of her employment—training related to safe restraint and transportation of children—placed her in the position in which the injury was incurred.

3. The Claimant had not suffered any left elbow pain prior to the incident, of February 17, and it is more likely than not that the incident at work aggravated and accelerated any underlying problem. Her subsequent fall in a parking lot precipitated no further injury to her left elbow and arm injuries. This occurred, however, after Claimant began treatment, so any medical expenses incurred beforehand could not have been caused by her later fall in a parking lot. The Claimant not seeking compensation for her broken right hand, which was unrelated to the incident at work. This subsequent injury is irrelevant to the compensability of the initial accident.

4. The Claimant reported to feel the onset of pain in her left elbow later that day and reported her injury to her Employer on February 18, 2017. Upon cross-examination conducted by the Respondent, however, the Claimant stated that she developed pain over the next week. The Employer's First Report of the Injury was completed on February 28, 2017 because—according to Respondent witness' testimony—they did not have notice of the injury until the 27th. The ALJ finds that Claimant reported her injury to an authorized Employer representative on February 27, 2017.

5. Respondents argue that the Claimant's pain allegedly began several days after the incident (the Claimant did not see a doctor for ten days afterwards) it is not the cause of the pain. Claimant states that she had no pain in her elbow before the event. The ALJ finds this testimony credible. All of the Claimant's authorized treating physician (ATPs) state in their reports that the Claimant's history of the incident is consistent. Respondent argues that there is no causation finding in the medical reports. Such an analysis is not necessary if the Claimant's testimony, coupled with the totality of the evidence supports causation, which the ALJ hereby infers and finds.

6. ATPs Dr. Davis, Dr. Brunworth, and Dr. Sollender all conclude that the Claimant has left medial epicondylitis, and Dr. Davis has recommended that Claimant receive PRP injections. Dr. Mordick disputes this and is of the opinion that the Claimant is at maximum medical improvement (MMI); however, Dr. Mordick is not an ATP, and the ALJ finds that his opinions have less weight and credibility than the opinions of the ATPs in this specific case.

Medical

7. The Claimant was first seen on March 8, 2017 and was given temporary restrictions for her injury from March 8, 2017 to March 29, 2017. On May 11, 2017, the Claimant was referred to Craig Davis, M.D., who diagnosed the Claimant with "left medial epicondylitis." Dr. Davis recommended a brace, injections, medications, ice and heat to the affected area. On April 17, 2018, Dr. Davis made a referral for PRP injections. Dr. Davis did not conduct a "causation analysis" as to the origin of the Claimant's injuries. Dr. Davis was an authorized referral.

8. Dr. Davis' April 17, 2018 report states that he "suggested a PRP injection which might be helpful in this situation. I went over the nature of the injection with her at some length and all questions were answered."

9. The Claimant also saw Gretchen Brunworth, M.D., for an EMG. On April 5th, 2018, Dr. Brunworth stated that the Claimant's EMG reported normal results. She also noticed that the Claimant was suffering from rheumatoid arthritis (RA) which she was of the opinion that it "may be contributing to her prolonged healing." Dr. Brunworth

did not conduct a “causation analysis” as to the origin of the Claimant’s injuries. Dr. Brunworth was an authorized referral.

10. The Claimant has suffered from RA for about eight years, with pain primarily emanating from her cervical spine and lower back.

11. The Claimant was also referred to Jonathan Sollender M.D., on March 20, 2018. Dr. Sollender called for an MRI (magnetic resonance imaging) of her left elbow. On June 12, 2017, the MRI had normal results, but also showed slight changes of chronic lateral epicondylitis. Dr. Sollender was within the chain of authorized referrals.

12. Dr. Sollender further conducted a physical examination, and noted tenderness along the medial bone of the left epicondyle. Dr. Sollender recommended additional testing for her RA. He did not recommend PRP injections, but held it was a reasonable consideration if her MRI showed any obvious medical elbow pathology. Dr. Sollender did not conduct a “causation analysis” as to the origin of the Claimant’s injuries.

Thomas Mordick, M.D., Respondents’ Independent Medical Examiner (IME)

13. The Claimant also saw Dr. Mordick at the request of the Respondents. Dr. Mordick disagreed with Dr. Davis’ recommended PRP injections because there was no tear in the Claimant’s medial epicondyle, according to Dr. Mordick. He was of the opinion that Claimant’s February 17, 2017 injury was a result of her RA and there likely existed no causation between the injury and the recommended injections. The ALJ finds Dr. Mordick’s opinions and testimony interesting but insufficient to outweigh the opinions of Dr. Davis and the Claimant’s (a 36-before-and-after the incident of February 17, 2017) testimony. Dr. Mordick’s testimony does not make it more likely than not that the Claimant’s RA was **not** aggravated and accelerated by the incident of February 17, 2017. Stated in the affirmative, the ALJ finds that it is more likely than not that the incident of February 17, 2017, aggravated and accelerated the Claimant’s underlying RA.

Ultimate Findings

14 The ALJ finds the Claimant’s testimony concerning lack of previous problems in the left elbow credible, persuasive and they outweigh the opinions of IME Dr. Mordick. Further, the ALJ finds the medical opinions of Dr. Davis and Dr. Sollender credible, highly persuasive and they indirectly support a causal relation to the February 17, 2017 incident.

15. Between conflicting testimonies and opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant’s testimony as a whole,

and the indirectly supporting opinions of Dr. Davis and Dr. Sollender and to reject opinions and testimony to the contrary.

16. The Claimant has established by a preponderance of the evidence that she sustained a compensable injury, or aggravation and acceleration of her underlying RA, to her left elbow on February 17, 2017.

17. The medical care and treatment that Claimant received for her left elbow, as demonstrated in the evidence, was authorized, causally related to the February 17 incident, and reasonably necessary to cure and relieve the effects of that injury.

18. On the date of injury, the Claimant was paid \$14.38 an hour, based on a 35-hour week, which establishes an AWW of \$503.30, which the ALJ hereby finds.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See *Bodensleck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office*, 297 P.3d 964, **2012 COA 85**. 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); also see *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). 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). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. See § 8-43-210, C.R.S; *One Hour Cleaner v. Indus. Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony concerning lack of previous problems in the left elbow was credible, persuasive and outweigh the opinions of IME Dr. Mordick. Further, the medical opinions of Dr. Davis and Dr. Sollender were credible, highly persuasive and indirectly supported a causal relation to the February 17, 2017 incident.

b. In *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997), the Court of Appeals determined that a medical opinion was not necessary to prove causation because imposing such a requirement would be reading something into the statute that was not there. See *Jacoby v. Metro Taxi, Inc.*, 851 P.2d 245 (Colo. App. 1993). § 8-41-301, C.R.S., which specifies the conditions necessary for a compensability determination (this would include the compensability of a medical procedure or diagnostic tests) does **not** provide that a medical opinion is necessary to make such a determination. As observed in *Lymburn*, to require a medical opinion to support a causality determination would be to read something into the statute that does not exist. As found herein above, the Claimant's testimony, indirectly buttressed by the opinions of Dr. Davis and Dr. Sollender, circumstantially support the compensability of the February 17, 2017 incident.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005). Also see *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). 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). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett*, 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies and opinions, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's testimony as a whole, and the indirectly supporting

opinions of Dr. Davis and Dr. Sollender and to reject opinions and testimony to the contrary.

Compensability

d. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving 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.** § 8-41-301(1) (c), C.R.S. See *Merriman v. Indus. Comm'n*, 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff*, 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory, supra. Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). Also see § 8-41-301(1) (c), C.R.S.; *Parra v. Ideal Concrete*, W.C. No. 4-179-455 [Indus. 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, the incident of February 17, 2017, caused the Claimant's left elbow epicondylitis and/or an aggravated and accelerated of her underlying rheumatoid arthritis.

Medical

e. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. See *Mason Jar Restaurant v. Indus. Claim Appeals Office*, 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). As found, the Claimant's medical treatment for her left elbow was the result of a referral by the Employer and thereafter further treatment remained in the authorized chain of referrals.

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 for her left elbow is causally related to the incident of February 17, 2017. Also, medical

treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt*, 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990) to cure and relieve the effects of her compensable injury.

Average Weekly Wage

g. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office*, 18 P. 3d 867 (Colo. App. 2001). See § 8-42-102, C.R.S. As found, Claimant's AWW is \$503.30.

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. See *City of Boulder v. Streeb*, 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office*, 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). 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 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. Also see *Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to compensability, medical benefits and AWW.

ORDER

IT IS, THEREFORE, ORDERED THAT:

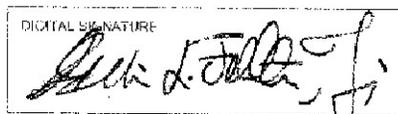
A. The Claimant sustained a compensable left elbow injury on February 17, 2017.

B. Respondents shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the Claimant's compensable left elbow injury of February 17, 2017, subject to the Division of Workers Compensation Medical Fee Schedule.

C. The Claimant's average weekly wage is hereby established at \$503.30.

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

DATED this _____ day of February 2019.

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EDWIN L. FELTER, JR.
Administrative Law Judge

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